

13 July 2018

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION
AND FINANCIAL SERVICES INDUSTRY****Submission on Round 4 Hearings – Case Studies****Issues affecting Australians who live in remote and regional
communities, which relate to interactions between Aboriginal
and Torres Strait Islander people and financial services entities****Introduction**

1. Consumer Action works to advance fairness in consumer markets, particularly for disadvantaged and vulnerable people, through financial counselling, legal advice and representation, policy work and campaigns, and training and outreach. We provide financial counselling and legal advice and education to more than 15,000 Victorians each year, including on issues facing consumers in regional and remote areas of the state. Our lawyers have long-standing experience in responsible lending, insurance and general consumer issues and provide representation to people in disputes with financial service providers and insurers, including at internal and external dispute resolution services.
2. Over the past three years, we have provided extended advice and legal representation to 25 people on issues relating to funeral insurance. Often this is expensive funeral insurance which is unaffordable and unsuitable, with people at risk of losing all moneys paid upon cancellation of the policy. As part of this work, we have represented clients who have disputes with the Aboriginal Community Benefit Fund (**ACBF**).
3. Our work on funeral insurance is part of our specialist insurance law practice. Generally, this work includes assisting people who have been denied insurance cover, who have bought unsuitable insurance or who have claims disputes with insurers. We most commonly assist with car insurance, mis-sold add-on insurance, home insurance and funeral insurance.
4. Consumer Action has also provided outreach and training to community lawyers and financial counsellors across regional Victoria on funeral insurance. Following such outreach at a regional Aboriginal Co-operative in early 2016, we were referred a number of people who had questions



about ACBF. As part of this ongoing work, our Koori¹ Engagement Manager has engaged with Aboriginal² communities and organisations that support them on the issue of funeral insurance to identify community concerns and issues.

5. Our engagement work with the Aboriginal communities in Victoria more broadly includes working together with the Victorian Aboriginal Legal Service³ to improve referral pathways for Aboriginal communities and facilitating an action group, made up of community and government agencies working with Aboriginal communities. The group meets regularly to promote a co-ordinated approach to addressing civil legal needs for the Victorian Aboriginal community.³ We have also recently launched our Koori Help Line for Aboriginal communities in Victoria.⁴
6. Consumer Action has provided legal advice and representation and support to Ms Tracey Walsh, an Aboriginal and Torres Strait Islander woman living in Victoria, who gave evidence during the Round 4 hearings of her experiences dealing with ACBF.
7. Consumer Action acknowledges that the experiences of Aboriginal communities with financial service providers are as diverse as the communities themselves. It is therefore critical to the success of any community engagement on law and policy reform, that it be tailored to reflect the specific needs of each community by working together with that community in a meaningful and respectful way.

Case study: Tracey Walsh and Aboriginal Community Benefit Fund

Available findings of misconduct

8. We strongly support the findings of misconduct outlined by Senior Counsel assisting Rowena Orr QC, specifically that ACBF may have breached its obligations under sections 12DA and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and that it has engaged in conduct that fell below community standards and expectations.

Additional available findings of misconduct

9. We submit that it is also open for the Commission to make further findings of misconduct against ACBF. Specifically, we submit that it is open to the Commission to find:
 - a. ACBF has engaged in misleading and deceptive conduct under section 12DA of the ASIC Act by publishing recent media statements.

¹ The term 'Koori' refers to the Victorian Aboriginal communities.

² In this submission, the terms 'Aboriginal' and 'Indigenous' refer to Aboriginal and Torres Strait Islander peoples.

³ The civil law needs of Aboriginal Victorians are well-documented, including most recently by the Australian Indigenous Legal Needs Project in association with Larissa Behrendt and the Jumbunna Indigenous House of Learning in *The Civil and Family Law Needs of Indigenous People in Victoria* (James Cook University, 2013).

⁴ For further information about the Koori Help Line, see paragraph 73 of this submission.



- b. ACBF has engaged in misleading and deceptive conduct under section 12DA of the ASIC Act by describing the product as a 'plan'.
 - c. ACBF has engaged in unconscionable conduct under section 12CB of the ASIC Act.
 - d. ACBF discriminated against Ms Walsh under sections 5 and 24 of the *Disability Discrimination Act 1992* (Cth) (**DDA**) and has systematically discriminated against Aboriginal communities in contravention of sections 5 and 24 of the DDA by charging increased premiums and/or providing lower benefit amounts due to disability. We submit that it is appropriate for the Commission to recommend that the Australian Human Rights Commission investigate the latter.
 - e. ACBF may have also breached section 13 of the *Racial Discrimination Act 1975* (Cth) in relation to its suicide exemption and health categorisation and consider that it is appropriate for the Commission to recommend that the Australian Human Rights Commission investigate.
 - f. ACBF may have breached its contract with four customers by declining claims due to non-disclosure.
 - g. the ACBF Group directors have breached their duty of care and diligence under section 180 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and their duty to exercise their powers and discharge their duties in good faith under section 181, and if the breach of the latter duty is found to be reckless or intentional, the directors may be criminally liable under section 184.
10. We submit that it is appropriate for the Commission to refer Small Myer Hughes's correspondence to Consumer Action to the Queensland Legal Services Commission because it appears it may have breached its obligations under the Australian Solicitors' Conduct Rules.
11. We submit that it is also appropriate for the Commission to make recommendations on appropriate customer remediation where customers have suffered loss as a result of ACBF's misconduct.

