



WEstjustice submission on the operation and effectiveness of the 2014 General Insurance Code of Practice

28 April 2017

Insurance Council of Australia
56 Pitt St
Sydney NSW 2000

To whom it may concern,

Review of the 2014 General Insurance Code of Practice

Thank you for the opportunity to make a submission on the operation and effectiveness of the General Insurance Code of Practice 2014 (**the Code**).

Our submission illustrates how the Code and current practice:

- A. creates phantom consumers with uncertain and limited rights; and
- B. must be updated to include a response to family violence.

Summary of our recommendations

Where relevant, the Code should be updated to reflect the following recommendations.

A. Phantom Consumers

- 1. Industry needs to ask for proof of who is on title when a person is buying insurance.*
- 2. "Insured" as defined in the Code should mean only the party (or all of the parties) on title.*
- 3. Industry should agree to **not** follow the High Court decision in Matthews' case.*
- 4. Industry should consider how insurance and the family law can work better together.*
- 5. Industry should encourage a person to claim on their own insurance policy, for example, when there is an accident and the policy-holder is not-at-fault (such as a car accident).*
- 6. Insurers must provide consumers with a contact point to promptly provide information and answer questions in relation to legal proceedings. The contact point must include a telephone number with interpreting services available.*
- 7. In the context of legal proceedings, FOS' jurisdiction should be expanded to provide the power to investigate and determine consumers' complaints about an Insurer:*
 - a. taking significant time, to the consumer's detriment, to decide what action to take; and*
 - b. incurring legal costs in the consumer's name.*

B. Family Violence

8. *The Code should make reference to family violence and at a minimum incorporate the Economic Abuse Reference Group guideline on family violence, including:*
 - a. *Training for all staff on family violence*
 - b. *An internal policy on family violence for staff and customers*
 - c. *Internal systems to address customer privacy and safety issues*
 - d. *A single entry point for customers experiencing family violence and/or their workers to reach trained staff within the Insurer.*
9. *Industry should establish a system with the Insurance Council of Australia, similar to that used in disasters, through which a person can identify any insurance policy under which they are insured or may have the right to claim.*
10. *Claims involving family violence must be dealt with by a senior staff member with adequate training and authority to make flexible decisions.*

About WEstjustice¹

WEstjustice (Western Community Legal Centre) is a not-for-profit community organisation providing free legal and financial counselling services to the most vulnerable in Melbourne's western suburbs.

WEstjustice was created by the amalgamation in 2015 of the Footscray, Western Suburbs and Wyndham legal services. WEstjustice and each of the former centres have a long history of assisting clients with consumer law matters, including insurance cases. We work closely with newly arrived communities, clients experiencing financial and personal hardship, taxi drivers and victims of family violence, all of whom regularly present with insurance issues.

WEstjustice undertakes (and the former centres undertook) significant work preparing submissions and consulting with Industry and Government on how laws, policies and processes affect our clients and could be made fairer. We take this role seriously as it is the opportunity to reflect our clients' experiences of the laws, regulations and policies that affect their daily lives.

All case studies in this submission are based on real cases conducted by WEstjustice. The names and certain critical facts have been changed to preserve anonymity.

A. PHANTOM CONSUMERS

The Code's definitions, together with telephone underwriting and claims practices, create 'phantom consumers'. We use this term to mean people who fall outside the Code's specific definitions and whose status and rights are uncertain or limited as a result.

Phantom consumers include people missing in the insurance scenario, such as an 'uninsured' joint-owner of property, or insureds who have not submitted a claim with their own Insurer, such as a not-at-fault driver awaiting pay-out from the at-fault driver's Insurer.

An overarching problem for phantom consumers is that they tend to fall into the default category of 'third-party beneficiary'. In some cases, this classification is unfair and should be altered if Insurers continue telephone underwriting without requiring proof of ownership at the time of providing

¹ www.westjustice.org.au.

insurance. In other circumstances, the classification may be appropriate, but the Code's definition of a third-party beneficiary must be much clearer and include examples.

(i) Joint-ownership of property

Ingrid's case

Ingrid and her husband were joint-owners and joint-mortgagors of their home. Ingrid's husband was extremely controlling over Ingrid and the family's finances; he held all details of their accounts and policies and provided Ingrid with a very limited allowance.

Ingrid's husband was unwell and burned down the family home. Soon afterwards, Ingrid was contacted by insurance assessors conducting an investigation. Ingrid had not made a claim - she didn't know who her Insurer was - and the assessors informed her that the insurance policy was in her husband's name alone. The assessors and Insurer both initially denied Ingrid any information about the policy or claim based on privacy.

Throughout negotiations, the Insurer indicated that Ingrid might be considered a third-party beneficiary, as opposed to co-insured. These words meant little to Ingrid, but could significantly have impacted her rights under the claim.

Telephone underwriting is cost-effective but can lead to shortcuts and bad outcomes. Current practice is for Insurers to sell a policy and provide cover to the caller, and not necessarily cover a phantom joint-owner. Current practice appears *not* to ask whether there is a joint-owner of property to be insured, thus many people could find themselves in Ingrid's position.

