

Submission from Peter Mair to Senate Standing Committee on Economics

ASIC'S PERFORMANCE

THE PERILS OF REGULATORY FORBEARANCE: ASIC v. NRMA INSURANCE

ASIC's reputation generally, as a regulator, has long been and remains appalling – not least its repeated failures to properly protect the interests of consumers: this submission documents a particular illustration.

For some years now ASIC, while well aware of a malpractice at NRMA Insurance, has inexplicably chosen to forbear rather than deal with the matter forthrightly as the community would expect it to do.

Ideally, ASIC would ensure that NRMA customers are dealt with transparently and not secretly penalized -- and that the damage now otherwise done is made good. As is, the situation is a mess – there is nothing on the public record to inform and alert NRMA customers to the reality, and prospect, of being secretly penalized contrary to prominently advertised entitlements to maximum no-claim discounts 'for life'.

This inquiry aside, parliamentary committee hearings intended to hold ASIC accountable seem to be largely ineffective. Similarly, and specifically on the NRMA matter, ASIC's working relationship with the Financial Ombudsman is also apparently ineffective. Taking ASIC and FOS together in this instance, it seems they can't or won't do what the community would fairly expect them to do – and they are apparently accountable for not doing so.

ASIC's responses to repeated complaints -- to its Chairman -- about its management policies and practices in the NRMA matter, border on disdainful – justice delayed is justice denied to thousands of affected NRMA customers.

One reply from ASIC pointed to confidentiality obligations: incredibly (?), Section 127 of the ASIC Act was said to limit disclosure of the details of NRMA's reports of its 'compliance' with enforceable undertakings given to ASIC. Left hanging in the air is the obvious question of what ASIC does when it finds an ongoing problem with consequences widely disadvantageous to the community – not speaking up, not requiring prompt and effective remedial action, are hardly acceptable answers. ASIC's culture needs to be reoriented.

Looking ahead, one option, following a US initiative, would be a new consumer financial protection agency to oversee ASIC, and other regulators. Practically, a single in-principle question to be addressed by regulators, and by financial institutions, would apply the golden rule – is the likely outcome of these institutional practices compatible with what a reasonable person would fairly expect for themselves, their family and their friends? -- a 'no' means 'not on'.

Overview

NRMA Insurance is deliberately deceptive when, contrary to a promised entitlement to a 'maximum no-claim discount for life', motor vehicle policyholders entitled to that maximum discount are secretly penalised for five years if they make an at-fault claim.

NRMA, while well aware of these regulatory concerns generally, and specific Ombudsman orders to refund penalty premiums secretly levied on complainants, has made no meaningful change to its deceptive practices. It has not voluntarily taken the initiative to address the issues forthrightly – not only to stop the deception but, as well, disclosing penalties secretly levied and refunding penalty premiums secretly taken.

Having chosen to dig in, the hole the NRMA has dug is ever deeper. The regulatory reaper should have dealt with this intransigence – it has not.

ASIC has been well aware of this deception for some years but, inexplicably, it did not address the problem effectively at the outset – in 2006, ASIC should have clearly informed the public of NRMA's deceptive practice; required NRMA to stop the deception; required refunds of penalty premiums unfairly taken and, henceforth, required NRMA to deal with its customers openly and transparently. ASIC did not do any of that.

Eventually a couple of NRMA policyholders complained to the Financial Ombudsman (FOS) after realising that they had been charged premium penalties secretly and quite contrary to their annually confirmed entitlement to the 'maximum no-claim discount for life'.

FOS assessed the NRMA's practice; decried it as deceptive behaviour, clearly contrary to industry codes and standards, and required that the penalty premiums taken be refunded to the complaining policyholders. Unfortunately, while its determinations are published, the FOS does not identify institutions at fault and it is apparently able only to order refunds be made to policyholders that complain personally. Nor does FOS make any open public comment on the character of malpractices it discovers – a reticence that protects the secrecy.

.....and that is the first catch 22 here: 'no one' knows about the NRMA's deception because, first, the customers being secretly penalized would have no reason suspect that their entitlement to the 'maximum no claim discount for life' was not being respected. There is nothing in NRMA policy renewal notices, otherwise boldly detailing the discount entitlements granted, that alerts affected policyholders to a personal penalty premium secretly levied on them and secretly buried in the quoted gross premium.

