

ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

Submission on Round 6 Hearings – Case Studies

Insurance

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 relation to insurance. 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, Consumer Action has provided advice and/or legal representation to 538 people on insurance issues. 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 life insurance.
3. Consumer Action provided legal advice and support to Reverend Bruce Grant Stewart, who lives in Victoria, who gave evidence during the Round 6 hearings on his experiences dealing with Freedom Insurance (**Freedom**). Consumer Action provides these submissions on findings available in relation to Mr Stewart's case study, and also brief submissions on findings available in relation to additional case studies as follows:
 - a. ClearView Life Assurance Limited (**ClearView**)
 - b. The Colonial Mutual Life Assurance Society (**Commlnsure**) (heart attack and breast cancer claim case studies)
 - c. Insurance Australia Group Limited (**IAG**) (add-on insurance)
 - d. AAI Limited (**AAI**) (AAMI's Complete Replacement Cover Policy)

Consumer Action otherwise strongly supports the findings of misconduct and conduct falling below community standards and expectations submitted by Counsel Assisting the Commission.



4. This submission should be read in conjunction with Consumer Action's policy submission relating to insurance due 26 October 2018.

ClearView

Available findings of misconduct

5. We strongly support the submissions on findings of misconduct outlined by Senior Counsel Assisting Rowena Orr QC in that ClearView has engaged in misconduct as follows:
 - a. ClearView may have breached its obligations under section 992A of the *Corporations Act 2001* (Cth) (**Corporations Act**) in relation to 300,000 to 303,000 calls between 2014 and 2017.
 - b. In calls made between 2013 and 2016 where ClearView mis-sold policies, it engaged in unconscionable conduct under sections 12CA and 12CB of the *Australian and Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by pressuring individuals into buying life insurance policies, engaged in misleading and deceptive conduct by misrepresenting matters such as whether customers were agreeing to the purchase and the policy terms and breached its duty of utmost good faith required by section 13 of the *Insurance Contracts Act 1984* (Cth) (**IC Act**).
 - c. ClearView breached its obligation under section 912A(1)(a) of the *Corporations Act* by failing to take all reasonable steps to ensure it provided its services fairly, efficiently and honestly in the way it sold its policies.
 - d. ClearView breached its obligation under section 912A(1)(f) to ensure its representatives were properly trained.
 - e. ClearView failed to have in place systems to appropriately manage conflicts of interest between the interests of customers and those of its employees in breach of 912A(1)(aa) of the *Corporations Act*.

Additional available findings of misconduct

6. We submit that it is also open to the Commission to find that ClearView engaged in misconduct as follows:
 - a. ClearView engaged in unconscionable conduct in breach of sections 12CA and 12CB of the *ASIC Act* through its systemic practice of selling low-value insurance to a vulnerable and/or disadvantaged cohort of customers.
 - b. ClearView directors 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 potentially section 184.

Unconscionable conduct - Systemic targeting of accidental death insurance to vulnerable customer base

7. The systemic practice of selling low-value policies to a vulnerable and disadvantaged customer base constitutes unconscionable conduct. Accidental death insurance is particularly low-value. The likelihood of accidental death is extremely low: approximately 5% of deaths in Australia are



accidental.¹ ClearView's accidental death policies also contain other clauses which further limit the likelihood of a successful claim, such as exclusions where the use of alcohol or drugs contributes to the insured's death.² These policies do not provide a meaningful substitute for life insurance.

8. Over the last five years, ClearView sold 14,036 accidental death insurance policies, but received only 37 claims. Of these, it accepted only 43%. Of the 14 that ClearView declined, 10 were declined because they were not 'accidental'. ClearView admitted that it targeted a particularly 'low-value' policy with 'above market pricing' to 'low socio-economic' groups via an 'emotional pitch'.³ Further, ClearView encouraged aggressive and unfair tactics to achieve sales, including discouraging potential customers from speaking to their partners and from reading the documents before agreeing to purchase the cover.⁴
9. We refer to the Federal Court's finding that the sale of Consumer Credit Insurance (**CCI**) to pay day loan customers constituted unconscionable conduct in *ASIC v The Cash Store*.⁵ As with ClearView, The Cash Store's sales staff were encouraged to overcome objections, the target market were particularly financially vulnerable and the products very low-value. We submit that ClearView's practice of selling extremely low-value policies to a vulnerable and disadvantaged customer base was 'a systemic practice directed to exploiting vulnerable consumers' and therefore 'capable of constituting unconscionable conduct, without the need to identify the circumstances of, or effect on, any particular consumer'.⁶

Breach of directors' duties

10. 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),⁷ 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. 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 standards and expectations.
11. Sections 180 and 181 of the Corporations Act impose on directors duties of care and diligence and to exercise their powers and discharge their duties in good faith, duties also reflected at common law. This 'involves consideration of all circumstances including the foreseeable risk of

¹ Exhibit #6.71, RCD.003.0075.0138, 0206.

