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12 August 2011

By email: spla.reps@aph.gov.au

Committee Secretary
House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Secretary

Joint submission - Inquiry into the operation of the insurance industry during disaster events

The following is a joint submission from Choice, the Consumer Action Law Centre (**Consumer Action**), Financial Counselling Australia (**FCA**) and the Footscray Community Legal Centre. We welcome the opportunity to provide input to this inquiry. Information on the contributing organisations can be found in the appendix.

This submission has also benefited from the input of a number of Queensland based financial counsellors who assisted people affected by either flooding or Cyclone Yasi in early 2011. This input was gathered by FCA in July 2011.

In brief, we have recommended that:

- an Australian Standard for general insurance claims handling and assessment be established to improve insurer claims handling and dispute resolution;
- insurers should be required to be bound by the General Insurance Code of Practice as a condition of their licence, whether or not they are members of the Insurance Council of Australia;
- the Australian Government requires the insurance industry to fund a panel of expert independent hydrologists, administered by the Financial Ombudsman Service (**FOS**), that

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are available to give free advice to consumers in disputes regarding flood insurance claims;

- the FOS develop guidelines to allow its staff to assist applicants where matters are complex and applicants have not had the benefit of professional advice;
- in addition to the recommendation immediately above (or in alternative to it), the FOS establish a consumer advisor position to assist applicants who have not already received professional assistance;
- systemic issues investigated by FOS be reported in a more transparent and detailed way;
- the FOS put procedures in place to ensure that, following a natural disaster where a high number of disputed claims is expected, its representatives can be posted to affected areas for an extended period informing residents of their rights of appeal and FOS' role; and
- a specialist insurance legal service be funded in each state and territory to provide assistance to consumers seeking to dispute insurance matters through external dispute resolution (**EDR**).

Broadly, we note that many of the issues considered by the terms of reference may be mitigated by any Government response following the Natural Disasters Insurance Review. Nonetheless, regardless of this response, disputes will continue to arise between insurers and consumers and it is our view that improvements to claims handling and dispute resolution processes will still be required across the insurance industry.

Our comments are detailed more fully below.

Claims processing arrangements

Information provided to consumers

The experience of contributors to this submission as well as events described in the media illustrate the poor standard of information that many consumers have received from their insurers following recent natural disasters.

Some Queensland financial counsellors advise that their clients received insufficient information from insurers regarding the insurer's decision to deny claims. Many also state that claim handling and internal dispute resolution (**IDR**) were only resolved after the financial counsellor contacted the insurer on behalf of the client, requested assistance from the local Member of Parliament or referred the client to the Financial Ombudsman Service or Legal Aid Queensland.

Financial counsellors reported two cases where an insurance company had refused a claim verbally with no proper assessment and where consumers were not told of their right to make a claim.

“Insurers saying you are not covered but would not put it in writing until the local member or myself got involved ...”

“Client who came to see me about other financial matters said she was insured with [insurer]. This company declined her (flood) claim. When my client asked to appeal they wanted to know on what grounds, saying that she could not appeal just because they had declined her claim, she

had to have “proper” reasons. By the time the client saw me she felt she had no hope and didn’t want me involved in the insurance matter. I did advise client to go to FOS.”

In addition, we are also aware that some consumers who called their insurance company to enquire about their policy (without formally making a claim) were advised summarily by call centre staff that their policy wouldn't cover the loss and there was no point submitting a claim. This is particularly concerning, as without making a formal claim, the consumer does not receive a decision from their insurer that can be challenged at the FOS. We understand the insurance industry will amend the General Insurance Code of Practice to require staff to ask customers making these kind of enquiries if they would like to make a claim¹. However, compliance with this code amendment will need to be monitored to assess its effectiveness and the level of compliance.

A related issue is that of 'withdrawn' claims (that is, where a consumer lodges a claim but decides later to withdraw it before the insurer makes a decision). ASIC recently reported that of over 1.1 million motor vehicle insurance claims in 2009, 0.28 per cent were formally denied but over 7 per cent were withdrawn by the consumer² (that is, around 25 times more withdrawals than rejections). Considering the summary dismissal of claims by call centre staff, excessive delays in handling claims and other factors described in this submission, it is reasonable to suspect that that at least some claims made following this year's natural disasters have been withdrawn because of poor claims handling procedures, meaning official rejection rates may be artificially low. This is especially problematic when, as ASIC reports, some insurers will raise subsequent insurance premiums for that policyholder following a withdrawn claim (that is, treats the withdrawal as rejection for that purpose).

