

## Witness Statement Rubric 6-61

Name	Robert William Whelan
Address	Level 4, 56 Pitt Sydney NSW 2000
Occupation	Chief Executive Officer
Date	27 August 2018

I, Robert William Whelan, of Level 4, 56 Pitt Street Sydney NSW 2000 say as follows:

- 1 I am an Executive Director and the Chief Executive Officer (**CEO**) of the Insurance Council of Australia Limited (**ICA**). I have held the position of CEO since 22 March 2010 and was appointed as a director on 6 May 2010.

### The Royal Commission's Request

- 2 The **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry** has requested that a statement be prepared by the ICA addressing the questions set out in Rubric 6-61.
- 3 This witness statement is prepared in response to this request by the Royal Commission and addresses each of the topics in the order of Rubric 6-61, namely:
  - (a) Part A – General Matters
  - (b) Part B – Activities
  - (c) Part C – General Insurance Code of Practice
  - (d) Part D – Regulation of the insurance Industry
- 4 Now produced and shown to me and marked "**RW-1**" is a bundle of documents to which I refer in this witness statement. References are to tab numbers within the bundle at Exhibit "**RW-1**". The documents in RW-1 are also identified by reference to their unique document number beginning with "**ICA**".
- 5 Rubric 6-61 is at tab 1 of Exhibit RW-1, ICA.002.002.0001.

### Part A – General Matters

<b>Question 1:</b> <i>What is the ICA? What are its main functions and purposes? Of those functions and purposes, which does the ICA regard as the most important?</i>
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- 6 The ICA is a member based non-profit company limited by guarantee, owned and funded by its members. The liability of the members of the ICA is limited. The ICA is a representative body of the general insurance industry in Australia. The ICA currently has 31 employees.
- 7 The main objectives of the ICA are to, in no order of priority:

- (a) build trust in the insurance market;
  - (b) represent members' interests in both domestic and international issues;
  - (c) represent the general insurance sector to government and the community;
  - (d) anticipate and assist the industry to meet the needs of consumers and the community in general;
  - (e) promote community awareness of the role and benefits of insurance;
  - (f) encourage improved service standards across the insurance sector and promote appropriate self-regulation;
  - (g) promote private-sector provision of insurance services; and
  - (h) effectively and efficiently manage ICA resources.
- 8 Of these, building trust in the general insurance industry in providing insurance protection and security to the community is a key one.
- 9 The ICA represents its members, handles issues and develops industry positions through government lobbying, public affairs, industry forums, issues management and consumer services, all of which are supported by technical research and resources.

**Question 2:** *Describe the establishment and history of the ICA. What were the main factors that led to the establishment of the ICA? Exhibit key documents in relation to the establishment of the ICA (e.g. the constitution).*

- 10 The ICA was established on 1 July 1975 to act as the peak body for general insurance companies in Australia licensed under the *Insurance Act 1973* (Cth) (**Insurance Act**). The ICA succeeded the Council of Fire, Accident and Marine Underwriters of the Commonwealth of Australia and the various State Underwriting Associations, which trace their origins back to 1869.
- 11 The ICA was established to create a central, representative body for its members, and a uniform body to better represent the general insurance industry, which role had historically been carried out by multiple state-based associations.
- 12 The objects of the ICA are set out in clause 4 of the ICA Constitution, a copy of which is at tab 2 of Exhibit RW-1, ICA.002.001.0135. These objects are:
- (a) to influence the external environment in an ethical and expert manner and to develop and foster programs and manage issues to affect insurance and the wider community; and
  - (b) to do all such acts as are incidental and conducive to the furtherance of the above objects.
- 13 The ICA considers that the external environment includes the economic, political, business and social environments.
- 14 The ICA has the powers outlined in clause 5 of its Constitution in order to carry out the abovementioned objects.

**Question 3:** *Who is eligible to be a member of the ICA? What proportion of the general insurance industry are members of the ICA?*

- 15 All general insurance companies in Australia licensed under the Insurance Act to conduct new or renewal insurance business are eligible for membership with the ICA. Underwriters and Reinsurers are also eligible for membership with the ICA. Application for ICA membership is subject to ICA board approval and is governed by clauses 13 to 17 of the ICA Constitution (and appears at tab 2 of Exhibit RW-1, ICA.002.001.0135).
- 16 Current membership of the ICA comprises 50 members including insurance and reinsurance companies, Lloyd's underwriters, reinsurance brokers and agencies. **Annexure A** provides a list of ICA's members as at 17 August 2018. The Australian Prudential Regulation Authority's (**APRA**) Register of General Insurance lists 81 insurers (as at 5 July 2018 and including subsidiaries and related group entities with individual licenses) that are regulated by APRA in accordance with Section 122 of the Insurance Act,<sup>1</sup> but which may be ICA members at the group level (or parent entity) only.
- 17 ICA's 50 members represent approximately 92% of the gross written premium of all general insurance business transacted in Australia by insurers.
- 18 ICA's members, both insurers and reinsurers, are a significant part of the financial services sector. They provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability, professional indemnity, commercial property, and directors and officers insurance).

**Question 4:** *How is the ICA governed? Who is responsible for making decisions on behalf of the ICA?*

- 19 The ICA is governed by a board comprising twelve directors, each of whom is an appointed representative of a member of the ICA, plus a Chief Executive Officer/Executive Director who reports to the board. A President and Deputy President are appointed by the board. Each director, other than the Executive Director, is appointed by members at the Annual General Meeting (**AGM**) of the ICA and each hold office for a period of one year until the next AGM. The relevant clauses providing for the appointment of the board and the roles referred to in this paragraph are contained in clauses 42 to 43 of the ICA Constitution (at tab 2 of Exhibit RW-1, ICA.002.001.0135).
- 20 The CEO is responsible for the overall management, strategy and overseeing the day to day operations of the ICA. In my capacity as CEO, I report to the board of directors, who are elected by members in accordance with clause 47 of the Constitution and as described in the preceding paragraph. The board, and myself as CEO, are supported by an executive team who manage a series of divisions. A comprehensive committee structure has also been established to support the governance function of the ICA which draws on industry experts from member companies.

<sup>1</sup> (see: <https://www.apra.gov.au/register-general-insurance>)

**Question 5:** *What are the ICA's main sources of revenue? For each year from 1 July 2013 to the present, exhibit financial statements showing the ICA's sources of revenue, and the amounts of revenue derived from each source.*

- 21 The ICA is a member based non-profit company limited by guarantee, owned and funded by its members. The ICA has a financial year that runs with the calendar year ending on 31 December. The financial statements provided in response to this question have been prepared on a consistent basis and audited by KPMG in each of the years provided. Financial statements for each financial year are presented to members at the AGM which is held in May following the financial year end.
- 22 ICA's primary source of revenue is through compulsory member contributions. These contributions are comprised of an annual membership fee of \$20,000 per member company plus a general levy on members allocated based on members' individual declared Gross Written Premium, as declared and last reported to APRA. Membership fees are payable in accordance with clause 14 of the ICA Constitution.
- 23 In addition, certain ICA projects or expenses that are relevant to a specific group of members only (such as compulsory third party (**CTP**) or marine insurance) may attract a recovery of costs to fund dedicated project work directly relating to that class of insurance. Additional minor revenue sources include industry event registration fees and minor interest income.
- 24 Financial reports for the ICA disclose these main sources of revenue and the amounts derived from each source. These reports are prepared annually for the financial year ending on 31 December which are audited by KPMG on an annual basis and presented to members at the following year's AGM.
- 25 Copies of the ICA's Annual Financial Reports for the 2013 to 2017 financial years are at tabs 3 to 7 of Exhibit RW-1, ICA.002.001.0058; ICA.002.001.0032; ICA.002.001.0109; ICA.002.001.0083; ICA.002.001.0006.

**Question 6:** *What are the ICA's main expenses? For each year from 1 July 2013 to the present, exhibit financial statements showing the ICA's expenses.*

- 26 The Statement of Comprehensive Income contained in the Financial Reports at tabs 3 to 7 of Exhibit RW-1 disclose four main categories of ICA expenses, namely employee, professional, occupancy and general expenses. These expense categories include:
  - (a) for "Employee Expenses":
    - (i) remuneration, leave provisions and other on-costs; and
    - (ii) travel, accommodation and entertainment;for the ICA's 31 employees;
  - (b) for "Professional Expenses", fees paid to external consultants for services and advice, whether of a general nature or specifically to progress work on projects undertaken by the ICA in support of the strategic plan(s) of the ICA; and
  - (c) for "Occupancy and General Expenses":

- (i) office rent and related out-goings; and
- (ii) other office costs, such as telephones, IT costs, printing and stationery and depreciation.

## Part B – Activities

**Question 7:** *On its website, the ICA says that one of its main objectives is to “[r]epresent the general insurance sector to government and the community”. How does the ICA further that objective? Describe any relevant programs or activities in which the ICA has engaged since 1 July 2013. Exhibit key documents in relation to those programs or activities.*

- 27 As a member-based organisation, ICA works to achieve its objectives through:
- (a) the development of industry policies through committees that examine issues affecting the industry. The ICA coordinates industry views, identifies policy options, makes recommendations and reports to the ICA board through the CEO;
  - (b) consultation with relevant stakeholders regarding policy strategy and direction, including integration of industry views through a combination of committees, working parties and regular liaison and discussion with member companies;
  - (c) drawing upon expert advice from within the membership of the ICA as part of the standing committee process. Where necessary, additional expert advice is sought from consulting firms and recognised experts including actuarial, legal, economic and regulatory advisors;
  - (d) the provision of information about the general insurance industry through its website and various publications and submissions. The ICA also runs conferences, seminars and workshops for members, relevant stakeholders and other interested parties; and
  - (e) hosting forums for industry to meet and discuss key issues. These forums are an integral part of our communication and engagement process within the industry and include regular meetings with state managers and meetings of member company controlling officers.
- 28 The ICA has identified five strategic focal points for achieving its objective to “represent the general insurance sector to government and the community”. These strategic points are described below in more detail:
- (a) building trust and confidence in the insurance market;
  - (b) assisting consumers to make better decisions through improved product disclosure;
  - (c) supporting market efficiency;
  - (d) advocating for expansion of the insurance market; and
  - (e) protecting risk-based pricing.

### **1. Building trust and confidence in the insurance market**

- 29 General insurance is a product built on a promise that if defined trigger conditions occur, then agreed financial capacity and/or services will be delivered to help the policyholder recover.

Insurance is a discretionary purchase for most businesses and households. High rates of uptake help maintain a healthy pool from which claims can be paid and a decision by a consumer to purchase an insurance product requires trust in the product's future potential value to the consumer.

- 30 The importance of enhancing Government and consumer confidence in the insurance market is an integral part of all ICA's activities. Some of the specific initiatives the ICA has developed include the:
- (a) Understand Insurance project;
  - (b) General Insurance Code of Practice;
  - (c) industry-wide Catastrophe Coordination Arrangements;
  - (d) ICA's Advocacy Program; and
  - (e) insurance affordability initiatives including ICA's work with local and state governments to value mitigation proposals, addressing community groups with higher premiums, production of hazard data resources to enable greater understanding of the drivers of high premiums.

These initiatives are set out in detail in paragraphs 31 to 74 below.

- 31 An important element of building consumer trust in the insurance industry is ICA's work with members and the Australian Securities and Investment Commission (**ASIC**). An example of this is the work undertaken to address poor consumer outcomes experienced with the sale of add-on insurance through motor dealers and to ensure that identified issues do not recur. Last year, the ICA made two submissions to ASIC in relation to improving consumer outcomes for add-on insurance:
- (a) on 30 June 2017, in response to an Add-on Insurance Working Group in relation to add-on insurance, in which the ICA agreed in principle that a deferred sales model for add-on products sold through the motor dealer channel could address concerns about inappropriate sales practices such as pressure selling (at tab 8 of Exhibit RW-1, ICA.002.001.1589); and
  - (b) on 23 October 2017, in response to Consultation Paper 294, '*The Sale of add-on insurance and warranties through caryard intermediaries*', in which the ICA agreed with ASIC's proposals to implement a deferred sales model and to strengthen requirements for the supervision and monitoring of insurers' authorised representatives (at tab 9 of Exhibit RW-1, ICA.002.001.1653).

## **2. Assisting consumers to make better decisions through improved product disclosure**

- 32 Availability of and access to information is a key assumption that underpins the current product disclosure regime. The more information is available, the increased likelihood that consumers are able to make better and more informed decisions when deciding to purchase an insurance product.
- 33 The ICA has commissioned a number of studies on improving disclosure for general insurance and its products. In October 2015 the ICA released a paper titled *Too long: Didn't Read: Enhancing General Insurance Disclosure (TL:DR Report)*. A central finding of this study was the lack of empirical literature and research into how consumers make decisions about their insurance needs and the impact of product disclosure on decision-making. A copy of the TL:DR Report appears at tab 10 of Exhibit RW-1, ICA.002.001.1671.

