

# Determination

<b>Case number</b>	748764
<b>Complainant</b>	SA Field and Game Association
<b>Financial firm</b>	Community Broker Network Pty Ltd

# 1 Determination overview

## 1.1 Complaint

On 25 September 2014, the complainant engaged the financial firm (broker) as its broker to manage its directors and officers liability insurance requirements. In line with this, the broker arranged a liability policy with insurer A. The period of cover commenced from 15 October 2014 for twelve months.

A claim was lodged on the policy in 2015 due to legal proceedings issued by Mr R against the complainant and several of its officers. A has not agreed to indemnify the complainant on several bases. One of which is the complainant's failure to disclose the fact it was aware of circumstances that led to these proceedings.

The complainant has not disputed A's decision. This is because the complainant says the broker is responsible for this failure as Mr R's circumstances were disclosed in the proposal but this was altered by the broker.

The broker does not dispute the proposal had been altered. However, the broker says the complainant only disclosed matters relevant to Mr C, not Mr R.

The complainant also says the broker advised it would cover the legal costs associated with the declined claim after the proceedings concluded. The broker disputes this.

The proceedings have since been defended and are concluded. The complainant effectively incurred costs totalling \$340,434.09. The complainant is seeking compensation for these costs from the broker. The broker has refused.

## 1.2 Issues and key findings

### Is the broker liable to pay compensation?

No. Even if the panel accepts the broker removed any reference to Mr R's circumstances in the proposal, the available information does not show this caused the complainant to suffer the loss it is now claiming.

## 1.3 Determination

The determination is in favour of the broker.

The broker is not required to undertake any further action.

## 2 Reasons for determination

### 2.1 Is the broker liable to pay compensation?

#### Broker owes a duty of care to the complainant

Legal principles require insurance brokers to exercise reasonable care and skill in the performance of their duties. The relevant standard is that expected of a competent and experienced professional insurance broker.

In addition, the broker provides services to its clients under an Australian Financial Services Licence (AFSL). This means it is required to do all things necessary to ensure those services are provided efficiently, honestly and fairly. It also requires the broker to act in the best interests of their customer.

In considering whether a broker has acted reasonably, AFCA takes into account the requirements set out in the Insurance Brokers' Code of Practice, as well as good industry practice.

In pursuing a claim for compensation against a broker, a complainant must generally establish the following:

- the broker breached a duty owed
- the loss claimed was caused by that breach.

#### Parties dispute what was contained in the original proposal

There is no dispute the broker altered the complainant's proposal. This is concerning, particularly given the broker did not keep any contemporaneous recording:

- what it altered
- how this was communicated to the complainant
- any confirmation that the complainant agreed to the alteration

The failure to keep any form of contemporaneous record of such a significant matter is inconsistent with a broker exercising reasonable care and skill. To this extent, a breach has occurred.

There is no dispute the alteration was made to this section of the proposal:

#### 11. Claims History

*For the purpose of answering this question, please note that reference to "Association" includes all of its past and current subsidiaries.*

- a. Has any claim even been made or civil, criminal or regulatory proceedings brought against the Association or any Insured Person (whether as Insured Persons of the Association or any other entity), in respect of the risks of the kind to which this Proposal Form relates?
- b. Has any Insured Person ever received a notice to attend an official investigation, examination, inquiry or other proceedings order or

commissioned by an official body or institution, in respect of the risks of the kind to which this Proposal Form relates?

It appears the complainant had answered yes to these questions but the broker changed this to no. The broker says it did so after discussing this with the complainant. As stated before, the broker did not keep any contemporaneous record of its discussion.

The complainant maintains it was never informed of the change.

The parties also dispute what was intended to be disclosed.

The broker says it was Mr C's circumstances intending to be disclosed. The broker says the complainant never disclosed Mr R's circumstances. This included the fact Mr R had issued proceedings in the Equal Opportunity Commission (EOC) that was being covered by the complainant's previous insurer B.

The complainant disputes this as it says it answered yes to question 11 by reference to Mr R's circumstances. The complainant also says it included paperwork related to those proceedings. However, the complainant has not been able to produce any contemporaneous evidence showing this paperwork was attached to the proposal when given to the broker.

### **Broker should have kept contemporaneous records**

It is plain the broker's failure to keep any contemporaneous records is a significant omission. There is no dispute the broker has altered a signed proposal. Yet it did not keep any record confirming it did so under instructions. The complainant has consistently maintained it did not do so.

However, it is not clear if the alteration was to do with Mr R's circumstances or Mr C's. Whilst the complainant maintains it sought to disclose Mr R's circumstances, there is no contemporaneous record confirming this was communicated.

The broker maintains it was Mr C's circumstances that were notified. This is consistent with the fact A had put a specific exclusion addressing this.

Regardless, even if the panel were to accept the complainant's position that it had disclosed Mr R's previous proceedings or circumstances, and these were removed by the broker, this will not assist the complainant. This is because the panel is not satisfied there is sufficient information to show this caused the loss the complainant is now claiming.

### **No evidence a policy could have been obtained to cover Mr R**

When Mr C's circumstances were notified to A, A endorsed the policy with the following exclusion:

The Insurer will not be liable for Loss resulting from Claims by the following person(s) or organisations in any capacity: [Mr C]

If A was made aware of Mr R's circumstances, which included the EOC proceedings that were still ongoing, the panel accepts it is likely A would include a similar exclusion for Mr R. In particular, it is difficult to accept A, or any other liability insurer, would agree to be on risk for any other claim made by Mr R given the known circumstances.