Financial counsellors also reported that consumers had claims denied on the basis of a hydrologist's report, but the insurer was unwilling to give the insured access to the report:

Where a refusal was put in writing, the letter referred to a hydrologist's report. When the customer asked for a copy they were told they could not have it. They got a copy if they jumped up and down or when I became involved by referring them to FOS and Legal Aid.

The insurer at one stage wanted to charge my client for the report (\$350-360). It was only when he said he would go to his local member that they agreed to give him the report. When he advised that the report was incorrect they fobbed him off by saying that he was not covered for flood damage and that was that. This is where he contacted me and I referred him to FOS and Legal Aid and to make a complaint. He was going to lodge a complaint with FOS. He did not know about FOS until I spoke to him and his insurer at no stage told him about Internal Dispute Resolution or External Dispute Resolution.

As in the case study immediately above, financial counsellors have also advised that consumers are usually not aware of the existence of the FOS or Legal Aid. One financial counsellor reports that:

¹ See InsuranceNews, *ASIC seeks General Insurance Code of Practice amendment*, 14 March 2011. Accessed on 11 August 2011 from <<http://www.insurancenews.com.au/regulatory-government/asic-seeks-general-insurance-code-of-practice-amendment>>

² Australian Securities and Investments Commission (August 2011) *Review of General Insurance Claims Handling and Internal Dispute Resolution Procedures*, pp 5-6.

I cannot recall out of the 30 clients I saw in the two months I was at [Financial Counselling service] anyone who knew about FOS or Legal Aid or that you have the right to challenge what the insurer is telling you. When told, some consumers then worry that the insurance company might turn nasty against you.

Similarly, Footscray Community Legal Centre had a discussion with an elderly man who had received a two page rejection letter from his insurer which concluded with a reference to a review by FOS. The client commented that he had not appealed the decision because he and his wife could not afford a lawyer or the cost of legal proceedings. He had not understood the reference to FOS or that the review by FOS would be free.

We accept that the general population will have little knowledge of the role of FOS or Legal Aid. This is why it is so important that insurers advise customers of their rights to challenge insurer decisions—indeed it is required by the General Insurance Code of Practice.³ The examples set out above suggests that this is not occurring. The recommendation below regarding an Australian Standard for general insurance claims handling may be one way to address this problem.

Claims handling

There is a long and documented history in this country of consumer concerns regarding claims handling and assessment in the area of general insurance.⁴

As we have recommended recently,⁵ we believe practice could be improved by establishing an Australian Standard for general insurance claims handling and assessment.

There is significant experience within insurers and within FOS' general insurance area regarding what constitutes best practice in the steps that make up the process of receiving, handling and assessing general insurance claims, but this experience has not been extended in any systematic way to standards across the industry more generally.

Existing regulation or standards relating to claims handling, as set out in the General Insurance Code of Practice and ASIC Regulatory Guides 165 & 139, are limited in scope and coverage of this area, with a much greater focus placed on the standards for complaint handling and dispute resolution (also important) than on the handling and assessment of claims up to the point that the insurer makes a determination. Consequently, they do not adequately protect consumers from unfair claims handling and assessment practices including:

- misinformation about a consumer's right to lodge a claim;

³ See 6.9.

⁴ See for instance Insurance Law Service submission to the 2009 Review of General Insurance Code of Practice; Joint Consumer Submissions to the FOS Terms of Reference, Joint Consumer Submission to Review of ASIC RG 165 & 139; Legal Aid NSW submission to the Review of IOS (2005); National Legal Aid submission to Inquiry into Trade Practices Amendment (ACL), Senate Economics Legislation Committee, 2009 on Australian Consumer Law; National Legal Aid Submission to Options Paper on Unfair Terms, Treasury, 2010; Consumer Action Law Centre submission to Inquiry into Trade Practices Amendment (ACL), Senate Economics Legislation Committee, 2009 on Australian Consumer Law

⁵ See the joint submission to the Australian Government's *Clearing the Waters* discussion paper at <http://www.consumeraction.org.au/downloads/JointSubmission-ReformingFloodInsurance-May2011.pdf>

- failure to process claims without delay;
- poor practices with regard to the collection and use of evidence, including technical evidence such as hydrologists and lay evidence such as eye witness accounts;
- failure to provide refusal of claims without delay including proper reasons for refusal; and
- failure to adequately inform consumers of their rights to IDR & EDR in relation to refused claims or claims-related complaints.