The position of FOS – still a privately funded industry body -- is perhaps partly defensible in terms of protecting the privacy of 'members' of a scheme intended to resolve specific complaints. Beyond that, protection of the public interest should flow from FOS reports to ASIC identifying, for attention, specific malpractices having wide implications. That was the apparent intention recorded in the benchmark FOS decision requiring NRMA to refund penalty premiums paid. However, it is not clear that FOS passed this NRMA ball to ASIC and some initial irresponsibility on the part of FOS may need to be addressed.

Whatever, ASIC has the primary regulatory responsibility to deal with the NRMA's deceptive practices. Not only did ASIC not deal with the matter properly at the outset in 2006, well before FOS got involved, it has inexplicably still not responded properly. Put sharply, the NRMA's deception of its customers continues in spite of the FOS determination finding that NRMA was deceptive and ordering refunds – knowing this, ASIC should have asked NRMA to correct the practice and redress the consequences for all affected customers.

Asked ‘why not’, ASIC’s responses to me fly in the face of this predictable expectation: for some two years now, ASIC has been saying it is engaged in a general review of industry practices in relation to ‘no-claim discounts’. I am recently advised that this review report is being finalized and is expected to be published by end September.

I will be interested to infer from this review, how ASIC reconciles, with its regulatory responsibilities, its failure to deal with the NRMA matter properly at the outset or subsequently -- and, in my mind, the forbearance to an NRMA deserving immediate censure.

There are important issues of principle and good practice to be addressed in relation to ASIC, and FOS, separately and collectively – NRMA’s deceptive behaviour should not have happened and, once discovered, it should have been exposed and fixed, not kept hidden and allowed to continue.

Supplementary comments with supporting documentation follow.

Supporting documentation

2006

(i) What did ASIC intend to happen?

An ASIC media release 06-346 dated 28 September 2006 – see below -- has much in common with my assessment of the underlying issues as outlined above, including requiring that NRMA correct the behaviour that ASIC itself then said was misleading and deceptive.

The media release set down a plan for IAG (the Insurance Australia Group responsible for NRMA) to deal with the issue. What happened next is a mystery.

Recently, asked to disclose subsequent developments, ASIC claimed confidentiality for the information provided by NRMA when reporting the outcome of the implemented plan. Nonetheless, ASIC does say that ‘NRMA’ -- “worked cooperatively to resolve the concerns that ASIC had identified” and ‘We can confirm that ‘NRMA’ – “addressed all of ASIC’s concerns” and otherwise did as it was required to do.

Read it – see what you think.

In reflecting on this media release, keep in mind an obvious rejoinder – that, if NRMA had corrected the problem as ASIC then says it did, why has the problem not only persisted to this day but, along the way, and some 5 years later, the Financial Ombudsman determined that the problem of NRMA’s deception not only remained but ordered NRMA to refund penalty premiums to the customers that complained.

As is, the twain meet and ASIC’s announcement of the death of the NRMA’s deceptive behaviour was premature. Bluntly, there is something seriously amiss with ASIC’s understanding and handling of the NRMA matter in 2006.

Ask ASIC to account for its forbearance in 2006 and its continuing incompetence.

- ASIC's 2006 media release:

Insurance Australia Group (IAG) [= NRMA] will make changes to advertising materials and policy documents for comprehensive car insurance in response to concerns raised by ASIC.

IAG has clarified the use of the words 'Maximum No Claim Discount For Life' in advertising materials and policy documents for comprehensive car insurance.

ASIC was concerned that IAG's advertisements and other disclosure documents were misleading or deceptive, or were likely to mislead or deceive. NRMA Insuranceadvertised Maximum No Claim Discount For Life in many of its marketing campaigns.

IAG has agreed to take a number of steps including making significant changes to their documentation, publishing advertisements in major newspapers and setting up a dedicated telephone line to handle enquiries.

.....

Maximum No Claim Discount For Life is a policy feature available to many customers of NRMA Insurance..... It seeks to reward eligible customers by allowing them to retain the maximum no claim discount offered, even if the customer makes an at-fault claim. No claim discounts up to 65 per cent are offered.

ASIC's concerns

ASIC was concerned that NRMA Insurance's advertising materials and product disclosure statements did not make it clear that the premiums payable by customers who qualify for Maximum No Claim Discount For Life policies are affected by the claims and incident history of the drivers of the insured vehicle. That is, although customers retained the 65 per cent discount for the duration of their insurance, claims and incidents affect the base premium calculation and could lead to an increase in the premium. Any change in the base premium applies from the time of the next policy renewal.