Misleading and deceptive conduct – Media releases

12. We submit that it is open to the Commission to find that ACBF has engaged in misleading and deceptive conduct under section 12DA of the ASIC Act by making incorrect statements in recent media releases.
13. We refer first to ACBF's media release dated 27 June 2018,⁵ which provides that ACBF offers the 'ability to miss up to three payments in any calendar year and remain covered'. We submit that this description is misleading and deceptive. That is, the statement turns an entitlement under the rules to cancel a policy after four missed payments into a selling point.⁶ We note that ACBF customers are obliged to make-up the missed payment, even after ACBF cancels the policy due

⁵ Witness Statement of Bryn Jones, ACBF.0008.0001.0204, 2.

⁶ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3863.



to non-payment.⁷ The position in the Plan Rules is inconsistent with the media statement, and we submit that this constitutes misleading and deceptive conduct.

14. We refer to ACBF's media release dated 29 June 2018,⁸ which provides that ACBF will refund all contributions in the case of suicide without administrative charges. It fails to mention that this will only happen if the plan holder has made 12 months of payments.
15. We refer also to ACBF's media release dated 2 July 2018, which provides that ACBF covers suicide out of compassion and its suicide payouts are made at a loss. Mr Bryn Jones, ACBF director and CEO, conceded in oral evidence that this is incorrect.⁹
16. We submit that these statements are misleading and deceptive and that it is open to the Commission to find that in publishing these media releases, ACBF engaged in misleading and deceptive conduct under section 12DA of the ASIC Act.

Misleading and deceptive conduct – 'Plan'

17. We submit that the use of the word 'plan' in the ACBF documentation is misleading and deceptive.¹⁰
18. The word 'plan' is used widely in the funeral product industry to describe products such as a funeral bond or a pre-paid funeral for example the Suncorp Prepaid Funeral Plan,¹¹ and the Australian Unity Funeral Plan Bond.¹² These products are products where a consumer puts in a certain amount of money in (either as a lump sum or in instalments) and that money is then available when they pass away. We submit also that the word 'plan' in its ordinary usage describes a means of achieving something. This is consistent with the idea that one contributes to a fund in order to save towards a goal amount to pay for their funeral.
19. We refer to Ms Walsh's understanding that this was how the ACBF product would work for her, in that she thought that she was contributing to a fund.¹³
20. We note that the document entitled 'Aboriginal Community Funeral Plan Rules'¹⁴ does not clearly explain that if you stop paying, even if you have paid more than the benefit amount, no

⁷ Witness Statement of Tracey Walsh, TLW8, Annexure 3, FOS.0039.0001.0168, cl 7, 9.3.

⁸ Witness Statement of Bryn Jones, ACBF.0008.0001.0204, 2.

⁹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3863-3864.

¹⁰ See for example, Witness Statement of Tracey Walsh, TLW-1 RCD.0024.0016.0003, TLW-2 RCD.0024.0016.0001, TLW-3 ACBF.0001.0001.0148.

¹¹ Suncorp, *How are pre-paid funeral plans and funeral insurance different?*

<<https://www.suncorp.com.au/insurance/faqs/funeral/pre-paid-funeral-plans.html#pre-paid-funeral-plan>>.

¹² Australian Unity, *FuneralPlan Bond* <<https://www.australianunity.com.au/wealth/investment-bonds/lifeplan-products/funeralplan-bond>>.

¹³ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [13]-[15].

¹⁴ Witness Statement of Tracey Walsh, TLW-8, Annexure 3, FOS.0039.0001.0139.



money will be available to pay for your funeral.¹⁵ We submit that it is not possible to rectify an otherwise misleading statement (i.e. the use of the word 'plan') by conveying the true position in the 'fine print' (i.e. the Plan Rules). We submit that in these circumstances, the true position is not readily ascertainable by a reasonable person.¹⁶

Unconscionable conduct

21. We submit that it is open to the Commission to find that the evidence adduced over the course of the hearing about ACBF's business model and marketing strategy indicates a 'pattern of behaviour' that is unconscionable under section 12CB of the ASIC Act.
22. Ms Orr QC invited the Commission to find that ACBF engaged in conduct falling below community standards and expectations in the following ways:¹⁷
 - a. failure to warn policy holders of risk they might pay more than benefit;
 - b. failure to provide estimate of cost;
 - c. actively seeking to sell policies to children and young people in circumstances where they are unlikely to receive any benefit under the policy;
 - d. failing to credit payments towards a previous plan after cancellation;
 - e. failing to adequately disclose waiting periods;
 - f. providing a very low value product;
 - g. breaching Federal Court orders to use a disclaimer on advertising materials; and
 - h. failing to respond adequately to Ms Walsh's complaint and communicating in an aggressive and hostile manner.
23. Ms Orr QC submitted that this misconduct was at least in part attributable to the ACBF incentives scheme and that ACBF did not have a culture which enabled it to sell its products to Aboriginal communities respectfully.¹⁸
24. We submit that the reasons summarised above at paragraphs 22 and 23 are also relevant to a finding of unconscionable conduct. Further, we refer to the reasons Ms Orr QC advanced as to the way ACBF breached sections 12DA and 12DB of the ASIC Act, being the misleading and deceptive conduct provisions, in particular the statements about its dedication to and approval or endorsement of the Aboriginal community.
25. We submit that given the evidence before the Commission, it would appear that witness for ACBF, Bryn Jones, is ill-equipped to be the Chief Executive Officer and director of a funeral

¹⁵ Witness Statement of Ms Tracey Walsh, TLW-7, FOS.0039.0001.0014, [21]-[29].