² Transcript of Proceedings (Day 52, 12 September 2018) 5528; Exhibit #6.28 WIT.0001.0137.0006-7.

³ Transcript of Proceedings (Day 50, 10 September 2018) 5315-8; Exhibit #6.31, CVW.5000.0005.0190, 0212.

⁴ Transcript of Proceedings (Day 50, 10 September 2018) 5363-9; Exhibit #6.48.2, CVW.5000.0001.3232.

⁵ *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926, [94].

⁶ *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132, 140-1. Approved by the Federal Court in *ASIC v The Cash Store*, see above n5, para 83.

⁷ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023, [478], [480], [483].



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'.⁸ Section 206C provides that upon an application by ASIC, the Court has the power to disqualify persons who have contravened a corporation/scheme civil penalty provision from managing corporations. 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.

12. Directors must apply an 'enquiring mind'.⁹ 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. They 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.
13. Ms Orr QC submitted that it is open to the Commissioner to make findings of misconduct against ClearView, and that ClearView has engaged in conduct which fell below community expectations.¹⁰ We refer to these submissions in full and repeat our submissions relating to additional findings open to the Commission as referred to above at paragraphs 7 to 9. For example, we note that despite being aware of compliance shortcomings, in particular significant issues with unsolicited calls, ClearView failed to take meaningful steps to address this conduct. This allowed staff to continue to engage in problematic and harmful sales conduct over a number of years,¹¹ resulting in approximately 300,000 - 303,000 breaches of the anti-hawking provisions of the Corporations Act. The type of sales conduct ClearView encouraged included objection handling,¹² which was said to increase a salesperson's chances of selling by 50%.¹³ ClearView admitted that its remuneration structure, culture of aggressive sales tactics and compliance programme deficiencies caused these problems, and that its culture was one that tolerated or encouraged aggressive sales tactics at the cost of compliance.¹⁴

⁸ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023, [675].

⁹ *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; [2011] FCA 717, [20].

¹⁰ Transcript of Proceedings (Day 59, 21 September 2018) 6460–4.

¹¹ Transcript of Proceedings (Day 50, 10 September 2018) 5358.

¹² Objection handling is when a prospective customer presents a concern about the product/service a salesperson is selling, and the salesperson responds in a way that attempts to alleviate those concerns to ensure a sale, for example discouraging customers from reviewing the Product Disclosure Statement, if they said that they wanted to review the documents before agreeing to sign up.

¹³ Transcript of Proceedings (Day 50, 10 September 2018) 5373.

¹⁴ Transcript of Proceedings (Day 50, 10 September 2018) 5358–63.



Further investigation and remediation required

14. We refer to Ms Orr QC's submission that ClearView may have:
- a. engaged in unconscionable conduct under section 12CA and 12CB of the ASIC Act by pressuring individuals into buying life insurance policies;
 - b. engaged in misleading and deceptive conduct by misrepresenting matters such as whether customers were agreeing to the purchase and the policy terms; and
 - c. breached its duty of utmost good faith required by section 13 of the IC Act in relation to calls where ClearView mis-sold life insurance.
15. We respectfully submit that ClearView may have engaged in the same or similar conduct in addition to those identified by ASIC following its review of only 42 call recordings.¹⁵ Further, it is open to the Commission to recommend further investigation, noting that there are likely further customers entitled to a refund of premiums, together with interest, on this basis.

Freedom Insurance and Grant Stewart

Available findings of misconduct

16. We strongly support the submissions on findings of misconduct outlined by Ms Orr QC in respect of Freedom, specifically:
- a. Freedom may have engaged in unconscionable conduct in breach of section 12CA or 12CB of the ASIC Act by selling life insurance to Mr Stewart's son in circumstances where it knew or ought to have known that he was not consenting or that he did not understand that he was agreeing to the purchase.
 - b. Freedom may have engaged in unconscionable conduct in relation to the four calls identified in Freedom's breach notification to ASIC dated 7 September 2018.¹⁶
 - c. Freedom may have breached its obligations under section 912A(1)(a), (1)(ca), 1(f) and 1(h) of the Corporations Act in connection with the sale of policies to five vulnerable customers.
 - d. Freedom may have breached section 912A(1)(ca) of the Corporations Act by failing to have in place an adequate process to deter legislative breaches.
 - e. Freedom may have breached section 963E of the Corporations Act in relation to its variable component for remuneration sales staff and section 912A(aa) by failing to have in place adequate systems to address conflicts of interest.
 - f. Freedom may have breached section 963E of the Corporations Act relating to non-monetary benefits.