Time taken to process claims

The length of time it has taken some insurers to respond to customer claims following this year's natural disasters has been well publicised. A financial counsellor also shared their experience of these delays:

(A community worker) was saying that they put their claim in to repair their house and the insurance company said that the quote was too expensive. They got another quote and it was even more expensive. As far as I know the repair has still not been carried out. Driving around Tully there are lots of houses still without a roof and no sign of any work being done on them.

We acknowledge and welcome that the insurance industry has indicated a willingness to impose a requirement in the General Insurance Code of Practice that a decision on a claim be made within 6 months of receiving the claim. We note that this amendment has not yet been made, and that initial drafts of the amendment did not provide a consumer with a right to a final decision within 6 months of lodging the claim. We look forward to the final amendment to the Code providing consumers with a right to a final decision within 6 months of lodging a claim.

We also note that the Code already requires insurers to respond within 10 business days where all relevant documents are provided and no further investigation is required.⁶

However, the code is an imperfect solution. One problem is that it does not fully cover the industry. While insurers who are members of the Insurance Council of Australia are required to be signatories to the code, others may choose to not be bound. **We recommend that insurers should be required to be bound by the code as a condition of their licence, whether or not they are members of the Insurance Council of Australia.**

As discussed above, in our experience, the Code has also failed to deliver effective claims handling outcomes in the past.

Involvement of external parties

The involvement of hydrologists can have a significant impact on flood insurance disputes and reliance on their reports in determining disputes can raise issues for consumers.

⁶Paragraphs 3.1 and 3.2

One problem is that an incorrect hydrologist's report is likely to lead to an incorrect claim determination. One financial counsellor recounts:

One client actually got the hydrologist's report before we met but it was based on wrong information. The report referred to incorrect dates, both for when the flooding was supposed to have occurred and when the water subsided. The report included a statement that the owner had confirmed these timings. He had no contact with the hydrologist, but the tenant had done so. The tenant said his involvement with the hydrologist was to advise when they had left the house because of the threat of flood and when the water level dropped to a point where they could look inside the house. When the client advised that the report was incorrect the insurance company fobbed him off by saying that he was not covered for flood damage and that was that.

Where a claim determination or the resolution of a dispute turns on the opinion of an expert hydrologist, consumers are at a significant disadvantage because few will have the resources or the expertise to either commission their own hydrologist's report or challenge the findings of an insurer-commissioned report. **As we recommended earlier this year⁷, the Australian Government should require the insurance industry to fund a panel of expert independent hydrologists, administered by the FOS, that are available to give free advice to consumers in disputes regarding flood insurance claims.**

We note, however, that this will be unnecessary if the Government requires insurers to include flood cover in all home and home contents insurance policies, as is considered in the Natural Disasters Insurance Review issues paper.

Conduct of external dispute resolution processes

The effectiveness of dispute resolution within the Financial Ombudsman Service.

Unassisted applicants

In general, we have concerns about how effective the FOS can be in resolving insurance disputes where a consumer is not supported by an advocate (for example a solicitor or a financial counsellor). Insurance is an extremely complex area of law and insurance cases are challenging even for solicitors. It is unlikely that an unsupported consumer will be able to bring all relevant facts and law to the attention of the decision-maker in an insurance dispute.

A recent case seen by the Footscray Community Legal Centre provides a striking example:

Our clients originally sought advice from an engineer when they noticed that their neighbour's house was sinking into the ground and dragging their home down also. On investigation it was revealed that the damage was caused by large amounts of water pooling under the neighbour's home, apparently caused by a leaking water meter.

Our clients' insurer initially agreed to accept full liability for necessary repairs, however the insurer later wrote back to say they would accept only 70 per cent. The insurer claimed that 30 per cent was caused by 'seasonal changes', rather than the leaking meter, despite evidence that suggested otherwise.

⁷ See: *A Fair Go in Insurance* <<http://consumeraction.org.au/downloads/AFairGoInInsurance-Recommendations-010211.pdf>>

After receiving a quote from the insurer's chosen repairer, our clients decided to accept the 70/30 offer as the quote was a far cheaper than they thought they could access elsewhere. In addition they were increasingly concerned about the damage being caused to their home and simply wanted to solve the problem quickly. However, the insurer then refused to send the builder who provided the quote to conduct the repairs, but refused to explain why.