¹⁶ *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 1904; *ASIC v National Exchange Pty Ltd* (2003) 21 ACLC 1, 652 [50]-[74]; Australian Securities and Investments Commission, *Regulatory Guide 234: Advertising financial products and services (including credit): Good practice guidance*, November 2012, RG 234.47.

¹⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4134-4135.

¹⁸ *Ibid* 4135.



insurance company.¹⁹ Mr Jones gave evidence about the other two directors being directors with no day-to-day involvement in the operations of the business.²⁰ We refer to submissions below at paragraphs 41-55 relating to directors' duties and submit that this is also relevant to a finding of unconscionable conduct.

26. We submit that ACBF's business model and marketing strategy involves selling a particularly low value, unsuitable, confusing and harmful funeral product to communities with higher mortality rates²¹, higher unemployment²² and lower levels of literacy²³ than other communities, for whom funerals form a profound cultural significance.²⁴ Section 12CB(4)(b) of the ASIC Act allows a finding of unconscionable conduct in relation to a system of conduct or pattern of behaviour.
27. ACBF has cancelled 22,623 policies purchased since 2004.²⁵ These customers have received no benefit from the product and have potentially wasted thousands or even tens of thousands of dollars. ACBF failed to adequately disclose this risk to customers. The industry average amount insured for ACBF customers as at 30 June 2013 was the lowest of all funeral insurers at \$6,639, with the average being \$8,859. We note ACBF's claims payout ratio of 13.6%, the lowest of all insurers surveyed.²⁶ ACBF currently has 16,190 policies where customers will potentially pay more than the benefit amount and 754 policies where customers have already paid more than the benefit amount.²⁷
28. We refer to the decision in *Australian Securities and Investments Commission v The Cash Store*.²⁸ In that case, the Court found that selling people insurance from which they were highly unlikely to benefit, constitutes unconscionable conduct. We submit that selling ACBF's funeral insurance product to customers, in particular children, who are very likely to either cancel or pay more than the benefit amount, constitutes unconscionable conduct.
29. We refer to the statement of Tracey Walsh.²⁹ Ms Walsh was only approximately 49 years of age when she had already paid a total of \$8,000 in payments to ACBF, her entire benefit sum.³⁰ Despite this, she would have been required to pay indefinitely to maintain cover until she passed away. Ms Walsh's life expectancy as an Aboriginal and Torres Strait Islander woman is 77.2 years

¹⁹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3822-3823.

²⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3789; Witness Statement of Bryn Jones, [E].

²¹ Department of Prime Minister and Cabinet, Australian Government, *Closing the Gap: Prime Minister's Report 2015*, 6-9 <https://www.pmc.gov.au/sites/default/files/publications/Closing_the_Gap_2015_Report.pdf>.

²² *Ibid* 19.

²³ *Ibid* 14-15.

²⁴ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3748-3749.

²⁵ Witness Statement of Bryn Jones, WIT.0001.0054.0011, 16.

²⁶ Australian Securities and Investment Commission, *Analysis of the Funeral Insurance Sector in Australia* (April 2014) ASIC.0025.0003.1757.

²⁷ Witness Statement of Mr Bryn Jones, WIT.0001.0054.0011, [15.1]-[15.2].

²⁸ [2014] FCA 926.

²⁹ Witness Statement of Tracey Walsh, WIT.0001.0072.0001.

³⁰ Witness Statement of Ms Tracey Walsh, TLW-7, FOS.0039.0001.0014, [34].



of age.³¹ If she were to pass away at the age of 77.2 years and she had continued to pay, she would have paid a total of approximately \$34,000, for a benefit amount of \$8,000.³² This does not take into account any age bracket increases, which could also have applied to increase her payments.³³ Fortnightly payments would likely become more and more difficult, for example when she retires, and could well become impossible. It follows that it is highly unlikely to benefit her. This would have been apparent at the time ACBF sold her the product. That is, it would have been apparent that Ms Walsh would likely either pay more than the benefit amount or would have to cancel at some point.

30. Further, as submitted by Ms Orr QC, ACBF's policies are particularly inappropriate for their target market, as compared with other funeral insurance policies on the market, because:

- a. ACBF's health categorisation could result in Aboriginal customers paying more than they would if they had obtained funeral insurance from another provider,³⁴ and
- b. ACBF policies did not pay out for suicide until recently,³⁵ despite the higher rates of suicide in Aboriginal communities.³⁶

31. We submit that despite targeting its product almost exclusively to Aboriginal people and holding itself out as an Aboriginal organisation,³⁷ there is no evidence that ACBF has taken reasonable steps to ensure that it communicates effectively with this cohort of consumers, nor does it appear that it has taken into account the impact of "gratuitous concurrence".³⁸ Instead, ACBF appears to profit from the trust and confidence Aboriginal communities' place in Aboriginal organisations,³⁹ providing a product that is particularly unsuitable to the needs of Aboriginal communities.