¹⁵ Transcript of Proceedings (Day 50, 10 September 2018) 5352.

¹⁶ Exhibit #6.74,



Additional available findings of misconduct

17. We submit that it is also open for the Commission to make further findings of misconduct against Freedom, as follows:
- a. Freedom engaged in misleading and deceptive conduct in breach of section 12DA of the ASIC Act and/or made a false or misleading statement with respect to price in breach of 12DB(1)(g) of the ASIC Act by describing the cover as 'free' in the course of the sale of life insurance to Mr Stewart's son.
 - b. Freedom breached its duty of utmost good faith under section 13 of the IC Act in relation to the sale of life insurance to Mr Stewart's son.
 - c. Freedom may have engaged in misleading and deceptive conduct under section 12DA of the ASIC Act in relation to the call identified in its letter to ASIC dated 7 September 2018 relating to a complaint made on 26 June 2018, by failing to explain that the policy provided cover for accidental death only.¹⁷
 - d. Freedom engaged in unconscionable conduct through its systemic practice of selling particularly low-value insurance, combined with a culture and incentive programme that encouraged the use of high pressure sales.
 - e. Freedom breached section 912A(2) of the Corporations Act by failing to have an appropriate dispute resolution system, as evidenced by its failure to respond appropriately to Mr Stewart's written and verbal complaints.
 - f. Freedom's directors 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 potentially section 184.

Misleading and deceptive conduct - Description of insurance as 'free' in sale of insurance to Mr Stewart's son

18. We refer to the two calls Freedom made to Mr Stewart's son to sell him life insurance. The sales representative stated during the first call:¹⁸

It's literally, it's just a quick call today in regard to that free funeral cover, that we made available for yourself.

19. During the second call, he said:¹⁹

I'm just giving you a call because you qualified for free funeral cover today. It just (sic) my job to put it in place for you.

¹⁷ Exhibit #6.74, ASIC.0073.0001.0001, 0004.

¹⁸ Exhibit #6.66.37, FIG.0001.0001.0248.

¹⁹ Exhibit 6.66.38, FIG.0001.0001.0249.



20. During the second call Mr Stewart made to Freedom to try to cancel the policy, the representative stated:

What he has done was, he originally got called in relation to a funeral insurance cover, right? Now, we're the only company out there that offer a 12-month free cover to basically insure all our customers for accidental death for free for the first 12 months. So, what your son has done was, he took out the final expenses cover, which is to insure himself for free for the first 12 months. He's not paying anything for the final expenses cover, right, for the first 12 months.

21. The policy was called the Freedom Protection Plan, consisting of funeral cover, accidental death cover and accidental injury cover.²⁰ The premiums totalled \$10.60 per fortnight, with the premiums for accidental death and injury cover at \$4.04 per fortnight payable within 14 days of inception, and the full premium (ie including the 'final expenses' cover) to be charged after 12 months. In describing the cover as 'free' on numerous occasions, Freedom engaged in misleading and deceptive conduct. The reality was that Mr Stewart's son was to pay almost immediately for the policy, with the premiums to increase significantly after 12 months. We submit also that it is also open to the Commission to conclude that this constitutes a breach of section 12DB(1)(g) of the ASIC Act.

Breach of duty of utmost good faith - Sale of insurance to Mr Stewart's son

22. We submit that in selling life insurance to Mr Stewart's son, Freedom breached its duty of utmost good faith under section 13 of the IC Act. We refer to Lord Mansfield's decision in *Carter v Boehm* in 1766 in which he declared 'good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary'.²¹ The duty of utmost good faith 'encompasses notions of fairness, reasonableness and community standards of decency and fair dealings'.²²
23. We refer to the two sales calls made to Mr Stewart's son,²³ and submit that in these circumstances, Freedom knew the policy was of limited value and that it might not be suitable. Most significantly, Freedom knew that Mr Stewart's son did not understand that he was agreeing to purchase life insurance. Despite this, the sales representative sold the policy, employing unfair sales tactics as described below.
24. The Freedom representative decided to terminate the first call to Mr Stewart's son after he confirms his mother is not home when the representative asked him this question. It appears that the representative made this decision because he knew Mr Stewart's son did not appear to have

²⁰ Exhibit 6.66.39.4, FIG.0001.0001.0057.

