



FCRC

Financial & Consumer Rights Council Inc.

Mr Robert Cornall AO

General Insurance Code of Practice Review
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Royal Exchange NSW 1225

By email: secretariat@codeofpracticereview.com.au

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Review of the General Insurance Code of Practice

Dear Sir

We write regarding the current review of the General Insurance Code of Practice ('the Code'), on behalf of the Federation of Community Legal Centres (Vic) Inc and the Financial and Consumer Rights Council Inc. We are concerned that the time allowed for public consultation is inadequate, with only four weeks between the announcement of the review and the deadline for written submissions. Despite this, we thank you for the opportunity to comment on the Code and hope to supplement our written submission with further comments at a public consultation session.

In this submission we address:

- the need to use interpreters when communicating with people from non-English speaking backgrounds, in relation to the purchase of insurance products and the recovery of debts; and
- the need to strengthen the hardship provisions of the Code.

We provide a number of case studies to support our recommendations.

1 About the Federation and the Council

The Federation of Community Legal Centres is the peak body for over 50 community legal centres across Victoria. Community legal centres (CLCs) are independent community organisations that provide free legal services to the public. CLC activities integrate assistance for individual clients with community legal education, community development and law reform projects that are preventative and based on client need.

CLCs commonly assist people who are disadvantaged, vulnerable or marginalised. Our clients are predominantly living on very low incomes, including many young and elderly people and people from non-English speaking backgrounds. CLCs' experience within their communities distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

The Financial and Consumer Rights Council Inc (FCRC) is the peak body for financial counsellors, consumer rights workers and other advocates of vulnerable consumers in Victoria. The FCRC actively supports financial counsellors by promoting the needs of those experiencing financial hardship. The FCRC works with government (both State and federal), the banking, utilities, debt collection and other industries, and with many other sectors and organisations.

Financial counsellors in Victoria provide assistance, advocacy, and information to those who are experiencing financial difficulty or problems with debt.

2 Failure to use interpreters

CLCs and financial counsellors assist many clients from non-English speaking backgrounds. In doing so, we often need to use interpreters to obtain accurate instructions and to provide effective advice. It is apparent to us that insurers rarely offer the services of interpreters when dealing with these clients.

The Code should require insurers to enquire as to whether an interpreter is required or to provide contact details for interpreting services, whenever they communicate with customers from a non-English speaking background.

a Purchasing insurance

We are concerned that the insurance industry has moved to heavy reliance on telephone underwriting. Where a client's first language is not English, the failure to involve an interpreter may lead to a breach of disclosure requirements or a failure to understand the terms and conditions of a policy.

Case study 1

In 2007 our client purchased a comprehensive vehicle insurance policy. Due to her limited English, she asked her friend to make the transaction on her behalf. During the conversation she spoke only once to the insurer's representative, to confirm that she wanted her friend to make the purchase on her behalf.

Our client gave her name and date of birth. No other questions were relayed to her by her friend acting as an interpreter. Our client had not heard of duty of disclosure at the time of purchase and had no understanding of the concept. At no point did the insurer's representative suggest that the client delay the purchase in order to obtain the services of an interpreter.

In February 2008 the client's car was stolen. Her daughter lodged a claim with the insurer. The insurer spoke to the client only once, to confirm that her daughter was acting on her behalf. Later, the insurer telephoned the client, asking her to obtain a copy of her driving history from VicRoads. This was arranged by the client's daughter.

Subsequently the client received a letter advising that the insurer intended to conduct an investigation into her claim. The client attended an interview with an investigator. This time, an interpreter was provided.

The client attempted to cooperate but had trouble understanding many of the questions, even with the assistance of the interpreter and her daughter.

During the interview our client was asked about a previous conviction for driving whilst suspended. She said she believed she did not have any convictions. She was later advised that she does have a conviction and an outstanding fine, and that a warrant has been issued for non-payment. This came as a shock to our client as she had never been to court and was not aware of having been charged with an offence.

The client was advised by the insurer in April that her claim has been refused.

b Dealing with debts

Communication difficulties increase a debtor's stress when trying to negotiate regarding a debt or explain why he or she cannot pay. See Part 3, below, for further discussion of debt recovery practices in the insurance industry.

3 Debt recovery and the hardship provisions

CLC solicitors and financial counsellors most frequently cite the Code in negotiation with insurers over motor vehicle accidents, where the client is at fault and has no insurance against third party property damage. The insurer of the other party typically seeks to recover its costs from the at-fault CLC or financial counselling client.

a Negotiation based on the financial hardship provisions

CLC solicitors and financial counsellors draw on the financial hardship provisions at 3.10, 3.11 and 3.12 of the Code when negotiating with insurers regarding their clients' debts. CLCs invoke these provisions when their clients are genuinely unable to pay, or cannot do so without suffering extreme financial hardship. Such clients are usually dependent on Centrelink benefits, have one or more children and very limited employment opportunities. They are often recent immigrants or refugees with little or no English, little understanding of their legal rights and no familiarity with insurance products.