If Industry won't change its telephone underwriting practice then an 'uninsured' joint-owner on title should have the same rights as the insured joint-owner. The phantom joint-owner should be regarded as 'co-insured' rather than the catch-all 'third-party beneficiary' under the Code. The distinction is that a third-party beneficiary would generally have fewer rights than the insured joint-owner, as illustrated in Ingrid's case and expanded below.

Recommendations

- 1. Industry needs to ask for proof as to who is on title at the time of entering the insurance contract.*
- 2. "Insured" as defined in the Code should mean only the party (or all of the parties) on title.*

(ii) Privacy implications for phantom consumers

One practical limitation of deeming a phantom consumer to be a 'third-party beneficiary' is the phantom's limited access to information due to privacy. Ingrid was prevented from accessing any information about the insurance policy and the claim on foot in relation to her jointly-owned property. She was told by the insurance assessors to see a lawyer but all enquiries were denied based on privacy reasons. But for Ingrid being referred to WEstjustice for free legal help, she would likely have given up on, or failed in pursuing, a claim under the policy.

It is easy to imagine privacy causing unnecessary problems and stress for other phantom consumers, such as a not-at-fault driver from accessing information about the at-fault driver's claim. We therefore refer to and repeat recommendations 1 and 2 above.

(iii) Matthews' case creates an unfair precedent

Matthews' case

Advance (N.S.W.) Insurance Agencies Pty. Limited v Matthews (1989) 166 CLR 606

In Matthews' case, Mr and Mrs Matthews took out joint insurance to cover their household contents. Two days later, their home was robbed in relation to which they made a claim on the policy. The Insurer rejected the claim because Mr Matthews failed to disclose that he previously had an insurance claim rejected.² Mrs Matthews was unable to recover any compensation despite being completely unaware of Mr Matthews' previous claim and innocent of any misrepresentation.

The High Court determined that Mr Matthews' actions precluded the co-insured Mrs Matthews from receiving any compensation from the Insurer. The majority found that it would be unfair for a co-insured party "responsible for the fraudulent non-disclosure to be able to compel performance of the contract by the Insurer". The Court noted the unfairness of the result to Mrs Matthews but held that "it is not a matter that compels one to adopt a different construction".

Matthews' case is current law in Australia and will remain that way until overturned with a High Court challenge or legislative reform. A similar approach was taken in *MMI General Insurance Ltd v Baktoo & Anor*³ in the context of one joint-insured setting fire to the property. This is despite New Zealand, Canadian and United Kingdom authority⁴ and the Supreme Court of Tasmania⁵ taking a more liberal approach to the impact of the actions of a co-insured party on the innocent co-insured party's ability to receive an insurance pay-out. Any High Court challenge is extremely unlikely due to the costs involved and the existence of comprehensive external dispute resolution.

Today we would hope that an innocent co-insured party (with a composite or joint insurance policy) would receive some form of compensation, especially given the potential for abuse of the system to perpetrate family violence. We also expect that, considering all of the circumstances and fairness, FOS would follow the more liberal approach.⁶

To clarify the position, Industry should openly agree, through amendment to the Code, that it will not follow the High Court authority in Matthews' case, and take the more liberal approach, allowing some compensation for the innocent party.

Recommendation

3. Industry should agree to *not* follow the High Court decision in Matthews' case.

² Years prior, Mr Matthews had been in a business partnership. A suspicious fire caused damage to the partnership property. The partnership made a claim, it was rejected but ultimately settled.

³ [2000] NSWCA 70 (11 April 2000).

⁴ Australian Government, Treasury, 'Review of the Insurance Contracts Act, Final Report on second stage: provision other than section 54' available at:

http://icareview.treasury.gov.au/content/reports/finalreport/11_Chapter9.asp, accessed on 20 April 2017.

⁵ *Holmes v GRE Insurance Limited* (1989) 5 ANZ Ins Case 60-8 94 (Supreme Court of Tasmania).

⁶ However, see the FOS determination in case number 308798, outlined in detail in (v) below.

(iv) Sole-ownership of property

Daphne's case

Daphne was the sole-owner of her house which she owned outright. Daphne later entered into a relationship with Jerry and altered her insurance policy to add Jerry as co-insured to her building and contents policy. Daphne was encouraged to add Jerry to the policy in order to obtain the multi-policy discount available from her Insurer.

During a violent argument, Jerry severely damaged the property. Daphne rang her Insurer to make a claim but was advised that her former partner, as co-insured, had cancelled the policy and arranged for a policy rebate cheque to be paid solely in his name and forwarded to his new address. Daphne was advised that as the policy had been cancelled she could not make a claim and that, further, as the damage had been caused by a co-insured she would be unable to claim on the policy (i.e. Matthews' case).

Daphne advised her Insurer that she was the sole owner of the property and that she had paid the insurance premium directly from her account. The Insurer cancelled the cheque to her former partner and re-issued a cheque in joint names to reflect the joint policy. Daphne no longer had access to a joint account with her partner and did not want to seek his assistance given the family violence orders that were in place at that time.

The intersection between family law, family violence and insurance is particularly complex and we do not have a clear solution or recommendation for how these areas should operate together.

Daphne's case could have been avoided if recommendation 2 was implemented ("insured" as defined in the Code should mean *only* the party (or all of the parties) on title). Yet the opposite scenario to Daphne's case could also give rise to unfairness. That is, a person who was not on title but contributed significantly to the household would be prevented from being co-insured under a policy.⁷ We think that this scenario and the interaction between Insurance and family law warrants further consideration, particularly in the family violence context (see also Part B).⁸ In the interim, a beneficial owner could be a specific category of 'third-party beneficiary' with the same, or very nearly the same, rights as the on title, insured party.