²¹ (1766) 3 Burr 1905; (1766) 97 ER 1162.

²² *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68, [49].

²³ Exhibit #6.66.37, FIG.0001.0001.0248, Exhibit #6.66.38, FIG.0001.0001.0249; FIG.0001.0001.0002; and FIG.001.001.0250.



capacity to make a decision about entering into an insurance policy. We note that in any event, Mr Stewart's minimal responses, delay in responding to questions and the tone of his voice are sufficient to indicate on an objective basis that he might not have had capacity to consent. Further, after listening to the calls, Mr Orton of Freedom admitted that the Freedom representative knew that Mr Stewart's son was not capable of understanding.²⁴

25. Despite knowledge of Mr Stewart's son's limited capacity, the same sales representative contacted him again and proceeded with the sale. During this subsequent phone call, the sales representative employed unfair sales practices, including collecting bank account and other information before seeking agreement to purchase the policy, and continuing despite the difficulty Mr Stewart's son was having following the conversation and his specific request to end the call. In internal documents, the Chief Operating Officer admitted 'The call is a bit of a shocker' and the Head of Sales responded 'I felt sorry for the poor customer throughout the call.'²⁵ Freedom agreed that it was 'deeply troubling conduct' and that the sales representative should not have sold Mr Stewart's son the policy.²⁶
26. We submit that these internal reactions to the conduct reflect those of the community and support the view that this conduct was unfair, unreasonable and fell significantly short of community standards of decency and fair dealing.

Unconscionable conduct – Sale of low-value insurance through aggressive sales conduct

27. We submit that it is open to the Commission to find that that Freedom's marketing and direct sale of low-value accidental death insurance constitutes unconscionable conduct under section 12CA or 12CB of the ASIC Act. 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.
28. The evidence given demonstrates that accidental death insurance in itself is particularly low value.²⁷ We note that as with ClearView's policies, Freedom's policies contain other exclusions, such as exclusions for 'aerial activity', alcohol or drugs and 'participation in motorised sport'.²⁸ The policies do not provide a meaningful substitute for life insurance, as acknowledged by Freedom in oral evidence.²⁹ We note also that it appears that particularly vulnerable consumers appear to be susceptible to sales of this cover due to various factors including the way it is sold, being locked out of mainstream life insurance policies (for example due to pre-existing conditions) and low financial literacy.

²⁴ Transcript of Proceedings (Day 51, 11 September 2018) 5446–7.

²⁵ Transcript of Proceedings (Day 51, 11 September 2018) 5492; Exhibit #6.93, FIG.0001.0001.0075.

²⁶ Transcript of Proceedings (Day 51, 11 September 2018) 5446.

²⁷ Exhibit #6.71, RCD.0003.0075.0138, 0146.

²⁸ See Transcript of Proceedings (Day 51, 11 September 2018) 5442–3.

²⁹ Transcript of Proceedings (Day 51, 11 September 2018) 5432.



29. In oral evidence, Freedom admitted its provision of sales incentives to direct sales staff, including commissions, a 'boat party' and a trip to Bali, encouraged aggressive and inappropriate sales,³⁰ in particular to vulnerable customers.³¹ This is supported by evidence of complaints reported to ASIC by Freedom which were all made by family members in relation to disabled customers, bar one.³² Freedom also gave evidence of selling accidental death policies to customers attempting to cancel their life insurance,³³ noting that only 28.5% of calls where customers were seeking to cancel were able to cancel their policies.³⁴
30. The combination of the exploitative sales culture, the compliance programme deficiencies and the incentive programme in the context of low-value products, predominantly purchased by vulnerable consumers, meant that Freedom departed from community standards in such a way that the conduct can be seen to be against good conscience.³⁵ Accordingly, it is open to the Commission to find that Freedom engaged in unconscionable conduct through its systemic practice of aggressively selling particularly low-value insurance to a vulnerable and disadvantaged customer base.

Dispute resolution failures

31. We submit that Freedom's failure to respond appropriately to Mr Stewart's complaint and his requests for call recordings demonstrates that it does not have an appropriate dispute resolution system, as required by section 912A(2)(g)(i) of the Corporations Act.
32. On about 15 June 2016, upon discovering that his son had signed up to life insurance with Freedom, Mr Stewart contacted Freedom by phone to cancel the call.³⁶ The Freedom representative advised that they would listen to the call and get back to Mr Stewart. Later that day, Mr Stewart sent an email to Mr Harvey Light, Freedom's Head of Operations, in which he specifically noted that he wished to 'lodge an official complaint'.³⁷ We refer to Freedom's internal correspondence in response to Mr Stewart's complaint, in which staff belittled Mr Stewart and made disparaging comments about his son.³⁸

³⁰ Transcript of Proceedings (Day 51, 11 September 2018) 5466.

