



## **Inquiry into insurers' responses to 2022 major floods claims**

### **Disaster Legal Help Victoria's Submission to the Inquiry**

31/10/2023

## Acknowledgement of country

This submission was written on the land of the Wurundjeri people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. Disasters exacerbate social inequalities and discrimination, and we acknowledge the strength and resilience of all First Nations people amid these conditions. We recognise the tremendous leadership of Aboriginal Elders and Aboriginal community-controlled services in disaster response and recovery.



## Contents

<b>Acknowledgement of country</b> .....	<b>2</b>
<b>Contents</b> .....	<b>i</b>
<b>Disaster Legal Help Victoria</b> .....	<b>1</b>
<b>Key issues</b> .....	<b>1</b>
Coverage disputes .....	2
Existing wear and tear disputes .....	2
Case study 1 .....	3
Insufficient cash settlements .....	3
Delays and poor communication .....	3
Case study 2 .....	4
Embargoes and unaffordable premiums .....	4
<b>Recommendations</b> .....	<b>5</b>

## Disaster Legal Help Victoria

Thank you to the Standing Committee on Economics for the opportunity to provide Disaster Legal Help Victoria's input into this Inquiry. Our submission details the significant issues we have witnessed through our service provision with disaster-impacted Victorians' insurance claims, and provides recommendations for how to improve the effectiveness, transparency, affordability, and ongoing relevance of insurance in Australia. We also make recommendations on how dispute resolution can be made fairer and faster, improving outcomes for disaster-impacted people.

Disaster Legal Help Victoria (DLHV) is a joint initiative of the Federation of Community Legal Centres, Justice Connect, the Law Institute of Victoria, Victoria Legal Aid, the Victorian Aboriginal Legal Service, and the Victorian Bar.<sup>1</sup> DLHV brings together the skills and resources of the legal profession, including government and private legal entities, to help mitigate and respond to complex and widespread legal needs that arise in disasters. DLHV was originally formed to provide free legal support for those affected by the February 2009 Victorian bushfires and has since provided legal response to disaster events such as the 2019/2020 'Black Summer' bushfires and the Flood Event of October 2022 in Victoria.

In response to the 2022 Floods, Disaster Legal Help Victoria and its local Partners have undertaken activities such as:

- Targeted communications in 10 languages on the DLHV website, posters and social media posts on disaster recovery and legal intake points to flood impacted communities;
- Led the establishment of a legal sector flood response meeting of DLHV Partners, local legal services, the DJCS and Courts Services Victoria to share information and coordinate response;
- Attended recovery hubs in Rochester, Seymour, Echuca and Elmore to provide information and referral for people in affected communities;
- Attended resilience events in Maribyrnong and Maidstone, providing information and referral;
- Provided advice and referrals on the dedicated DLHV phone line;
- Triage and referred additional help-seekers to pro bono legal assistance;
- Provided Community Legal Education in flood-impacted communities, including seminars and distribution of educational materials;
- Delivered professional development and training to lawyers to increase their awareness and expertise in legal issues relating to disaster, through our Disaster Legal Help Community of Practice.

## Key issues

Since the 2022 Flood Event, insurance related enquiries have comprised 76.5% of the enquiries received by Disaster Legal Help Victoria via email and in-person at recovery centres. On the dedicated DLHV phonenumber, insurance was also the most common issue in the October-December 2022 period, representing 27% of all calls. More than 12 months on from the October 2022 Flood Event in Victoria, Disaster Legal Help Victoria continues to receive enquiries from flood-impacted community members with insurance problems who are seeking legal help for the first time regarding an unresolved claim.

Recurrent issues include coverage disputes, existing wear and tear or 'maintenance' disputes, insufficient cash settlements, delays, and poor communication. In addition, we have seen insurance embargoes and

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<sup>1</sup> Disaster Legal Help Victoria (nd.), 'About Us', <https://www.disasterlegalhelp.org.au/about-us>

significantly increased premiums (unaffordable to many community members) since the Flood Event, and we are concerned about the repercussions of this in future disasters.

## Coverage disputes

Coverage disputes pertain to the type of coverage a consumer has purchased and their entitlements when their property and/or contents are damaged or destroyed. Unfortunately, many insurance companies have made flood cover an optional extra where consumers can opt-out to reduce the cost of insurance, which has caused serious problems with underinsurance since at least the early 2010s.<sup>2</sup> However, many consumers are covered for storm damage, where flooding occurs due to blocked or overwhelmed storm water drains.<sup>3</sup> We have witnessed in our service provision that help-seekers have made legitimate claims regarding storm water damage but have had these declined by the insurer, with the insurer alleging that the damage was caused by riverine flooding not storm water.

