An Issues Paper to the Joint Select Committee on Implementation of the National Redress Scheme – 20 March 20 on less well-known lifelong implications of Childhood Sexual Abuse

1. About AFCA Case 605042 submitted to AFCA on *23 November 2018*

1 This issues paper arises from how AFCA dealt with case 605042 submitted to AFCA on *23 November 2018*.

2 The *principal part* of AFCA case 605042 submitted to AFCA on 23 November 2018 *(the complaint)* relates to allegations that an AFCA Financial Firm member *(the life insurer)* whose conduct when dealing with an insurance claim *(the customer relationship)* for total disability benefits *(the benefits)* under a Group Salary Continuance Insurance Policy *(the Policy)* involved a breach of utmost good faith.

- *The duty of utmost good faith involves, at a minimum, honestly and requires the life insurer to conduct itself 'consistently with commercial standards of decency and fairness, with due regard to the interests of the insured'.*

3 The allegations are that the life insurer breached its duty of utmost good faith by dishonestly briefing my treating psychologist of Ballarat's Pomegranate House Psychological Services by letter dated *24 June 2004* with known false and misleading information claiming that in psychiatrist Dr David Alcorn's *27 August 2003* Addendum Report he provided opinion that I was fully fit to work in *any* capacity which Dr Alcorn did not do.

4 Concluding that the case wasn't particularly urgent the treating psychologist referred me for treatment with Ballarat's Centre Against Sexual Assault (CASA) for childhood sexual abuse from which I was subsequently diagnosed by Dr Alcorn in *2011* with PTSD from *1 July 2004*. Dr Alcorn's *12 April 2011* report states:

- *In summary, the precipitation of this disorder was reflected in a marked increase in his symptomatology when he undertook intense cognitive and therapeutic focus on his childhood sexual abuse and maladaptive adult interpersonal behaviours.*

- *In that regard, this examiner's warning of 27 July 2003 [to the life insurer] concerning exploration of childhood sexual abuse matters in the course of planned therapies should be noted:*

In my opinion, this area should only be explored at the subject's specific request and with his express consent, informed by the disclosure of the clinically significant risk of development of severe anxiety in the course of psychotherapy concerning those experiences.

5 In regard to a capacity for work in June 2004, Dr Alcorn's *27 July 2003* report states:

- *In my opinion, the subject is not prevented by virtue of psychiatric disorder, from undertaking a return to work trial or even part-time work as a senior technical officer.*
- *The subject's emotional stability and current lifestyle would be most suited to working in a small to medium-sized organisation with an employer/supervisor he knew well and who had a flexible attitude to leave requirements.*
- *However, it must be noted that there is a minor, but nevertheless clinically significant risk of return of his condition following a return to employment, but at this stage and in the absence of a return to work program, evaluation of this risk cannot be further quantified.*

2. About AFCA

1 AFCA is the new consumer funded complaint resolution service authorised by the responsible Minister to investigate and resolve complaints about Financial Firms that are AFCA members and is offered as a free alternative to the Courts.

2 Overseen by the Australian Securities and Investments Commission (ASIC), the AFCA Board through the CEO and Chief Ombudsman has responsibility for ensuring that AFCA carries out its functions as required under its Constitution and the Corporations Act 2001 (Cth) and that AFCA provides an independent, fair, accountable, efficient and effective service, with strong corporate governance.

3 The Board, through the CEO and Chief Ombudsman is also responsible for approving and overseeing the Rules that AFCA follow when investigating a complaint. The Board does not get involved in individual cases or service complaints. AFCA jurisdiction is set out in AFCA Rules.

4 AFCA rules apply to all complaints and form part of *a contract* between AFCA, the Financial Firm and the Complainant. Generally, a complaint is within AFCA jurisdiction if it arises from *a customer relationship*, meets relevant time limits, and has not been previously dealt with by AFCA, a predecessor service, court or tribunal.

5 AFCA considers complaints submitted to it in a way that is independent, impartial, fair and transparent and in a timely manner with clear outcomes and reasons. It will have regard to relevant legal principles, applicable industry codes and good industry practice. For example, Section 13 of the Insurance Contracts Act 1984 states:

- *A contract of insurance is a contract based on utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.*

6 Any user of AFCA's service can complain about the standard of service AFCA provided to them. Examples are, whether AFCA took too long to deal with a complaint, or didn't communicate properly.