32. We refer to the decision in *Make It Mine Finance Pty Ltd*,⁴⁰ in which the Court noted that 'corporate operators dealing with a vulnerable class of consumers have to take considerable care in complying with and implementing the statutory safeguards designed for the protection of that class'.⁴¹ We refer also to the Federal Court's reasoning in *ASIC v Channic Pty Ltd Ltd (No*

³¹ Australian Bureau of Statistics, *Life Expectancy at Birth of Aboriginal and Torres Strait Islander Australians* <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/A80BD411719A0DEECA257C230011C6D8?opendocument>>.

³² Witness Statement of Ms Tracey Walsh, TLW-7, FOS.0039.0001.0014, [34].

³³ Witness Statement of Bryn Jones, WIT.0001.0054.0001, [12.3]-[12.5].

³⁴ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3844.

³⁵ Witness Statement of Bryn Jones, WIT.0001.0054.0001, [21.3].

³⁶ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3862.

³⁷ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3804.

³⁸ Described by Mr Nathan Boyle, Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3723; see also Diana Eades, *Aboriginal Ways of Using English* (Aboriginal Studies Press 2013), pp 100-101.

³⁹ See for example, Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [9].

⁴⁰ (*No 2*) [2015] FCA 1255.

⁴¹ *Ibid*, [122].



4),⁴² noting that ACBF must have known about the susceptibility of customers to stop paying, especially considering the high number of whom rely on Centrelink payments⁴³ and also the very real possibility that they would pay significantly more than the benefit sum. We note that this is particularly apparent in respect of policies sold to children.

33. Compared to other funeral insurance providers, ACBF has the highest proportion of customers in lower age brackets, with approximately two thirds aged below thirty years of age and approximately one third below the age of fifteen.⁴⁴ Mr Jones conceded in oral evidence that it is a motivator for ACBF to sell as many policies as possible and that ACBF's sales representatives make inquiries about whether customers have children and attempt to sell funeral policies for them.⁴⁵ We submit that due to the amount of money that would have to be paid over the course of a person's life and the increased likelihood that the policy would be cancelled due to non-payment in respect of a funeral insurance policy for children, funeral insurance is particularly unsuitable for children.
34. We submit that it is open to the Commission to find that ACBF's practice of targeting Aboriginal communities, giving them the impression that their organisation is affiliated with Aboriginal communities, and selling a product that is particularly unsuitable to them, is unconscionable. We submit also that it is open to the Commission to find that by actively selling a product in respect of children and young people, who are highly unlikely to receive any or a limited benefit, ACBF has engaged in unconscionable conduct.

Discrimination

35. We submit that it is open to the Commission to find that ACBF has unlawfully discriminated against Ms Walsh under sections 5 and 24 of the DDA by providing a benefit reduced by \$4,000 (\$8,000 instead of \$12,000) and charging a higher premium (\$36 instead of \$18),⁴⁶ due to Ms Walsh's mental illness.
36. As set out above, by letter dated 8 March 2017, Consumer Action wrote to ACBF's solicitors and requested that ACBF review its categorisation of Ms Walsh's cover and associated payment requirements in light of its obligations under discrimination legislation.⁴⁷ ACBF did not respond.⁴⁸

⁴² [2016] FCA 1174, 1844.

⁴³ We note that ACBF used to have an arrangement with the Department of Human Services that permitted it to deduct plan payments using CentrePay: Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37*(2018), 3836-3837.

⁴⁴ Australian Securities and Investment Commission, *Analysis of the Funeral Insurance Sector in Australia*, ASIC.0025.0003.1757, 8.

⁴⁵ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3809.

⁴⁶ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [12]; Exhibit TLW-2 (RCD.0024.0016.0001).

⁴⁷ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [26]; Exhibit TLW-6 (RCD.0024.0016.0022).

⁴⁸ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [26].



37. We submit that it is open to the Commission to find that ACBF discriminated against Ms Walsh on the grounds of her disability in contravention of sections 5 and 24 of the DDA by charging a higher premium and providing a lower benefit amount. ACBF failed to review its position on this. ACBF has not provided any statistical or actuarial data to support its position that it is entitled to discriminate under section 46 of the DDA. We submit, in the alternative, that ACBF is not an insurer, so the section 46 exemption therefore should not apply.⁴⁹
38. We submit also that the health categorisation practice adopted by ACBF, in particular the way it charges higher premiums and/or provides reduced benefits according to a customer's disability,⁵⁰ could well breach sections 5 and 24 of the DDA. We consider that it is appropriate for the Commission to recommend that the Australian Human Rights Commission investigate.
39. ACBF has marketed a funeral insurance policy containing a suicide exemption (unlike all other funeral insurers on the market),⁵¹ almost exclusively to Aboriginal communities, where suicide is significantly more common.⁵² We submit that the sale of these products may amount to unlawful discrimination under section 13 of the *Racial Discrimination Act 1975* (Cth) (**RDA**). We note that this is particularly compelling in respect of the Community Plan, which is open to an 'Aboriginal Person' only as per the Plan Rules.⁵³ We consider that it is appropriate for the Commission to recommend that the Australian Human Rights Commission investigate.
40. We note that in his oral evidence, Mr Jones acknowledged that ACBF charges higher premiums for people with medical conditions that are more common in Aboriginal communities.⁵⁴ Similarly, we submit that this may constitute unlawful discrimination under section 13 of the RDA and consider that it is appropriate for the Commission to recommend that the Australian Human Rights Commission investigate.