- 34 The TL:DR Report noted that the current disclosure framework may be limited by its focus on the provision of information rather than on the consumer's ability to make use of that information to decide whether to purchase a general insurance policy best suited to their needs. Information that encourages informed decision-making should be targeted and timely, and appropriate to the needs of consumers at the particular stage in the insurance process. For example, consumers require different information at the point of sale compared with claims time.
- 35 The TL:DR Report recommended moving away from a focus on the minimum requirements of the mandated disclosure regime towards best-practice transparency. Principles around best-practice transparency should be developed over time as insurers learn from the trialling of new and innovative ways of providing information.
- 36 In February 2017, the ICA published a report on *Consumer Research on General Insurance Product Disclosures (Consumer Research Report)*. The Consumer Research Report made five key findings as to consumer behaviour when buying insurance:
- (a) there is no single pathway to purchase and the use of information in decision-making is highly varied;
  - (b) while most consumers report they have evaluated the details of their policy, most do not access the PDS;
  - (c) while most consumers are confident in their understanding, comprehension appears to be poor;
  - (d) many consumers do not consider the specific risks for which they need to purchase cover as a criterion for decision-making; and
  - (e) the accessibility of the PDS can be improved, although there are other opportunities for stronger consumer engagement

A copy of the Consumer Research Report appears at tab 11 of Exhibit RW-1, ICA.002.001.1738.

- 37 The ICA is building on the findings in the Consumer Research Report to explore viable and relevant initiatives to improve consumer decision-making on purchasing an insurance product. One such example the ICA is currently considering is the feasibility of a core package of insurance covers for home and contents policies and the need to standardise key definitions.

### **3. Supporting market efficiency**

- 38 The ICA considers that reducing 'drag factors' on insurance (those issues that increase the cost of a product for a consumer and may influence the rate of non- or underinsurance) is an important step in facilitating a sustainable market over the long term.
- 39 There are several programs and initiatives under way within the ICA that are aimed at addressing drags on insurance uptake. The key programs in this area focus on the removal of insurance taxes, reduction in the rate of insurance fraud, and premium compression by addressing underlying natural peril risk through government mitigation, improved town planning and better building standards. The ICA manages the Insurance Fraud Bureau of Australia process which has a presence at [www.ifba.org.au](http://www.ifba.org.au).
- 40 Further examples of ICA initiatives are the ICA's:
- (a) submission to the NSW Legislative Council's Inquiry into the Fire and Emergency Services Levy dated 27 November 2017 (at tab 12 of Exhibit RW-1, ICA.002.001.1616;

- (b) response to the Australian Competition and Consumer Commission's (**ACCC**) Issues Paper on Northern Australia Insurance Inquiry dated 19 January 2018 (at tab 13 of Exhibit RW-1, ICA.002.001.1299; and
- (c) submission on the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018* dated 15 August 2018 (at tab 14 of Exhibit RW-1, ICA.002.001.1595).

41 Much of the ICA's work of commenting on legislative and regulatory proposals affecting general insurance is aimed at enhancing market efficiency.

#### **4. Advocating for expansion of the insurance market**

- 42 The Australian insurance market is mature and well developed. Because of this, opportunities for growth are principally limited to technical innovation and improvement.
- 43 Some insurance markets remain on government balance sheets that could be more cost-effectively (for policyholders) underwritten by the private market.
- 44 The ICA is working with relevant jurisdictions to find opportunities to competitively underwrite a number of statutory classes of insurance, for example workers compensation and third party injury.

#### **5. Protecting risk-based pricing**

- 45 Most insurance products in Australia are priced according to the insurer's understanding of the probability and potential quantum of a claim. The lower the probability of a significant claim occurring, the lower the premium.
- 46 A risk-based pricing approach achieves three outcomes:
- (a) it sends an unambiguous price signal to the asset owner that there is a risk factor relevant to their situation that they should be aware of;
  - (b) it allows insurers to collect sufficient premiums to cover risks from those most likely to have the risks manifest, creating a sustainable product and not penalising those with lower risks by asking them to subsidise those with higher risks; and
  - (c) it encourages insurers to develop or tailor products to address specific risks faced by the community.
- 47 For those consumers with acute risks, risk-based pricing can, and does, result in elevated premiums when compared with the national median. Delivering high premiums to exposed policyholders has at times caused community concern and attracted government attention and examination. This is an uncomfortable tension for insurers but risk-based pricing is the most effective way to achieve the outcomes described at paragraph 46.
- 48 The ICA has a number of projects that help ensure the best use of risk-based pricing as a lever to improve community outcomes. These include a hazard data collection and community exposures project, as well as issue-specific mitigation valuation programs with local and state governments.
- 49 Further detail on a number of the ICA's mutually supporting programs is set out below in paragraphs 50 to 74.

### ***ICA Advocacy Program***

- 50 Given the presence of insurance in almost all forms of asset and community protection, there are very few public policy issues that do not have some insurance nexus or implications.
- 51 Through its Advocacy Program, the ICA endeavours to maintain regular and ongoing consultation and engagement with elected public officials and office holders, legislators, departmental officials and regulators. The ICA briefs public sector stakeholders on issues of importance to the ICA, its members, the economy, its customers and the public and responds to Government and regulator enquiries and committees.

### ***Understand Insurance program***

- 52 Understand Insurance, launched in 2013, is an award-winning consumer financial empowerment initiative of the ICA ([www.understandinsurance.com.au](http://www.understandinsurance.com.au)). It is Australia's most comprehensive general insurance information resource to help consumers and small businesses to understand general insurance and make informed decisions. It does not sell products or promote individual insurers.
- 53 Understand Insurance explores almost every type of insurance – including home, contents, car, business, travel, boat, and pet insurance – and risks ranging from everyday car accidents and kitchen fires to extreme events such as cyclones, floods and bushfires.
- 54 The Understand Insurance website is a useful resource; it contains checklists and top tips, as well as testimonials about user experiences with insurance. The website offers free tools to assist users to calculate the replacement value of a home and its contents to help prevent underinsurance, and provides guides to help find an insurer or an insurance broker.
- 55 The Understand Insurance website looks at what insurers do, how insurance products work, and why Australians might need insurance. It explores risks, what to consider when choosing a policy and an insurer, how to manage the cost of a premium, how to lodge a claim and what to do in a dispute with an insurer. It aims to educate consumers when choosing whether to purchase an insurance product.
- 56 Understand Insurance is designed to assist consumers and businesses to make better decisions about protecting their most valuable assets. In creating Understand Insurance, the more informed ICA consulted widely with consumer groups, consumer legal services, disability advocates, regulators and government agencies to help make the website as accessible and consumer friendly as possible.
- 57 Understand Insurance partners with other organisations to conduct joint research, help highlight insurance issues and raise consumer awareness. These include Smartraveller.gov.au, the Nicole Fitzsimons Foundation, the Foundation for Young Australians, and 10,000 Girl. It works closely with MoneySmart and ASIC's National Financial Literacy Strategy. It runs awareness campaigns to highlight timely issues, such as disaster season preparation, travel insurance for school holidays and small business insurance at tax time.
- 58 In 2018, Understand Insurance was recognised by the Global Federation of Insurance Associations as one of the world's best financial literacy programs.
- 59 In 2016-17, Understand Insurance reached more than four million consumers through traditional and online media and a further 200,000 through social media engagement, plus more than 420,000 users visited the Understand Insurance website.

### ***Risk-based pricing and mitigation program***

- 60 The ICA manages a broad risk-based pricing and mitigation program focused on encouraging competitive risk-based premiums that reflect the best understanding of natural hazards and how they impact specific communities. Key projects that support government and community stakeholders include:
- (a) **Support for mitigation implementation.** The ICA helps to identify where a lack of mitigation may be causing an acute level of risk for a community. ICA then assists relevant levels of government to value different mitigation proposals by identifying to what extent premiums may be compressed through each option. Once mitigation is completed the ICA ensures that relevant underwriting data, acknowledging the mitigation, is made available to underwriters who can then pass on lower premiums.
  - (b) **Underwriting data.** The ICA collects hazard information from local and state governments Australia wide, so that all insurers can competitively reference (as one input) the most accurate and available data when determining premiums. This program frequently involves community education forums, assisting local governments to explain hazards to particular parts of their community.
  - (c) **Community education.** Using underwriting data, based on collected government information, the ICA has created a set of tools for use by insurance professionals engaged in dialogue with at risk individuals and businesses regarding their exposures. These tools help inform potential policyholders about any potential risks in their locations that they may have been previously unaware of.

### ***Natural Disaster Response program***

- 61 The ICA's Natural Disaster Response program is one of its cornerstone operations. It seeks to facilitate the delivery of insurance funded recovery following a large natural disaster event. This program is described in more detail at Question 9.

### ***High-risk consumers community education and awareness***

- 62 The ICA regularly provides community briefings to high-risk communities where insurance pricing issues may be acute and where the probability of future disaster events remain high.
- 63 The briefings focus on how insurance underwriting operates, how claims are assessed, important steps to ensuring that adequate insurance is held and how to prepare for future events.
- 64 The next round of community briefings are targeting major towns and cities in North Queensland in November 2018.

### ***Disaster Season Advertising***

- 65 For the past five years the Insurance Council of Australia has sought to raise awareness of the importance of preparing households, small businesses and communities for extreme weather events.
- 66 Using weather bureau seasonal outlooks, the ICA identifies regions that may be exposed to natural disasters from November through to March each year. It then designs an advertising campaign, typically using a mix of print, online and radio, to encourage communities to be better prepared.
- 67 The ads use the Understand Insurance brand. They are amplified, where possible, with unpaid media engagement such as radio interviews.

### **Find an Insurer**

- 68 Find an Insurer ([www.findaninsurer.com.au](http://www.findaninsurer.com.au)) is an ICA initiative that helps consumers and small businesses find insurers that offer products they may be seeking.
- 69 The service originated with the Financial Ombudsman Service but became part of the ICA's remit in 2012. Findaninsurer.com.au now lists 257 products from 145 insurance providers. More than 1.3 million consumers visited the website in 2016-17.
- 70 Find an Insurer is supplemented by a Consumer Referral Service hotline, which assists consumers who are unable to access the internet or require personal assistance. This hotline receives more than 21,500 calls a year.
- 71 Find an Insurer helps ICA member companies meet their Code of Practice obligations by helping consumers find insurance, where those companies are unable to provide a product to that consumer.

### **Consumer Liaison Forum**

- 72 The Consumer Liaison Forum (**CLF**) was formed by the ICA in early 2017, and is made up of consumer representatives and an independent chair. It acts as a conduit for key consumer issues to be raised with the ICA board of directors, with a view to collaboratively designing practical industry responses to issues raised in the CLF. The participating organisations, in addition to the ICA, are:
- (a) WEStjustice;
  - (b) Consumer Action Law Centre;
  - (c) Legal Aid QLD;
  - (d) Legal Aid NSW; and
  - (e) Financial Rights Legal Centre.

### **General Insurance Code of Practice**

- 73 The General Insurance Code of Practice (**Code**) was first introduced in 1994 and has since been reviewed five times; in 1998, 2005, 2009 and 2012 (including the current review due to be completed in November 2018). It is intended that a draft Code will go to the ICA board for approval in November 2018 and the Code transition will commence on 1 January 2019.
- 74 The Code is the principal self-regulation document upon which members of the ICA rely to achieve positive and sustainable consumer outcomes. Code operations are set out in detail in response to Questions 10-18.

**Question 8:** *On its website, the ICA also says that one of its main objectives is to “[e]ncourage improved service standards across the insurance sector and promote appropriate self-regulation”. How does the ICA further that objective? Describe any relevant programs or activities in which the ICA has engaged since 1 July 2013. Exhibit key documents in relation to those programs or activities.*

- 75 The ICA's approach to encouraging improved service standards is founded upon the Code. All ICA members are required to subscribe to the Code, performance against which is independently monitored by the Code Governance Committee (**CGC**).

- 76 There are no specific programs relating to service standard improvements beyond the operation of the Code. Reputational forces, driven by market perceptions, are typically relied upon to encourage insurers to outperform their industry colleagues in terms of service standards.
- 77 There are no coordinated industry processes used to compare the performance of individual insurers against the minimum service metrics contained in Code. There are circumstances in which significant issues relating to adherence to, and compliance with, the Code will be considered by the board of the ICA, including, for example, consumers having a right to claim regardless of the actual terms of their policy. Code operations are more comprehensively explored in Questions 10-18.

**Question 9:** *Does the ICA have particular policies or processes for responding to natural disasters or severe weather events? If so, describe those policies or processes, how the ICA responds to natural disasters or severe weather events, and why the ICA developed those policies or processes. Exhibit key documents.*

- 78 Natural disasters create significant challenges and issues for the communities they affect. Disaster events also bring unique challenges for insurers that are not normally presented to the insurance industry in the usual business operations. Delivering on the promise of providing insurance to policyholders in a sustainable manner following a natural disaster or severe weather event has become increasingly important for insurers in Australia and is a matter of significance and importance to the ICA.
- 79 A number of important lessons followed from the government-led recovery operation in response to Cyclone Larry in 2006, particularly in relation to industry coordination.
- 80 Following Cyclone Larry, the ICA undertook an internal review of existing arrangements for disaster management. In 2006, the board of the ICA approved a significantly re-engineered process for natural disasters. The existing external body responsible for managing industry level events was dissolved and functions were internalised within the ICA in order to have greater control over outcomes and processes. The latest version of the coordination arrangements for disaster management appear at tab 15 of Exhibit RW-1, ICA.002.001.1269.
- 81 During the last five years of operation, the ICA has recorded 93 extreme weather related events in ICA's catastrophe dataset. The ICA considers five core factors when determining if the status of an event should be elevated to 'declared catastrophe', triggering coordination arrangements:
- (a) **Claims cost and volume of claims:** Events involving more than one insurer with an expected loss projection of more than \$20 million will typically be considered for declaration as a catastrophe.
  - (b) **Coordinated recovery response by relevant state government:** If the relevant state government is activating state recovery coordination functions to support an impacted community the ICA (as a member of the state recovery committee framework) will typically consider declaration of a catastrophe event.
  - (c) **Level of community impact:** The more acute the localised impacts in terms of property damage, infrastructure loss and business disruption, the more likely that the ICA will consider declaration of a catastrophic event.
  - (d) **Special electorate issues:** If the impacted area has suffered similar events in the past or has acute economic or demographic vulnerabilities that may need to be supported, the event may be considered for declaration as a catastrophic event.