Recommendation

4. Industry should consider how insurance and the family law can work better together.

(v) Cancellation of Insurance policies

Daphne's case illustrates the problem arising in practice, where a person other than the insured party (or only one joint-policy holder) cancels a policy without the policy holder's knowledge. Such action could be an act of family violence, leaving the victim unknowingly in an extremely vulnerable position.

⁷ This could be problematic if a settlement payout were made and spent by the party on title before the beneficial owner could pursue (what can be very lengthy) Family Court proceedings.

⁸ Other issues, for example, cultural exacerbations, could also conceivably impact insurance and at some stage warrant further consideration.

In 2013, the Financial Services Ombudsman (**FOS**) determined a very similar matter to Daphne's case.

FOS case number 308798 (2013 determination)

The Applicant and her husband were joint owners of their home on title and held joint home building insurance. There was a history of family violence and the parties were separated. The husband was allowed to unilaterally cancel the policy over the telephone without the Applicant's knowledge. He then set fire to the property.

FOS found in favour of the Applicant on the cancellation point, but it is telling that she had to pursue the matter to a final decision without an acknowledgement from the Insurer that her ex-partner should not have been able to unilaterally cancel the policy.

We note that, because of policy wording reflecting *Matthew's case*, the Applicant was not compensated at all for any loss caused by the fire.

Other legal centres, and particularly those providing family violence services, have reported recent instances of cancellation of policies by perpetrators and we see this as an emerging issue that should be addressed.

Cancellation of insurance policies again highlights the limitations of telephone underwriting. To prevent financial abuse, we repeat our call for more stringent processes around insuring parties on title. Industry should recognise its role in this problem and be more cautious about only allowing policy-holders to cancel insurance (and generally requiring consent of all insured parties to cancel joint-policies).

(vi) Why wouldn't you claim on your own insurance?

A consumer who doesn't claim on his or her own policy can find him or herself in the position of third-party beneficiary (another phantom consumer) with less rights than if a claim was made on the consumer's own policy.

Beatrice's case

Beatrice was a 70-year-old widow. Her car was comprehensively insured when she had a car accident and was the not-at-fault driver. The at-fault driver (Dimitri) was also comprehensively insured and arranged for repairs to go through his Insurer's approved repairer. Beatrice never lodged a claim with her own Insurer.

Beatrice had issues with the repair job. After an assessor hired by Dimitri's Insurer inspected the vehicle, Beatrice took her car to a different smash repair company approved by Dimitri's (the at-fault) Insurer, for rectification work on a headlight. Upon delivery of the car, the smash repair company told Beatrice that Dimitri's insurance company would pay for her to use a hire car while they fixed her car. The company gave Beatrice the number for a car-hire company and encouraged her to arrange a car. Beatrice could have enquired about a car hire service from her own or Dimitri's Insurer, but the smash repair company did not tell her about that option.

On delivery of the hire car, Beatrice was told to provide her bank account details to the car-hire company. Four days later, the car-hire company called Beatrice and told her Dimitri's Insurer would not cover the car-hire fees. Beatrice therefore agreed to pay \$40 per day for the hire. Around a month later, when Beatrice came to see WEstjustice, the smash repair company had been informing Beatrice that it "hadn't got to her car yet". Beatrice was very concerned about paying \$40 per day and the car was still not fixed.

There is a fundamental problem with a not-at-fault driver being encouraged not to claim on her own insurance. It is poor practice, potentially in breach of clause 7.8 of the Code, and could mislead and disadvantage the phantom insured person who has paid for cover. Beatrice could have had a more generous policy (such as a replacement car) than Dimitri, the at-fault driver. Perhaps more importantly, she would have a contact person within her Insurer to deal with and she would expect the matter to be resolved in her best interests.

Insurance companies that award "safe drivers" with discounted premiums, cheaper roadside assistance, special "status" or other benefits are also guilty of encouraging policy-holders not to claim on their insurance policy. Our clients often tell us they would prefer not to claim on their policy - for example, where damage is minimal or they are not at fault - for fear of future premiums increasing.

Industry has voiced concerns about the practice of car-nappers⁹ discouraging consumers from claiming on their own insurance so the car-nappers can recover from the at fault driver, and make commissions in the process. These are genuine concerns, and the insurance Industry shouldn't be making the same representations to consumers in order to save the Insurer money or give the appearance of fewer rejected claims (the claim would be reported as "withdrawn" as opposed to "rejected").

We can also foresee disclosure problems for phantom consumers in this context, who were encouraged in whatever way to not claim on their policy. This could lead to people paying premiums and not being covered, for a problem created by Industry.

Recommendation

5. Industry should encourage a person to claim on their own insurance policy, for example, when there is an accident and the policy-holder is not-at-fault (such as a car accident).

(vii) A right to transparency throughout legal proceedings

Any consumer involved in legal proceedings issued by their Insurer should be given a contact point so that he or she can ask questions and stay informed about a case in which his or her rights may be significantly affected. This needs to be a telephone number with interpreter services available, given the importance of time in litigation.

