Submission to the General Insurance Code Governance Committee - Monitoring Priorities Consultation

14 February 2023

About Westjustice

Westjustice is a Community Legal Centre that provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong, and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray, a youth legal branch in Sunshine, and outreach across the West. Our services include legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy. Westjustice has also been at the forefront of developing and trialling innovative, integrated, place-based partnerships.

Our insurance practice

We assist clients with insurance matters, particularly motor vehicle and home and contents insurance matters, through our:

- Motor Vehicle Accident Clinic
- Consumer Law Clinic
- Settlement Justice Partnership ('SJP'), which assists people who are recently-arrived in Australia, in partnership with settlement agencies
- Tenancy Advocacy and Assistance Program ('TAAP').

We thank the General Insurance Code Governance Committee ('CGC') for the opportunity to contribute to this consultation.

Submissions

Over the past 12 months, Westjustice has continued to encounter concerning trends in our insurance casework, particularly in our consumer, motor vehicle accident and tenancy practices. Some of these matters do not fall within the CGC's remit, particularly where an issue requires a government response, but we have included them to provide the CGC with a full picture of the issues we have observed over this period.

1. Motor vehicle accident claims where the driver is not the policyholder

It is common for people to share motor vehicles among family, friends and community members, particularly within newly-arrived communities. Clients have sought our assistance when they were in a motor vehicle accident while driving another person's motor vehicle, or when they had lent their car to another person who was in a motor vehicle accident.

Some owners did not have motor vehicle accident insurance or had only third-party cover, which left them liable for damages when they or the driver of the vehicle were at fault or unable to meet the costs of repairing their vehicle. Others paid for their own repairs because they did not know they could, or did not know how to, report an accident to their insurer. This reflects

broader concerns about underinsurance and limited understanding of insurance policies and processes, particularly among people who have recently arrived in Australia.

Even when owners had comprehensive motor vehicle insurance, we received inconsistent responses, or in some cases no response, from insurers when trying to assist third party beneficiaries under insurance policies, such as drivers who were not the policyholder. It is unclear how a claim should be lodged or processed in such matters, while some insurance policies and Product Disclosure Statements ('PDS') have ambiguous clauses about the application of excess. Some insurers also would not provide us with key documents relating to the claim or policy, so that we could properly advise and assist our clients.

We recommend that the CGC develop a guidance note to assist insurers to appropriately navigate these matters.

2. *Failure to use interpreters*

Some of our clients, particularly in the SJP and Consumer Law Clinics, cannot speak or read English and may be unable to read or write in their own languages.

Insurers have access to interpreters and requirements under the *General Insurance Code of Practice* for appropriate use of interpreters,[1] but have frequently failed to offer, or declined access to, interpreters for our clients. Among other things, a lack of access to interpreters resulted in:

- clients being confused and distressed;
- clients not understanding the exclusions relevant to their policies, including options to purchase additional cover for major events such as flood and fire;
- clients failing to understand the insurance claims process, their rights; and obligations under their insurance policies;
- outcomes of claims not being communicated to clients within the timeframes set out in the Code; and
- delays in resolving insurance claims.

Large corporate service providers, including insurers and debt collectors, sometimes relied on family members to interpret, especially children. It is inappropriate and distressing for minors to be used as interpreters, particularly in debt collection or other matters where they might be asked to convey threats of litigation to their parents. There is a high risk that a child may not properly interpret unfamiliar financial concepts, such as insurance exclusions, and children should not have to advocate for their parents regarding traumatic experiences of family violence or ill-health.

The practice also creates a considerable risk of elder abuse.[2] In one SJP matter, an insurer used an adult child to interpret a discussion about a claim where the child's interests were at odds with the policyholder parent for whom they were interpreting, in circumstances where the insurer was on notice of this conflict.

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[1] Part 9 of the General Insurance Code of Practice.
[2] Bourova, E, Ramsey, I and Ali, P, '*It's Easy to say 'Don't sign anything': debt problems among recent migrants from a non-English- speaking background',* Alternative Law Journal, Vol 44, No. 2, 2019, p 127. Accessed at https://journals.sagepub.com/doi/epub/10.1177/1037969X18817875 on 17 January 2023.