- (e) **Media impacts:** If the event is attracting significant media attention and speculation, an insurance catastrophe declaration may be considered in order to trigger data reporting arrangements so that accurate information regarding the event can be given to the media.

82 Only 24 of the 93 events referred to at paragraph 81 above were of sufficient magnitude to be declared a catastrophe under the industry catastrophe arrangements. These 24 declared catastrophe events (occurring between 2013 to 2018) resulted in more than 650,000 insurance claims, with a total value exceeding \$10 billion. The ICA's historical catastrophe list is available to the community, researchers and governments at: <http://www.icadataglobe.com/access-catastrophe-data/>.

83 The arrangements are executed by forming an 'Insurance Taskforce' when a natural disaster of sufficient magnitude occurs that impacts on a community. An Insurance Taskforce for a catastrophe event is typically comprised of a senior representative from those insurers with a claims footprint in the disaster area, as well as key contacts from the National Insurance Brokers Association, the Financial Ombudsman Service, and the Australian Institute of Chartered Loss Adjusters.

84 First approved by the board of the ICA in 2007 and amended from time to time, the ICA's mission for the catastrophe coordination arrangements is:

*"To provide industry level support and services following a declared catastrophe event that augments the collective ability of general insurers, who are members of the Insurance Council of Australia, to deliver critical support to the community and to act as a partner in government disaster recovery actions".*

85 Core activities pursued by the ICA to achieve this mission include:

- (a) Government liaison at State and Local Government levels to ensure that the insurance response is appropriately integrated with any government recovery operations being undertaken;
- (b) establishing and maintaining a presence in the disaster zone for the first 10 days, to facilitate access for insurer teams, identify any potential systemic issues, and to liaise directly with victims in recovery centres who need immediate insurance access. After this initial period, ICA representation is delivered on an 'as needs' basis and is coordinated with local agencies, typically resulting in a physical presence for 4-5 days per month until the closure of the event;
- (c) coordinating key messaging from the industry to the community via the media, focusing on consumer safety and efficient claims processes, as well as mitigating against the dissemination of mis-information that may inhibit achieving either of these outcomes;
- (d) coordinating community forums focusing on insurance claims. Claimant only forums are run by the ICA, with most insurers deploying a claims team to facilitate individual issues and resolution where required. These forums are typically run 4 weeks after an event, at a point where most policyholders are in alternative housing, have had a loss assessment performed and are likely to be at the 'scope of works' stage of rebuilding;
- (e) escalating issues to the Insurance Taskforce, including through:
- (i) liaison with government, capturing macro issues that may impact the rebuilding efforts of all insurers, for example government direction that may require a new building standard to be implemented or particular debris removal processes to be followed; and

- (ii) interaction with individual policyholders in recovery centres, insurance forums and the 24hr Insurance Hotline, providing guidance on common insurance questions that are asked and escalating concerns or requests for further information through to senior executives at the relevant insurer where necessary to facilitate direct communications between the insurer and their customers; and
  - (f) data collection and decision support. Using data supplied by insurers to provide an aggregated view of the total insured cost of an event, the volume and types of claims being lodged and lastly the trajectory of claims closures over a (typically) 12 -18 month period until claims closure reaches at least 95%. This data is used by government to help track the overall performance of the industry and the extent to which the community may require taxpayer funds to assist in recovery. The data is also referenced by the media, community groups and the global insurance and reinsurance industry.
- 86 Given Australia's acute exposure to natural disasters, the coordination arrangements are well-practiced and in almost constant use. Notwithstanding this, no two disaster events are the same. Each event brings its own challenges and opportunities for improvement, both to the industry level coordination arrangements and to individual insurer processes. Set out below is a summary of the issues relevant to the four catastrophe events identified by the Royal Commission as being of interest:

### **1. NSW Hunter Valley floods - April 2015**

- 87 The NSW Hunter Valley Floods occurred in April 2015 and were the result of an intense East Coast low pressure system that caused storm and flood damage along the eastern seaboard, including parts of the Hunter Valley. At least four people died in this event, which was described by many in the region as the worst since 2007. Severe flooding affected the areas of Maitland and Dungog, inundating homes and isolating entire communities. Power and water access was restricted for tens of thousands of homes across the wider Hunter Region.
- 88 The event involved the lodgment of more than 135,280 claims to the industry, for an insured value of \$949 million. The claims lodged included:
- (a) 65,118 claims for damage to residential homes;
  - (b) 56,166 claims for household contents lost, damaged or destroyed;
  - (c) 7998 claims for damage to commercial buildings;
  - (d) 4834 claims for personal motor vehicles;
  - (e) 754 claims for financial loss caused by business interruption; and
  - (f) 236 claims for business owned motor vehicles.
- 89 Following the catastrophe declaration, the ICA and insurers mobilised response teams to attend recovery and community centres to provide information and guidance to customers. The ICA held policyholder forums to educate and provide guidance to affected households, and liaised with local government and relevant state and federal MPs. The ICA also activated the insurance hotline service to provide an escalation path for community members with general questions or needs regarding the insurance process.
- 90 The industry reached an estimated 95% claims closure rate 13 months after the event occurred. A total of 81 disputed claims are understood to have been referred to the Ombudsman, equating to 0.06% of claims.

- 91 Closure rates for this event matched similar events in the previous 5 years. The supply of trades was sufficient, given the proximity to major urban centres. The deployment of standard flood cover in many policies, by insurers, facilitated quicker outcomes for many policyholders, who previously may have not purchased the cover or may have elected to opt-out. For example, had this event occurred in 2007, approximately 99% of policyholders would not have flood cover included in their policy. The claims process would, as a result, be more complicated and would rely upon the commissioning of hydrology reports to determine causation (and therefore if the policy would respond). The rollout of flood cover as a standard inclusion by many insurers has led to wide adoption by the community with approximately 94% of policyholders now choosing a policy that includes flood cover.
- 92 A key issue that was observed following the NSW Hunter Valley floods was the extent to which a small number of policyholders (approximately 6%) had elected to 'opt-out' of flood cover, or had chosen to buy policies that excluded flood. Considerations of policyholders within this group included flood risk assessments and the premiums associated with that type of cover. The absence of publicly available flood mapping for many areas in the disaster zone was assessed as a key factor to the understanding and considerations of policyholders.
- 93 In response to this issue, the ICA has liaised with multiple local governments to encourage the development of flood mapping (now complete) and has deployed a publicly available flood mapping resource for insurance professionals to use in conversations with members of the public, ensuring that they have an additional opportunity to understand the extent of the flood risk at their specific location. This resource is publicly available online: <https://icadata.link/globe>.

## **2. Wye River Bushfires - December 2015**

- 94 The Wye River bushfires occurred in several areas on the Otway Peninsular in Victoria, impacting over 240 buildings (116 totally destroyed) in the hamlets of Wye River and Separation Creek in particular. The impacted areas were notable for the limited access to waste facilities, restricted volume of emergency and temporary accommodation, very steep terrain and high category of Bushfire Attack Level (**BAL**) on most properties, requiring compliance with higher rebuilding standards than many home owners anticipated.
- 95 This event involved the lodgment of over 511 claims, for an estimated insured value of \$110 million. The claims lodged included:
- (a) 235 Residential Building Claims;
  - (b) 177 Contents Claims;
  - (c) 16 Domestic Motor Claims;
  - (d) 65 Commercial Property Claims;
  - (e) 8 Commercial Motor Claims; and
  - (f) 10 Business Interruption Claims.
- 96 Following the catastrophe declaration, the ICA deployed a team to the region to liaise with local residents evacuated as a result of the fires and to work with agencies to facilitate access for insurer claims teams as quickly as possible. The ICA held policyholder forums to provide information and guidance to affected householders, and participated in several community initiated briefings. The ICA also activated the insurance hotline service to provide an escalation path for community members with general questions or needs, including a number of residents who could not identify or recall their specific insurer.

- 97 The industry reached an estimated 95% claims closure rate 18 months after the event occurred. It is understood that a total of eight claims were brought to the Ombudsman for resolution, equating to 1.5%.
- 98 Anticipating high costs for removal of debris and the impact on residents already underinsured and facing high rebuilding costs (bushfire rebuilding standards), the ICA negotiated a coordinated cleanup response with the Victorian Government, to be undertaken by government contractors for a capped fee that would then preserve the maximum policyholder funds for rebuilding purposes. This benefited the majority of property owners impacted by the event.
- 99 The cleanup responses initiative took a longer period of time to negotiate with the Victorian government than initially hoped, which resulted in increased uncertainty for some property owners and added several weeks delay to rebuilding efforts. To address this issue for future events, the ICA and the Victorian Government have agreed an understanding in relation to the structure of future cleanup operations and decisions will be made to execute a timely response.
- 100 Underinsurance was a significant issue for many policyholders during this event. The very steep terrain, intensity of bushfire exposure and nature of the older existing buildings (now lost) had led many to underestimate the costs of rebuilding. To address this issue the sum-insured web-calculator was developed (and is used by the ICA and most insurers) which incorporates a factor for bushfire risk and accounts for the additional costs likely to be incurred given bushfire risk rating and the age of the property.
- 101 Conducting valuation of works for cash settlement purposes involved significant challenges due primarily to the steep terrain areas and the associated higher rebuilding standards. Insurers valuing the agreed scope of works for cash settlement purposes, driven either by underinsurance or a consumer request, typically do so based upon the costs at which the insurer could have the works undertaken. In some circumstances, most notably where significant engineering is required due to the slope of the land parcel, the insurer may be able to perform the works more efficiently than the policyholder could (if organising their own rebuild).
- 102 Further, when calculating a cash settlement, some insurers may deduct project administration and other overheads from the cost of the works (that they would incur) adopting the view that these costs would not be incurred by the policyholder whilst managing their own rebuild. A cash settlement for the rebuild costs may therefore, in some circumstances, be less than the rebuilding costs that could reasonably be achieved by the policyholder themselves. This practice has been flagged by regulators as an example of a potentially Unfair Contract Term and has been addressed by the Ombudsman in determinations.

### **3. Broken Hill hail storm- November 2016**

- 103 On 11 November 2016, the Broken Hill hail storm heavily impacted eastern parts of South Australia, western regions of Victoria and the far west of New South Wales. The storm, which brought hail the size of golf balls, strong winds with gusts of almost 100kmh, and heavy rain was likened to a mini tornado. Typical hail and storm damage was experienced by residential and commercial buildings, as well as a significant number of vehicles.
- 104 The ICA declared a catastrophe event for the entire region (a breakdown specific to Broken Hill is not possible using the current data). This event saw the lodgment of over 52,000 claims for an insured loss estimated at \$597 million. Following the catastrophe declaration, the ICA liaised with respective state governments regarding the damage and deployed staff to key locations.
- 105 The industry reached an estimated 95% claims closure rate 13 months after the event occurred. It is understood that 31 claims resulted in disputes heard by the Ombudsman, equating to 0.06% of claims. Closure rates for this event were similar to other hail events in remote regions during the previous 5 years and referrals to the Ombudsman were very low, indicative of the positive outcomes for the vast majority of claimants.

- 106 Key issues observed by the industry related to the remote location of much of the damage, which presented challenges with securing trades, supplies and replacement items. This is an issue for individual insurers to address through ongoing improvement to claims servicing models.
- 107 Given the large and remote geography for this event, regional access to data by local agencies as well as FAQ's and escalation paths for claimants was flagged as an area for potential improvement. The ICA undertook to develop a website resource focused specifically on catastrophe events for agencies and claimants seeking insurance information or wishing to escalate an issue. The website [www.disasters.org.au](http://www.disasters.org.au) was commissioned in 2017 and has received positive feedback from agencies.

#### **4. Severe Tropical Cyclone Debbie - March 2017**

- 108 Cyclone Debbie struck the Queensland coast in the vicinity of Airlie Beach, on Tuesday March 28, as a Category 4 Severe Tropical Cyclone. Over the next seven days storm and flood damage from the Cyclone Debbie weather system continued along the eastern seaboard, with damage occurring as far south as the NSW/VIC border. The same weather system crossed the Tasman and caused impacts in New Zealand, incurring further insurance losses for a large number of Australian based insurers.
- 109 Cyclone Debbie is the second-most expensive cyclone in Australia's history (after Cyclone Tracy, which hit Darwin on Christmas Day, 1974) in today's dollar terms. This event saw the lodgment of more than 75,000 insurance claims for an estimated insured value of \$1.77 billion. Lodged claims included:
- (a) 37,149 Residential Building Claims;
  - (b) 22,272 Contents Claims;
  - (c) 6980 Commercial Property Claims;
  - (d) 4986 Domestic Motor Claims;
  - (e) 1680 Commercial Motor Claims; and
  - (f) 1285 Business Interruption Claims.
- 110 The ICA pre-positioned a team in Townsville prior to landfall of the cyclone, to establish links with local agencies and to gain entry to the impacted region by road post-landfall (noting airports would be closed for some time). Following the declaration of the catastrophe event, the ICA deployed additional teams to Proserpine, Airlie Beach, Mackay, Lismore and Murwillumbah, to liaise with local residents and to work with agencies to get access for insurer claims teams as quickly as possible.
- 111 The ICA held multiple claimant forums in each location over the next several months and activated the insurance hotline service to provide an escalation path for community members with general questions or needs.
- 112 The ICA worked closely with Queensland state agencies to facilitate the recovery efforts and rotated a team of insurance experts through Airlie Beach and Proserpine at regular intervals to give community members an opportunity to raise issues. Relevant issues raised with the ICA were passed to individual insurers to coordinate a response to the claimant if necessary.
- 113 The industry reached an estimated 90% claims closure rate 12-months after the event. A 95% closure rate was achieved by 14 months with claims for this event now more than 98% closed.