7 Compensation to a maximum $5000 for accepted service complaints may be awarded in appropriate circumstances.

3. How AFCA dealt with Case 605042 - The AFCA Dispute

1 To be clear from the beginning, *the principal part* of this complaint is not a matter involving a new or past claim for benefits under the policy or a matter that has been previously dealt with by a predecessor service, court or tribunal.

2 It is a matter relating to allegations that an AFCA Financial Firm member (the life insurer) whose conduct when dealing with an insurance claim for total disability benefits under a Group Salary Continuance Insurance Policy (the customer relationship) involved a breach of utmost good faith.

3 On this issue, there are two significant unresolved matters about how AFCA dealt with case 605042:

- *AFCA's failure to give credible and transparent accountability that justify removal of the principal part of the complaint and not dealing with that having a robust complaint resolution process that allows a decision maker to review an assessment previously issued by a case worker and reach a different view.*

- *AFCA only dealing with a matter arising from the principal part of the complaint and dismissing that matter unaided by the principal part of the complaint and on the basis that the life insurer did not breach the duty of utmost good faith because the duty of care did not require the insurer to supervise treatment by providing all reports to all treaters.*

4 That this matter has been radically re-cast with all appearances to suit the outcome needs hardly to be said. Not only has the *principal part* of the complaint been unjustly removed, my input ignored, Supreme Court of Victoria and VCAT decisions and expert opinion misrepresented and the principals involved with the duty of utmost good faith abandoned, but the narratives themselves are such that they constitute a major problem of trustworthiness, honesty and accountability.

5 That problem, using those words, *trustworthiness, honesty and accountability*, concern the degree to which they were used as a basis for re-shaping this case and reflect not enough time taken to check facts or reporting accurately, forcing re-prosecution of the original complaint many times and also giving rise to an appreciation of industry bias.

6 It is a problem that cannot be avoided if to raise it might cause those minded to accept it without question dismiss it, or could only seem to those of contrary opinion an evasion of the issue, which would render any discussion valueless.

7 Awareness of this will, to be sure, shape a general understanding of the nature and character of the Australian Financial Complaints Authority (AFCA). But I give thanks to those who have demonstrated what happens to trustworthiness, honesty and accountability when clarity and consistency of information is missing.

4. The Offending Narratives

Case Officer 20 December 2018 – Supreme Court of Victoria 7 July 2010 Decision

1 AFCA case 605042 received a response dated *20 December 2018* from the Case Officer who denied jurisdiction based on an incorrect account of a *7 July 2010* Supreme Court of Victoria decision.

2 The Case Officer's decision was made on the basis that the Supreme Court of Victoria on *7 July 2010* decided the following:

- *1 In October 2013 (sic), [the insurer] decided to stop paying benefits under the Policy because you did not satisfy the definition of total disability under the Policy.*
- *2 [The insurer] did not breach the Policy by not giving Dr Beshara (sic) (your psychiatrist) adequate opportunity to provide further opinion before it decided to terminate benefits and not advising you of its action to its decision;*
- *3 [The insurer] did not engage in unconscionable conduct or in misleading and deceptive conduct.*

About the 7 July 2010 Supreme Court of Victoria decision

3 On *8 October 2008* an application was made to VCAT in the Civil Claims Division under the *Fair Trading Act* 1999 (the FTA) claiming the life insurer's termination of total disability benefits in *October 2003* was a breach of the life insurer's policy.

4 On *10 June 2009*, VCAT ruled it had jurisdiction to deal with the major part of the application.

5 The life insurer appealed that decision to the Supreme Court of Victoria under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT Act). The main issue being whether the Tribunal had jurisdiction under ss 107 and 108 of the VCAT Act.