Abeba's case

Abeba, an Ethiopian mother-of-five who speaks little English, had comprehensive car insurance with an online Insurer. She claimed on her policy for an accident in which she was the not-at-fault driver

⁹ Crash repair and car rental companies, often working together with a solicitor.

and was unsure if the at-fault driver (Tony) was insured. Abeba's Insurer appeared to accept the claim and paid for repairs to her car.

Months later, Abeba was served with a Magistrates' Court complaint on behalf of Tony, seeking payment of around \$8,000 for damage to Tony's car arising out of the accident.

Abeba couldn't contact her online Insurer as the only contact point is via email and she is illiterate. By the time Abeba sought help from WEstjustice, the 21-day time limit for filing a defence had passed. WEstjustice contacted Tony's lawyers who provided contact details for Abeba's Insurer's lawyers. We also discovered that Tony had obtained judgment against Abeba and Abeba's Insurer was seeking to set aside the orders in order to contest the claim on liability.

Abeba had no knowledge of any of these proceedings taking place in her name or her potential liability for costs, especially as her Insurer had accepted her claim in the first place. Abeba has suffered significant stress as a result of this and is now receiving treatment from her doctor for depression.

The Code doesn't refer to the right of subrogation and we don't suggest inserting a reference to this complex right. The Code must, however, refer to an insured's right to transparency, information and a contact point within his or her own Insurer to discuss a case in these circumstances.

Abeba's case also raises the issue of legal costs in a right of subrogation case conducted by the Insurer. Consumers in Abeba's position are significantly at a disadvantage, not only with respect to understanding the law and processes, but also absent any practical power to question or challenge the Insurer's actions. An Insurer taking months to determine what action to take to the consumer's detriment, or incurring significant legal costs in the consumer's name, are two areas over which FOS' jurisdiction should be expanded.

A recent NSW case illustrates how complicated and convoluted right of subrogation cases can become.

De Armas v Peters [2015] NSWSC 1050

Mr Peters was involved in a car accident with Ms De Armas. Peters was insured by NRMA and his policy provided limited car hire.

Peters sued De Armas for compensation for the gap in the cost of car hire (it appears these were brought by solicitors for Peters' car-hire company). Peters didn't tell his insurer about this proceeding. Peters was likely referred to the car-hire company by his repair company. In many of these cases, a person in Peters' position wouldn't pay up-front car-hire costs, instead the car-hire company's solicitors would sue the other driver to recover the costs.

NRMA, through its right of subrogation, also sued De Armas in Peters' name with respect to the same accident for repair costs, towing and the insured part of the car-hire costs.

The NSW Supreme Court refused leave to appeal the two local court cases, stating that the matters were both distinct enough and thus did not give rise to an estoppel.

Abeba's case is just one of many examples WEstjustice has encountered, and it appears that these sorts of cases such as *De Armas and Peters* are becoming widespread. Amending the Code to

increase transparency for consumers and accountability for Industry throughout legal proceedings is long overdue.

Recommendations

6. Insurers must provide consumers with a contact point to promptly provide information and answer questions in relation to any claim and/or legal proceedings. The contact point must include a telephone number with interpreting services available.

7. In the context of legal proceedings, FOS' jurisdiction should be expanded to provide the power to investigate and determine consumers' complaints about an Insurer:

- a. taking significant time, to the consumer's detriment, to decide what action to take; and*
- b. incurring legal costs in the consumer's name.*

B. FAMILY VIOLENCE

The Code is silent on Insurers' responses to family violence. The Code is also deficient in dealing with family violence scenarios including economic abuse, often leading to unreasonable and long-lasting impacts on victims.

WEstjustice is a founding member of the Economic Abuse Reference Group (EARG). The EARG has compiled the document at Attachment A which outlines a number of family violence/economic abuse issues pertaining to the insurance industry (some of which have been referred to or expanded in this submission) that should be considered in this review of the Code.

(i) Industry needs to respond to family violence

Our lawyers have encountered a number difficult cases involving Insurers and family violence, as illustrated by some of the case studies referred to in this submission. Family violence is a real issue for the insurance Industry that must be addressed.

The EARG has also compiled a guideline for Industry on responding to family violence, including economic abuse.¹⁰ Insurers should adopt, so far as relevant, the 'Good Practice Principles' and 'Key elements of a response to the financial impacts of family violence' contained in that document. Of those principles and elements, we note:

- **The impact of family violence on staff.** Our work with other industries demonstrates that more family violence cases are being brought to companies' attention due to increased incidence, awareness and reporting of family violence. When staff are trained to identify warning signs of family violence, even more cases will arise. Any family violence case can take its toll on an Insurer's staff, and appropriate training and support should be in place.
- **Industry a frontline family violence point.** A related issue, our work with utilities has shown that quality training has led to staff members taking telephone calls being a frontline family violence point. In some cases, the staff member has been the first person to whom the victim/consumer

¹⁰ Available at www.earg.org.au.

has disclosed the violence.¹¹ Staff aren't expected to be family violence workers, yet training is critical so that the worker can confidently refer the consumer to appropriate services and take steps to ensure the consumer's safety.