It is understood that less than 500 claims have resulted in referrals to the Ombudsman, equating to 0.6% of claims.

- 114 Despite challenges relating the scale of the event, the closure rate for claims was approximately 12% faster than for previous cyclone events and the rate of referrals to the Ombudsman remain low, indicating that the claims management processes have been positive for the vast majority of policyholders.
- 115 Following Cyclone Debbie, local MPs urged the industry to use local tradespeople and builders for the work involved in cleaning up and rebuilding the affected region. Insurers and their contractors engaged many properly qualified local firms and provided competitive quotes. Specialist builders were also engaged in specific regions to supplement the recovery efforts due to availability of local tradespeople and the need to rebuild the affected areas in a timely manner.
- 116 The use of non-local tradespeople was a concern for some claimants and resulted in some policyholders requesting a cash settlement from the insurer to allow them to make their own arrangements. A number of the issues associated with the propensity for cash settlements to be requested, including confusion over how they are managed and the implications for the region during future cyclones should those cash settlements not translate into repairs being undertaken by the property owner are being addressed by the ICA and discussed with government during upcoming pre-season disaster briefings with agencies and MPs.
- 117 Many insurers and the ICA observed acute damage issues with older or less well maintained property damaged in this event. Pre-existing damage, un-repaired or poorly maintained conditions in a property, are required to be declared under most policy applications. Where an event has caused damage that could have been prevented or minimised through proper performance of the building, and it becomes clear that the pre-existing condition of the building was not properly disclosed, assessment of liability can become complicated for both the insurer and claimant. The ICA is developing material for community education regarding the need to maintenance of older property and is undertaking a regional roadshow in Queensland where this issue will be discussed at community forums in November 2018.
- 118 Though Lismore was protected by a levee, it was deliberately constructed to mitigate against small floods and was quickly overtopped. The flood caused extensive damage to businesses in Lismore's CBD. In some locations, many business and household policyholders had elected to 'opt-out' of flood cover. The primary reasons given, in order of frequency, were:
- (a) 'I do not believe that I have a flood risk';
  - (b) 'I know there is a flood risk, but I am protected by a levee system'; and
  - (c) 'flood cover is expensive and I felt I could not afford it.'
- 119 To address this issue, the ICA has advocated for enhancements to Lismore's flood mitigation works and community education program. Planning work by local government is well advanced and should result in application for state government funding in 2018. Successful completion of better mitigation will be reflected in lower premiums and greater uptake by residents of flood insurance options.

## Part C – General Insurance Code of Practice

**Question 10:** Describe the establishment and history of the General Insurance Code of Practice (Code). In doing so, address:

- (a) when the Code was first introduced;
- (b) why the Code was first introduced;
- (c) the process by which the Code was first developed;
- (d) the different iterations of the Code that have existed, and the key changes made in each of those iterations; and
- (e) the process by which each iteration of the Code was developed.

Exhibit key documents, including copies of each iteration of the Code.

- 120 The ICA is responsible for maintaining and publishing the Code. The Code is a voluntary code written by members of the insurance industry and requires insurers, and other industry participants who have adopted the Code to provide services to their customers in an open, fair and honest way.
- 121 The Code's standards apply to many features of a customer's relationship with their insurer including when buying insurance, what to expect when making a claim, timeframes for making a claim decision, and processes for making complaints. The Code also requires insurers to provide assistance to individuals who are in financial hardship and having difficulty meeting their financial obligations to an insurer.
- 122 In this section, I refer to different versions of the Code as follows:
- (a) the Code as first introduced in 1994 and effective from 1 July 1996 (at tab 16 of Exhibit RW-1, ICA.002.001.0883) (the **Original Code**);
  - (b) the Code as revised in 2000 following a review in 1998 (at tab 17 of Exhibit RW-1, ICA.002.001.0349) and as updated from time to time to reflect changes in insurance legislation (the **Revised Code**);
  - (c) the Code which was effective between 18 July 2006 to April 2010 (at tab 18 of Exhibit RW-1, ICA.002.001.0288) (the **2006 Code**);
  - (d) the Code which was effective between 1 May 2010 to 30 June 2012 (at tab 19 of Exhibit RW-1, ICA.002.001.0179) (the **2010 Code**);
  - (e) the Code which was effective between 1 July 2012 to 30 June 2015 (at tab 20 of Exhibit RW-1, ICA.002.001.1026) (the **2012 Code**); and
  - (f) the Code which was effective from 1 July 2015 to the date of this statement (at tab 21 of Exhibit RW-1, ICA.002.001.0199) (the **Current Code**).
- 123 The ICA's work in relation to the Original, Revised, 2006 and 2010 Codes pre-dates my appointment as the CEO of the ICA.

124 I have caused inquiries to be made of the ICA's documentary records and have been provided with the following documents in relation to the introduction and review of the Code during this period:

- (a) Chapter 9 of Tasman Asia Pacific Paper entitled "Analysis of market circumstances where industry self-regulation is likely to be most and least effective" for the 2000 Treasury Self-Regulation Taskforce, at tab 22 of Exhibit RW-1, ICA.002.001.0902;
- (b) the final report of the independent review of the Original Code issued in October 1998, at tab 23 of Exhibit RW-1, ICA.002.001.0363;
- (c) the final report of the independent review of the 2000 Code and report by Richard Grellman as stakeholder consultation facilitator, at tabs 24 and 25 of Exhibit RW-1, ICA.002.001.1150; ICA.002.001.1201; and
- (d) the final report of the independent review of the 2006 Code, at tab 26 of Exhibit RW-1, ICA.002.001.0304.

**(a) *When the Code was first introduced***

125 The Original Code was first developed and introduced in 1994 and officially launched on 1 July 1995 following approval by the former Insurance and Superannuation Commission (**ISC**).

**(b) *Why the Code was first introduced***

126 In 1993, the Commonwealth Government announced it was intending to introduce a compulsory code of practice for the general and life insurance industries. In 1994, following extensive lobbying by general insurers, the Commonwealth Government announced that it would allow the insurance industry to develop a self-regulatory code instead of imposing a statutory code.

127 The Original Code was first developed in anticipation of legislative changes to the Insurance Act which would require each authorised general insurer in Australia to adopt a code of practice approved by the ISC. Its stated objective was to raise service standards in the insurance industry.

**(c) *The process by which the Code was first developed***

128 The Code was first developed in 1994 in consultation with industry representatives, the Government (including the ISC) and consumer representatives. There was a 12-month implementation phase with full implementation from 1 July 1996.

129 The responsibility for the implementation and administration of the Original Code was vested with the Insurance Enquiries and Complaints (**IEC**), an organisation established by the ICA to administer a dispute resolution scheme which preceded the development of the Original Code. Following approval by the ISC, the Code was launched and training was provided to members.

**(d) *the different iterations of the Code that have existed, and the key changes made in each of those iterations; and***

**(e) *the process by which each iteration of the Code was developed***

130 The ICA is required to review the Code from time to time, with an independent reviewer appointed to undertake this process and in addition to formal independent reviews of the Code, the ICA will consult with the CGC, FOS, consumer and industry representatives, relevant regulators and other stakeholders to develop the Code on an ongoing basis (originally every two years under the Original Code). The different iterations of the Code are set out in paragraph

122 above. The key changes made in each of those iterations and the process by which each Code was developed is described below.

131 The Code has been independently reviewed four times: in 1998 (by George Pooley), 2005 (by David Knott), 2009 (by Robert Cornall AO) and 2012 (by Ian Enright). The independent reviewers were selected having regard to their experience and expertise, following stakeholder consultation and feedback.

132 The ICA has also reviewed and updated the Code between independent reviews. For example, after a sequence of natural disasters in 2010-2011, improvements were made to the catastrophe provisions in the Code. Further information regarding each of the independent reviews is set out below in paragraphs 133 to 164.

### **1. 1998 Review**

133 The Original Code remained in place until 2000, following the Code's first independent review. The review was to commence two years after the Code came into operation and was due to be completed within one year. In 1998, the ICA (with agreement from the Insurance Enquiries and Complaints (**IEC**) and the ISC) commissioned George Pooley as the independent reviewer of the Original Code. The Final Report of the review indicates that the review was facilitated by:

- (a) officers of the ICA and IEC;
- (b) the authors of 29 submissions, and participants at a forum to discuss Code issues;
- (c) discussions with a number of Chief Executive Officers of insurance companies; and
- (d) discussions with other interested parties.

A copy of the Final Report issued in October 1998 is at tab 23 of Exhibit RW-1, ICA.002.001.0363.

134 The review proceeded in a number of stages. First, there was a press notice in *The Financial Review* and *The Australian* announcing the review and requesting submissions from interested parties by the end of June 1998, 29 of which were received. At the second stage, a forum was held to enable interested parties to discuss their submissions and the issues raised. The forum was held in Sydney on 30 July 1998 and was attended by representatives from Government, insurers and consumer groups. During these two stages, there were discussions with a number of CEO's of insurance companies, authors of several of the submissions and officers of IEC and the ICA.

135 Stage three involved the preparation of the Final Report and delivery to the ICA, when then oversaw stage four. The ICA considered the report and determined what changes, if any, it wished to make to the Code.

136 The key changes to the Original Code following this review were as follows:

- (a) the IEC assumed several new responsibilities from the former Code Compliance Committee (**CCC**) in respect of the administration of the Code. For example, pursuant to clause 7.4, the Revised Code empowered the IEC to first identify breaches and determine whether a breach should be reported to the CCC;
- (b) the IEC was obligated to administer the General Insurance Enquiries and Complaints Scheme, which replaced the former Claims Review Panel Scheme, pursuant to clause 6.4; and

- (c) the Revised Code was supported by newly established Code Guidelines for additional implementation information to be provided to insurers. A copy of the Code Guidelines is at tab 27 of Exhibit RW-1, ICA.002.001.1110.

## 2. 2005 Review

- 137 The second independent review began in 2004.
- 138 In June 2004, the ICA released a draft Code for a three-month period of public consultation. The draft Code had been completed following an intensive review by both ICA officers and members of the insurance industry. The ICA appointed former ASIC Chairman David Knott to conduct the independent review and the 44 submissions received in response. Mr Knott made 36 recommendations, all of which were agreed to in principle by the ICA. The ICA also agreed to Mr Knott's recommendation that it engage an independent person to facilitate discussions with key stakeholders on the 36 recommendations. A copy of the final report of Mr Knott is at tab 24 of Exhibit RW-1, ICA.002.001.1150.
- 139 On 13 January 2005, the ICA appointed NSW Motor Accidents Authority Chairman Richard Grellman to facilitate stakeholder consultation on the 36 recommendations made by David Knott. Mr Grellman concluded this consultation process in April 2005. The various stakeholders engaged with are set out in the final report provided to the ICA, at tab 25 of Exhibit RW-1, ICA.002.001.1201.
- 140 The 2006 Code was approved by the ICA in May 2005 and released in July 2005. The 2006 Code commenced operation in July 2006.
- 141 The key changes to the Revised Code following this process were as follows:
- (a) a commitment was inserted for insurance contracts to be governed by the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth);
  - (b) the Insurance Ombudsman Service was introduced and given the responsibility of monitoring compliance with the 2006 Code and operating the external disputes resolution scheme to assist consumers;
  - (c) a new chapter was inserted in relation to purchasing insurance, including amongst others mandating standards which will apply to the initial enquiry and purchase of insurance and renewal of cover; and advice to consumers that information about insurance products and the Code will be provided when insurance is purchased;
  - (d) in relation to insurance claims, provision for financial hardship for consumers and third parties was added;
  - (e) a new section was inserted in relation to responding to catastrophes and disaster, which included a commitment to respond and have in place appropriate processes to manage catastrophes and disasters resulting in a large number of claims;
  - (f) included an insurer commitment to support industry initiatives aimed at explaining general insurance to consumers and the community;
  - (g) a new section was inserted in relation to complaints handling procedures; and
  - (h) a new section was inserted in relation to code monitoring and enforcement.