Non-disclosure

41. Since January 2018, ACBF has declined four claims due to non-disclosure of cancer.⁵⁵ We refer to Ms Walsh's Plan Rules,⁵⁶ and note that it does not appear that the contract allows ACBF to decline a claim due to non-disclosure of pre-existing medical conditions. This being the case, we submit that it is open to the Commission to conclude that ACBF may have breached its contract with these particular customers. We consider it appropriate for the Commission to find

⁴⁹ *Life Insurance Act 1995* (Cth) s 11(3)(e)(ii) ; *Insurance Contracts Act 1984* (Cth) s 8.

⁵⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3844.

⁵¹ Australian Securities and Investment Commission, *Analysis of the Funeral Insurance Sector in Australia*, ASIC.0025.0003.1757, 23; Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3861.

⁵² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3862.

⁵³ Aboriginal Community Funeral Plan Rules, ACBF.0004.0001.0046, rule 4.1.

⁵⁴ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3844.

⁵⁵ Witness Statement of Bryn Jones, WIT.0001.0054.0001, [21.3(b)], [22.1].

⁵⁶ Witness Statement of Tracey Walsh, TLW-8, Annexure 3, FOS.0039.0001.0139.



that ACBF ought to pro-actively contact the relevant 'Payees', agree to pay out these claims, compensate them for consequential loss (for example interest and charges on a loan taken out for funeral expenses) and for non-financial loss for the stress and inconvenience. We submit also that the Commission recommend that ACBF be required to advise payees of their rights to complain to the Financial Ombudsman Service or the Australian Financial Complaints Authority if they are not satisfied.

Breach of directors' duties

42. We submit that where the Commission finds misconduct or conduct that falls below community expectations, and that conduct exposes the company to significant risk of harm (including harm to its reputation), it is open to the Commission to also make a finding that the directors and other officers have breached their duties under the Corporations Act.⁵⁷ Such a finding is important to ensure there is accountability among the leadership (including directors and senior management) for misconduct or conduct that has fallen below community expectations.
43. Sections 180 and 181 of the Corporations Act impose duties of care and diligence and to exercise their powers and discharge their duties in good faith, duties also reflected at common law. These are civil penalty provisions, to which corresponding civil penalties attach. Section 206C provides that upon an application by ASIC, the Court has the power to disqualify persons from managing corporations who have contravened a corporation/scheme civil penalty provision. It is noted that section 184 provides that it is a criminal offence for directors who are reckless or intentionally dishonest in their failure to discharge the duty of good faith as set out in section 181, and corresponding criminal sanctions are attached.
44. It is clear from the case law that a director can breach their duty of care and diligence under section 180 by exposing the company to risk of harm including sanctions, civil liability or reputational damage.⁵⁸ The test 'involves consideration of all circumstances including the foreseeable risk of harm to any of the interests of the company and the magnitude of that harm, together with the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question, and any burdens of further alleviating action'.⁵⁹ Importantly, all of a company's interests—including reputation—are relevant when considering the risk of harm.⁶⁰ This has been called the 'stepping stone' approach to liability.⁶¹

⁵⁷ Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Submission on Round 1 Hearings – Consumer Lending* (3 April 2018), [9.4]-[9.8] <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180403-Submission-on-Consumer-Lending-FINAL-1.pdf>>.

⁵⁸ *ASIC v Cassimatis (No 8)* [2016] FCA 1023, [478],[480-1],[483]

⁵⁹ *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, [675].

⁶⁰ *Ibid* [478], [480], [483].

⁶¹ As set out in *ASIC v Cassimatis (No 8)* [2016] FCA 1023, *ASIC, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 934 and *ASIC, in the matter of Padbury Mining Limited v Padbury Mining Limited* [2016] FCA 990



45. Ms Orr QC has submitted that it is open to the Commissioner to make findings of misconduct against ACBF and that ACBF has engaged in conduct which fell below community expectations.⁶² The evidence relied upon by Ms Orr QC includes engaging in conduct that is liable to mislead the public as to the nature, the characteristics and the suitability of their products, at times in breach of Federal Court orders and contrary to ASIC's recommendations.⁶³ This conduct has exposed systemic failures in ACBF's culture, governance and remuneration practices and in addition to Ms Orr QC's submissions on civil liability, has attracted significant media coverage and risk of reputational harm⁶⁴ to the company.
46. Directors must not be directors in name only; they must apply an 'enquiring mind'.⁶⁵ Under section 180 of the Corporations Act, directors must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would. Directors must make business judgments in good faith for a proper purpose, with no material personal interest, having informed themselves of the relevant subject matter and in the rational belief that it was in the best interests of the company. Arguably, a reasonable director would inform themselves of the day to day operation and management of a company to act in the best interests of the company, including managing the risk to reputation of the company and consequent loss to shareholders.
47. The misconduct and conduct which fell below community expectations outlined above occurred over some years, including during the directorships of Bryn Jones, Jonathan Law and Ron Pattenden.⁶⁶ In his first statement to the Commission, Mr Jones referred to his co-directors Mr Pattenden and Mr Law as follows (emphasis added) –

*Jonathan Law is currently a non-executive director of the company and is **not involved in the day to day management and/or day to day operation** of the company.*

*Ron Pattenden, the original founder of ACBF, was appointed as a director of the Group since May 2013, however, Mr Pattenden's **appointment was made simply to comply with legislative provisions with respect to the required number of directors**. Mr Pattenden is **based offshore and has limited understanding and involvement in the day to day***

⁶² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 39* (2018), 4134.

⁶³ *Ibid* 4134-4135.