³¹ Transcript of Proceedings (Day 51, 11 September 2018) 5453; Exhibit #6.74

³² Exhibit #6.74, ASIC.0073.0001.0001, 0003–4.

³³ Exhibit #6.70, FIG.0008.0008.0013, 0044; Mr Orton accepted that this practice occurred and that it was inappropriate. See Transcript of Proceedings (Day 51, 11 September 2018) 5435.

³⁴ Transcript of Proceedings (Day 52, 12 September 2018) 5499–5506.

³⁵ *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149; [2018] NSWCA 15, [195]; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

³⁶ Exhibit #6.64, WIT.0001.0146.0001, 0004.

³⁷ Exhibit #6.64, WIT.0001.0146.0001, 0004.

³⁸ Exhibits #6.69, FIG.0011.0001.0001, and #6.97, FIG.0001.0001.0071.



33. On 17 June 2016, Mr Stewart again contacted Freedom again, this time with his son.³⁹ He also requested a copy of the call recordings. This time, Freedom agreed to cancel the policy, but not before they transferred him to the retention team, a member of which tried to convince him it was a worthwhile policy. Mr Stewart did not receive a response to his complaint nor a copy of the information until he followed up in July 2018, that is, over two years later.⁴⁰
34. We refer to ASIC Regulatory Guide 165 Licensing: Internal and External Dispute Resolution and submit that Freedom breached of section 912A(2)(g)(i) of the Corporations Act by failing to provide a response to Mr Stewart's complaint, in circumstances where it is obliged to provide a response within a maximum of 45 days.⁴¹

Breach of directors' duties

35. Ms Orr QC has submitted that it is open to the Commissioner to make findings of misconduct against Freedom and that Freedom has engaged in conduct which fell below community expectations.⁴² We refer to these submissions in full and repeat our submissions relating to additional findings open to the Commission as referred to above at paragraphs 17 to 34. We submit that, in these circumstances, it is also appropriate for the Commission to find that Freedom's directors breached their duties of care and diligence and to exercise their powers and discharge their duties in good faith.

Further investigation required

36. We refer to Ms Orr QC's submission that Freedom may have engaged in unconscionable conduct in the sale of life insurance to Mr Stewart's son and in respect of four calls Freedom identified. We refer also to our submissions above relating to misleading and deceptive conduct and the breach of the duty of utmost good faith in the sale of insurance to Mr Stewart's son. We submit that Freedom may have engaged in unconscionable conduct and/or misleading and deceptive conduct and/or breached the duty of good faith in other transactions which were not the subject of complaints to Freedom. We consider that this warrants further investigation and we respectfully submit that it is open to the Commission to recommend that ASIC undertake such an investigation, noting that customers may be entitled to premium refunds, together with interest, if their decision to take out the policy or policies resulted from the breach or breaches.

Sale of accidental death life policies generally

37. As set out above, accidental death policies are particularly low value, with an average payout ratio for the years 2015 to 2017 of 16.1%.⁴³ Insurers have reported high decline rates, as outlined below, suggesting customers do not understand what they are buying. We submit that the sale

³⁹ Exhibit #6.64, WIT.0001.0146.0001, 0005.

⁴⁰ Exhibit #6.64, WIT.0001.0146.0001, 0006–7; Transcript of Proceedings (Day 51, 11 September 2018) 5413–5.

⁴¹ ASIC *Regulatory Guide 165: Licensing: Internal and external dispute resolution*, Issued May 2018, 165.88.

⁴² Transcript of Proceedings (Day 51, 11 September 2018) 6469–70.

⁴³ Transcript of Proceedings (Day 52, 12 September 2018) 5527.



of these products in and of itself, and especially to vulnerable and disadvantaged consumers, constitutes unconscionable conduct.

