Insurance Code is another regulatory mirage

By Melissa Harrison

The Insurance Council of Australia, the industry's peak lobbying body, has estimated that as of March 2022, insurers had received 168,000 claims in relation to the recent floods which have devastated Queensland and New South Wales. As the Citizens Party has documented, history suggests that numerous claimants will discover that insurance policy fine print has excluded them from coverage. (*AAS*, 30 March 2022.) Moreover, consumer advocacy groups such as the Consumer Action Law Centre and Financial Rights Legal Centre have reported the industry's poor treatment of customers after natural disasters, including: unreasonably long delays in processing claims which have forced people to sleep rough on their bushfire-ravaged properties; insurers unfairly pressuring people in difficult circumstances to accept insufficient cash settlements; avoidance of honouring claims until pressured by consumer legal advocates; and instances of bullying, errors and incompetence.

Unfortunately, the poor conduct of Australia's $57.5 billion general insurance industry,[1] which is a highly concentrated oligopoly, has gone largely unacknowledged and unpunished, because the industry has been allowed to "self-regulate".

In 1993, in response to industry misconduct, the Keating Government announced that it would regulate the insurance industry by developing dispute resolution standards and a statutory code of conduct. However, intense lobbying by the insurance sector successfully convinced the government that the industry should develop, own and enforce its own voluntary "self-regulatory" code. This was a structure patterned after the recommendations of the 1991 Martin Inquiry, which championed further deregulation of the banking industry, including self-regulation through an industry ombudsman and a code of banking practice. The first iteration of the General Insurance Code of Practice (the Code) was implemented from 1996.

The Code is owned and maintained by the Insurance Council of Australia (ICA), the peak lobbying body which is funded by contributions from industry members. The 21 September 2018 *Australian Financial Review* observed that during the 2018 Banking Royal Commission, "the success of the lobby group in protecting the interests of the industry" was noted throughout public hearings. For example, until recommendations from Royal Commissioner Kenneth Hayne resulted in legislative changes in late 2021 and early 2022, the general insurance industry was exempt from unfair contract laws, and claims handling was not classified as a financial service, which meant that corporate law which required financial companies to act fairly, efficiently and honestly towards their customers did not apply to insurance claims.

The regulatory gaps and the obvious deficiencies of the insurance industry's "self-regulatory" model were exposed in Royal Commission hearings, when insurance executives were hauled in to testify about numerous instances of egregious misconduct.

Also testifying was the CEO of the ICA, Robert Whelan, who admitted that the ICA had essentially just dithered for years while being fully aware that its members were engaged in serious misconduct, specifically in the car insurance industry. The Code was blithely ignored by insurance companies and there was widespread non-compliance. Whelan excused the ICA's inaction, stating that its powers to act were limited because it was a voluntary member-based company, and the ICA was not a regulator.

The Insurance Council of Australia's Robert Whelan testifying at the banking royal commission. Photo: Screenshot

Whelan's demonstration of the ICA's unwillingness to act to prevent customer harm has disturbing implications for consumer protection in the industry. This is because insurance companies are only bound to abide by the Code through a tripartite Deed of Adoption between the ICA, the insurance company (or "Code subscriber") and the industry-funded Code Governance Committee Association. The terms of the deed are not publicly available. The Code states that it "does not create legal or other rights between [Code subscribers] and any person or entity *other than the Insurance Council of Australia*" (emphasis added), indicating that the only contractual obligation which requires insurance companies to abide by the Code is a secret agreement with their own lobbyist!

Monitoring and enforcing the Code

The ICA stridently opposes the Code being incorporated into individual customer contracts. The lobbyist claims that the current arrangements satisfy the Australian Securities and Investments Commission's (ASIC) regulatory guidance for "self-regulating" industry Code monitoring and enforcement; however, curiously, the ICA has not sought ASIC's official approval of the Code (despite promising to do so since at least 2012). ASIC has no oversight or enforcement role in regards to the general insurance Code.

The third party to the Code's Deed of Adoption, the Code Governance Committee Association (the Association) was established in 2014. It has six members, three of which are nominated by the ICA and represent the insurance industry (industry members include the ICA's current CEO, Andrew Hall); and three which represent consumers, which are nominated by the Australian Financial Complaints Authority (AFCA) (and in prior years by AFCA's predecessor organisation, the Financial Ombudsman Service). The Association is funded by Code subscribers ($865,200 in 2021) and by the ICA, on behalf of its members ($614,000 in 2021). The Association's operations are opaque. It has a negligible online footprint, and records of its membership, financial statements or its Constitution are not published on the ICA's or AFCA's website. The ICA did not respond to the author's requests for more information

1. According to Australian Prudential Regulation Authority (APRA) figures, the general insurance industry's gross earned premium was $57.5 billion in 2021.

about the Association.