6 On *7 July 2010*, the Court dismissed the life insurer's application. Cavanough J. said:

- *I consider that the Tribunal's ultimate conclusion – that it had jurisdiction under ss 107 and 108 in relation to the principal part of Mr Skewes' claim – was nevertheless correct, because on the proper interpretation of s 107 the matter still does not amount to a dispute or claim related to a personal injury". On that basis, the appeal should be dismissed.*

Case Manager 4 January 2019 – Supreme Court of Victoria 7 July 2010 Decision

7 By letter dated *4 January 2019*, the Case Manager responded to my letter dated 2 January 2019 objecting to the Case Officer's decision.

8 Despite my letter of *2 January 2019* highlighting them, the errors in the Case officer's letter are repeated in the Case Manager's letter with the Case Manager closing the file.

Team Manager 8 January 2019 – VCAT already decided – no evidence of misconduct and – unconscionable act – no financial relationship and more

9 On *8 January 2019* following further objection to the Case Officer's decision and further input from me that the complaint is unrelated to the 2011 VCAT decision, the Team Manager wrote to me describing fresh but otherwise still incorrect circumstances why my complaint cannot be considered by AFCA. For example:

- *According to court judgement on 5 August 2011, VCAT has already decided in favour of the financial firm and found that the financial firm ceased your policy appropriately and there was no evidence of misconduct and unconscionable act. The policy and your cover ceased in 2000 and because you hold no policy with the financial firm there is no financial relationship between you and the financial firm.*

More from the VCAT decision of 5 August 2011

10 Bond University employed me as a Senior Technical Officer from *February 1994 to April 2002*. As part of my salary package, I was covered by the Policy provided by the insurer to Bond University. The Policy commenced on *6 June 2000*. Coverage under the Policy on any view expired on *1 June 2004*.

11 On *5 April 2004*, after the insurer informed me on *13 October 2003* that I no longer fell within the Policy's definition of totally disabled, I sought an internal review of the life insurer's decision to cancel the benefits. On *11 April 2005*, the insurer confirmed its decision.

12 VCAT made no general comment on finding no evidence of unconscionable or misleading and deceptive conduct. Instead, VCAT specifically found the life insurer did not engage in unconscionable conduct in relation to the process by which the life insurer gathered medical opinion before it decided to discontinue benefits in *October 2003* and the life insurer did not engage in misleading and deceptive conduct in relation to the time taken by the life insurer to conduct its internal review, stating as follows:

- *Turning to the process by which [the life insurer] gathered medical evidence before it decided to discontinue payments to Mr Skewes, in my view [the life insurer's] conduct does not show the high degree of moral blameworthiness required to constitute unconscionable conduct.*

- *On the issue of the time taken by [the life insurer's] internal review process, again the required moral blameworthiness does not exist in my view. In the context of the events as I have described above, I do not view [the life insurer] not telling Mr Skewes about Dr Alcorn's report and inviting him to obtain further medical evidence as amounting to misleading and deceptive conduct.*

- *I see no basis for deciding that the time taken by [the life insurer] to conduct its internal review amounts to misleading and deceptive conduct.*

13 Moreover, in this letter the Team Manager unfairly confirmed the file remained closed without providing opportunity for me to appeal the new circumstances stating:

- *You have now exhausted the appeals process for this dispute and your file will remain closed.*

14 Furthermore, the Team Manager's narrative seems to a concoction of information provided to the Case Officer by the life insurer on *8 January 2020* stating:

- *[The life insurer] has no record of Mr John Skewes ever holding (that is, being owner of) an insurance policy with [the life insurer]. I can confirm however that in around December 2000, as an employee of Bond University, Mr Skewes was eligible to make a claim under the terms of the Group Salary Continuance Insurance Policy Number MP 9806. This policy was owned by Bond University and has since ceased.*

More from the Team Manager 1 February 2019 – PTSD fully developed in 2010 – policy cancelled in 2003 – no longer any financial service – outside six-year time limit

15 Following my complaint dated *31 January 2019* addressed to the AFCA CEO and Chief Ombudsman about the way AFCA was dealing with my complaint, the Team Manager in a letter dated *1 February 2019* provided further incorrect information to explain why my complaint falls outside of AFCA jurisdiction and again unfairly refused an opportunity to respond in summary stating:

- *This complaint is about PTSD fully developed in 2010, confirmed by a psychiatrist report in April 2011 and [the life insurer] failed to disclose this earlier. The VCAT decision says the Tribunal is not making a judgement in relation to his PTSD. Your policy was cancelled in 2003 and so did your benefit. VCAT has already held it was cancelled appropriately.*

- *Because your benefit and the policy itself ceased on 2003, there is no longer any financial service between [the life insurer] and you. You cannot claim on a non-existent policy and that ended 8 years prior to the claimed medical condition. Any subsequent claim in 2011 would also be outside of our general six-year time limit.*

- *You have now exhausted the appeals process for this dispute and your file will remain closed. Any further correspondence will be noted but no further response on these matters is intended to be provided.*

More from the VCAT decision of 5 August 2011

16 *In late 2010, [the life insurer] asked Dr Alcorn to see Mr Skewes again. On 12 April 2011, Dr Alcorn reported:*

- *It is my opinion that the subject's current symptom history and mental state examination does support the diagnosis of Post-Traumatic Stress Disorder. As a consequence, it is my medical opinion that the subject has been unable to work due to Post-Traumatic Stress Disorder since 2004-5 (following the commencement of the additional, specialised counselling which focused upon issues of childhood sexual abuse).*

The Service Manager 4 April 2019 – the letters all expressed slightly different views and reasons the case was outside jurisdiction – information withheld by the life insurer and not provided to the psychologist –not able to revisit issues already considered by VCAT or FICS

17 The AFCA Service Manager wrote to me on *4 April 2019* in response to my *29 January 2019* complaint addressed to the AFCA CEO and Chief Ombudsman about the way AFCA was dealing with the *principal part* of the complaint.

18 The Service Manager responded first with an apology for the letters dated 20 December 2018, 4 January 2019, 8 January 2019 *'all expressed slightly different views and reasons that your case was outside of our jurisdiction.'*

19 The Service Manager then established that AFCA will deal with the case that information was withheld by the life insurer and not provided to the psychologist and confirming that AFCA would not be able to revisit issues already considered by VCAT or FICS, which brings to bear the two significant unresolved matters about how AFCA dealt with case 605042 identified at 3.3 above.

Case Manager 18 April 2019 – dealing with the case that information withheld by the life insurer and not provided to the psychologist – cannot consider entitlements to benefits under the policy

20 Acting on the case that information was withheld by the life insurer and not provided

to the treating psychologist, the Case Manager repeated previous recitals that AFCA cannot consider entitlements under the policy stating:

- *We will investigate whether the life insurer breached a duty by not providing the treating psychologist with a copy of Dr Alcorn's 27 July 2003 report.*

- *We cannot consider entitlements to benefits under the policy. This is because this was considered both by FICS in 2007 and later VCAT in its decision dated 5 August 2011.*

Service Complaints Case Manager 17 September 2019 – dealing with the case that information withheld by the life insurer and not provided to the psychologist – and those which remained outside of AFCA jurisdiction

21 The Service Complaints Case Manager also failed to identify or connect a justifiable AFCA jurisdiction decision to the *principal part* of the complaint stating:

- *Your case manager's letter to you dated 18 April 2019 sets out her understanding of the issues she was going to consider, and those which remained outside of AFCA jurisdiction, and you had an opportunity to respond to that letter.*

CEO and Chief Ombudsman 18 November 2019 – the 24 July 2019 Ombudsman's Decision – The 7 July 2010 Supreme Court of Victoria Decision – The 5 August 2011 VCAT ruling – The basis for AFCA's jurisdictional assessment – the previous errors in our jurisdictional assessment

22 While assuring me that the ombudsman had considered all the issues I had raised and had addressed the key issue, *'He determined the insurer did not breach its duty of utmost good faith'*, the AFCA CEO and Chief Ombudsman in his letter dated *18 November 2019* also failed to identify a justifiable reason giving rise to the *principal part* of the complaint being outside AFCA jurisdiction stating:

- *The Supreme Court made a ruling as to whether VCAT had jurisdiction to deal with your court case.*