38. We refer to the statements made in respect of Auto & General, Colonial Mutual Life Assurance Society (**CMLA**), MLC, One Path, Suncorp, Westpac and Zurich to the Royal Commission and note the following:
- a. Over the last five years, Auto & General received approximately \$775,000 in premiums in respect of 1684 policies. It declined the only claim it received on the basis that it was not accidental.⁴⁴
 - b. CMLA received approximately \$121 million in premiums. Of its 1829 claims, it accepted only 3%. Its claims ratio ranged between 3.42% and 23.03%.⁴⁵
 - c. Over the last five years, Suncorp received approximately \$3.9 million in premiums in respect of accidental death policies. It has received only 10 claims, of which it accepted only 5. It received no claims during 2017 and 2018.⁴⁶
 - d. Zurich received almost \$500,000 in premiums and did not receive any claims.⁴⁷
39. We submit that it is open to the Commission to find that the sale of accidental death by these insurers constitutes unconscionable conduct. These life insurers are targeting low-value products at vulnerable and disadvantaged consumers, who are more susceptible to sales of this cover due to various factors including the way it is sold, being locked out of mainstream life insurance policies (for example due to pre-existing conditions) and low financial literacy.
40. It is open to the Commission to find that this at the very least constitutes conduct falling below community standards and expectations.
41. We respectfully submit that the Commission also recommends ASIC investigate with a view to ascertaining whether remediation is required noting that customers might be entitled to a refund of premiums where an insurer mis-sold a policy to them.

CommInsure

Available findings of misconduct and conduct falling below community standards and expectations

42. We strongly support the potential findings of misconduct outlined by Ms Orr QC in respect of CommInsure, specifically:
- a. CommInsure may have breached sections 12DA and 12DB of the ASIC Act in relation to misleading and deceptive advertising material for trauma policies.

⁴⁴ Exhibit #6.182, TAL.500.009.0209.

⁴⁵ Exhibit #6.103, CBA.9000.0112.1000.

⁴⁶ Exhibit #6.108, SUN.9999.0020.0001.

⁴⁷ Exhibit #6.110, ZUR.9999.0003.0041.



b. CommInsure may have breached its statutory obligation under section 13 of the IC Act to act towards the insured with breast cancer with the utmost good faith.

43. We also support the recommended findings of conduct falling below community expectations in respect of CommInsure.⁴⁸

Additional available findings of misconduct

44. We submit that it is open to make further findings of misconduct against CommInsure regarding its claims handling process for its insureds who made claims for breast cancer⁴⁹ and a heart attack.⁵⁰

Breast cancer claim – breach of duty of utmost good faith and breach of contract

45. We submit that CommInsure breached its duty of utmost good faith in relation to its insured with a breast cancer claim by relying on the definition of 'radical' surgery in a particularly narrow and unfair way, failing to take into account the insured's interests, expert medical opinion,⁵¹ or the principles of insurance policy interpretation.⁵² CommInsure's interpretation of 'radical' surgery was that the insured must have a complete mastectomy. That interpretation does not appear to be available from the ordinary meaning of the words 'radical surgery' and was contradicted by expert medical opinion.⁵³ We submit that CommInsure's interpretation was particularly problematic in these circumstances where medical progress meant that less invasive surgery was required for the same condition than would have been required when the insured took out the insurance policy due to medical progress.⁵⁴ We note also that it appears that one reason the insured did not require a complete mastectomy in these circumstances was the size of her breasts,⁵⁵ highlighting the particular iniquity of this interpretation.

46. Despite this, CommInsure maintained its decision and its narrow interpretation of the clause. We submit this conduct amounts to a breach of the duty of utmost good faith. We note that the Financial Ombudsman Service (**FOS**) found in favour of the insured on the basis that CommInsure was not entitled to rely on the definition.⁵⁶

47. We submit also that in this case, it is open to the Commission to find that CommInsure engaged in misconduct in the form of breach of contract by declining the claim in reliance on the 'radical surgery' definition. We refer to section 14 of the IC Act in this regard, which sets out that if an

⁴⁸ Transcript of Proceedings (Day 59, 21 September 2018) 6482-83.

⁴⁹ Transcript of Proceedings (Day 53, 13 September 2018) 5638-53.

⁵⁰ Transcript of Proceedings (Day 52, 12 September 2018) 5549-5608.

⁵¹ Transcript of Proceedings (Day 53, 13 September 2018) 5644-7.

⁵² *Guastalegname v Australian Associated Motor Insurers Ltd* [2017] VSC 420.

⁵³ Transcript of Proceedings (Day 53, 13 September 2018) 5644-7.

⁵⁴ Transcript of Proceedings (Day 53, 13 September 2018) 5647.

⁵⁵ Transcript of Proceedings (Day 53, 13 September 2018) 5644.

⁵⁶ Transcript of Proceedings (Day 53, 13 September 2018) 5650.



insurer's reliance on a clause would be a breach of the duty of utmost good faith, then it may not rely on the provision. We also repeat the contents of paragraph 45 above. We note also that FOS found in favour of the insured, saying that Commlnsure:⁵⁷

...was not entitled to deny the claim because the policy does not define the phrase "radical breast surgery" and therefore [Commlnsure] was not entitled to limit the interpretation to a mastectomy. The applicants have provided medical documents supporting that the insured had suffered a carcinoma in situ which led her to having radical breast surgery.