- **Single entry points within each Insurer is critical.** A single entry point is a telephone number within each company through which a consumer, his or her caseworker/support person or internal staff member can reach staff members trained to take a call involving family violence. In addition to safety and referrals outlined above, for family violence cases, often the response to a claim or issue with a policy will require an unorthodox or flexible solution. Staff members must also recognise the privacy and security issues that can arise in the family violence context from disclosing information (such as a private address, account details or information about a claim).

Recommendation

8. *The Code should make reference to family violence and incorporate the principles in the EARG guideline on family violence, including:*
 - a. *Training for all staff on family violence*
 - b. *An internal policy on family violence for staff and customers*
 - c. *Internal systems to address customer privacy and safety issues*
 - d. *A single entry point for customers experiencing family violence and/or their workers to reach trained staff within the Insurer*

(ii) Complex and unexpected family violence scenarios

Ingrid and Daphne's cases above illustrate some of the complexities for victims of family violence in dealing with Insurers. Our casework demonstrates that the scenarios arising in insurance and family violence are particularly complex, unexpected and enter uncharted territory.

Gloria's case

Gloria, a 45-year-old woman, was in a long-term relationship with Eric. Eric had been extremely controlling and possessive throughout their 16 years together.

Eric decided the couple would move from Newcastle to Melbourne for work opportunities. He instructed Gloria to drive his van while he flew down to make arrangements. Along the way, Gloria had an accident and was the at-fault driver. Gloria exchanged details with the other driver but she had no idea if the van was insured (or if it was, with which Insurer).

Eric refused to tell Gloria whether the van was insured. He said even if the van were insured, it was Gloria's "bad driving" that caused the accident and she should pay. He later disappeared and Gloria hasn't seen him in months. Gloria recently received a letter of demand for \$10,000 damage caused to the other driver's car.

¹¹ In other cases, consumers' discussions with staff members have revealed that the consumer is a victim of financial abuse. Adequate training of staff members to be able to assist the consumer and manage the staff member's own stress in these circumstances is critical. This situation arose in Ingrid's case where she discovered through discussions with the Insurer that the perpetrator unilaterally cancelled or never took out an insurance policy in her name.

Gloria needed to know if the car was insured. There is a mechanism used in disaster situations, for example, bushfires, where the Insurance Council of Australia can disclose with which Insurer a building is insured. This mechanism could be extended for a range of insurance policies that might be victims of family violence, especially economic abuse, such as in Gloria's situation.

Mariam's case

Mariam was the sole owner and mortgagor of her home. She had been in a violent relationship with Igor for three years.

Unrelated to the violence, Mariam's house had been damaged through some heavy rains. The house was scarcely liveable and Mariam's young son's bedroom was the worst affected by the water damage.

Following months of inspections and discussions with her Insurer, Mariam was told she would receive a substantial settlement sum for the damage to her house. She was expecting her cheque around the same time that Igor ended the relationship.

After six weeks of waiting, Mariam contacted her Insurer. She was told the cheque had been made out to Igor on his instruction, and had already been banked by him.

As stated above, we do not have the solution for how insurance and family law should interact, but we believe this area warrants further consideration (recommendation 4). Family law involves complex and expensive disputes over ownership including equitable rights to property, which can further complicate an insurance claim. Family law proceedings also add extremely long delays and stress to resolving disputes.

One step that Industry should take is to ensure that for family violence cases, where the stakes and risks are high, an appropriate staff member deals with the claim or enquiry. The staff should have adequate training to be able to identify warning signs of family violence and appreciate the safety risks that can arise. What the cases show is the need to think outside the norm to resolve many cases involving family violence. Therefore, the staff making the decisions on claims and enquiries must have the authority to provide flexible resolutions.

Recommendations

- 9. Industry should establish a system with the Insurance Council of Australia, similar to that used in national disasters, through which a person can identify any insurance policy under which they are insured and/or may have the right to claim.*
- 10. Claims involving family violence must be dealt with by a senior staff member with adequate family violence training and authority to make flexible decisions.*

Please contact Denis Nelthorpe or Stephanie Tonkin on (03) 9749 7720 if you have any queries or for further information in relation to this submission.

Yours faithfully

A handwritten signature in black ink that reads "Denis Nelthorpe". The letters are cursive and connected.

Denis Nelthorpe
Chief Executive Officer
WEstjustice

A handwritten signature in black ink that reads "Stephanie Tonkin". The signature is more stylized and less legible than the one to its left.

Stephanie Tonkin
Special Projects Lawyer
WEstjustice



Insurance and Family Violence- 10/4/17¹²

Economic Abuse Reference Group

The Economic Abuse Reference Group (EARG) represents eight Victorian organisations who are working in relation to some finance related recommendations from the Victorian Royal Commission into Family Violence. Five organisations from other states are contributing to the group's work on national issues (including insurance). See www.earg.org.au

Members of the EARG who have contributed to this paper are:

- Consumer Action Law Centre
- Good Shepherd ANZ
- Womens Legal Service Victoria
- WestJustice
- Kildonan
- Financial Counselling Australia
- Legal Aid NSW
- CARE ACT
- Financial Rights Legal Centre (NSW)

Engagement with the Insurance Industry

We are aware that some insurance companies are considering the impact of family violence and its interaction with insurance law and practices with a view to improving outcomes for customers. In March 2017, some of the above groups attended one of the Insurance Council of Australia's community consultation meetings, and raised the issues of family violence and presented a version of this paper.