⁶⁴ Clancy Yeates, "'Fake' funeral insurer used rainbow serpent logo to lure Indigenous Australians', *The Age* (online), 3 July 2018 <<https://www.theage.com.au/business/banking-and-finance/fake-funeral-insurer-used-rainbow-serpent-logo-to-lure-indigenous-australians-20180703-p4zp8v.html>>; Misa Han, 'Banking royal commission: Funeral insurer CEO Bryn Jones got job through his dad', *Australian Financial Review* (online), 4 July 2018 <<https://www.afr.com/business/insurance/banking-royal-commission-funeral-insurer-ceo-bryn-jones-got-job-through-his-dad-20180704-h127r6>>; Michael Roddan, 'Banking royal commission: Funeral insurer docked Centrepay accounts despite not knowing whereabouts', *The Australian* (online) 4 July 2018 <<https://www.theaustralian.com.au/business/banking-royal-commission/banking-royal-commission-funeral-insurer-docked-centrepay-accounts-despite-not-knowing-whereabouts/news-story/0db629fe3ecdf84250e029f9763882be>>.

⁶⁵ *Australian Securities and Investments Commission v Healey* [2011] FCA 717, [20].

⁶⁶ Exhibit 4.146.1 - ACBF.0005.0001.0001 to the first witness statement of Bryn Jones.

It is noted that for one of those companies, Community Funeral Plants Ltd, there is one further director – Geoffrey Clayton.



*operations of the Group, although he has been made aware generally of the changes to operations in recent years.*⁶⁷

48. This responsibility is even higher where ACBF has previously breached the law and the risk of harm to the company and the magnitude of that harm is foreseeable. In ACBF's media release on 29 June 2018, which ought to have been authorised by Mr Jones, ACBF was at the very least reckless in its interpretation of its need to change their 'funeral insurance offerings'.⁶⁸ In the release, ACBF refers to 'law changes' as the cause which was also the initial view expressed by Mr Jones during cross-examination. It was only through the cross-examination, that Mr Jones appeared to come to understand that the changes were made because of the 2004 Federal Court finding that ACBF had breached the law.⁶⁹ In fact, the Court held that ACBF had breached s 992A of the Corporations Act by offering financial products for sale in the course of, or because of, unsolicited meetings.⁷⁰ ACBF subsequently stopped accepting new members into Fund No 2, and instead established the ACBF Funeral Plan and Community Plan which were exempted from the Corporations Act and its 'anti-hawking' provisions' by virtue of being a 'expenses-only' funeral policies. This amounted to a restructure designed to avoid the application of the law.
49. It was also revealed through his cross-examination that Mr Jones was not aware of several occasions when ACBF had published advertisements in contravention of Federal Court consent orders entered into with ASIC in 1999 with respect to misleading and deceptive conduct.⁷¹ It was not clear from his evidence whether Mr Jones understood the effect of the Court orders or even that or why the orders were made.⁷²
50. Mr Jones gave evidence that he has no qualifications, and that prior to joining the ACBF Group in November 2017 he had no background working in the insurance sector or with Aboriginal people.⁷³ He gave evidence that he had previously volunteered, 'went out to Palm Island on mission trips to work with indigenous ... communities', taught children sport and was working in the IT sector.⁷⁴ He met the owner, who "banks with" his father, in a coffee shop, was hired as CEO as he 'attended his business and saw changes he could make, just from a technological point of view, as well as how he could better position himself or the company'.⁷⁵

⁶⁷ Also at Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36*(2018), 3789.

⁶⁸ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3799.

⁶⁹ *Australian Securities and Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 963.

⁷⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3800; *Australian Securities and Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 963.

⁷¹ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3823-7; *Australian Securities and Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* (Unreported, Federal Court of Australia, O'Loughlin J, 24 September 1999) ASIC.0032.0003.0003.

⁷² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3792-3.

⁷³ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3822.

⁷⁴ *Ibid* 3823.

⁷⁵ *Ibid* 3822-3.



51. While obviously relevant to a consideration of whether Mr Jones has discharged his duties as a director in accordance with the law, this information is also relevant to consideration of same in relation to the other directors, who were directors at the time that Mr Jones was hired as the CEO of the ACBF Group, presumably with knowledge of his (lack of) qualifications and relevant expertise.
52. Mr Jones gave evidence that none of the directors or managers of the ACBF Group are Aboriginal people, that the ACBF Group has no sponsorship or affiliation with any Aboriginal owned or controlled organisations and that a majority of the staff of the ACBF Group are not Aboriginal people.⁷⁶
53. Mr Jones also gave evidence that ACBF commissioned a cultural audit from MURACONNECT in March 2018.⁷⁷ MURACONNECT reported that 'there appears to be a lack of cultural understanding and cultural confidence amongst the majority ACBF employees', and that recruitment processes failed to 'recognise the inherent business requirements of the need to have an understanding of Aboriginal and Torres Strait Islander culture and history, and the ability to communicate effectively and sensitively with Aboriginal and Torres Strait Islander people'.⁷⁸ MURACONNECT noted that while the majority of staff undertook some cultural awareness training in the previous six months, 'this training was not tailored, nor specific, to the on-job needs of ACBF staff'.⁷⁹ MURACONNECT noted further that the 'development of a strategic approach to marketing through the implementation of a community-based communications strategy will enable broader promotion of ACBF and its products through out Aboriginal and Torres Strait Islander communities'.⁸⁰
54. Mr Jones gave no evidence of any new strategic approach to marketing or of any cultural awareness or any other training that had since been implemented by ACBF in an effort to address these issues.
55. Given that ACBF's target market is Aboriginal people, it is notable that the directors have not yet sought to develop or implement processes to ensure that the company is best placed to increase the opportunities to engage Aboriginal customers 'effectively or sensitively' and 'build the ACBF brand'.⁸¹ Together with the misleading statements made in press releases in recent weeks, it would appear that the directors have facilitated quite the opposite despite claiming to operate 'for the benefit of' Aboriginal people.⁸²

⁷⁶ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3789.