## 3. 2009 Review

- 142 On 28 May 2009, Robert Cornall AO was appointed by the ICA to conduct an independent review of the 2006 Code pursuant to clause 1.14. A copy of the Final Report of the independent review is at tab 26 of Exhibit RW-1, ICA.002.001.0304.
- 143 The review commenced on 1 June 2009 and was advertised nationally. Submissions were sought and consultations conducted on the basis that the review was inviting comments from any interested parties about their experience with or views on the Code without limiting responses to matters raised in a discussion paper.
- 144 On 4 June 2009, Mr Cornall wrote to a number of key stakeholders advising them of the review and seeking an opportunity to discuss any concerns they might have about the operation of the Code. Those stakeholders included: the Hon Nick Sherry (Minister for Superannuation and Corporate Law), the Hon Chris Bowen (Minister for Financial Services, Superannuation and Corporate Law), The Hon Chris Pearce MP (Shadow Minister for Financial Services, Superannuation and Corporate Law), Mr Tony D'Alosio (Chairman, ASIC), Professor The Hon Michael Lavarch (Chairman Financial Ombudsman Service (**FOS**)), Mr Colin Neave (Chief Ombudsman, FOS), Dr John Laker AO (Chairman, APRA), Mr Richard Gilbert (Chairman, Financial Industry Council Australia), and Mr John Trowbridge (Member, APRA).
- 145 Other stakeholders were contacted directly by email or telephone during June 2009 to advise them of the review and seek their input and views. Those stakeholders included the following key consumer organisations: the Consumer Credit Legal Centre, the Consumer Action Law Centre, the Australian Financial Counselling and Credit Reform Association, Victoria Legal Aid, Legal Aid Queensland and Legal Aid NSW.
- 146 Extensive consultations were also undertaken with key stakeholders through public consultation sessions and face-to-face meetings. The key stakeholders directly consulted include: Consumer Organisations - Brotherhood of St Laurence, Consumer Credit Legal Centre (Insurance Law Service), Federation of Community Legal Centres (Victoria), Public Interest Law Clearing House, Victoria Legal Aid, APRA, ASIC, Australian Institute of Chartered Loss Adjusters, the CCC, FOS, the National Insurance Brokers Association (**NIBA**); and members.
- 147 The review received 20 written submissions of which 16 were public and listed on a website dedicated to the review. Four confidential written submissions were received, including one from ASIC. In addition to written submissions, verbal submissions were also made during meetings conducted with key stakeholders, including: ASIC, APRA, FOS, Mr Peter Daly AM and the Office of Minister Chris Bowen MP.
- 148 The main categories of issues raised in submissions and consultations were:
- (a) the application and scope of the financial hardship provisions;
  - (b) the role and functions of the CCC;
  - (c) the application of the Code to all forms of general insurance (other than those specifically excluded), not just retail insurance; and
  - (d) suggestions to correct, clarify, amend or improve the drafting of the Code.
- 149 The key changes to the 2006 Code, resulting in the 2010 Code, were as follows:
- (a) in relation to financial hardship, the introductory wording of clause 3.11 was redrafted to adopt language used in the Mutual Banking Code of Practice and read as follows: *"If a person is experiencing difficulty repaying a debt due to illness, unemployment or other reasonable cause, we will work with the person, if he or she cooperates with us, and consider one of the following options..."*; and

- (b) in relation to the CCC, the Code was amended to provide that the FOS should regularly supply industry wide data to the CCC to enable it to better monitor compliance with the Code, identify serious or systemic issues in regard to the Code or its application, and to require the CCC to report its findings on those issues to FOS for its consideration and further action as FOS considers appropriate.

#### **4. Amendment to catastrophe provisions**

150 Outside the independent review process, amendments were made by the ICA to the catastrophe provisions of the Code in February 2012 in response to public feedback after the sequence of natural disasters in 2010-11, most notably the Queensland floods and Cyclone Yasi. The amendments, which were included in the 2012 Code, provided:

- (a) a clear four-month time frame for claims handling which would include catastrophes and an exemption for “extraordinary” events declared by the ICA board where the insurers’ ability to decide claims had itself been affected;
- (b) a clear time frame of twelve weeks for the provision of external expert reports to insurers;
- (c) hydrology and other external expert reports used for claim determination to be made available to the customer within ten business days;
- (d) a “right to claim”; and
- (e) in line with actual member practice, an amendment to make it clear that insurer staff are required to be trained to deal professionally with policyholders during a catastrophe. Training would cover understanding the consumer situation “particularly in a catastrophe or disaster”.

151 In addition to the above and as a result of recommendations from the Queensland Floods Commission, the ICA proposed two additional amendments be made without waiting for the next Code Review:

- (a) a requirement to inform policyholders that they can ask for copies of information relied upon by an insurer when denying a claim; and
- (b) a requirement to inform policyholders of their right to request a review if the insurer declines to provide those copies.

152 Further initiatives to strengthen the effectiveness and importance of the Code as an instrument of self-regulation were also implemented. These included:

- (a) a request that FOS undertake an immediate review of how insurers performed against the Code during the 2010/2011 natural disasters;
- (b) action to improve the effectiveness and transparency of the Code, including making all future Annual Reports by the CCC public by posting them on the ICA website; and
- (c) bringing forward to mid-2012 the independent review of the Code that would otherwise not be due until May 2013.

#### **5. 2012 Review**

153 On 3 May 2012, the ICA appointed Ian Enright, a financial services lawyer, as the independent reviewer of the Code.

- 154 The Final Report of the independent review is at tab 28 of Exhibit RW-1, ICA.002.001.0647. The Final Report indicates that a Clinical Advisory Panel (**CAP**) was appointed to assist with the review, consisting of Julie Maron as the customer representative and Annabelle Butler as the insurer representative.
- 155 This review was brought forward by 12 months in order to focus on three issues at the time:
- (a) the natural disasters in 2010 – 2013 which caused exceptional and distressing loss, highlighted by the various inquiries into those natural disasters which highlighted the role of insurance;
  - (b) the competitive market in which insurers operate and the uncertain returns on investment portfolios; and
  - (c) the scale of legal and regulatory changes affecting the industry.
- 156 The review was launched with an issues paper in October 2012. The review also involved consultations, forums and meetings with stakeholders. Early stakeholder consultation occurred with ASIC, FOS, the ICA Consumer Reference Group, the Consumer Advocate Working Group, the CAP, the CCC and Code Review Working Group, the Australian Institute of Chartered Loss Adjusters and NIBA. There were also specific forums on financial hardship, governance, internal dispute resolution (**IDR**) and claims. The public consultations sessions for Melbourne, Ipswich, Perth, Sydney and Wagga Wagga were advertised publicly and the CAP made these sessions available to local politicians, representatives and members of the community. Three forums were held in September, October and November 2012.
- 157 The submissions received are listed in Appendix C of the Final Report at tab 28 of Exhibit RW-1.
- 158 The workshops covered the Code's framework and presentation, Code promotion, coverage, financial hardship, claims, complaints and IDR, governance, monitoring and enforcement, and natural disasters.
- 159 Mr Enright delivered a 200-page report made up of 60 recommendations to the ICA in May 2013.
- 160 The ICA then formed a Code Review Working Group made up of more than 20 insurer representatives, to work on changes to the Code as a result of the review's recommendations. Between July 2013 and February 2014, the Code Review Working Group developed 18 iterations of the revised Code. While the Code was being revised, initial meetings were held with consumer advocates in September 2013, focusing on financial hardship provisions in particular.
- 161 Ahead of the review of the 2010 Code being finalised, the ICA provided a draft revised Code to all ICA members and conducted key stakeholder consultations in November 2013, including to members of the ICA's National Consumer Reference Group, ASIC, FOS EDR and FOS Code. In the interests of time, and targeted consultations, the draft revised Code was not released publicly. The ICA was in regular contact with ASIC throughout the development of the revised Code, culminating in ASIC providing a preliminary view on the revised Code's position in relation to RG183 in September 2014. A copy of ASIC's preliminary view is at tab 29 of Exhibit RW-1, ICA.002.001.0991.
- 162 The most recent version of the Code came into force on 1 July 2015 following a 12-month transition period.
- 163 The revisions made to the 2012 Code in 2014 enhance and clarify the rights of consumers. The key changes made to the 2012 Code following this process were as follows:

- (a) greater focus on the use of plain English, including ensuring communications are in plain language when customers are buying or renewing insurance;
- (b) in relation to instalment contracts and missed payments, insurers must now give a consumer two separate notices when cancelling an instalment contract for non-payment to ensure the customer is aware they no longer retain insurance cover;
- (c) provides for greater assistance to be given to customers who are experiencing financial hardship. For example, an insurer can work with a customer who is having difficulty paying a debt on a payment arrangement, such as extending the due date for payment, paying the amount in instalments, or paying a reduced lump sum;
- (d) standards and processes for making claims, including for:
  - (i) receiving a decision on a claim from an insurer – including the requirement for an insurer to provide written reasons for denial of a claim;
  - (ii) receiving an urgent financial payment if needed, such as following a catastrophe, or under travel insurance cover if a consumer loses their belongings overseas;
  - (iii) review of a claim following a catastrophe;
- (e) sets out a clear and distinct two-stage process for insurers to resolve complaints. If the internal complaints process of the insurer is not successful in resolving a customer's complaint, the Code clearly identifies the external dispute resolution scheme provided by the FOS; and
- (f) the introduction of the independent CGC and its sanctions.

164 Since early 2017, the ICA has been conducting a wide-ranging review to ensure it remains fit for purpose. This latest revised Code will come into effect in 2019. The process behind the review will be explored further in response to question 13 below.

**Question 11:** *Why were entities given a 12 month transitional period to comply with the current iteration of the Code? Why did a shorter transitional period not apply?*

165 The 12-month transition period provided to subscribers to comply with the Current Code was approved by the ICA after consultation between the ICA and its members on the maximum time members considered was required to put in place the significant systems and process changes that the Current Code required, as well as to ensure there was a high degree of internal staff training on the Code's requirements.

166 The ICA took the advice of the Code Compliance team at FOS, which had been involved in many code transitions in the past. During the transition period, the ICA formed a Code Transition Working Group that met regularly to collectively discuss matters of Code interpretation and compliance and to assist signatories with the transition.

167 The different resourcing, size and structures of industry members were taken into account when determining a suitable transition period. Some larger insurers required time to train all of their employees whilst some of the smaller insurers, who had less resources, required time to implement all the systems and process changes.

**Question 12:** *What proportion of the general insurance industry has adopted the Code? Does the ICA have any measures in place to promote the adoption of the Code? If so, what are they?*

- 168 As at 31 January 2018, the proportion of the General Insurance Industry (excluding reinsurers) covered by the Code makes up 96.7% of the total General Insurance Gross Earned Premium.
- 169 It is a condition of ICA membership that members who provide products covered by the Code must adopt the Code. The ICA constitution was amended by special resolution of members in May 1996 to include a new clause requiring a member to comply with the operative provisions of the Code (clause 17(k) of the Constitution at tab 2 of Exhibit RW-1).
- 170 Subscribing to the Code is done by way of a Deed of Adoption entered into between the participant, the ICA and the CGC. By executing this Deed of Adoption the participant agrees to adopt the Code and to fulfil its obligations under the Code. A copy of the current template Deed of Adoption is at tab 30 of Exhibit RW-1, ICA.002.001.1935.
- 171 Any other industry participants may also subscribe, and the ICA encourages all general insurers to adopt the Code. **Annexure B** lists the subscribers to the Code as at 17 August 2018. To the best of my knowledge, there are currently five non-members of the ICA who have adopted the Code; Defence Services Homes Insurance Scheme, Greatlakes Insurance, Southern Cross Benefits, Sunderland Marine Mutual and Progressive Direct Insurance Pty Ltd.
- 172 General insurance companies listed by APRA who are members of the ICA but not Code subscribers include reinsurers, providers of medical indemnity or workers compensation insurance, which are classes of insurance that fall outside the scope of the Code.

**Question 13:** *Describe the process that has been undertaken in reviewing the current iteration of the Code, and the key changes that are likely to be made in the next iteration of the Code. In doing so, explain who participated in that process, and what role they had in making decisions about changes to the Code. Exhibit relevant documents.*

- 173 On 17 February 2017, the ICA launched a targeted review of the Current Code at the request of the ICA board in light of developments impacting the general insurance industry since the commencement of the Current Code (**2017 Review**). The 2017 Review consulted widely with the industry, regulators, and consumer and community organisations. The issues raised by stakeholders were broad but focused on improving consumer outcomes. Importantly, they also addressed growing awareness of complex social issues including mental health, hardship and family violence.
- 174 The Terms of Reference of the 2017 Review require ICA to consult during the course of the review and in relation to any proposed findings or recommendations with:
- (a) ICA's National Code Committee, made up of member representatives to address issues arising out of Code reviews;
  - (b) ICA's Consumer Liaison Forum, made up of consumer representatives and an independent chair;
  - (c) CGC;

- (d) ASIC; and
- (e) FOS.

A copy of the 2017 Review Terms of Reference is at tab 31 of Exhibit RW-1, ICA.002.001.0235.