- *Subsequently, VCAT issued a ruling on 5 August 2011 in favour of the insurer. It is on this basis that our AFCA jurisdictional assessment was made. AFCA cannot consider matters that have already been determined by a previous predecessor scheme or court. A matter that has already been decided by another forum, cannot be decided again.*
- *I am sorry that you consider the matter is not resolved and that a key issue was removed. I assure you this was not the case. Our role is to consider the issues raised by a complainant and, if the complaint cannot be resolved by agreement (between the parties), reach a decision about the most appropriate outcome.*
- *We have taken on board the previous errors in our jurisdictional assessment for training and quality purposes.*

The AFCA Independent Assessor 20 December 2019 –About the Independent Assessor – Independent Assessor weighed in on the merits of the case – a number of incorrect jurisdictional decisions – all four letters failed to correctly describe – no unconscionable or misleading and deceptive conduct – Fit for work and capable of returning to previous or alternative employment

23 The AFCA Independent Assessor is appointed by the Board to consider complaints about the standard of service provided by AFCA in handling a dispute or complaint. It is not as an appeal or review mechanism for AFCA jurisdiction Decisions and Determinations on the facts or merits of a dispute.

24 This means the AFCA Independent Assessor is specifically precluded from considering the merits or substance of an AFCA Decision or Determination.

25 However, the AFCA Independent Assessor weighed in on the merits of this case by determining AFCA made a number of incorrect jurisdictional decisions before it accepted the dispute was within its jurisdiction to consider, stating:

- *I acknowledge there are errors in [the Case officer's] letter that are repeated in [the Case manager's] letter, despite your email of 2 January 2019 highlighting them.*

- *I am satisfied that all four letters [20 December 2018, 4 January 2020, 8 January 2020 and 1 February 2020] failed to correctly describe your complaint as you repeatedly described it to AFCA.*

26 In addition, the AFCA Independent Assessor weighed in on the merits of this case by determining VCAT found the life insurer did not engage in misleading or deceptive conduct in its provision of reports to Pomegranate House stating:

- *VCAT found the life insurer did not engage in unconscionable or in misleading or deceptive conduct.*
- *Ms Vertigan's 4 April 2019 letter explained that AFCA would 'not be able to revisit issues that have already been considered by the VCAT decision or [FICS]'.*
- *I am satisfied this included your allegation that the life insurer had engaged in misleading and deceptive conduct in its provision of reports to Pomegranate House.*
- *I am satisfied that Ms Vertigan (generally) and Ms de Pedro (specifically) provided you with reasons why your 'key issue' could not be revisited by AFCA.*

27 And this replacing the VCAT decision and reasons dated 5 August 2011stating:

- *Turning to the process by which [the life insurer] gathered medical evidence before it decided to discontinue payments to Mr Skewes, in my view [the life insurer's] conduct does not show the high degree of moral blameworthiness required to constitute unconscionable conduct.*

- *On the issue of the time taken by [the life insurer's] internal review process, again the required moral blameworthiness does not exist in my view.*

- *In the context of the events as I have described above, I do not view [the life insurer] not telling Mr Skewes about Dr Alcorn's report and inviting him to obtain further medical evidence as amounting to misleading and deceptive conduct.*

- *I see no basis for deciding that the time taken by [the life insurer] to conduct its internal review amounts to misleading and deceptive conduct.*

28 Moreover, the AFCA Independent Assessor is in error in her assessment of 20 December 2019 alleging Dr Alcorn's original 27 July 2003 medical report included that I was fit for work and capable of returning to my previous or alternative employment, stating:

- *... you believe that Dr Alcorn's report, which was not included in AIA's letter to Pomegranate House, while stating you were 'fit for work and capable of returning to [your] previous or alternative employment' also noted a 'minor, but nevertheless clinically significant risk of a return of [your] condition following a return to employment'."*

29 There also is no evidence in any of Dr Alcorn's medical reports that included that I myself was fit for work and capable of returning to my previous or alternative employment.

30 In this regard, Dr Alcorn's original 27 July 2003 medical report emphasises ***'Examples Only'*** of *'Adaption'* reflecting in general a person's fitness for full time work and ability to cope with the normal demands of the job.

5. Conclusion

1 It is relatively easy for AFCA to speak about things that don't in reality exist, leading others to believe impossible things, but the fact is the assessment of this complaint is dangerously misleading and distracting.

[redacted]