A debtor with no assets, whose only income is a Centrelink payment, is effectively immune from debt recovery action. Under s 60 of the *Social Security (Administration) Act 1999* (Cth), social security payments are 'absolutely inalienable'. They are also protected by s 12 of the *Judgment Debt Recovery Act 1984* (Vic). In these circumstances, continued pursuit of the debt is futile and can cause the debtor severe stress, anxiety and related health problems. Where there is no real prospect of a change in the debtor's financial situation, continued requests for payment may constitute harassment under sub-s 21(h) of the *Fair Trading Act 1999* (Vic).

In this context, insurers sometimes agree to waive part or all of a debt. We commend this practice as a fair and rational response to the genuine hardship experienced by many of our clients. We suggest that it is also beneficial to insurers and their shareholders, as it reduces expenditure on futile debt recovery efforts.

b Inadequacy of the hardship provisions

While the hardship provisions have assisted many CLC and financial counselling clients, they accord too much latitude to individual insurers and do not guarantee fair treatment in every case. The general requirement in clause 3.10, that an insurer 'act fairly and in a considerate manner,' is vague and open to subjective interpretation.

In some cases, insurers seek payment of a debt by instalments, even when it is clear that such arrangements would inflict severe hardship on the debtor and would not be approved by a court in a debt recovery action.

In other cases, an insurer may concede that a debtor cannot pay, but will only agree to suspend recovery action for a year. This leaves the client in a state of uncertainty and fear at the prospect of future recovery action. Many such clients are likely to move house frequently, and may as a consequence lose contact with their solicitor or financial

counsellor. The practice of delaying recovery action creates a risk that, when the insurer renews its recovery efforts, the client will be unrepresented.

Case study 2

Our client is married with one child. He arrived in Australia from Sudan in 2000. He speaks very little English. He is currently enrolled in an English language course at Victoria University. He receives Austudy payments from Centrelink.

The client was involved in a motor vehicle accident. He accepts liability. The other driver's insurer is pursuing him for \$4,223.92 in damages.

We advised the insurer that our client's income is protected by s 12 of the *Judgment Debt Recovery Act 1984* (Vic) and his assets are valued at less than \$5,000. We further advised that we saw no likelihood that our client would enter regular employment in the foreseeable future and that he would probably be dependent on Centrelink benefits for some time.

We requested a waiver of the client's debt pursuant to clauses 3.10 and 3.12 of the Code. The insurer advised that it will suspend recovery action for one year but refused to waive the debt.

Case study 3

Our client arrived in Australia from Ethiopia in 2003. Her proficiency in English is limited.

The client was involved in a motor vehicle accident in August 2007. She accepts liability. At the time of the accident she was in part time work, but ceased work in December 2008 due to pregnancy. Since that time she has received a Centrelink income. In August 2008, the insurer obtained judgment in default of defence and an order that the client pay \$4,553.44.

The client sought advice from a CLC. The CLC wrote to the insurer explaining the client's circumstances, including that she is expecting a child and will in all likelihood be entitled to remain on Centrelink benefits for at least five years.

The insurer accepts that the client is not in a position to pay the debt at present, but maintains that there are reasonable prospects of her being able to pay in future. The insurer has refused to waive the debt.

Case study 4

Our client is a Sudanese refugee. She has eight children, the oldest of whom is 12. Her sole income is a Centrelink payment.

The client was involved in a motor vehicle accident, for which she accepts liability. The insurer pursued her for damages of approximately \$1,350. The client sought assistance from a CLC.

The CLC wrote to the insurer in an attempt to settle the dispute. Despite the client's parlous financial position, the CLC offered to settle the matter for \$500, paid in monthly instalments of \$25.

The insurer rejected the offer and continues to demand payment of \$1,350.

Case study 5

Our client is 18 years old and lives with his mother and grandmother. He is from a non-English speaking background. He receives Youth Allowance and works part time, earning \$60 per week.

He was involved in an accident in January 2009. He admits liability. The damage to the other vehicle cost \$1,641.86 to repair.

The client sought legal advice from a CLC solicitor who wrote to the insurer, explaining his circumstances. The CLC solicitor contacted the insurer several times by telephone and letter in an attempt to resolve the dispute.

In the meantime, the insurer contacted the client directly and persuaded him to enter into an instalment plan. The client advised his solicitor that he agreed to the instalment plan because he did not want to be hassled by the insurer any longer.

Case study 6

Our client is 18 years old and cares for her incapacitated mother. She receives a Centrelink carer's pension.