The use of expert reports by insurance companies, such as hydrologist reports, to substantiate a claim denial can render consumers powerless to respond. These expert reports are costly – particularly for disaster-impacted people who have lost assets and/or salary – and are difficult to access in regional and remote communities. We have assisted many help-seekers who feel defeated by an insurer's use of expert reports when they do not have the means to get their own independent report conducted.

## Existing wear and tear disputes

Many of the help-seekers we have assisted are involved in existing wear and tear disputes, also referred to as 'maintenance' disputes.<sup>4</sup> Their flood claims have been rejected by the insurer, with the insurer alleging that the damage to the property was caused by existing wear and tear/ lack of maintenance rather than by the October 2022 Flood Event, similarly documented by the Australian Securities and Investments Commission.<sup>5</sup> We have seen this especially in relation to structural damage to a property, such as to stumps, pins, walls, and doors/windows.

Again, as with coverage disputes, the use of expert reports by insurance companies can render consumers powerless to contest an insurer's decision due to the unaffordability and/or unavailability of independent experts.

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<sup>2</sup> Dan Nancarrow (January 6, 2011), 'When is a flood not a flood?', *The Sydney Morning Herald*, <https://www.smh.com.au/environment/weather/when-is-a-flood-not-a-flood-20110105-19g0p.html>; InsuranceNews.Com.Au (December 8, 2021), 'Queensland flood reignites "confusion" over policy coverage', <https://www.insurancenews.com.au/daily/queensland-flood-reignites-confusion-over-policy-coverage>

<sup>3</sup> Berrill & Watson (nd.), 'Storm versus flood insurance claims', <https://www.berrillwatson.com.au/expertise/general-insurance/storm-versus-flood-insurance-claims/>

<sup>4</sup> Legal Aid Queensland (March 2022), *When Disaster Strikes – Cyclones, Storms and Floods: A Guide to Getting Your Insurance Claim Paid*, [https://www.legalaid.qld.gov.au/files/assets/public/v/1/publications/work-and-money/when-disaster-strikes-guide/storm-insurance\\_content.pdf](https://www.legalaid.qld.gov.au/files/assets/public/v/1/publications/work-and-money/when-disaster-strikes-guide/storm-insurance_content.pdf), p. 33.

<sup>5</sup> ASIC (August 2023), *Navigating the Storm: ASIC's Review of Home Insurance Claims*, Report 768, <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-768-navigating-the-storm-asic-s-review-of-home-insurance-claims/>, p. 21.

### Case study 1

An insurer had obtained a report from a loss assessor on a flooded property in Rochester. The assessor determined that the consumer had not maintained the stumps on the property.

After the consumer received legal advice and self-advocated to the insurer, the insurer acknowledged that the assessor had not ascertained whether the insured property had been subject to a major flood eight years earlier (which it had) or whether there had been a successful claim after the earlier flood (there was). The earlier claim was accepted with no assessment of the stumps conducted by the insurer's assessor. Further, maintenance of the stumps had never been communicated when the policy was annually renewed. The insurer eventually acknowledged that their assessor report was deficient and had not sought sufficient information to decide on restumping the property.

Further, in all the cases of wear and tear disputes we have assisted, there was no communication from the insurer as to the maintenance they required to ensure valid coverage in an insured event. This has meant that help-seekers even with full flood cover have had their claims rejected yet were never told what maintenance the insurer expected them to do on the property.

### Insufficient cash settlements

The common industry practice of offering cash settlements instead of managing a repair/rebuild of the flood damaged property has left many consumers with unexpected out-of-pocket costs due to the settlement being insufficient. Research conducted by the Financial Rights Legal Centre revealed that concerns around cash settlements were the second most common issue for their clients affected by disaster events, with many people experiencing issues with low cash offers, requirements placed on them by their bank (as mortgagees), and project managing complex repairs work (with no project management/building experience).<sup>6</sup>

Many of the people we have assisted describe accepting a cash offer due to feeling frustrated and fatigued with disaster recovery, including the insurance claims process, and wanting to reach resolution. It is crucial that the industry recognise the mental health effects of disasters – including how trauma can impair decision-making - and clearly inform consumers to seek independent legal and financial advice before deciding on a cash offer.

Unfortunately, flood-impacted people who accepted cash settlements can end up seeking legal help to reopen their claim due to the settlement being insufficient. This has been exacerbated by labour and supply shortages, which have caused delays and have therefore increased costs associated with temporary accommodation, storage, and inflation.