- 175 I understand that the ICA appointed Philip Khoury, Managing Director of Cameron Ralph Pty Ltd to provide independent oversight of the review to ensure that the review appropriately considered the submissions received.
- 176 Following the release of the terms of reference, the review commenced with a six week public consultation period which concluded on 31 March 2017. Ten public submissions and four confidential submissions were received in response to the terms of reference. The ICA and its National Code Committee reviewed these initial submissions.
- 177 On 8 November 2017, the ICA presented its Interim Report of the Review of the General Insurance Code of Practice 2017 (**Interim Report**) for consultation. Further consultations were then undertaken, facilitated by Philip Khoury, and feedback provided in relation to the Interim Report. A copy of the Interim Report is at tab 32 of Exhibit RW-1, ICA.002.001.0434.
- 178 In developing the recommendations for the Final Report of the Review of the Code (**Final Report**), the ICA took into account detailed submissions and discussions with the ICA's Consumer Liaison Forum, ICA member committees, and submissions received from a range of consumer representatives, the CGC and ASIC. A copy of the Final Report is at tab 33 of Exhibit RW-1, ICA.002.001.0538.
- 179 Philip Khoury has provided two oversight reports on the Interim Report and Final Report, copies of which are at tabs 34 and 35 of Exhibit RW-1, ICA.002.001.0279; ICA.002.001.1101.
- 180 Based on the feedback received, the ICA has identified a number of priority areas, reflected in the 30 recommendations made. These include matters such as:
- (a) assisting consumers experiencing vulnerability (including family violence, financial hardship and mental health conditions);
  - (b) more effective disclosure;
  - (c) standards on claims investigations; and
  - (d) strong governance of product design and distribution.
- 181 Key changes to the Current Code recommended in the Final Report included:
- (a) a new upfront section expressing the objectives and key commitments of the Code;
  - (b) a new principles based section on consumers experiencing vulnerability, including recognising the diverse needs of consumers experiencing vulnerability and a commitment to accommodating the needs of consumers experiencing vulnerability;
  - (c) enhanced protections for consumers experiencing financial hardship, including amending the financial hardship application timeframes to accord with the National Credit Code, training for employees and agents to help identify signs of financial hardship, a commitment to accept offers to pay debt in instalments, requests for further information to be made as early as possible, and sufficient information to be provided in debt recovery letters so a consumer can determine that the amount being recovered is fair and reasonable;

- (d) effective disclosure and access to information revisions;
- (e) a requirement that insurers have policies in place documenting their processes and governance arrangements for designing and distributing products so that insurance products are designed and distributed to an appropriate target market and to prevent pressure selling and unacceptable sales practices;
- (f) new mandatory standards on the use of investigators and requirement for insurers to have measures in place to insure suitable service suppliers are appointed;
- (g) in situations of total loss, claimants will be treated with sensitivity and provided with support and assistance to determine the amount of their claim. Further, insurers will not require proof of ownership or an inventory assessment where it is clear that the loss exceeds the sum insured or any sub-limit within it. Insurers are to provide to claimants in writing when their claim is denied or partially accepted, which aspects have not been accepted. Insurers are to provide greater transparency around a denied or partially accepted claim and an uninsured third party's right to access the complaints process. Where an insurer's repairer does a poor or faulty repair, require the insurer to cover reasonable costs of hire car and accommodation above what the insured is covered for;
- (h) the ICA should continue to work with insurers to determine changes to the complaints process in order to address concerns about the current two stage process. Insurers should inform the consumer in writing of their right to take their complaint to FOS and the reasons for the delay if a decision for a complaint can't be made within 45 days;
- (i) the principles of honesty, fairness, efficiency, transparency and timeliness should operate broadly and as standalone provisions via the removal of the words 'in accordance with this section'. The CGC should be enabled to publish its decisions on a de-identified basis on the Code website to assist Code subscribers to understand the CGC's interpretation of the Code; and
- (j) amendments to meet the requirements for ASIC approval of the Code.

182 The ICA is now commencing targeted consultation with stakeholders about the drafting of the new Code provisions, to give effect to the Final Report recommendations. Once the new draft Code is approved by the ICA, members will have a transition period to make any required changes to processes or educate staff before it comes into effect.

**Question 14:** *What are the principles or priorities by reference to which the ICA makes decisions about whether to support a particular change to the Code? Have those principles or priorities changed over time? If so, how and why?*

183 In considering changes to the Code, the ICA takes into account any relevant reviews, reports and external developments, such as legislation, regulation, other industry codes, external reviews and guidance.

184 During previous reviews, the ICA considered the recommendations of independent reviewers, was focused on the objectives of the Code, and conducted more targeted reviews with guidance from reports and external reviews in deciding whether to support particular changes to the Code.

185 During the current review and in determining the changes to the Code, where there would be greatest impact on achieving good consumer outcomes, the ICA has used the following criteria of assessment:

- (a) the change would improve treatment of customers;
- (b) the change would improve product design;
- (c) the change would improve claims experience; and
- (d) the change would improve the position of information and processes to ensure customers are kept adequately informed during and after the point of sale.

186 The ICA has sought to balance this criteria with the expected length of time required for implementation, systems changes and costs involved, any gaps in the formal regulatory regime and the impact on smaller market players and the competitive landscape. As the 2017 Review unfolded, issues arose that were not previously anticipated, or issues intersected with other legislative changes or proposals underway. In those cases, the ICA was precluded from making changes which might have resulted in an inconsistency with the law. For example, product design and distribution is an area currently subject to consultation by Treasury.

**Question 15:** *Reflecting on the changes that have been made to the Code over time, are there any trends or themes that emerge from those changes? If so, how would you describe them?*

187 Over time, the Code has been amended to seek to reflect the changing community expectations on insurers. It has become consumer-centric and focused on plain language consumer understanding. A wider range of areas are now covered by the Code, such as support for those experiencing financial hardship, those experiencing family violence, those being investigated and consumers experiencing vulnerability. The recommendations of the recent Code review introduced new layers to the Code in the form of standards and guidance, including guidance on mental health.

188 The complaints process is much more prescriptive than in the earliest versions of the Code, reflecting the need to assist consumers to understand their rights when they are not satisfied with their insurer, and supporting them through a standard industry process.

189 Code governance has also become more clear and arms-length over time. The Original Code provided for the CCC to be a committee of the ICA board, made up of the CEO of the ICA, the consumer representative on the board of the IEC, and an independent chair. The Code was to be monitored by the IEC. The current CGC is independent of the ICA, and has a prescribed role in monitoring Code compliance and imposing corrective actions for breaches.

**Question 16:** *The ICA has stated that it intends to submit the revised Code for ASIC approval, and has sought to meet the requirements of ASIC Regulatory Guide 183 (RG 183) where possible. Why has the ICA decided to submit the revised Code for ASIC approval? Will the revised Code meet the requirements of RG 183? If not, why not?*

190 In the Interim Report and Final Report following the 2017 Review, the ICA recommended that the new Code should be amended to meet the requirements of ASIC Regulatory Guide 183 (**RG 183**).

191 The ICA is of the view that ASIC approval would enhance confidence in the Code and in the insurance industry.

- 192 At the ICA Annual Forum on 7 March 2018, which I attended, ASIC Deputy Chair Peter Kell delivered a speech, indicating that ASIC believes its approval would assist to strengthen consumer confidence in the Code. It was further indicated that approval of a Code by ASIC would provide an additional marker of the quality of the Code, having met the standards of its regulatory guidance. A copy of this speech is at tab 36 of Exhibit RW-1, ICA.002.001.1018.
- 193 In line with this, the ICA has sought to meet the requirements of RG 183 and the review recommendations of the Final Report addresses gaps and areas of clarification in the Code in order to clearly address RG183. I am of the view that the recommendations in the Final Report will amend the Code to meet the minimum requirements of RG 183.
- 194 Recommendation 26 in the Final Report provides that in order to meet the requirements for ASIC approval of the Code, the Code should be amended to:
- (a) clarify that the Code is enforceable through CGC oversight and sanction powers, and through FOS taking the Code into account when determining disputes;
  - (b) enable the CGC to report systemic code breaches and serious misconduct to ASIC, and require the CGC to notify an insurer's Chief Executive that it intends to do so. The ICA will work closely with the CGC to ensure there is a common understanding of the meaning of systemic breach or serious misconduct, to provide insurers with clarity; and
  - (c) include a maximum timeframe for independent reviews in line with RG 183.
- 195 The key requirements under RG183 will be discussed in turn.
- 196 RG 183.25 provides:

*Enforceability of a code is one of the key threshold criteria for approval. It is essential that code breaches can be dealt with effectively and independently. This requires that:*

- (a) subscribers must agree to be contractually bound by the code (including by any amendments to the code over time);*
- (b) there is an independent person or body that is empowered to administer and enforce the code, including imposing any appropriate sanctions (code administrator);*
- (c) the code provisions provide that consumers have access to internal dispute resolution (IDR) processes and an appropriate external dispute resolution (EDR) scheme for any code breaches resulting in direct financial loss; and*
- (d) there is broad standing to complain about any other code breach to the independent body.*

- 197 The Current Code meets the requirement in RG.183.25(a) as Code subscribers contractually agree through a Deed of Adoption to be bound by the Code and give the CGC power to monitor and enforce compliance.
- 198 RG.183.25(b) is also met as the CGC is an independent body empowered to administer and enforce the Code. In the Final Report, recommendations will also address the requirements of RG 183.70, which provides that:

*'Subscribers must be subject to a range of sanctions for code breaches that go beyond providing compensation or rectification to individual consumers. These sanctions might include:*

- (a) formal warnings;*
- (b) public naming of the non-complying organisations;*

- (c) *corrective advertising orders;*
- (d) *fines;*
- (e) *suspension or expulsion from the industry association; and/or*
- (f) *suspension or termination of subscription to the code.*

199 The recommendations will assist to address sanction requirements, including:

- (a) the Code is to be amended to clarify that the CGC can impose sanctions on a Code subscriber to compensate a consumer for any direct financial loss or damage caused. This was a power which previously existed, but would benefit from clarification;
- (b) the Code will also be amended to clarify that the Code is enforceable through CGC oversight and sanction powers and through FOS taking Code breaches into account when determining disputes; and
- (c) the CGC is to be enabled to publish its decisions on a de-identified basis on the Code website, to assist Code subscribers to understand the CGC's interpretation of the Code's requirements.

200 RG.183.25(d) is also sought to be met by Recommendation 26, which recommends that the Code be amended to clarify that anyone can report alleged breaches to the CGC at any time.

201 Under Recommendation 27, the CGC will be enabled to report systemic code breaches and serious misconduct to ASIC. This will meet the requirements of RG183.74 which provides that '*Code administrators must remain responsible for reporting systemic code breaches and serious misconduct to ASIC.*'

202 RG 183.27 acknowledges that in most cases, subscribers will incorporate their agreement to abide by the Code by contracting directly with the independent person or body that has the power to administer and enforce the code. In some cases, subscribers will also incorporate their agreement in individual contracts with consumers. The ICA acknowledges that enforceability of the Code is a central consideration. The ICA considers that while incorporation into consumer contracts is one way to ensure robust enforceability, a robust code compliance and governance regime would also meet these requirements. The ICA's position in relation to the incorporation of the Code in consumer contracts is discussed further in response to question 17 below.

203 Finally, RG183.82 requires that '*A code must be independently reviewed at intervals of no more than three years.*' The ICA has recommended under Recommendation 27 that the Code be amended to include a maximum timeframe for independent reviews in line with RG183. The ICA has formed the view that the review process should commence 3 years from the date that the transition period to the new Code commences, rather than when the Code is fully adopted, so that the process of transition does not delay reviewing the Code.

204 The ICA intends to continue close consultation with ASIC as drafting of the new Code is finalised.

**Question 17:** *Does the ICA support the incorporation of the Code into contracts with consumers? If not, why not?*

205 The ICA does not support the incorporation of the Code into consumer contracts. The ICA formed the view that it was not desirable to expose members to potential actions for breach of the Code based on breach of contract, breach of the duty of utmost good faith under the Act or

misleading or deceptive conduct under the Corporations Act or ASIC Act, for the reasons set out below.

- 206 One of the key benefits of industry self-regulation is its flexibility. In a submission to the ASIC Enforcement Review on 26 July 2017 (at tab 37 of Exhibit RW-1, ICA.002.001.1013), the ICA noted the following in relation to the incorporation of the Code into consumer contracts:
- (a) incorporation of the Code into consumer contracts could reduce the Code's flexibility and lead to a Code that is reduced to minimal, base level prescriptive standards;
  - (b) if subscribers are required to make the Code enforceable at law through their contracts with customers, flexibility could well end up being stripped out and the Code reduced to prescriptive service standards;
  - (c) it could weaken the ability of the industry to respond in the Code to evolving issues such as family violence or mental health;
  - (d) the Current Code's enforceability mechanisms are robust without the need for incorporation into consumer contracts;
  - (e) Code subscribers are contractually bound to the Code's provisions through the entering into a deed of adoption. This gives the CGC the power to monitor and enforce compliance with the Code. The CGC is able to apply a range of sanctions for Code breaches including ordering that corrective action be taken, naming insurers and requiring financial redress. Further, FOS (soon AFCA) as the EDR provider for the scheme has the power to have regard to applicable industry codes or guidance as to practice when determining a dispute; and
  - (f) the current Code scheme delivers good consumer outcomes by providing an efficient, accessible and affordable way for consumers to bring disputes at no cost to them. By contrast, the incorporation of the Code into consumer contracts would be of minimal marginal benefit to consumers as they would still be required to seek court action, which can be costly and time consuming.