ASIC considered that people with a Maximum No Claim Discount For Life policy would not expect to have an at-fault claim considered in the calculation of a base premium.

ASIC's Executive Director of Enforcementwarned that marketing slogans should be carefully supported by clear and accurate disclosures.

'Insurance companies must be clear about the policy features and exemptions contained in their marketing messages, particularly where definitive statements are made about the level and duration of a discount. We won't hesitate to take corrective action where this does not occur'.....

Agreed steps

IAG has worked constructively and cooperatively to resolve ASIC's concerns, and has:

- ***agreed to publish newspaper advertisements in major newspapersto provide early disclosure of the issue.***
- ***reviewed and changed its advertising materials and website;***
- ***prepared a supplementary product disclosure statement to be issued to new customers and to existing customers at the time of renewal;***
- ***agreed to set up a dedicated telephone enquiry line and website pages to provide further information and assistance to customers; and***
- ***agreed to waive cancellation fees for customers who wish to cancel their comprehensive car insurance policies because they misunderstood how the Maximum No Claim Discount For Life feature worked.***

ASIC has issued a direction under the Corporations Act 2001 which requires Insurance Australia Limited to provide reports to ASIC detailing the number of enquiries it receives about this issue.

(ii) What did not happen?

The problem was not fixed – ASIC’s arrogant display of regulatory bravado in this media release was hot air of no consequence.

It is probable that ASIC’s reluctance to disclose what NRMA said when reporting the outcome of the corrective action required in 2006 is because, literally, nothing of any material consequence happened – even if some people saw some NRMA ‘disclosure’ no one would have complained because no one would have understood what NRMA was required to publicise and why.

What is the betting: were any advertisements required to be placed by NRMA in 2006 written to be clearly understood –or, rather, intended not to be understood? Did ASIC vet the advertisements? -- Did anyone respond and complain? – and, if so, were they told their only options were ‘stay’ with NRMA or ‘go’ with no prospect of refunds either way?

As foreshadowed, the one thing we know clearly is that the problem was not properly addressed by ASIC in 2006 -- that whatever ASIC ‘required’ and whatever NRMA ‘did’, the practical outcome made no material difference, the misleading and deceptive behaviour continued. The problem remained – and remains.

With ASIC keeping mum about good intentions gone awry, one can only speculate on what went wrong: – not least, ASIC clearly did not monitor the situation in a way – for example, talking to affected NRMA customers – that would have made clear that the problem remained.

More fundamentally it is also very clear that whatever NRMA did ‘as required’ in 2006, none of its customers directly or prospectively liable to pay penalty premium levies had any comprehension of that – and they still do not.

No one – not NRMA, not ASIC, not FOS – has ever clearly disclosed in plain English that the NRMA’s prominently promised entitlement to the ‘maximum no-claim discount for life’ was deceptive and not true – that the promised ‘for life’ entitlement was compromised by obscure fine print provisions to the contrary, fine print unseen by the customers because none of it was ever presented in a way that customers would be aware of it or understand it.

That was the deception, that is the continuing deception – the customers have never been told the truth clearly and the ‘responsible’ regulators have protected, and not proscribed, that institutional deception.

Why did ASIC not make a clear public comment to ensure the NRMA’s deception would be widely reported in the national print and broadcast media? Why have they still not done so?

(iii) What went wrong?

The problem was not fixed – the problem is still not fixed: that’s what went wrong.

There is a contrast between the clarity with which ASIC understood the need to deal with the issue in 2006 and the problem still remaining unresolved – this contrast is especially stark when coupled with the FOS determinations, ordering refunds, some five years later, and passed to ASIC as a systemic issue, with NRMA, needing a formal regulatory response. Stark becomes dark when some 2+ years later, still nothing has been done to properly inform NRMA customers of the deception and open avenues of redress.

An incompetently wrong step in 2006, favouring NRMA, and disadvantaging its customers, put ASIC on a long wrong track – ASIC, never having backtracked, now has a much bigger mess to deal with.

I see parallels in this mess with other, better-publicised, shortcomings of ASIC characterised by regulatory forbearance putting the interests of regulated businesses ahead of the interests of their customers and the broader public interest.