### Delays and poor communication

Recovery from the 2022 Flood Event has been slow. This has not been helped by delays caused by insurance companies and/or their contracted parties. We have assisted help-seekers who have waited several months between communication from their insurer, with long waits especially between expert reports being organised, advising on the outcome of reports/loss assessments, and having various repairs work conducted. While we recognise that some factors causing delays - such as labour and supply shortages - are beyond the

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<sup>6</sup> Financial Rights Legal Centre (2021), *Exposed: Insurance Problems After Extreme Weather Events*, [https://financialrights.org.au/wp-content/uploads/2021/07/Financial-Rights-Exposed-Report\\_FINAL.pdf](https://financialrights.org.au/wp-content/uploads/2021/07/Financial-Rights-Exposed-Report_FINAL.pdf), p. 22.

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control of the insurer, we do think that insurance companies have a responsibility to communicate transparently about anticipated time to resolve claims and that delays need to be accounted for in the temporary accommodation provision.

Further, we have witnessed that many consumers have been in protracted claims disputes where the insurer has failed to escalate the consumer's case from the claims team to internal dispute resolution. We continue to be contacted by help-seekers who are stuck in a claims dispute 12 months after the flood event but have not been escalated to internal dispute resolution or an experienced claims problem solver.

### **Case study 2**

A couple in Shepparton were in dispute with their insurer 9 months after the floods. The couple felt that their insurer was not listening to them. There had been problems caused by an insurance broker. The couple felt that the claims personnel had drawn a line through further negotiations.

The dispute had not been referred to senior management or internal dispute resolution and the couple did not know how to progress their claim. After seeking legal advice, the couple successfully advocated for a referral to senior management which resulted in their claim being handled by an experienced claims problem solver. Two weeks later the offer was increased by \$200,000.

The claim should have been referred to internal dispute resolution or a problem solver after 4 months. It was costing both the insured and the insurer to have the claim stuck in a stalemate.

## **Embargoes and unaffordable premiums**

The 2022 major floods have prompted some insurers to rule out providing cover to certain postcodes and many have significantly increased premiums.<sup>7</sup> Insurance plays a crucial role in disaster recovery for households, businesses and whole communities, and the unavailability or unaffordability of insurance will have devastating consequences in future disasters, slowing and even preventing recovery. This was recognised in the Royal Commission into National Natural Disaster Arrangements:

Insurance is important because individuals cannot rely on public and charitable entities to restore their positions following a natural disaster. Government funding does not take the place of insurance, and nor should this be expected. Further, governments should not disadvantage or disincentivise those who have insurance, for example through recovery targeted to the uninsured, as to do so may encourage underinsurance.<sup>8</sup>

Therefore, urgent reforms are needed to ensure the ongoing availability and affordability of insurance in Australia, such as:

- public reinsurance schemes and/or a carefully designed insurance discount scheme;

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<sup>7</sup> Mikaela Ortolan et al. (November 9, 2022), "Insurers stop offering insurance to postcodes near flood-affected communities", *ABC News*, <https://www.abc.net.au/news/2022-11-09/communities-near-floods-struggle-to-get-insurance/101628426>

<sup>8</sup> Commonwealth of Australia (2020), *Royal Commission into National Natural Disaster Arrangements*, Chapter 20: Insurance, <https://www.royalcommission.gov.au/system/files/2020-12/Royal%20Commission%20into%20National%20Natural%20Disaster%20Arrangements%20-%20Report%20-%205Baccessible%5D.pdf>, p. 416 (20.2).

- prioritising climate resilient development through changes to land use planning and building codes, and;
- providing government schemes to financially support homeowners to retrofit their homes.

Reforms such as these will reduce the risk for insurers and enable them to provide coverage in areas vulnerable to climate impacts.

## Recommendations

In consultation with lawyers who represent consumers of insurance, and in support of the research and efforts of many others including the Financial Rights Legal Centre, Disaster Legal Help Victoria provides the following recommendations to the Standing Committee on Economics to address the issues we have identified above. We recommend that:

- 1. The Federal Government should make independent expert reports accessible to consumers. This should include:**
  - a. Establishing a federal fund to pay for independent expert reports in the aftermath of disaster with contribution from the insurance industry. This fund could be overseen by the General Insurance Code Governance Committee.
  - b. Establishing a group of independent experts and tradespeople who can conduct assessments/reports, paid for by the fund. This would avoid consumers having to use conflicted assessors who work for, or want to work for, the insurance industry.
  - c. Amending the General Insurance Code of Practice to include an obligation on insurers to provide information regarding accessing independent expert reports.
- 2. The Federal Government should legislate standard definitions.**
  - a. The Federal Government should legislate standard definitions for a broad range of common terms and conditions in home and contents insurance contracts. This should include terms like 'defect', 'maintenance', 'wear and tear', and key natural hazard events.
- 3. Insurers must communicate transparently and proactively about wear and tear exclusions, including communicating their expectations regarding upkeep of the property at policy purchase and renewal.**
  - a. Insurers must communicate transparently and proactively with consumers about exclusions at the point of policy purchase and renewal. As part of this, insurers must provide advice on what property maintenance is expected of consumers and how regularly this maintenance should be conducted. Consumers should be encouraged to keep records and receipts of all maintenance work.
  - b. Insurers must not reject a claim based on maintenance/wear and tear if there is sufficient evidence that the damage would have occurred in the disaster event, regardless of efforts on the part of the consumer to maintain the property.
  - c. If an insurer rejects a claim based on maintenance or wear and tear, they must provide the expert report(s) informing the decision and clearly detail the outstanding maintenance work - including the difference it would have made to the outcome in a disaster event.
- 4. Insurers should be required to communicate the risks of cash settlements to consumers.**
  - a. If making a cash settlement offer, insurers should give consumers full information regarding the risks involved. This information should include the following warnings:
    - i) that insurers are able to obtain lower rebuilding costs than consumers and so the quotes given to insurers are likely significantly lower than those a consumer will receive;



- ii) that the insurer will have no ongoing obligation to guarantee the quality, cost or timeliness of any works, and;
    - iii) that accepting a cash offer may cause issues with the consumer's bank if there is a mortgage involved.
  - b. When making an offer, insurers should be required to encourage consumers to seek independent legal and financial advice and provide the contact information for legal and financial advice services. A sign-off mechanism could be built in, so that the consumer must sign off on having either sought independent advice or chosen not to before accepting the settlement. Insurers should allow consumers ample time and opportunity to consider a cash settlement offer, including obtaining their own independent quotes, and supporting the consumer to negotiate amendments to the offer as normal practice without the consumer having to make a complaint.
  - c. Insurers should also be compelled to inform consumers of their legal right to reopen a claim after receiving a cash settlement.
- 5. The Federal Government must make urgent reforms to ensure availability and affordability of insurance.**
  - a. The Federal Government must upscale its investments in risk reduction, focusing on the most vulnerable communities first. This should include changing land use planning laws and building codes for all new builds and funding retrofitting schemes and buybacks for existing builds to increase disaster resilience. A homeowner should be able to choose between retrofitting their property or accepting a buyback. These options should be available in preparation against disaster not just after a disaster event when decision making is impacted by trauma.
  - b. The Federal Government must seriously consider government-supported reinsurance pools like the Cyclone Reinsurance Pool and/or a well-designed discount scheme as laid out in the Natural Disaster Insurance Review 2011 report.<sup>9</sup>
  - c. The Federal Government should bring forward its 2025 planned review of the Cyclone Reinsurance Pool. We urge the government to enact the review earlier as the issue of unaffordable premiums is already urgent. If the Reinsurance Pool has effectively lowered premiums, then we would encourage the broader application of such a pool to cover other disaster events including floods.
  - d. The Federal Government should require one of its relevant agencies, such as the Climate Change Authority, to hold detailed flood risk information nation-wide and make it publicly accessible, so that Australians are aware of climate and disaster risk when purchasing or renting property.
- 6. Insurers must be required to continue to provide insurance cover during the course of a claim.**
  - a. An insurer must not refuse renewed home and contents cover during the course of a claim. It is particularly important that insurers are required to provide ongoing public liability insurance, as homes are often left in a dangerous state during a flood claim process.
- 7. Insurers must improve their Internal Dispute Resolution (IDR) processes to improve the efficiency of claim resolution.**
  - a. Insurers must implement protocol that necessitate escalation of a claim to senior IDR staff or experienced problem solvers within their company if 4 months have passed since the claim was lodged and the claim remains in dispute.

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<sup>9</sup> Commonwealth of Australia (2011), *Natural Disaster Insurance Review*, Inquiry into Flood Insurance and Related Matters, [https://treasury.gov.au/sites/default/files/2019-03/p2011-ndir-fr-NDIR\\_final.pdf](https://treasury.gov.au/sites/default/files/2019-03/p2011-ndir-fr-NDIR_final.pdf), pp. 55-60.

- b. Insurers must ensure their claims staff have sufficient work experience, trauma-informed communication skills and knowledge of disaster impacts, including in the contexts that their consumers live in. This will mean that they can adequately understand the consumer's claim (for example, regional and rural consumers tend to have assets and dwellings less common in urban areas, such as water tanks, electric fencing, irrigation, specialist sheds, etc).
- c. Compliance and enforcement by the General Insurance Code Governance Committee must be tightened to hold insurers accountable on their obligation to provide consumers with information on making a complaint.