**Question 18:** *Since 1 July 2013, has the Code Governance Committee imposed any sanctions under the Code? If so, provide a table that sets out:*

- (a) *the date on which the sanction was imposed;*
- (b) *the entity on which the sanction was imposed;*
- (c) *a brief description of the nature of the sanction;*
- (d) *a brief description of the conduct that gave rise to the sanction; and*
- (e) *whether the sanction was required to be kept confidential. Reflecting on the changes that have been made to the Code over time, are there any trends or themes that emerge from those changes? If so, how would you describe them?*

207 The CGC is the independent body responsible for monitoring Code subscribers' compliance with Code standards.

208 The Code Governance Committee Association (**CGCA**) was established in 2014 for the purpose of appointing an independent CGC (which operates as a committee of the CGCA). The CGCA

is an incorporated association with 6 members, 3 members being appointed by the Insurance Council and 3 members appointed by the Financial Ombudsman Service (**FOS**), being consumer representatives. The CGC was established in 2014 and is independent to the ICA. The Constitution for the CGCA is at tab 38 of Exhibit RW-1, ICA.002.001.1955.

209 The CGC has an independent Chair, a consumer representative and an insurance industry representative. As part of its duties, the CGC is empowered to impose sanctions on Code subscribers under clause 13 of the Current Code. Specific information on sanctions is held by the CGC.

210 The CGC is made up of three independently appointed members, being:

- (a) a consumer representative;
- (b) an industry representative; and
- (c) an independent chair.

211 The current CGC is comprised of:

- (a) Ms Lynelle Briggs, AO;
- (b) Ms Brenda Staggs; and
- (c) Mr Andy Cornish.

212 The constitution, functions and powers of the CGC are set out in its Charter, and include:

- (a) receiving compliance reports from Code subscribers;
- (b) receiving reports of possible Code breaches from the Financial Ombudsman Service;
- (c) receiving reports of alleged Code breaches from consumers;
- (d) investigating reports of alleged Code breaches and making determinations;
- (e) agreeing with Code subscribers any corrective measures to remedy Code breaches and monitoring their implementation;
- (f) imposing sanctions on Code subscribers if breaches are not corrected, such as a requirement that particular rectification steps be taken, that Code subscribers place corrective advertising, and/or publication by the CGC of a Code subscriber's non-compliance; and
- (g) publishing an Annual Report of the activities of the CGC.

A copy of the CGC Charter is at tab 39 of Exhibit RW-1, ICA.002.001.0872.

213 The solicitors for the ICA have written to the Office of the Solicitor Assisting the Commissioner to direct the Commissioner to the best contact at the CGC, who would be able to provide detailed information about the CGC.

## Part D – Regulation of the insurance industry

**Question 19:** *What does the ICA see as being the advantages of self-regulation of the insurance industry?*

- 214 There are number of advantages to self-regulation, a view which is informed by the ICA's experience in the general insurance industry over a period of more than 40 years. Self-regulation promotes a, solutions-focused, dynamic and innovative approach in responding to trends, developments and issues in a timely manner as they arise.
- 215 An important attribute of self-regulation is the ICA's ability to keep up-to-date with developments in natural disasters response efforts and engage with industry members and relevant Government stakeholders to develop dynamic, coordinated and relevant responses to trends, developments and issues facing the general insurance industry and society more broadly. For example, through the ICA's 2017 Review of the Current Code and related ongoing consultations (described in Question 13), the ICA has been able to engage with members, Government and other key stakeholders about issues that are becoming an increasing focal point for society and relevant to the general insurance industry, such as issues related to mental health and family violence.
- 216 The ICA recognises that self-regulation is not, of itself, a complete solution and, as with any regulatory model or framework, it has its shortcomings and disadvantages. These are discussed in response to Question 20.
- 217 The limitations on the effectiveness of any self-regulated industry are primarily driven by the election of those within it to participate, the percentage of those within the particular industry who agree to adhere to a particular code. The same is true for the insurance industry and the Code. The ICA's current membership represents over 90% of all general insurance business transacted in Australia. In addition, 5 non-ICA members have also adopted the Code. This high membership rate evidences an acceptance amongst the substantial majority of the insurance industry of the need to be bound by, and accountable to, a set of rules and regulations and a practice of behaviour to drive better outcomes for customers.
- 218 To be successful, any industry wide regulatory model, including self-regulation, needs a proper structure and strong foundation to support it. This foundation must be built on frameworks, standards, safeguards, processes and mechanisms for independent review to ensure self-regulation is not only responsive but responsible to industry, the market and broader society. Industry self-regulation requires best practice guidelines and benchmark standards together with a genuine commitment from the relevant industry participants to best practice and good governance. The ICA accepts that while issues of concern may arise, self-regulation is an effective model that is working responsively to seek to meet the needs of the industry and its key stakeholder, the consumer.
- 219 Industry codes provide a strong incentive for industry members to not only meet, but exceed, the relevant benchmarks in order to attract customers and expand market share. As set out above, the relevant standards for the general insurance industry are encapsulated in the Code.
- 220 As the representative body for the general insurance industry, the ICA actively promotes the achievements of best practice and benchmark standards within the general insurance industry, and in the publication and management of the Code. As described in Part C above, the Code was designed and implemented with the objective of raising customer service standards in the Australian general insurance industry and protecting the rights of policyholders.

221 It is the experience of the ICA that reforms and initiatives are implemented more quickly than reforms progressed through formal legislative processes, which are slow and can often take many years to implement. For example, the recommendations of the Cameron/Milne Review in relation to the *Insurance Contracts Act 1984* (Cth) (**Insurance Contracts Act**) were reported in 2004 but were not legislated until 2013.

222 On 10 September 2003, the Government announced that it would be undertaking a comprehensive review of the Insurance Contracts Act. Mr Alan Cameron AM and Ms Nance Milne were appointed to a review panel to conduct the review. The objective of the review was to make recommendations aimed at improving the overall operation of the Insurance Contracts Act through correcting deficiencies and clarifying ambiguities in its operation. Following a process of public consultation and submissions, two reports were released, which made 38 recommendations. Some of the recommendations address the following:

- (a) best practice guidelines relating to claims handling processes by insurers should be developed and included in relevant industry codes;
- (b) a breach of the duty of utmost good faith should be both a breach of an implied contractual term and a breach of the Insurance Contracts Act;
- (c) in other cases of bundled insurance contracts, the exceptions in subsection 9(1) of the Insurance Contracts Act should apply to each aspect of the bundled cover as if they were included in separate insurance contracts;
- (d) the Insurance Contracts Act should be amended to clarify its intended territorial application to all contracts issued by direct offshore foreign insurers to Australian insureds or in respect of Australian risks;
- (e) the provisions in the Insurance Contracts Act that permit alternatives to direct written communication between insurers and insureds should be harmonised, to the extent reasonably practicable, with equivalent provisions under the *Corporations Act 2001* (Cth);
- (f) ASIC should be given a statutory right to intervene in any proceeding relating to matters arising under the Insurance Contracts Act;
- (g) the Insurance Contracts Act should be amended so that the insurer must provide to the insured, at the time when the insurance policy is issued, a reminder that the duty of disclosure obligations continue until the time the policy is entered into; and
- (h) section 32 of the Insurance Contracts Act should be amended so that it is clear that remedies for non-disclosure and misrepresentation remain available in relation to a misrepresentation or non-disclosure that occurs between the time an insured becomes a member of the scheme and applies for cover.

223 Following the release of these reports and further public consultation and as a result of the review, the *Insurance Contracts Amendments Bill 2010* was prepared.

224 While the Code has been, and is, subject to considered review and reform, its dynamic framework ensures the industry, and the ICA, are able to implement changes that recognise and address key issues that arise from time to time that impact the community and require a response. For example, following the major natural disasters in Queensland, NSW and Victoria in 2011, the general insurance industry recognised and responded quickly to community concerns about claims handling timeframes. The industry committed itself to achieving faster clearance timeframes for the handling of claims relating to natural disasters and was able to implement these changes within 6 months.

- 225 An advantage of self-regulation is the ability for the general insurance industry to be targeted in its strategy and direction; an important consideration in the context of broader governing laws and financial services regulations and guidelines. The Code has been used to focus industry members on commitments that are relevant to general insurance products.
- 226 The most recent review of the Code will result in commitments and guidance that respond to issues that are product-specific, for example, add-on insurance products. Industry-led reforms also have the benefit of industry expertise in systems and processes that drive efficient and effective solutions.
- 227 In the ICA's experience, self-regulation offers an effective tool in addressing complex issues. This is particularly the case for initiatives such as the general insurance industry's approach to customers impacted by family violence, where aspirational standards are more likely to drive positive outcomes. Effective disclosure promotes a more flexible self-regulation model as it can address complex behaviours more quickly and informally than formal or prescribed regulation. It is also able to incorporate a more experimental and iterative process of learning through consumer testing and trialling.

**Question 20:** *What does the ICA see as being the disadvantages of self-regulation of the insurance industry?*

- 228 The ICA recognises that no model of regulation is without its limitations, and that self-regulation requires the appropriate infrastructure and a strong commitment from member bodies to be effective and successful.
- 229 The alternative to self-regulation is a compulsory compliance and regulatory reporting regime, which may be able to identify industry-wide trends more quickly through such reporting. Insurers generally only have visibility over issues that arise in the context of their own businesses, such that emerging cross-industry issues may not become readily apparent. A self-regulatory model requires effective coordination through a representative body to ensure that issues and trends are identified as they arise and addressed, if required, in a timely way.
- 230 Further, the ICA has found that a cooperative and collaborative approach with regulators and other stakeholders such as governments through ongoing consultation and engagement to identify and address emerging issues is a useful model to counter the disadvantages noted above. For example, cross-industry issues in the sale of add-on insurance were identified and are being effectively addressed through this process, with the general insurance industry working with ASIC to improve consumer outcomes through a combination of voluntary and regulatory actions and responses.
- 231 Australia's competition law framework, restricts matters on which the industry may initiate dialogue. Whilst the purpose of this is to ensure against anti-competitive practices in the market, a side effect is the potential to limit the ability of industry participants who are competitors to respond in a coordinated fashion to particular challenges. The general insurance industry's recent attempt to cap commissions paid to motor dealer distributors of add-on insurance products is an example of where Australia's competition law regime has presented barriers to uniform industry action. The ICA considers this is capable of being overcome by working with the relevant regulatory bodies such as the ACCC to seek the necessary authorisations to enable industry members to work with industry consumers to achieve good outcomes such as caps on commissions. In the absence of such engagement, such conduct may give rise to breaches of the exclusionary and cartel provisions in Australia's competition laws. Notwithstanding the ACCC subsequently rejected the insurance industry's authorisation request in respect of this issue, the process provided a transparent attempt to seek a uniform industry approach to capping commissions.

**Question 21:** *What is the ICA's response to recommendations 18 to 22 of the ASIC Enforcement Review Taskforce?*

232 The ICA is aware of, however has not yet developed, an industry response to the ASIC Enforcement Review Taskforce recommendations. As noted previously (in Question 17 above), the ICA's views on relevant issues are provided in its submission to the ASIC Enforcement Review Taskforce. A copy of the ICA's submission appears at tab 37 of Exhibit RW-1, ICA.002.001.1013.

**Question 22:** *Leaving the Code to one side, does the ICA consider that existing laws regulating the insurance industry are sufficient to protect the interests of consumers? If so, why? If not, why not?*

233 The existing legislative framework regulating the insurance industry is robust and provides protections for consumers. The Insurance Contracts Act in particular, provides protection to consumers by requiring contracts of insurance to be based on "*the utmost good faith*" and renders any contractual provision void when reliance upon it would be a breach of this duty. Amendments made to the Insurance Contracts Act in 2013 further bolstered these protections by empowering ASIC to intervene in any proceedings relating to a matter under the Insurance Contracts Act. This provides ASIC significant oversight and enforcement powers to punish insurers, including the withdrawal of an insurer's Australian Financial Services Licence (**AFSL**). Insurance is an important example of government creating a comprehensive set of rights and obligations specifically around contracts of insurance.

234 As well as the obligations under the legislative framework, general insurance products are also subject to the comprehensive financial services regulatory regime under Chapter 7 of the *Corporations Act 2001* (Cth). This includes the obligation to have in place internal and external dispute resolution processes, and arrangements for compensating retail clients for loss or damage suffered because of breaches to financial services law. In parallel to this, it is also important to recognise the critical role of Australia's robust prudential regulatory framework in instilling confidence to general insurance policyholders confidence that the promises made to them will be kept.

235 The ICA acknowledges that ASIC's recent investigations into the sale of add-on insurance have highlighted issues with the way some insurance products are designed and distributed since financial services reform in 2000. The regulatory framework principally had focused on product disclosure to ensure that consumers purchased products appropriate to their needs. This regime is currently undergoing substantial review and change. As recommended by the Financial System Inquiry (**FSI**) and accepted by the Government, financial services product issuers and distributors will soon be subject to additional obligations to ensure that product design and distribution processes result in appropriate consumer outcomes. ASIC will also be given product intervention powers that will substantially enhance its regulatory oversight. These new obligations will substantially transform the existing regulatory framework, and minimise the risk of inappropriate conduct as identified for add-on insurance products.

236 The ICA is aware of concerns about the adequacy of ASIC's powers over claim handling. This is explored further in the response to Question 25. However, the ICA notes that insurers' claims handling obligations under the Code (section 7) are extensive.