We understand this will be raised with the ICA Board, so, as yet, there is no formal response from the ICA. However, the initial informal response was positive. We look forward to working with the ICA and its members.

¹² This version is not confidential and may be shared or quoted publicly.

Good Practice Guide

The EARG has produced a Good Practice Guide for the Development of Industry Family Violence Policies which is available on our website www.earg.org.au. While not specifically focused on insurance, this will provide some background and basic principles.

“Victim” or “Survivor”?

While the term “family violence victim” is used for simplicity in this paper, it is important to recognise that many of the women in the case studies, and the women we see, have survived the abuse and are working towards independence (including financial independence). They are, in fact, “family violence survivors”.

Insurance law and practice – impact on victims of family violence.

Current insurance laws and practices result in unfair outcomes that can exacerbate the emotional and financial impact of family violence on victims.

Issues

The following insurance issues have been identified by members of the Economic Abuse Reference Group in cases involving family violence.

Victim of family violence can’t claim against policy due to conduct of the co-insured: Under joint insurance policies, a partner is likely to be excluded from making a claim for loss if damage is deliberately caused by the co-insured, even if the couple is separated or if there is a family violence order issued by a court. In addition to not receiving compensation for loss, the victim of family violence will be liable for joint debt (such as a house mortgage) after property destroyed.

Any valid claim may be paid to the perpetrator alone if the insurance is in his name.

A claim may be rejected due to non-disclosure by one joint insured, even if the other insured was unaware of the matter that should have been disclosed.

The perpetrator may cancel the insurance without the victim’s knowledge, if insurance is in the perpetrator’s name alone. Even if the policy is solely in the victim’s name, if the perpetrator is listed as a co-insured, he may cancel the policy without her permission or knowledge (although in 308798 FOS found that the insurer didn’t have the right to cancel the policy in these circumstances).

The victim may not be able to access information about the insurance if it is in the perpetrator’s name alone.

An insurance claim may be rejected on the basis that the victim invited the perpetrator into the house even if the perpetrator is not a joint-owner or co-insured. This impacts unfairly on victims of family violence who can suffer the loss of significant property with no access to compensation via their insurance policy. Insurance investigations may ignore the reality of family violence, for example when a partner, or ex-partner, forces his way onto property or takes property without permission or under threat.

Insurance investigators act inappropriately. This problem doesn't just arise in relation to family violence. Incorrect assumptions can be made about a person's knowledge or control in relation to the actions of a family member. Interviews can be intimidating, inappropriately handled and can take several hours after which time the interviewee is exhausted. In relation to victims of family violence, such an interview (particularly if by a male investigator) can be particularly stressful.

Policies usually exclude cover for theft or damage caused by a household member.

Landlord insurance typically covers the landlord but the insurer will often make a negligence claim against the tenant/s who have caused the damage (whether intentionally or not). While a co-tenant who was not responsible for the damage could defend such an action our experience is that many tenants don't understand their legal rights in these cases and insurers often claim payment by tenants in a broad range of circumstances, sometimes where it is clear that there is no negligence involved. While this can cause detriment to all tenants, it is a particular problem when damage has been caused by a perpetrator of family violence.

Case Studies

FOS – 299529 (Financial Ombudsman cases are all from determinations which are published on the FOS website)

Issues: Damage to joint property caused by perpetrator (a co-insured), whether, due to mental illness there was intention to cause damage, FOS jurisdiction excluded majority of dispute.

The woman was separated from her husband and had obtained an AVO against him, when he caused a fire which destroyed the house and contents. At the time the house was jointly owned. The insurer rejected the claim on the basis that the fire was started by the husband (a co-insured).

The woman lodged a dispute with the Financial Ombudsman Service (FOS) on the basis that the husband was suffering from mental illness at the time of the fire and did not have the intention to set fire to the house.

The FOS was unable to determine the dispute in relation to the house insurance because the sum involved exceeded FOS's jurisdiction. However, FOS determined that it could determine the dispute in relation to contents claim (19% of the total loss).

FOS determined that the insurer pay the contents claim because the perpetrator didn't intend to cause damage based on his mental health.

It is not known whether the insurer paid the house insurance claim (which was outside FOS jurisdiction).

FOS - 314951

Issues: Deliberate damage caused to joint property by co-insured (husband), whether insurance policy composite (where interests can be separated) or joint, whether wife could claim against the policy for her loss.

The couple were separated. The wife lived in the jointly owned house, the husband was living in a shed on the property.

The husband deliberately set fire to the house. The insurance company rejected the wife's claim on the basis that the husband (a co-insured) deliberately caused the damage.

FOS considered case law to ascertain whether the insurance contract was "composite" or "joint". Had the policy been a considered to be a composite policy, the policy would protect each party's share in the assets. However, based on the insurance contract, FOS determined that the insurance contract was joint, and therefore the wife's interest could not be separated from that of her husband and the claim could be rejected on the basis that the co-insured deliberately caused the damage.

FOS 308798

Issues: Whether co-insured had the right to cancel the policy, whether policy joint or composite, whether claim could be denied because damage caused by co-insured.