⁷⁷ It is noted that the cultural audit makes no reference to any engagement with Aboriginal people or communities in its report.

⁷⁸ MURACONNECT, *Cultural Audit Report – Aboriginal Community Benefit Fund* (2018) ACBF.0003.0001.0114, 3.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* 5.

⁸¹ *Ibid* 7.

⁸² Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3789.



56. As set out above, it is evident that the current directors of the ACBF Group including Mr Jones, Mr Pattenden and Mr Law have exposed the company to risk of further harm including sanctions, civil liability for conduct of a kind similar to previous breaches of the law, and to reputational damage. Taking into account the “stepping stone” approach to liability,⁸³ it is therefore open to the Commissioner to find that the ACBF directors have breached their duties of care and diligence and to exercise their powers and discharge their duties in good faith.

Referral to Legal Services Commission

57. We submit that it is open to the Commission to refer ACBF’s legal representatives’ conduct in this matter to the Queensland Legal Services Commission. Rule 4 of the Australian Solicitors’ Conduct Rules requires a solicitor to be “...courteous in all dealings in the course of legal practice” and “avoid any compromise to their integrity”.⁸⁴ Rule 34.1 provides that a solicitor must not in any communication associated with representing a client “make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor’s client, and which misleads or intimidates the other person” or “use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person”.⁸⁵

58. In correspondence to Consumer Action, ACBF’s legal representatives, Small Myer Hughes (**SMH**), described Ms Walsh’s claim as “vexatious”, an “abuse of process” and “irrelevant” and the request for information as “vexatious” and “an abuse of process”.⁸⁶ In its letter to Consumer Action dated 22 December 2016, SMH wrote:

ACBF continues to be dismayed by groups such as yours purporting to represent the interests of ACBF’s customers. Any allegation that ACBF is guilty of any wrongdoing cannot be sustained. Please cease your campaign against our client.

59. We note that it appears SMH failed to respond to Consumer Action’s letter dated 8 March 2017.⁸⁷

60. Despite SMH’s correspondence, by letter dated 7 June 2018, SMH made an offer to settle on ACBF’s behalf.⁸⁸

61. Ms Walsh described how she felt about SMH’s response.⁸⁹

⁸³ See f/n 61.

⁸⁴ Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at 24 August 2015) r 4.

⁸⁵ *Ibid* r 34.1.

⁸⁶ Witness Statement of Tracey Walsh, TLW-5 (RCD.0024.0016.0011); TLW-8 (FOS.0039.0001.0139).

⁸⁷ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [26].

⁸⁸ Witness Statement of Tracey Walsh, TLW-9, CALC.0001.0001.0001.

⁸⁹ Witness Statement of Tracey Walsh, WIT.0001.0072.0001, [25]; Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3775-3776.



I got worried because I thought that ACBF might cancel my policy if I caused trouble for them. I thought I was a little person, and that I didn't have much power to do anything against a big business. I wasn't sure what to do. I thought that maybe I should back off, because ACBF had these big lawyers, and if it went further, I might lose the Plan. I didn't want to be caught without the Plan, because I had to bury both my mum and dad, and I knew what the cost would be.

Remediation

62. We consider that it is appropriate for the Commission to recommend that ACBF pro-actively compensate people who were misled as to ACBF's association with Aboriginal communities.
63. Should the Commission also find that ACBF engaged in unconscionable conduct, we submit that it ought also to make recommendations about appropriate remediation.
64. We refer to ACBF's recent practice of allowing customers to cease payments and retain the benefit if they contact ACBF and are in financial hardship.⁹⁰ We submit that the Commission ought to recommend that ACBF pro-actively contact customers who have already paid more than their benefit amount, allow them to stop making payments and maintain the benefit.
65. As above, we submit that it is open to the Commission to recommend remediation in respect of payees who have had claims declined due to non-disclosure.

Case study: Kathy Balngayngu Marika and Let's Insure (Select AFSL)

Available findings of misconduct

66. We strongly support the findings of misconduct outlined by Ms Orr QC.

Additional available findings of misconduct

67. We submit that it is also open to the Commission to find that:
 - a. Select AFSL (**Select**) breached its obligations under section 12DA of the ASIC Act in relation to statements it made during the phone calls about the product;
 - b. Select breached its obligations under section 12DB(1)(g) and (h) of the ASIC Act in relation to statements made during the phone calls about the price of the product;
 - c. Select breached its obligations under section 12 DB(1)(h) of the ASIC Act in relation to statements made during the phone calls about the need for the product;
 - d. Select breached consumer protection laws by refusing Ms Kathy Balngayngu Marika's request to cancel the policy;

⁹⁰ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 36* (2018), 3798.