Soon after, the insurer commissioned a soil expert who found that the levels of saturation would undermine the foundations of our clients' home and needed to be addressed immediately.

After further delays, our clients received a letter from the insurer saying that they would now only pay for 10 per cent of the damage, as the remainder was due to causes other than the leaking meter.

After waiting over a year after the problem was first reported, our clients appealed to the FOS. According to our clients, the insurer's statement contained a number of incorrect statements in and also neglected to mention the report of the soil expert.

When our clients approached Footscray Community Legal Centre, a conciliation hearing was fast approaching. The insurer undoubtedly had access to a great deal of legal and other expert advice. Despite the obvious power imbalance and the extraordinary complexity of the case, FOS failed to advise our clients to seek legal advice.

We recognise the importance of a decision-maker maintaining (and maintaining the appearance of) impartiality. However, the FOS cannot reasonably be expected to make correct determinations in complex matters if parties are unable to bring all relevant points to its attention.

We recommend that the FOS develop guidelines to allow its staff to assist applicants where matters are complex and applicants have not had the benefit of professional advice. Guidelines should be developed in consultation with members and consumer representatives. **Alternatively or in addition to developing such guidelines (and as recommended in the past⁸), a consumer advisor position could be established in FOS to assist applicants who have not already received professional assistance.** We note that FOS already hosts industry advisors, and the consumer advisor position could be based on that model.

Systemic issues

The FOS is required by ASIC Regulatory Guide 139 to report systemic issues to ASIC. As we have noted above, consumer advocates have over a number of years identified issues with general insurer claims handling and dispute resolution, however it is difficult for us to determine whether or not these issues are being investigated by FOS. For example, FOS' 2009-10 Annual Review reports that FOS "identified 71 possible systemic issues" 58 of which "were found to be definite systemic issues and were resolved to the satisfaction of the relevant Ombudsman"⁹.

⁸ See Consumer Action Law Centre (2008) *Joint Consumer Submission to Financial Ombudsman Service's Issues Paper - Developing New Terms of Reference for the Financial Ombudsman Service*, p 50. Accessible at www.fos.org.au/public/download.jsp?id=3376.

⁹ Accessed on 5 August 2011 from <http://fos.org.au/annualreview/2009-2010/systemic-issues-serious-misconduct.html>

However, details on what those issues are is unclear from the annual review, which lists only 12 issues investigated in very general terms and only five in any detail.¹⁰

We recommend that systemic issues investigated by FOS be reported in a more transparent and detailed way. This could be achieved by amending ASIC Regulatory Guide 139 to include a specific obligation of this kind. The amendment could be modelled on the existing obligation in Regulatory Guide 139 that External Dispute Resolution Schemes include "a comprehensive summary and analysis" of complaints and disputes information in their annual reports.¹¹ Alternatively, an obligation could be placed on ASIC to report publicly on the systemic issues reported to it by EDR schemes, and the action taken (both by the EDR scheme and the regulator) to address them.

Barriers to participation in external dispute resolution for consumers.

Statistics from flood insurance claims

The ICA advised attendees at its National Consumer Reference Group meeting on 14 June 2011 that 6.5 per cent of residential property claims from the Queensland floods (that is, 3,400 claims) had been rejected. For comparison, by June 2011 there were 56,878 claims relating to Cyclone Yasi, of which 0.02% were denied¹². It is understood that most of the flood claims were refused because the insurance policies in question excluded flood damage. The ICA also advised that there was only 1.2 per cent of claims in dispute (60 per cent in internal dispute resolution processes and 40 per cent at external processes).

On the figures above, only around 18 per cent of consumers who had claims rejected have decided to proceed to dispute resolution. It is difficult from our standpoint to explain why the remaining 82 per cent chose to not dispute their rejection. However, we would suggest that such a high number, in cases where a great deal is at stake for consumers and decisions are based on fine distinctions between whether damage was caused by "flood" or "storm" that these figures point to significant barriers to accessing external dispute resolution.

We recommend that FOS should put procedures in place to ensure that, following a natural disaster where a high number of disputed claims is expected, FOS representatives can be posted to affected areas for an extended period informing residents of their rights of appeal and FOS' role. We acknowledge and welcome the Natural Disasters Hotline established by FOS and the public forums (attended by FOS, the ICA and Legal Aid representatives) organised in areas affected by the Queensland floods.