The wife arranged a house and contents insurance to cover jointly owned property. The husband was named as a co-insured. The wife had been legally advised to force the husband to leave the house by way of an AVO, but agreed to let him stay in the house until there was a property settlement. The husband set fire to the house. The insurance policy had been cancelled by the husband a month earlier without the wife's permission or knowledge. FOS found that the insurer shouldn't have cancelled the policy. However, FOS found that the insurer had the right to deny the

claim because the damage was caused by a member of their family and by someone who was lawfully at the address.

WestJustice 1

Issues: Husband caused house fire, wife not on insurance policy, interest on mortgage accruing while insurance matter resolved.

The victim of family violence was a single mother of two children. She suffered from a long-term illness and received a disability support pension. She experienced controlling behaviour by her husband.

The husband set fire to the jointly-owned home. It appears that he had planned to burn it with his wife inside. He was admitted as an involuntary psychiatric patient. A five-year intervention order was obtained to protect the wife and the children, who ended up living in a refuge for four months.

The wife wasn't listed as an insured on the insurance policy. There were concerns that even if the claim was paid that this may be paid to the husband, or to his family who claimed they held a power of attorney.

Following WestJustice's advocacy and pro-bono legal assistance, the insurer agreed to pay the claim and to make payment into a lawyer's trust account pending a family law property settlement.

While this was a positive outcome, it took significant work by WestJustice, and the delay in an outcome left the wife in a very difficult financial position, having paid over \$10,000, for rent and moving expenses – and interest was accruing on the mortgage which she couldn't pay.

WestJustice 2

The client is about 40, on disability support pension. She is the victim of family violence. There is a property settlement on foot, but it is unclear whether there are any assets.

Client had an accident in a vehicle owned by her ex-partner. She believed there was insurance on the vehicle but that the policy was in her ex-partner's name. The client doesn't dispute liability.

The client was served with a court complaint relating to the accident. The client knew which insurer her husband had used in the past, and called them, but they were unable to confirm whether or not there was an insurance over the vehicle.

Thinking through solutions

While the EARG hasn't discussed all options to address these problems, the following are some initial thoughts from the members of our group.

Damage caused by a co-insured.

It is unjust (and seems to defeat the purpose of insurance) if a person cannot protect their interests in property, such as a house, against events over which they have no control.

While insurers could have family violence policies that "kick in" once family violence is reported (for example accepting damage by a family violence perpetrator as a basis for paying the victim's part of the claim), this problem is better addressed by changing the structure of household insurance policies at their inception.

The option of clearly wording household insurance policies as composite policies – where each insured can claim their share of the loss - should be considered. We understand the courts generally consider these policies to be composite policies in some countries such as New Zealand.

For such an approach to fully address this problem, mortgage lenders would need to be prepared to separate out liability for a joint mortgage. However, if family violence victims could claim their share from an insurance claim, this issue could be raised with the banking institutions.

Damage by a family member or visitor.

While payment of claims for damage by a visitor, or family member, may increase claims and require attention to the risk of fraud, this exclusion impacts unfairly on insureds where damage is caused that is beyond their control – and particularly on victims of family violence.

We believe that the insurance industry should examine this exclusion and consider options for compensating ‘innocent’ claimants.

In the meantime, insurers must better understand the nature of family violence, and that an ex-partner or violent relative may not have actually been ‘invited’ onto the property.

Industry information for family violence victims

We note that the ‘Understand Insurance’ website of the ICA does have a section on financial hardship but no mention of family violence. Once some responses are developed there should be clear information for victims of family violence.

Who is the insured?

The nature of the process of purchasing insurance means that couples who share property often obtain insurance in the name of one person only, meaning that a claim may be made (and paid to) one person, that a person who has an interest in the property may be unable to obtain information about the policy. Requiring all insured parties to consent at all stages of purchasing and maintaining a policy could be inefficient. It could also exacerbate problems experienced by some victims of family violence. This problem requires further consideration to identify a response that will improve outcomes for family violence victims - whether they are named on the policy or not.

One suggestion is that women who are victims of family violence, should have the same rights as victims of natural disasters to contact the ICA to seek information on their policies.

Privacy

Privacy policies must consider the risks of sharing forwarding, or other information, with a person who is jointly on the policy, or who has been on the policy in the past.

Investigations

We believe that there are a range of problems with the conduct of insurance investigators, which impact unfairly on many consumers, but that exacerbate problems experienced by victims of family violence.

Strict guidelines should be developed for insurance investigators, particularly in relation to personal interviews which ensure that the individual understands and can enforce their rights and is not pressured or harassed.

Family Violence Policies

The insurance industry should implement some of the more general family violence policies that are being adopted by other industries which cover issues such as staff

training, identifying indicators of potential family violence and not requiring a victim to repeat her story.

Court Decisions and other relevant material

These are summaries of the main points from some relevant court decisions (not necessarily family violence related).

Advance (NSW) Insurance Agencies Pty Ltd v Matthews¹³

Fraudulent failure to disclose by one party, other party didn't have knowledge, whether fraud of one party = fraud of insured, Insurance Contracts Act.

In this case, the insurer rejected a claim by Mr and Mrs Matthews on the grounds that Mr Matthews fraudulently failed to disclose a material fact (which was that another insurer had rejected a prior claim of Mr Matthews relating to a fire at another business).