Case study: failure to advise of claim outcome

Our client Lisa* (name changed) is a refugee and cannot read or write English. She made a claim for storm damage in January 2022 after a storm had caused water ingress in her balcony, resulting in a metre length hole in her roof. The claim was made in January, however our client only became aware that the claim was denied in July when our legal centre intervened. When asked why our client never received a formal letter outlining the decline, we were advised by the insurer it was because she was illiterate. We note no other means of communication were used to convey this information to our client. As a result, our client had to live with a hole in her roof during the extreme storm events across the winter of 2022. To date, the hole has not been repaired and the insurer is now denying the claim on the basis of structural damage.

We acknowledge it can be difficult for staff to identify when a customer requires an interpreter, particularly as we move away from face-to-face consumer interaction, and some may hesitate to assume a person's language ability is limited to avoid offence or discrimination. Reliance on customer identification of need is also problematic, as many customers are not aware that interpreting services are available for free, or at all. However, we encourage insurers to provide interpreting services as an option as a means of dismantling the accessibility barriers for non-English speakers.

3. Rejection of authorities from lawyers and financial counsellors

We experienced recurring issues with insurers rejecting authorities from lawyers or financial counsellors acting on a customer's behalf and failing to respond promptly to requests for basic information, such as claim records or a contract of insurance, even when our client was the policyholder. In some matters, we have been forced to apply to the Australian Financial Complaints Authority ('AFCA') to obtain these basic documents. This has caused extensive delays, exacerbated our clients' financial hardship and distress, and unnecessarily increased AFCA's workload.

4. Claims handling in home insurance matters

We have experienced issues with claims handling in home insurance matters which has been further exacerbated by major weather events including the 2021 Mansfield Earthquake and the 2022 Maribyrnong Floods. Some key issues include:

- insurer delays in responding to and assessing claims;
- failure of insurers to communicate the decision or outcome of the claim within the timeframes set out in the Code;
- reliance on broad general exclusions in denying claims, in particular the exclusion of 'pre-existing structural damage', requiring clients to source expensive expert reports to refute;
- reliance on broad general exclusions which are not adequately defined, or defined contrary to relevant legislation;
- the rejection of claims that appear to stem from mistakes in claims processing – for example, an insurer relying on reports about a building not subject to the claim and disputing insurable events that were matters of historical record, such as earthquakes.

In one SJP matter, an insurer's customer service representative gave our client and their settlement worker information about their rights that contravened the wording of the client's policy, in a situation where they had been without their car for over three months.

Case study: insurer reliance on erroneous assessor report

Our Consumer Clinic advised Nayfa* (name changed) who made a storm damage claim following heavy rains in Melbourne. The insurer sought to deny her claim on the basis that the water ingress that caused a hole in her garage ceiling was caused due to structurally defective roofing tiles which would be excluded under her policy. Upon review of the assessor's report and a photo of our client's property, it was clear that there was no roof over the garage ceiling and that the area above the garage ceiling was in fact a balcony. It appeared that the report in all likelihood pertained to a different building. In this case, it was concerning to see the insurer's reliance on an assessor's report that was plainly wrong and that no further enquiries (such as a simple Google search of the property) were made prior to declining the claim. We also note the privacy ramifications where assessments of another customer's building are sent to an unrelated party.

Case study: denial of earthquake event despite evidence to the contrary

Our Consumer Clinic has been representing a client whose claim for damage from the 2021 Mansfield Earthquake claim was denied on the basis that, amongst other things, the geotech's findings that it was unlikely the 2021 Mansfield earthquake would have been felt as far as the Western suburbs of Melbourne despite contemporary news reports and accounts that the quake could be felt across the city and even interstate as far as Adelaide and Launceton. This report was used to support the insurer's denial of the loss and damage to the client's property that arose directly after the earthquake event. The matter is now set for AFCA determination.

It was our experience that clients' in the SJP and clients from non-English speaking backgrounds who attended our Consumer Law Clinic typically did not under understand that their home and contents policy would not cover damage to their property without limitation.

