



**ASIC Enforcement Review**

**Submission on Position and Consultation Paper 4:  
Industry Codes in the Financial Sector dated 28 June  
2017**

**26 July 2017**

## Introduction

Since 2012, PIAC has provided legal advice and representation to people who have experienced discrimination or been treated unfairly by general and life insurance providers on the basis of a current, historical or imputed mental health condition when applying for insurance or making a claim on an existing policy.

Relevant to ASIC's Enforcement Review, we have assisted individuals to seek redress through internal and/or external dispute resolution processes, raised concerns with the general and life insurance industries about their practices and recommended practical changes to the Financial Services Council's Life Insurance Code of Practice and Insurance Council of Australia's General Insurance Code of Conduct.

While there have been some improvements to the way the general and life insurance industries treat mental health over the past five years, progress has been extremely slow and there is significantly more to be done.

Our experience representing individuals in disputes with general and life insurance providers shows that insurers are unlikely to improve their practices voluntarily.

The introduction of a co-regulatory model where industry participants are required to subscribe to an ASIC approved code and where, in the event of non-compliance with the code, individual customers would be entitled to seek appropriate redress through internal and external dispute resolution, will improve outcomes for consumers, raise industry standards and assist insurers to meet their legislative obligations.

This submission addresses questions raised in Position and Consultation Paper 4, adopting the numbering set out in that paper.

- 1. Would a requirement to subscribe to an ASIC approved industry code result in improved outcomes for consumers?**
- 2. In respect of which financial sector activities should the requirement apply?**

PIAC submits that a requirement that general and life insurers subscribe to an ASIC approved industry code will result in improved outcomes for consumers. As ASIC has pointed out, the purpose of an industry code is to establish an industry wide commitment to deliver a certain standard of practice, to raise industry standards and complement legislative requirements, and to encourage consumer confidence in a particular industry.

For many years, PIAC has raised concerns that existing practices in the general and life insurance industries have failed to prevent unlawful disability discrimination against consumers who have, have had, or might develop, a mental health condition. These practices fail consumers when they apply for insurance and when making claims on existing policies.

Despite increasing community and industry awareness of the issues, the sector has been extremely slow to change and insurers have repeatedly shown themselves to be unwilling to improve their practices voluntarily. Changes to practices have been sporadic and inconsistent across the sector. While PIAC is proud to have been a part of some of the changes made by

general and life insurers through our casework, these have generally been subject to strict confidentiality obligations.

In September 2016, PIAC provided formal feedback to the FSC on its draft Life Insurance Code of Practice and in May 2017 made a formal submission to the ICA on its Review of the General Insurance Code of Practice. Many of the important issues raised by PIAC with the FSC have not been addressed in the Life Insurance Code of Practice. We are yet to see whether any of PIAC's recommendations to ICA have been incorporated into the General Insurance Code of Practice. While PIAC is committed to working with the FSC and ICA to improve their codes, their failure to address industry wide practices in relation to mental health cover and claims to date has been marked and extremely disappointing. PIAC is concerned that without a co-regulatory model, these codes will not achieve their potential.

An ASIC approved industry code will establish a minimum standard that is treated seriously by industry and appropriately incorporated into its day-to-day business. The requirement to periodically report on compliance with the code will also assist to increase awareness of, and compliance with, improved industry standards and result in improved outcomes for consumers.

Under the proposed model, ASIC will not prescribe the contents of the codes. PIAC submits that even if ASIC does not prescribe the contents of the codes, it should provide direction as to areas and issues that the code should cover, and that this should include practices and procedures relating to applications for insurance and claims on policies which reveal a mental health condition. The insurance sector's understanding of mental health and obligations under disability discrimination legislation is inconsistent and its commitment to avoiding discrimination has been inadequate. Current practices of insurers often result in decisions which are unfair, unlawful and/or which exacerbate an individual's condition. While a code would not prescribe substantive terms of policies or payment of claims, it should include processes that will ensure basic standards that currently do not exist. **Enclosed** are copies of our submissions to the FSC and ICA on their codes.

Although the code will only seek to set out base standards, PIAC suggests there is a strong case for identifying best practice to assist the industry to significantly improve its performance in this area.

#### **4. What costs or other regulatory burden would the requirement imply for industry**

A number of general and life insurance providers are already bound by existing codes. There may be costs incurred in updating internal policies and providing training to staff to ensure they understand the requirements of any updated code and corresponding policies. For some insurers who are not currently signed up to a code or do not have adequate measures in place to implement the code, there may be increased initial set up costs.