The initial judge found that there had been no misrepresentation in relation to a question "have you ever had any....claim rejected?" because "you" referred to the husband and wife jointly. However, the judge found there was a breach of the duty to disclose, s.21(1), which was fraudulent, but not on the part of the wife, and therefore the insurer couldn't avoid the contract altogether, so the court could determine the quantum of the claim.

On appeal by the insurer, the Court of Appeal considered the policy to be a composite policy, where "joint and several interests" were insured, and found the knowledge of both insureds was required before there is a duty of disclosure, and therefore the insureds had not failed to complete the duty to disclose.

The insurer was successful in having that decision overturned on appeal to the High Court which found that fraud on the part of one joint insured is "sufficient to characterize the joint failure to disclose as fraudulent". "On balance, it appears to me that the preferable construction of s.21(1) [Insurance Contracts Act, 1984] is to treat the words "known to the insured" as meaning, in the case of a policy of joint insurance, within the collective knowledge of the joint insured, that is to say, as known to at least one of them."

MMI General Insurance Ltd v Baktoo¹⁴

Composite or joint policy, fraud (setting fire) by one of the insureds, whether indemnity of co-insured.

A couple made an insurance claim when their restaurant was damaged by fire. The original trial judge found that the husband and lit the fire and could not benefit under the policy. Of interest to the EARG is the initial judge's reference to a different "socially realistic approach" developing in the US and Canada which enabled an innocent "joint assured" to recover the appropriate proportion of a joint loss. He referred to a Tasmanian¹⁵ decision which followed a Canadian decision where a wife could recover her loss in circumstances similar to the current case.

¹³ Advance (NSW) Insurance Agencies Pty Ltd v Matthews [1989] HCA 22; (1989) 166 CLR 606 (2 May 1989)

<http://www.austlii.edu.au/au/cases/cth/HCA/1989/22.html>

¹⁴ MMI General Insurance Ltd v Baktoo & Anor [2000] NSWCA 70 (11 April 2000)
<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/70.html>

¹⁵ Holmes v GRE Insurance Limited (1989) 5 ANZ Ins Cas 60-894 (Supreme Court of Tasmania).

The judge found that while the interests of the husband and wife were “inseparably connected”, that the wife had played no part in the fire and, as an innocent party, she was entitled to indemnity in respect of her proportion of the loss.

The insurer appealed.

The NSW Court of Appeal found that the interests in partnership property is inseparably connected and are to be treated as one, and that consequently the insurance is joint insurance, and the insurer is entitled to reject a claim made by the innocent joint insured.

Review of the Insurance Contracts Act

Excerpts from Chapter 9 “Innocent Co-Insureds” from “Final Report on second stage: provision other than section 54” (2004)¹⁶

9.3 In the case of spouses holding joint tenancy in a dwelling it is usual to be covered under a joint contract of insurance. There have been a number of cases involving wilful acts (for example, arson by one of the parties) which have led courts to consider whether such a policy is joint or composite. Under the ‘traditional’ approach to joint insurance of jointly owned property, the wrongdoing of one co-insured will preclude a claim by the other and no express wording in the policy to that effect is required for that to be the result. A rationale for such an approach is that all parties elected to treat the interests of the co-insureds as one under the contract, so it follows that an act or omission by one of them should affect both. To allow a claim in relation to jointly held property to succeed would allow the party in default to indirectly benefit.¹⁶⁶

9.4 Some decisions in other jurisdictions have taken a different approach to the question of joint or composite insurance in such cases. For example, in *Maulder v National Insurance Co of New Zealand Ltd*,¹⁶⁷ a case involving a husband deliberately destroying a house by fire, the court noted that the ‘traditional’ approach which focused on the nature of the property interests at the time the insurance contract was entered into failed to take into account the reality of modern spousal relationships and the fact that they can alter rapidly. The court expressed the view that insurers should be taken to know that the categorisation of property as ‘joint’ in the context of a spousal relationship is meaningless, and if the insurer wished to prevent an innocent party from recovering for loss due to breach by a co-insured, the policy would need to have clear language included to that effect. The court found that the insurance policy was a composite one and each insured had cover for their respective interests in the property. This type of approach to innocent co-insured cases has been coined a ‘socially realistic’ approach, as opposed to the traditional approach.¹⁶⁸

9.5 The issue of an innocent co-insured being disadvantaged also arises in the context of misrepresentation or non-disclosure by a co-insured.

ASIC Concerns about Insurance Investigation Practices

In a recent speech to the insurance industry, the ASIC Chairman said:

“We are also planning to review surveillance and investigation processes used by insurers to identify fraudulent claims. This is an area that has been highlighted by consumer representatives and media who have raised concerns about processes

¹⁶ http://icareview.treasury.gov.au/content/Reports/FinalReport/11_Chapter9.asp

which are detrimental to consumers. Industry has been on notice of these concerns, and has had time to review them and address any shortcomings.”¹⁷

Joint/Composite legal decisions in New Zealand

This 1994 paper written by a New Zealand law student refers to the development of the law around joint/composite insurance policies in New Zealand.

<http://www3.austlii.edu.au/au/journals/OtaLawRw/1994/2.pdf>

¹⁷ Regulatory update to the general insurance industry, speech by Greg Medcraft, Chairman, Australian Securities and Investments Commission, Insurance Council of Australia Annual Forum (Sydney, Australia) 17 February 2017