Case study: failure to properly define 'boarding house' exclusion

We represented Peter* in the Australian Financial Complaints Authority after his insurer refused his claim for accidental escape of liquid, causing loss and damage to his home. The denial was on the basis that he was operating a 'boarding house'. The insurer's definition of 'boarding house' was contrary to the equivalent legislative and regulatory definitions in Victoria and appeared to capture house-share situations where an owner-occupier lived with friends. At the time, Peter had been residing at the property and letting out one of his rooms to a friend in order to make the mortgage repayments which was a common arrangement throughout the pandemic. AFCA determined that the insurer was not entitled to deny the claim because they continued to offer him insurance notwithstanding his disclosure that he was letting his room to others and that the boarding house exclusion had not been defined within the PDS. AFCA awarded a further $1000 in non-financial loss as the insurer cancelled Peter's policy without any basis during the AFCA complaint process. See further: **AFCA Determination 810049.**

This reflects the concerns we raised earlier in our submission about limited understanding of insurance policies and processes, particularly among people who are recently-arrived in Australia and/or from non-English speaking backgrounds. It also emphasises the need for insurers to use interpreters at all stages of the insurance process, including the sales process.

5. 'Car napping'

We have seen an increase in matters involving 'car napping' across both the SJP and our general access Motor Vehicle Accident Clinic. 'Car napping' describes a co-ordinated practice orchestrated by unscrupulous businesses – at various times involving car hire, smash repairs and tow truck companies, and debt recovery lawyers ('legal recoveries firms') – which takes advantage of drivers' limited legal, insurance, and mechanical knowledge following motor vehicle accidents.

A typical 'car napping' matter involves roadside referral by an attending tow truck driver directing the 'not-at-fault' driver to specific car hire, smash repairs, and recoveries firms. The driver often signs documents at the scene of the accident when they are stressed. For not-at-fault drivers with comprehensive insurance, or where the at-fault driver was insured, there is arguably no value in these services, which prolong disputes by claiming disproportionate repair, storage and car hire costs from the at-fault driver or their insurer. Individuals generally mistakenly, or are misled to, believe the carnapper is liaising with their insurer.

Some uninsured clients who were at-fault in an accident where the not-at-fault 'other driver' was represented by a legal recoveries firm also received damages claims that dramatically exceeded the market value of the damaged vehicle. In one SJP client's case, the costs were calculated without any physical inspection of the damaged vehicle.

Disputing quantum of loss following motor vehicle accidents is arduous, requiring inspection of the other driver's car by an independent expert and the production of a 'court standard' expert report. Typically, the costs of such a report would exceed $2,000 as a legal disbursement. Unlike a dispute with an insurer of another driver, no industry ombudsman scheme exists, and matters that are not resolved by negotiation must be settled in court.

There is little incentive for a legal recoveries firm, whose business model is premised on recovering court costs from the opposing party, to settle such disputes out of court. Accordingly, affected drivers – both at-fault and not-at-fault – experience undue stress as they are pulled into a protracted litigation, and the court system must expend considerable resources for these matters to progress.

Insurers cannot address car-napping alone but should have clear and consistent procedures for when their customers fall victim to it. We recommend that that the CGC develop a guidance note would assist the insurance industry and consumers to navigate these issues.

6. Car rental businesses claiming to offer comprehensive insurance

Our Motor Vehicle Accident Clinic has assisted clients who have leased cars from businesses, particularly commercial passenger vehicles, who claim to offer comprehensive motor vehicle insurance in promotional material or terms and conditions but are self-insured at best. Drivers

are then unable to lodge a claim with these companies after an accident and are pursued for the cost of all damage.

These companies are rarely, if ever, AFCA members or Insurance Council of Australia ('ICA') members, but we raise this issue to alert the CGC and ICA to a pressing regulatory gap that disadvantages both consumers and general insurers.

7. Insurers pursuing renters under landlord insurance policies

Insurers continue to pursue renters for costs under rights of subrogation, following claims by residential rental providers under their landlord insurance policies. These claims occurred where neither the rental provider nor the insurer had a legal basis for pursuing the renter or had established the renter's liability. Some of our cases involved insurers:

- pursuing renters for rent arrears where the renter had not accrued those arrears
- alleging renters were liable for rent as compensation for breaking their lease agreement when the renter had lawfully ended their tenancy
- pursuing renters for damage they are not legally liable for, such as fair wear and tear or other damage to the property that the renter did not cause.

We note that these practices continue despite undertakings from the insurance sector in late 2021 that these practices would cease following a campaign by Choice and WEstjustice.