The client was involved in a motor vehicle accident. She accepts liability. The other driver's insurer is pursuing her for \$8,498.59.

The client consulted a CLC after being served with a Complaint Form 4A. The CLC contacted the insurer and advised that the client's income is protected by s 12 of the *Judgment Debt Recovery Act 1984 (Vic)* and her assets are valued at less than \$5,000. The CLC invoked the hardship provisions of Code. The insurer agreed to adjourn the proceedings *sine die* in order to consider the hardship provisions. The client completed a Financial Statement provided by the insurer, and provided the insurer with a copy of her Health Care Card, her bank statements and a statement from Centrelink confirming her entitlements.

The insurer responded by offering to settle the matter for \$6,000. The client has no capacity to pay this amount. As a consequence, the matter was referred to the insurer's Internal Dispute Resolution department. The matter is under review and remains unresolved.

To date, the proceedings have taken 8 and half months and have caused both the client and her incapacitated mother considerable stress and anxiety. Both agree they would pay anything to resolve the matter but they are simply unable to do so.

As these case studies illustrate, some insurers pursue disadvantaged low-income debtors when they know that the debtor cannot pay, that the debtor's income is protected by statute and that any payment will cause the debtor extreme financial hardship. Some persist in contacting debtors directly even when they know the debtors are legally represented. While such conduct might be undesirable, it does not explicitly contravene the current hardship provisions of the Code.

c Suggested amendments to the hardship provisions

We believe that the hardship provisions should be strengthened to impose clearer obligations on insurers to treat low-income debtors fairly and compassionately, in accordance with relevant State and federal laws.

i Specific protection for debtors on Centrelink benefits

As noted above, Centrelink benefits are protected by State and federal laws. The hardship provisions should recognise this by explicitly stating that insurers will not pursue a debt if (a) the debtor's sole income is a Centrelink benefit, (b) the debtor has no significant assets, and (c) there is no real prospect that his or her situation will change.

The provision should explicitly provide that long-term recipients of Centrelink income will not be harassed with repeated demands for payment.

ii Specific provision for waiver of debts in cases of severe hardship

The Code should recognise that some very disadvantaged debtors do not and never will have the capacity to pay their debts. In cases of extreme disadvantage or hardship, the Code should provide for waiver of debts on compassionate grounds.

iii Proper assessment of capacity to pay

If an insurer is not willing to waive a debt on the grounds of hardship, it should be required to make proper enquiries regarding the debtor's capacity to pay. These enquiries should include a realistic assessment of the debtor's future earning capacity, bearing in mind the six year time limit for recovery in civil actions.

iv Grounds for refusal to make a decision

Whilst the decision to delay a requirement for payment (as set out in clause 3.11) will be appropriate in some cases, a long term delay is inappropriate where the client has no real prospect of a change in circumstances. As noted above, a long delay in making a final decision may lead to a loss of representation if the client is forced by financial circumstances to move before the debt is reassessed by the insurer. Prolongation of the dispute also adds to a client's stress and anxiety.

The Code should state that an insurer must have reasonable grounds for postponing a decision as to whether or not a debt will be waived.

The Code should include a general presumption that where a debtor has very young children or other ongoing carer's responsibilities, or is old enough to be on aged pension, the debtor's earning capacity is not likely to improve within the relevant limitation period.

v Better enforcement

The current hardship provisions are not universally observed due to inadequate enforcement mechanisms. Improvements to the hardship provisions should be coupled with greater accountability and better enforcement practices.

The monitoring and compliance section of the Code should state that any failure to comply with the hardship provisions is a 'significant breach' reportable to the Financial Ombudsman Service ('FOS'). Insurers who repeatedly breach these provisions should be identified by the FOS and reported to the Code Compliance Committee.

In considering sanctions to be imposed under clause 7.18, the Code Compliance Committee should have regard to the principles of corporate social responsibility.¹ The Committee should consider the social costs of unduly harsh debt recovery policies, particularly in a period of economic unrest. It should recognise the value of flexible, common sense debt recovery policies in maintaining public confidence in and respect for the industry.

Repeated serious breaches of the hardship provisions should attract the full range of sanctions listed under clause 7.19, including rectification in individual cases, compliance audits, public apologies and admissions of non-compliance with the Code.

Thank you again for inviting comments on the Code. We would be very happy to attend a consultation session to discuss these issues further. We hope that our suggestions will assist you in making the Code fairer, more effective and more compassionate towards low-income and disadvantaged Victorians.

Sincerely



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ⁱ See, eg. Australian Human Rights Commission at http://www.hreoc.gov.au/human_rights/corporate_social_responsibility/, the Institute for Human Rights and Business at <http://www.institutehrb.org/> and the United Nations Global Compact at <http://www.unglobalcompact.org/>.