Non-English speaking clients

In general, the experience of Footscray Community Legal Centre (demonstrated by the case study below) is that clients from a non-English speaking background are unlikely to be aware of their rights to external dispute resolution and need considerable support.

¹⁰ See note above, and <http://fos.org.au/annualreview/2009-2010/examples.html> (accessed 5 August 2011).

¹¹ See 139.153

¹² Natural Disasters Insurance Review Issues Paper (June 2011) p 6. Accessed on 5 August 2011 from <<http://www.ndir.gov.au/content/Content.aspx?doc=issuespaper.htm>>.

Our client purchased a policy with the help of a friend who called the insurer from a public phone. The friend answered all questions about disclosure and did not ask our client for any clarifications. All documentation, the policy and the section 22 disclosure warning notice was sent to our client in English – a language she could not read in relation to disclosure that she had not personally provided. Our client purchased a policy, made a claim and made a complaint to Financial Ombudsman Service without any use of interpreters or ever receiving any correspondence or notices in her own language.

The impact of free legal advice on people's access to external dispute resolution

Free legal advice undoubtedly enhances access to external dispute resolution. However, capacity to provide free expert insurance related legal advice after a disaster will be severely limited.

Insurance is a highly specialised area of law. Up skilling community legal sector solicitors to allow them to provide comprehensive advice on insurance matters would create a significant resource drain unless specific funding was provided. In Consumer Action's experience, solicitors without specialist insurance expertise are only able to provide limited advice to consumers on insurance matters.

The experience of one Queensland financial counsellor indicates how, even months after the floods, insurance cases continued to overwhelm community resources:

I rang Legal Aid several months after the floods. My client had a notice threatening house repossession, so the matter was serious. The consumer lawyer gave my client a few minutes of phone advice, and then told me that the Legal Aid Consumer Protection section wasn't available for ordinary client casework because they were all busy doing flood work.

With the exception of the Insurance Law Service in New South Wales, there are no free legal services that specialise in insurance matters. The Bushfire Insurance Unit¹³ was established following the 2007 Victorian Bushfires, however this was a one-off project and is no longer in operation. We note that even establishing the Bushfire Insurance Unit (comprising four solicitors) required seconding one insurance expert from interstate.

We recommend that a specialist insurance legal service be funded in each state and territory to provide assistance to consumers seeking to dispute insurance matters through external dispute resolution. This will build expertise in the Legal Aid and Community Legal Centre sector which will assist in responses to future natural disasters. Alternatively or in addition to this recommendation, a consumer advisor position could be established in FOS to assist applicants who have not already received professional assistance.

Thank you again for the opportunity to provide input. Please contact us if you have any questions about this submission. Our contact details are in the appendix.

Yours sincerely

¹³ For details, see Victoria Legal Aid (2010) *Legal Assistance and Community Recovery after the 2009 Victorian Bushfires: the Bushfire Legal Help Response*. Accessed 4 August 2011 from <http://legalaid.vic.gov.au/xfw/BLH_project_report_June__2010.pdf>

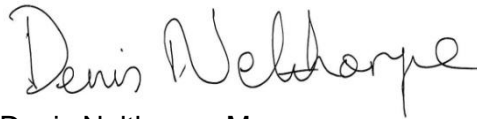


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Appendix - About the contributors

CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests – ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

Contact: Elizabeth McNess, Policy Advisor, 02 9577 3344 or emcness@choice.com.au

Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Contact: David Leermakers, Policy Officer, 03 9670 5088 or david@consumeraction.org.au

Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors. Financial counsellors help consumers in financial difficulty by providing information, support and advocacy. Their services are free, confidential and independent.

Contact: Fiona Guthrie, Executive Director, 0402 426 835 or fionaguthrie@financialcounsellingaustralia.org.au

Footscray Community Legal Centre

Footscray Community Legal Centre and Financial Counselling Service is a non-profit, community managed incorporated association. The Centre has a Legal Service and a Financial Counselling Service. Our purpose is to address systemic injustice by providing free legal and financial counselling services on an individual level and more broadly through community education, law reform and advocacy. We assist people who live, work or study in the City or Maribyrnong. Our service gives priority to those who cannot afford a private lawyer and/or do not qualify for Legal Aid.

Contact: Denis Nelthorpe, Manager, 0414 545 290 or denis.nelthorpe@iinet.net.au