This NRMA mess does need to be similarly exposed and dealt with.

2010-2011

The Financial Ombudsman Service – questions remain unanswered

This story, albeit from a personal perspective now of only minor relevance, starts with a realization in 2010 that, contrary to an undertaking given to me, and implied in its policy documents, NRMA had imposed a premium penalty from 2008 on my comprehensive motor vehicle insurance policy. In the event NRMA resisted – long and strong -- any suggestion that the penalty premiums should be refunded. The complaint, put to FOS in 2010, was eventually resolved, in January 2011, and the penalty premiums were refunded (with interest).

The following commentary builds on two published FOS determinations which are published at -- http://www.fos.org.au/centric/home_page.jsp

The two determinations referred to are, respectively, the benchmark determination and the decision on my case based on that benchmark precedent.

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/212334.pdf>

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/212044.pdf>

FOS determinations do not name names -- the specific PDS (product disclosure) and FSP (service provider) references in the benchmark determination relate to NRMA -- the politely formal but very clear assessment of the NRMA's deception says in part:

27. I am aware that most insurer's offer "guaranteed" or "life", rating-one, policies and I also believe that it is generally accepted by both insurers and policyholders that in the event of a single claim, the guaranteed 'rating-one' means that the premium charged for the next renewal will be charged as though that claim was not lodged on the policy.

.....

29. I consider it is generally accepted insurance and insurance marketing practice to equate "rating 1" with maximum no claim discount and a guaranteed rating 1 to mean a claim can be lodged without any premium increase.

30. I am satisfied that the maximum rating I status carries an implication that no additional charge is to be levied if a claim was lodged. The PDS does not include any explanation of the seeming certainty of the premium increasing if a claim is lodged. Far from being clear and transparent, in my view the FSP's actual rating process is completely obscure no matter how carefully the PDS and certificate of insurance are read.

31. While the FSP has called the rating factor an "incident loading" it is clear that this is no more than a premium penalty and in effect no different to a reduction in "rating".

.....

35. I consider the FSP's conduct in this regard to be inconsistent with both accepted good insurance practice and the requirements of Section 13 of the Act. I accept that the applicant had reason to hold a genuine belief that under the terms of the policy issued he was entitled to lodge the claim on the basis there would be no increase in premium.

36. I determine the applicant is entitled to a refund of any additional premium charged as a result of the 2009 claim lodged under the contract. I also intend to refer this matter to the compliance manager for the General Insurance Code of Practice for further review.

...so, what happened subsequently at FOS

In following up subsequent developments, what happened next at FOS is open to a view that ‘nothing happened’ until I formally enquired of, first, FOS and then ASIC. A related inference is that it was not until mid 2011 that FOS and ASIC agreed that there was, still, a ‘systemic issue’ with NRMA. In the event there was a final recommendation at the end of an ASIC “Review of general insurance claims handling and internal dispute resolution procedures” (REPORT 245 August 2011):

Insurers should review and, where appropriate, improve disclosure and/or make available additional information on excesses and the operation of NCD schemes

The blandly innocuous tone of this ‘finding’, possibly appended to the report as a face-saver, is completely at odds with the tone of the dealing between ASIC and NRMA in 2006. One might have inferred, as I did at the time, that this 2011 report was the first indication that ASIC had been made aware of the problem. In fact, and directly to the contrary, ASIC had issued the media release in 2006 that made clear it understood the problem then and purported to have ‘fixed’ it, then. (See above)

This contradictory run of events might be plausibly passed off with some variation on inadvertent institutional incompetence / failed corporate memory -- meaning that the boastfully claimed earlier ‘success’ with NRMA was simply overlooked. [Unlikely, given that any ASIC ‘success’ would have been indelibly printed on the mind of any ASIC staffer wanting to be seen to belong.]

Conversely, however, this run of events is open to a suspicion that, ASIC would hardly have welcomed the realization that its 2006 dealing with NRMA had failed comprehensively. ASIC may then have been inclined to welcome, first, a fresh start and secondly a chance to bury specific issues with NRMA in some protracted general review of industry practices with ‘no claim discount schemes’ – a report which is only now about to be delivered.