However, these are not unreasonable costs and can be managed by the insurance industry. Further, any cost or other regulatory burden is likely to be outweighed by the benefits of an industry wide enforceable code, including increased standards and improved consumer outcomes and confidence.

**7. Will ensuring enforceability provisions of codes meet a minimum standard improve consumer outcomes?**

There can be no doubt that consumer confidence in the general and life insurance industries is low. Poor practices, the glacial pace of change and the overall absence of a genuine commitment to change across the sector has contributed to such declining levels of consumer confidence.

Currently, the Life Insurance Code of Practice states that it is binding on life insurance providers. However, the code does not create any legal rights with consumers and the Life Code Compliance Committee (**LCCC**) has discretion to investigate complaints. Insurers can be sanctioned if they do not correct breaches of the code. The Financial Ombudsman Service (**FOS**) and the Superannuation Complaints Tribunal may consider whether an insurer has complied with the standards of the code when determining a dispute before it. The sanctions that the LCCC may impose are rectification steps, a formal warning, a code compliance audit, corrective advertising, writing directly to the customer impacted by the breach and/or publication of non-compliance. As the Life Insurance Code of Practice only commenced on 1 October 2016 and had a transition period until 30 June 2017, the effectiveness of the LCCC is not yet known and there has been no public reporting of actions taken by the LCCC.

The General Insurance Code of Practice similarly does not create any legal rights with consumers and the Code Governance Committee (**CGC**) also has discretion whether or not to investigate a complaint and insurers can be sanctioned if they do not correct breaches of the code. The sanctions that the CGC may impose are rectification steps, a code compliance audit, corrective advertising and/or publication of non-compliance. The CGC outsources its day-to-day compliance monitoring work to the FOS Code Compliance Team. The General Insurance Code of Practice Annual Report for the 2016 financial year shows that 32 breaches were finalised during that financial year and 202 new code investigations were received. Remedial action included 8 incidences of processes or systems being improved.

Ensuring that enforceability provisions of codes meet a minimum standard will improve consumer outcomes. If the codes are not enforceable, compliance with the codes is likely to be ad hoc and consumers will have little recourse if their disputes do not otherwise give rise to a legal liability or fall within the terms of reference of external dispute resolution schemes.

**8. Are contractual arrangements with code monitoring bodies the most effective enforcement mechanism?**

**9. Is it appropriate that, where feasible, code content be incorporated into contracts with customers?**

A contractual arrangement between the insurance provider and code monitoring body is not the most effective enforcement mechanism.

The limitation of a contractual arrangement between the insurance provider and code monitoring body is that the consumer is removed from the enforcement process and must rely on the code monitoring body to take enforcement action. The code monitoring body must also be appropriately resourced and staffed to handle the number and complexity of complaints made by consumers.

ASIC should consider assigning responsibility for investigation of breaches of the code to the new Australian Financial Complaints Authority (**AFCA**). There is currently a contractual arrangement between FOS and its financial services provider members and this arrangement has been shown to be largely effective. While a limitation of this system is that consumers must rely on FOS to take enforcement steps against the financial services provider, PIAC understands that there are generally high rates of compliance with FOS decisions.

At a minimum, PIAC agrees that any code should expressly provide that a subscriber's failure to comply with the code is to be taken into account in resolving disputes with individual customers through the subscriber's internal dispute resolution and that determinations of such disputes fall within AFCA's jurisdiction.

Where feasible, code content should also be incorporated into contracts with consumers. Such a step would ensure increased awareness amongst consumers of their rights under their policies and would also create obligations that are legally enforceable by consumers.

**10. Should the composition of individual code monitoring bodies and arrangements for enforcement be subject to ASIC approval?**

Yes. The effectiveness of industry codes is heavily dependent on the composition of the individual code monitoring bodies and arrangements for enforcement. The composition of individual code monitoring bodies and arrangements for enforcement should be subject to ASIC approval. This will ensure greater transparency, oversight and accountability.

**11. What characteristics should code-monitoring bodies have? (for example, what level of independence should they have?)**

Code-monitoring bodies should be independent and committee members should have relevant consumer or industry experience, in addition to compliance and enforcement expertise and other appropriate qualifications. The bodies should also be sufficiently resourced to handle the number and complexity of complaints made by consumers.

**PUBLIC INTEREST ADVOCACY CENTRE**  
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