- e. Select engaged in unconscionable conduct in its use of referral selling combined with an incentive program and encouraged use of high pressure sales; and
 - f. Select directors have breached their duty of care and diligence under section 180 of the Corporations Act and their duty to exercise their powers and discharge their duties in good faith under section 181, and if the breach of the latter duty is found to be reckless or intentional, the directors may be criminally liable under section 184.
68. Ms Marika, a Yolngu woman from north-east Arnhem land who now lives in New South Wales, gave evidence to the Commission about her dealings with Select about a funeral insurance product.
69. In the course of selling the funeral insurance policies to Ms Marika in September 2015, we submit that Select breached its obligations under section 12DA of the ASIC Act to not engage in conduct that is misleading or deceptive. We refer to the call recordings.⁹¹ At various points, the sales representative suggests directly or indirectly that this product is suitable for Ms Marika, is required, will not expire, is affordable and is cheaper than alternatives. In addition, the sales representative uses sales tactics that confuse Ms Marika about the nature of the product, the need for the product, the use of her family and friend's phone numbers and the entitlement to vouchers. In particular, in conversation about the accidental cover, the sales representative allows Ms Marika to believe it could be used when she is sick or has an infection or requires the hospital. We submit that this conduct is misleading and deceptive conduct by omission.⁹²
70. In the course of selling the funeral insurance policies to Ms Marika in September 2015, we submit that it is open to the Commission to find that Select breached section 12DB(1)(g) of the ASIC Act which prohibits a person from making false or misleading representations with respect to the price of services. We refer to the call recordings.⁹³ In the phone calls with Ms Marika the sales representative says the product is "priced up to 50% cheaper and as you can imagine you don't want to be spending too much".⁹⁴ This may also be in breach of section 1041E and 1041G of the Corporations Act because it is likely to induce Ms Marika into entering the contract, and the sales representative appears not to care if the representation is true and the overall conduct is dishonest.
71. In the course of selling the funeral insurance policies to Ms Marika in September 2015, Select breached section 12DB(1)(h) of the ASIC Act which prohibits a person from making false or misleading representations concerning the need for any services. We refer to the phone recordings.⁹⁵ In the phone calls with Ms Marika, the sales representative tells Ms Marika that people often taken out insurance in addition to insurance with superannuation, that most people

⁹¹ SAF.0001.0001.0070; SAF.0001.0001.0082.

⁹² Conduct may be misleading by omission where there is a reasonable expectation of disclosure: *Demagogue Pty Ltd v Ramensky* [1992] FCA 851.

⁹³ SAF.0001.0001.0070; SAF.0001.0001.0082.

⁹⁴ Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Proceedings Day 37* (2018), 3911.

⁹⁵ *Ibid.*



take out funeral insurance for their whole family, and that Ms Marika would cease to be covered by her existing funeral insurance policy when she stopped working. The sales representative is suggesting that Ms Marika needs this service in addition to the insurance she already has. Furthermore, these statements are not necessarily true. This conduct is also likely to breach obligations set out in sections 1041E and 1041G of the Corporations Act because it is likely to induce Ms Marika into entering the contract, and the sales representative appears not to care if the representation is true and the overall conduct is dishonest.

72. In the dealings Select had with Ms Marika on 16 September, we submit that it is open to the Commission to find that:
- a. Select may have engaged in unconscionable conduct and/or misleading and deceptive conduct in breach of the ASIC Act,
 - b. breached the duty of utmost good faith in the Insurance Contracts Act, and
 - c. breached the prohibition on dishonest conduct in section 1041G of the Corporations Act

in its failure to address Ms Marika's request to cancel the product. We refer to the call recordings.⁹⁶

73. Ms Marika asks to cancel the product, but the representatives do not allow her to do so. In the first call, Select does not respond to her query and defers her decision to cancel by getting someone to call her back. In the second call, Select again do not respond to her request, suggesting that she get a month free. Given Ms Marika is attempting to exercise her cooling off rights, the failure to respond to her request to cancel, to defer the decision and to offer a free month without discussing her request is misleading and dishonest.
74. We submit that it is also open to the Commission to find that Select's use of referral selling combined with an incentive program encouraged use of high pressure sales and constitutes unconscionable conduct. Section 12CB(4)(b) of the ASIC Act allows a finding of unconscionable conduct in relation to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. We therefore submit that it is open to the Commission to find that Select's use of its referral scheme in contravention of prohibitions on referral selling in the ASIC Act coupled with the incentive program and sales training is, in all the circumstances, unconscionable. One action on its own might be merely unfair but the combine use of the referral scheme, the incentive program and the sales tactics in the context of sales of funeral insurance, a product predominantly purchased by vulnerable consumers, meant that Select were departing from community standards in such a way that the conduct can be seen to be against conscience.⁹⁷

⁹⁶ Ibid.

⁹⁷ *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, [195].



75. We also submit that where the Commission finds misconduct or conduct that falls below community expectations, and that conduct exposes the company to significant risk of harm (including harm to its reputation), it is open to the Commission to also make a finding that the Select directors have breached their duties of care and diligence under the Corporations Act.⁹⁸ Such a finding is important to ensure there is accountability among the leadership (including directors and senior management) for misconduct or conduct that has fallen below expectations.

⁹⁸ See also paragraphs 41-55 of this submission; Consumer Action Law Centre, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Submission on Round 1 hearings – Consumer lending* (3 April 2018), [9.4]-[9.8] <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180403-Submission-on-Consumer-Lending-FINAL-1.pdf>>.