Records filed with the New South Wales government's incorporated associations register reveal that one of the Association's primary objectives is to appoint the three members of a Committee established underneath it, which is called the Code Governance Committee (CGC). The CGC's members include an industry representative (nominated by the ICA); a consumer representative (nominated by AFCA); and a Chair, who is jointly nominated by the ICA and AFCA. The CGC is ostensibly the independent monitor and enforcer of the General Insurance Code of Practice. However, the Association retains significant power over the "independent" CGC. For example, the Association can amend the CGC's governing Charter, after "consultation" with the CGC, ICA and AFCA. The Charter restricts the CGC's operations, requiring it to maintain strict confidentiality, including as to whether an insurance company has been compliant or non-compliant with the Code; the CGC must de-identify company information in its reports. When conducting Code breach investigations, the Charter requires that the CGC must ensure the insurance company's business "is not disrupted unduly".

In its submission to the 2017 review of the Code, the CGC raised issues regarding its governance structure, in which it operates as a sub-committee of the incorporated Association, particularly because its reporting and funding arrangements were managed directly with the industry-funded ICA. The CGC recommended that its independence should be strengthened by constituting the CGC as an independent body in its own right; however, the ICA brushed this recommendation off, stating that the CGC's governance structure was a matter for the Association to determine through changes to the CGC's Charter. Notably, in the author's email communication with CGC staff, the Association was described as "a committee of the Insurance Council of Australia", and the CGC recommended that information requests about the Association should be directed to the ICA.

The CGC receives reports of Code breaches from AFCA, customers, and subscribers, which are required to self-report breaches to the CGC. The CGC reports that in 2020-21 there were 41,768 self-reported Code breaches (a 27 per cent increase on the previous year). However, of these, the CGC only investigated 195 (using an outsourced service provider, see below), identifying 64 confirmed Code breaches. When the CGC has determined that there has been a breach, they will "work with the subscriber" to ensure remedial action is taken.

The CGC has an obligation to report significant breaches of the Code to ASIC, however subscribers are responsible for determining whether a breach of the Code is significant and therefore needs to be reported to the CGC. The CGC has raised concerns over inconsistencies in significant breach reporting and systemic underreporting of breaches. In 2020-21 there were 131 reports of significant breaches (a 17 per cent increase over the previous year), which affected over 1.4 million consumers and resulted in remediation payments of more than $42 million.

Although the CGC has powers to impose "sanctions" on insurance companies for Code breaches, these are a slap on the wrist—the most serious sanction available is the ability for the CGC to publicly "name" a company for a significant Code breach. Additionally, during the Royal Commission it was revealed that, despite having received 31,000 self-reported Code breaches since its establishment, the CGC had not imposed a single sanction; to date, the CGC has still failed to apply any sanctions. This is a long-standing pattern of the insurance industry's Code monitoring body—a 2012 House of Representatives *Inquiry into the operation of the insurance industry during disaster events* revealed that the CGC's predecessor organisation, the Code Compliance Committee, had not imposed a single sanction since at least 2004.

The Insurance Law Service told the 2012 inquiry that "[t]here seems to be little incentive to comply with the Code as there are no consequences for failure to do so". This situation persists—the 2018 Banking Royal Commission revealed that a major insurer had no idea about the CGC's enforcement role; and in June 2020, the CGC expressed its disappointment that breach reporting was not reaching insurance company boards, and only a handful of boards were being provided with the CGC's annual reports and recommendations for improving Code compliance. Evidently, the CGC's so-called "enforcement" powers are so pathetic as to be beneath the insurance industry's notice.

AFCA and the Code

The ICA insists that the Code is adequately enforced through the aforementioned CGC, and also through the government-authorised External Dispute Resolution (EDR) scheme provider, the Australian Financial Complaints Authority, because AFCA may have regard to industry codes when deciding disputes. However, AFCA is a private company, not a government agency or regulator, and therefore cannot apply penalties or impose fines for Code breaches. AFCA can only decide if a customer is entitled to compensation for loss that they may have suffered as a result of a Code breach. In addition, there are serious concerns over industry-funded AFCA's extreme secrecy, industry capture and lack of accountability. (*AAS*, 26 January 2022.)

AFCA reports that last year, disputes involving insurance companies comprised 24 per cent of all complaints, second only to the banking industry. In 2020-2021, AFCA received 13,805 complaints about general insurance companies. If a complaint progressed to AFCA's final decision stage (last year only 13 per cent of general insurance complaints got this far), AFCA decided in the insurance company's favour 76 per cent of the time.

In addition to its role as a financial dispute resolution body, AFCA is also closely intertwined with insurance Code breach monitoring. AFCA plays a controlling role in appointing half of the members of the Code Governance Committee Association and the CGC (a role also previously played by AFCA's predecessor, FOS). In addition, the CGC has outsourced its responsibility for monitoring and investigating Code breaches to AFCA's Code Compliance and Monitoring Team, which is a "separately operated and [industry] funded business unit of AFCA". Notably, AFCA's key participating role is replicated in the Code monitoring practices of the banking industry, and AFCA's fundamental design is based on its predecessor EDR schemes, which were created by industry. (*AAS*, 12 March 2022.)

Together with the CGC, which is controlled by the ICA-linked Code Governance Committee Association, AFCA and the ICA monopolise the avenues by which customers can report breaches of the general insurance Code. Although the ICA claims that the general insurance Code sets out conduct standards that insurance companies "must" meet, the Code creates no legal obligations between "self-regulating" insurance companies and their customers; is rarely, if ever, enforced; and ultimately, is not worth the paper it is written on.