The complainant has recently submitted Mr R's proceedings were unrelated to the previous matter. However, this is inconsistent with other communications. Also, having considered the pleadings in the EOC and the Court ones, it is clear there is a relationship.

No evidence has been produced to show the complainant could have purchased any form of cover from either A, or any other insurer, that would have covered Mr R's circumstances. Given the above, the panel considers it unlikely such cover could have been sourced.

The panel also notes it is unlikely the complainant would have renewed their policy with B given:

- their relationship with the previous broker was breaking down, and
- B's policy was only available through that previous broker

Given all this, the panel cannot accept that a broker, exercising reasonable care and skill, could have secured a policy that would have covered Mr R's circumstances.

### **Unclear if the complainant reasonably mitigated its situation.**

B was aware of Mr R's circumstances that led to the subsequent claims. Even though these subsequent proceedings were issued after B's policy lapsed, section 40 of the Insurance Contracts Act 1984 (the Act) could potentially put B on risk for them.

This is consistent with the likely intent of section 40. An insured could be left in a difficult situation when circumstances that give rise to a claim may occur whilst one insurer is on risk, but does not become a claim until some time later and when another insurer is on risk. In those situations, the second insurer would typically ask an insured to disclose any circumstances that may give rise to a claim and, when such matters are disclosed, seek to exclude them when issuing a policy and before a claim arises.

This leaves an insured unprotected for the subsequent claim through no fault of their own. As a result, section 40 is intended to provide some mitigation to this type of situation.

The broker has provided copies of emails and file notes of their communications with the complainant and B during the months between March and May 2015. The broker's file note of 28 May 2015 recorded a discussion with B that noted it may have accepted notification of a potential claim.

The broker says it advised the complainant to continue to pursue this matter and offered to assist. The broker says the complainant never took them up on this offer.

The complainant says it was told by the broker it would cover its legal fees at the conclusion of the litigation. There is no evidence to confirm such an arrangement. This is inconsistent with the contemporaneous documents and records.

It is not clear what action was taken by the complainant to pursue B from mid 2015. Following the broker's file note, it appears the next communication with B was done in 2020. By that time, B refused to provide any indemnity given the passage of time and the failure to comply with relevant policy conditions.

Had this matter been more actively pursued in 2015, it is possible that B may have been compelled to cover the claim given:

- the circumstances that gave rise to Mr R's claims arose when B was on risk
- B was aware of these circumstances
- section 40 of the Act may have operated to assist the complainant for these claims.

Given all this, it is possible that one of the reasons the complainant remains uninsured for the costs of the legal proceedings was due to a failure to pursue B. This cannot be attributed to the broker.

### **Broker not liable for the costs sought**

Given all this, the panel concludes the following.

Even if the broker removed any reference to Mr R's circumstances in the proposal, the panel does not accept the available information shows this caused the complainant to suffer the loss it is now claiming. This is because:

- it is likely A would have excluded any claim arising from these circumstances
- it is unlikely any other insurer would have agreed to insure the complainant for Mr R's claims
- the complainant was unlikely to have remained insured with B given:
  - > there were issues with its relationship with the former broker, and
  - > B's policy was only available through the previous broker

Further, and in the alternative, it is not clear the complainant reasonably mitigated the situation given B may have been on risk for Mr R's claims by reference to section 40 of the Act.

Therefore, based on the available information, the panel does not accept the broker is liable to pay for the complainant's costs now sought.

## 3 Supporting information

### 3.1 The AFCA process

#### **AFCA's approach is based on fairness**

AFCA has determined this complaint based on what is fair in all the circumstances, having regard to:

- the legal principles
- applicable industry codes or guidance
- good industry practice
- previous decisions of AFCA or its predecessor schemes (which are not binding).

The respective parties have completed a full exchange of the relevant information, and each party has had the opportunity to address any issues raised. We have reviewed and considered all of the information the parties have provided.

While the parties have raised a number of issues in their submissions, we have restricted this determination to the issues that are relevant to the outcome.

#### **A panel determined this matter**

Due to the nature of this complaint, we referred it to a panel for determination. The panel includes:

- an ombudsman
- a member with significant experience in consumer and small business advocacy
- a member with extensive insurance experience

#### **We assess complaints on available information and circumstances**

AFCA is not a court of law. We do not have the power to take or test evidence on oath, or to require third parties to give evidence.

When we assess complaints, we consider:

- available documents
- the recollections of the parties
- all relevant circumstances.

We give more weight to documents created at the time the events occurred. If there are no relevant documents, we will decide what most likely occurred based on the available information.

If there are conflicting recollections and these are evenly weighted, we may find that a claim cannot be established.

### 3.2 Documents Considered

- Complainant's email dated 30 November 2020
- Complainant's email dated 17 January 2021
- Complainant's email dated 24 February 2021
- Complainant's email dated 11 October 2021
- Brokers response dated 2 December 2020
- Brokers response dated 11 January 2021
- Brokers response dated 29 March 2021
- Brokers response dated 18 June 2021
- Brokers response dated 26 November 2021

A handwritten signature in black ink, appearing to be 'CL' or similar, written in a cursive style.

**Chris Lamos**  
**Ombudsman**  
**Australian Financial Complaints Authority**