Heart attack claim – breach of duty of utmost good faith and breach of contract

48. We submit that it is also open to the Commission to find that Commlnsure breached its duty of utmost good faith by declining the insured's claim on the basis of the heart attack definition in relation to the insured who suffered a heart attack, and for its conduct in dealing with the complaint, including failing to provide requested information to FOS,⁵⁸ and inappropriately disputing its jurisdiction.⁵⁹
49. We refer to section 14 of the IC Act and submit that it is open to the Commission to also find that its decision to decline the claim also amounts to misconduct, in that it breached its contract with the insured.

IAG and add-on insurance

Available findings of misconduct

50. We strongly support the submissions on findings of misconduct outlined by Counsel Assisting Mark Costello, specifically:
- a. IAG may have breached section 912A(1)(a) of the Corporations Act by failing to do all things necessary to ensure its financial services are provided efficiently, honestly and fairly by failing to review products to ensure benefit to customers, continuing to sell these products despite ASIC concerns, incentivised dealers to sell as many add-on insurance policies as possible regardless of suitability or value and failed to establish systems to oversee and monitor sales practices of authorised representatives. We refer to the submissions made below at paragraphs 52 to 72 relating to the additional available findings in this regard, which we consider also support this finding.
 - b. IAG may have breached section 912A(1)(ca) by failing to take reasonable steps to ensure its representatives complied with financial services law.
 - c. IAG may have breached section 912A(a)(aa) of the Corporations Act by failing to have in place adequate arrangements for the management of conflicts of interest arising out of its

⁵⁷ Transcript of Proceedings (Day 53, 13 September 2018) 5650.

⁵⁸ See Transcript of Proceedings (Day 52, 12 September 2018) 5570–2.

⁵⁹ Transcript of Proceedings (Day 52, 12 September 2018) 5565–7.



incentivisation programme. We refer to paragraphs 61 to 64 below, which we consider also supports this finding.

- d. IAG may have breached section 145 of the National Credit Code by authorising payments to authorised representatives exceeding the 20% commission cap.

51. We also support the submission on findings of conduct falling below community expectations. However, we submit that it is also open to find that the conduct described in fact amounts to misconduct in the form of unconscionable conduct and a breach of the duty of utmost good faith.

Additional available findings of misconduct

52. We submit that IAG engaged in unconscionable conduct under section 12CB of the ASIC Act and breached its duty of utmost good faith under section 13 of the IC Act.

Sale of low-value insurance through the add-on sales process

53. We submit that it is open to the Commission to find that the sale of low-value insurance as an add-on constitutes unconscionable conduct in these circumstances. 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.
54. Swann sold six types of add-on insurance: loan protection insurance, walkaway insurance, protection plus insurance, guaranteed asset protection (**GAP**) insurance, mechanical breakdown insurance and tyre and rim insurance. IAG admitted that the number and complexity of the products could have made genuine comprehension of the policies difficult.⁶⁰
55. For the period FYE2009 to FYE2018, Swann sold about 846,000 policies through car dealerships, receiving approximately \$1.07 billion in premiums.⁶¹ The average claims payout ratio was only approximately 10%.⁶² We submit that a claims payout ratio of 10% indicates that the policy is unlikely to benefit a customer. Further, for some policies, the ratio was significantly lower than this.
56. However, we submit that it is more appropriate to only use data for the period FYE2009 to FYE2016 to accurately calculate the claims ratio figures because IAG exited the motor vehicle dealer channel with the sale of its distribution rights to Eric Insurance in August 2016. Accordingly, it is appropriate to only take into account data for periods during which IAG was selling policies. Data for FYE2017 and FYE2018 distorts the figures because it gives 'credit' for claims paid during this period, but does not account for the significant reduction in premiums

⁶⁰ Transcript of Proceedings (Day 56, 18 September 2018) 6086.

⁶¹ Transcript of Proceedings (Day 56, 18 September 2018) 6089.

⁶² Transcript of Proceedings (Day 56, 18 September 2018) 6089; Exhibit #6.304, WIT.0001.0127.0001 at 0020–0024.



received. We note, as an example, there was a reduction from total premiums received through car dealerships in FYE2015 of \$153,340,042 to only \$63,384 in FYE2018.