The sincerity of this protracted ASIC review – and the sense of ASIC still not dealing with NRMA separately and more quickly -- will become apparent shortly. My misgivings, repeatedly made very clear along the way to the Chairman of ASIC (and FOS), flow in part from supplementary commentary in the benchmark FOS determination. In particular, reading paragraph 28 in conjunction with paragraph 27 (now repeated), it would seem that the FOS had already conducted a survey of industry practice sufficient to conclude that NRMA was probably alone in operating deceptively, contrary to accepted industry standards, codes and practices.

Consider paragraph 28:

27. I am aware that most insurer’s offer “guaranteed” or “life”, rating-one, policies and I also believe that it is generally accepted by both insurers and policyholders that in the event of a single claim, the guaranteed ‘rating-one’ means that the premium charged for the next renewal will be charged as though that claim was not lodged on the policy.

28. The Case Manager for this Service contacted three other motor insurers operating in the same market as this FSP and was provided with the advice that their policies operate in this way. While the actions of the other providers does not in any way bind the FSP in this matter, I am satisfied that the advice provided by the other providers is the commonly held expectation of motor

insurance policyholders and it is the applicant's submission that this was his belief.

- Is NRMA like a rat on the run?

Feeling frustrated by ASIC's 'wait til we are ready' responses to my requests that they deal with the NRMA, I did, in late 2011, co-operate with a similarly affected NRMA policy holder, to put a claim to NRMA for a refund of premium penalties paid. There were no special features supporting the claim. When NRMA rejected the claim, a complaint was put to FOS.

The relevant FOS Case number is 260935 and the way it unfolded goes to the credibility and integrity of the FOS scheme and the role of ASIC oversight.

The NRMA's initial response offered a refund of the penalty paid in respect of the 2011 renewal but then said "we are unwilling to backdate a refund ...for prior years, as we maintain the correct premium was charged." The letter went on to advise that, not satisfied, a complaint could be put to FOS.

Subsequently the complaint was so put to FOS and, after a long delay, and apparently to avoid a formal unfavourable determination by FOS, NRMA simply rescinded its rejection and refunded the penalty premiums paid -- it did so with a questionable rider that the refund rebated was 'ex gratia'.

This 'surrender' letter from NRMA nonetheless concluded: "NRMA Insurance regrets any confusion experienced and the amount of time taken to resolve the matter. A copy of this letter has been sent to the Financial Ombudsman Service."

While it may be unlikely that this FOS file can be exposed, I would like to think that in this matter ASIC could and should discover, and disclose to this Senate committee, the gist of the FOS/NRMA negotiation ahead of the NRMA decision to refund all the penalty premiums paid.

I suggest this course of inquiry to guard against the possibility, and reasonably fair inference, that NRMA only rescinded its decision – to not refund in full the penalty premiums taken – to obtain a much more valuable advantage for NRMA – avoiding a formally unfavourable FOS determination.

Consider the consequences of FOS publishing a determination that NRMA should repay the penalties levied in this unexceptional case. The subsequent wider circulation of that published FOS determination, fairly enhanced by identifying NRMA as the 'offender', would have immediately crystallized a general obligation for NRMA to repay all premium penalties previously taken from all affected policyholders.

..... not surprisingly, it is now my contention to this committee that a general refund order is precisely what should be given to NRMA by ASIC, acting as the appointed responsible regulator.

End piece

In my mind, this sequence of events, and related regulatory ‘decisions’, has the hallmarks of a failure of regulatory competence and authority in the first instance and ongoing regulatory failure subsequently.

In summary, ASIC was ineffective in dealing with an issue in 2006 that subsequently resurfaced in another forum – FOS – where, although it was formally decided to deal sensibly with individual complaints twice, and informally once, these decisions were not publicised and a related recommendation to refer the NRMA’s systemic deceptive practice for review by ASIC, is still languishing some 2 years + on.

In the interim, these regulators have turned a blind eye to the probability that anyone realizing they had been deceived and penalized, and eventually complaining to FOS, would be entitled to a refund of penalty premiums paid. Nothing has been clearly said to alert the public and affected policyholders to a prospect likely to prompt a stampede.

Whatever may eventually surface in any ‘final report’ later this year, there are some standing decisions of ASIC and related outcomes that would seem to be reviewable for the reason that they are manifestly unsound and absolutely objectionable.

Hopefully of similar concern to a corporate regulator, it is unlikely that a recalcitrant NRMA has made provision for the contingent – refund with interest -- liability hanging over it and growing day by day.

Peter Mair

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