**Question 23:** *Does the ICA consider that the current balance between self-regulation and external*

*regulation of the general insurance industry serves the interests of consumers? If so, why? If not, why not?*

- 237 The balance between self-regulation and external regulation in the general insurance industry has generally served the interests of consumers well. As discussed in response to question 20, the ICA considers that self-regulation complements the critical role that formal regulation plays in enforcing minimum prudential and conduct requirements. As noted in Question 20 above, the ICA has established a cooperative relationship with regulators to develop a constructive model that utilises a mix of formal and self-regulatory actions in responding to key issues and trends facing the general insurance industry. The ICA has also engaged extensively with ASIC on its most recent review into the Code, and ASIC has made substantial contributions to the proposed new Code obligations on investigation standards, mental health, vulnerable consumers and add-on insurance. The ICA believes that it is critical for cooperation and collaboration to continue.
- 238 The ICA acknowledges that there may be a greater role for self-regulation to play to address areas of evolving community expectations and to ensure those expectations are understood and can be met, where possible. The next iteration of the Code will incorporate aspirational standards on topics that have emerged as important issues to the community, such as family violence, mental health and vulnerable consumers.

**Question 24:** *Does the ICA support the Australian Government's proposal to extend the unfair contract terms regime to insurance contracts? If so, why? If not, why not?*

- 239 Australian consumers are protected by a comprehensive legal and regulatory regime, as described further in response to question 22. However, the ICA recognised and acknowledged that unfair contract terms (UCT) protections for insureds requires further consideration and development (see below in paragraph 240).
- 240 The ICA has previously made submissions in relation to the extension of UCT protections in:
- (a) contracts of general insurance, in response to the *Exposure Draft of the Insurance Contracts Amendment (Unfair Terms) Bill 2013*, dated 4 June 2013 (at tab 40 of Exhibit RW-1, ICA.002.001.1069);
  - (b) small business contracts, in response to the Treasury consultation paper *Extending Unfair Contract Term Protections to Small Businesses*, dated 31 July 2014 (at tab 41 of Exhibit RW-1, ICA.002.003.0324);
  - (c) small business contracts, in response to the Financial System Inquiry, dated 31 March 2015 (at tab 42 of Exhibit RW-1, ICA.002.003.0337);
  - (d) marine insurance contracts, in response to an invitation to apply for an exemption of marine insurance contracts from small business unfair contract terms law, dated 29 February 2016 (at tab 43 of Exhibit RW-1, ICA.002.001.1061);
  - (e) contracts governed by the *Insurance Contracts Act 1984*, in response to the *Australian Consumer Law Review Issues Paper* of March 2016, dated 27 May 2016 (at tab 44 of Exhibit RW-1, ICA.002.001.1041); and

- (f) contracts governed by the *Insurance Contracts Act 1984*, in response to the *Australian Consumer Law Review Interim Report*, dated 9 December 2016 (at tab 45 of Exhibit RW-1, ICA.002.001.1053).

241 The concerns expressed by the ICA in relation to the proposal to extend the UCT regime to contracts of insurance as set out in the submissions above, include:

- (a) statistical data points to the effectiveness of the consumer protection currently provided to general insurance policyholders. For example, as detailed in the *General Insurance in Australia Report* released by the General Insurance Code Governance Committee for 2016-17, 40.94 million retail general insurance policies were sold that year in Australia. Of the 4.02 million claims lodged, 95.8% were accepted and 27,919 complaints involved an internal dispute raised with the insurer;
- (b) acknowledging that, in regards to some sectors of the economy, it may be beneficial for UCT protections to be extended to small businesses, in relation to general insurance, consumers are well protected from UCT in relation to the insurance they purchase by the *Insurance Contracts Act*, supplemented by the *Corporations Act 2001* and the *ASIC Act 2001*;
- (c) to apply the unfair contract law remedy to general insurance would result in unwarranted layering of regulatory requirements on insurers and would lead to operating inefficiencies, the cost of which ultimately is passed on to the insured;
- (d) the application of an unfair contract law remedy to insurance contracts will create uncertainty in the application of insurance terms to claims, which may lead to further disputes resulting in inconvenience and delay, increasing costs and possibly premiums;
- (e) amendments made to the *Insurance Contracts Act* in 2013 significantly strengthened the protections available to insureds with respect to potential breaches of the duty of utmost good faith, a breach of which would enable ASIC to pursue the insurer under the *Corporations Act*; and
- (f) the resulting uncertainty as to whether a term necessary to limit the insurer's risk could be found void may lead to increases in the cost of insurance and therefore higher premiums.

242 Notwithstanding the above, and since June 2013, the ICA has over the last 18 months further explored the area of UCT in order to reach an outcome which would allow consumers to challenge insurance contracts for unfairness, while not undermining the commercial certainty necessary for the stable and sustainable long term performance of the general insurance industry.

243 The ICA nevertheless remains concerned that the elements of the model proposed for insurance in the *Proposals Paper* released by Commonwealth Treasury on 27 June 2018 may operate more restrictively, and generate more uncertainty than the current UCT regime (in the *ASIC Act* and the equivalent provisions in the *Australian Consumer Law*) does for other economic sectors. The ICA is currently developing a submission on the *Proposals Paper*, due to be provided to the Treasury by 24 August 2018. While there are a number of aspects of the approach proposed by Treasury which are of concern to industry, two preliminary difficulties have been identified:

- (a) under the proposal advocated in the *Proposals Paper*, the 'main subject matter of the contract' would be defined narrowly as terms that describe what is being insured. Under this approach, the terms of an insurance contract setting out the risks covered would be reviewable, with the insurer required to justify why those terms are necessary to protect their legitimate interests. This goes to the commercial bargain at the heart of the contract and is more onerous than what is applied to other business sectors. For example, the

terms of a standard form contract for sale of a car relating to the make, model, finish, and extras of the car being sold would not be reviewable for unfairness. The impact of the uncertainty created by the proposed model on insurers will be significant. If insurers cannot rely on the terms forming the basis of their contracts, they will need to reprice the risks being underwritten and there will be significant implications for their reinsurance arrangements and the capital they need to hold. In turn, this may affect the scope of policy coverage, leading to higher premiums for consumers.

- (b) Treasury has also proposed that, when determining whether a term is unfair, a term will be reasonably necessary to protect the legitimate interests of an insurer if it reasonably reflects the underwriting risk accepted by the insurer in relation to the contract and it does not disproportionately or unreasonably disadvantage the insured. While the need to manage underwriting risk is central to many terms of an insurance contract, it is not the only factor taken into account. Furthermore, making the test for protection of legitimate commercial interests dependent on the impact on the particular insured, and not the whole class of insureds, has the potential to undermine the nature of insurance and create significant contractual uncertainty. It would often be the case that the theoretical cost to the insurer of providing cover to a particular consumer (say for example for termite damage) would be relatively modest but the impact to that consumer of rectifying the damage could be significant.

244 Submissions in respect of these identified difficulties have not yet been finalised or received stakeholder approval so may be subject to further review and consideration.

245 European Council Directive (93/13/EEC) on the treatment of unfair terms in consumer contracts includes the following exemption for insurance contracts:

*“...the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;”*

246 The ICA is of the view that adoption in Australia of the European approach to the main subject matter of the contract would allow insureds to challenge terms which unfairly prevent them from receiving the protection they believed they had purchased, while giving insurers certainty that the commercial basis of the insurance contract would not be undermined. As highlighted in the Proposals Paper, the European Commission's 2017 evaluation of its consumer directives concluded that the protections remain fit for purpose.

247 Furthermore, the ICA is of the view that it is unnecessary to tailor the definition of unfairness in relation to insurance contracts and that the generic approach taken in the ASIC Act and Australian Consumer Law should apply.

**Question 25:** *Does the ICA support the removal of the exception in reg 7.1.33 of the Corporations Regulations 2001 (Cth), or otherwise support the extension of ASIC's powers in relation to the handling and settlement of insurance claims? If not, why not?*

248 The ICA acknowledges that Treasury is considering the merits of the removal of the exception in reg 7.1.33 of the *Corporations Regulations 2001* (Cth) in relation to handling insurance claims and will consult with relevant stakeholders. In this regard, depending on the problems identified, the ICA is open to considering the need to remove the exception in relation to general insurance.

249 The handling of insurance claims is specifically excluded from the definition of financial service in the Corporations Act. The ICA understands that the exception was originally designed to

allow insurers to have discussions with insureds during claim time without triggering financial advice rules. For example, the personal advice rules may be triggered by discussions between claims management staff and the insured around the quantum of a claim. Applying the financial advice regime to claims handling would make existing processes more costly, without any anticipated benefits for consumers. The exception was also initially put in place in recognition of the impractical nature of capturing within the regulatory regime the range of third parties that are also involved in the claims management chain, for example, smash repairers.

250 The ICA understands that ASIC has recommended that the Government remove the exception so that claims handling will be subject to the broad standards of conduct that apply to other aspects of an insurer's conduct, such as:

- (a) the duty of utmost good faith in the Insurance Contracts Act in respect to claims handling or settlement of a potential claim; and
- (b) standards on claims investigations which are recommended for inclusion in the Code.

251 The ICA will work with members to develop a position on removal of the exception or the extension of ASIC powers once Treasury has issued a consultation paper setting out the issues and resolution options.

Dated: 27 August 2018

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Robert William Whelan

**Annexure A**

- 1     AIG Australia Limited
- 2     Aioi Nissay Dowa Insurance Company Australia Pty Ltd (Adica)
- 3     Allianz Australia Insurance Limited
- 4     Ansvar Insurance Limited
- 5     ANZ Lenders Mortgage Insurance
- 6     AonBenfield Limited
- 7     Assetinsure Pty Limited
- 8     Auto & General Insurance Company Limited
- 9     Eric Insurance Limited
- 10    Avant Insurance Limited
- 11    Berkshire Hathaway Specialty Insurance Company
- 12    Catholic Church Insurance Limited
- 13    Chubb Insurance Australia Limited
- 14    Commonwealth Insurance Limited
- 15    Credicorp
- 16    Employers' Mutual Limited
- 17    Factory Mutual Insurance Co.
- 18    General Reinsurance Australia Limited
- 19    Genworth Financial Mortgage Insurance Pty Limited
- 20    Guild Insurance Limited
- 21    Guy Carpenter & Company Pty Limited
- 22    Hallmark General Insurance Company Limited
- 23    Hollard Insurance Company Pty Limited, (The)
- 24    Insurance Advisernet Australia Ltd
- 25    Insurance Australia Group Limited
- 26    Insurance Manufacturers of Australia Pty Limited
- 27    Lawcover Insurance Pty Limited
- 28    Lloyd's Australia Limited

- 29 MDA National Insurance Pty Limited
- 30 Medical Insurance Australia Pty Limited
- 31 MIPS Insurance Pty Limited
- 32 Mitsui Sumitomo Insurance Limited
- 33 Munich Holdings of Australasia Pty Limited
- 34 NTI Limited
- 35 OnePath General Insurance Pty Ltd
- 36 QBE Insurance (Australia) Limited
- 37 RAA Insurance Limited
- 38 RAC Insurance Pty Limited
- 39 RACQ Insurance Limited
- 40 RACT Insurance Pty Limited
- 41 Sompo Japan Insurance Inc
- 42 Suncorp Group Limited
- 43 Swiss Reinsurance Company Limited
- 44 Tokio Marine & Nichido Fire Insurance Co Limited
- 45 Virginia Surety Company Inc
- 46 Westpac General Insurance Limited
- 47 Willis Reinsurance Australia Limited
- 48 XL Insurance Company SE
- 49 Youi Pty Limited
- 50 Zurich Financial Services Australia Limited

**Annexure B**

- 1 AAI Limited
- 2 AI Insurance Holdings Pty Ltd, with effect from 1 September 2018
- 3 AIG Australia Limited
- 4 Aioi Nissay Dowa Insurance Limited
- 5 Allianz Australia Insurance Limited
- 6 Ansvar Insurance Limited
- 7 ANZ Lenders Mortgage Insurance Pty Ltd
- 8 Assetinsure Pty Ltd
- 9 Auto & General Insurance Company Limited
- 10 Berkshire Hathaway Speciality Insurance Company
- 11 Catholic Church Insurance Ltd
- 12 Chubb Insurance Company of Australia Ltd.
- 13 Commonwealth Insurance Limited
- 14 Credicorp Insurance Pty Ltd
- 15 Defence Service Homes Insurance Scheme
- 16 Eric Insurance Ltd
- 17 Factory Mutual Insurance Company
- 18 Genworth Financial Mortgage Insurance Pty
- 19 Guild Insurance Limited
- 20 Hallmark General Insurance Company
- 21 Insurance Advisernet Australia Pty Limited
- 22 Insurance Australia Limited
- 23 Insurance Manufacturers of Australia Pty
- 24 LawCover Insurance Pty Limited
- 25 Lloyd's Australia Limited
- 26 Mitsui Sumitomo Insurance Pty Ltd
- 27 Munich Holdings of Australasia Pty Ltd
- 28 NTI Limited

- 29 OnePath General Insurance Pty Ltd
- 30 QBE Insurance Australia Limited
- 31 QBE Lender's Mortgage Insurance Ltd
- 32 RAA Insurance Pty Ltd
- 33 RAC Insurance Pty Ltd
- 34 RACQ Insurance Limited
- 35 RACT Insurance Pty Ltd
- 36 Sompo Japan Nipponkoa Insurance Inc
- 37 Southern Cross Benefits Limited
- 38 Sunderland Marine Mutual Insurance Company Limited
- 39 Swiss Re International SE
- 40 The Hollard Insurance Company Pty Ltd
- 41 Tokio Marine & Nichido Fire Insurance Co Ltd
- 42 Virginia Surety Company Inc
- 43 Westpac General Insurance Limited
- 44 XL Insurance Global Risk
- 45 Youi Pty Limited
- 46 Zurich Financial Services Australia Limited