57. Data for the period FYE2009 to FYE2016 results in an approximate claims ratio of only **8.3%** for add-on insurance policies sold through car dealerships. We submit that this figure is more appropriate to assess the value of these policies.
58. We provide below a breakdown in respect of individual policies sold through car dealerships for the period FYE2009 to FYE2016:⁶³

Insurance type	Claims ratio for period FY09–16
Guaranteed Asset Protection & Price Protection Insurance	7.3%
Loan Protection Insurance	7.9%
Motorcycle Mechanical Breakdown Insurance	4.3%
Motor Vehicle Mechanical Breakdown Insurance	14.6%
Walkaway Insurance	(6.0%)
Protection Plus Insurance	2.1%
Tyre and Rim Insurance	5.1%
Overall claims ratio	8.3%

59. We note also that it appears IAG stopped selling Walkaway Insurance some time during FYE2014. For the period FYE2009 to FYE2014, the claims ratio for walkaway insurance was only **3.4%**, i.e. IAG received \$92,156,522 in premiums and paid out only \$3,168,410.⁶⁴
60. We refer to the decision in *ASIC v The Cash Store*, in which the Federal Court found that the sale of CCI was unconscionable in circumstances where the claims ratio was 1.1%.⁶⁵ We submit that the claims ratio data above indicates that these policies were similarly highly unlikely to benefit customers.

⁶³ Exhibit #6.304, WIT.0001.0127.0001 at 0020–0021, 0023–0024.

⁶⁴ Exhibit #6.304, WIT.0001.0127.0001 at 0020–0021, 0023.

⁶⁵ *ASIC v The Cash Store* [2015] FCA 926, [86] and [94].



61. Further, the add-on sales method that IAG chose to sell its products through inhibits good decision-making, making people more vulnerable, for example due to decision fatigue and a customer's focus on the primary purchase.⁶⁶
62. We submit also that it appears IAG encouraged unfair sales tactics such as evidenced in the document 'The Psychology of Menu Selling'.⁶⁷ IAG provided a copy of this document to ASIC in response to a request for information relating to the sale of add-on insurance.⁶⁸ This document details sales techniques to adopt for 'menu-selling', such as providing the 'objective' of the product and the value of the product 'not the price or dollar value but what it will do for the customer at the time they need to use it'.⁶⁹ It encourages salespeople to guide a person to a decision because 'once that decision is made, it is the subconscious that defends that decision'.⁷⁰ It also encourages salespeople to sell a number of options by use of a menu, all options including two to four add-on policies.⁷¹
63. The IAG document also notes that there is a 'General Rule of thought that a customer has about a 20% above NAF⁷² for inclusive insurances', despite providing no basis for this. It encourages salespeople to let customers know they have 'options when financing certain products above paying cash for products', despite the fact that where the entire cost of the add-on insurance policy is paid upfront by adding it to a car loan, a customer pays significantly more.⁷³ Salespeople are encouraged to 'generalise' when 'customer profiling'.⁷⁴ The sales tactics here indicate that the process was intentionally designed to maximise sales by minimising content of information about negative features such as price, exclusions or eligibility.
64. We refer also to the incentives provided to car dealerships to sell these policies, which we consider promoted unfair sales and conflicts of interest. Car dealerships were paid by commission only and car dealers would receive higher commissions for higher cover.⁷⁵ We submit that this incentivised inappropriate selling. As an example, commissions for GAP insurance ranged from 40% to 51%, depending on the level of cover sold,⁷⁶ meaning car dealers were incentivised to sell cover over and above the customer's requirements. The adverse impact of this on unsuspecting customers is evidenced by the 41,039 customers IAG identified as having been sold a more expensive level of cover than they needed. IAG admitted that car dealerships have very

⁶⁶ ASIC, 'A market that is failing consumers: The sale of add-on insurance through car dealers', Report 492 (2016), ASIC.0900.0001.0321.

⁶⁷ Exhibit #6.304.118, IAG.500.108.4466.

⁶⁸ Exhibit #6.304, WIT.0001.0127.0001 at 0011.

⁶⁹ Exhibit #6.304.118, IAG.500.108.4466 at 4471.

⁷⁰ Exhibit #6.304, WIT.0001.0127.0001 at 4472.

⁷¹ Exhibit #6.304, WIT.0001.0127.0001 at 4476.

⁷² We understand 'NAF' stands for 'net amount financed'.

⁷³ ASIC, 'A market that is failing consumers: The sale of add-on insurance through car dealers', Report 492 (2016), ASIC.0900.0001.0321 at 0349 (page 29).

⁷⁴ Exhibit #6.304, WIT.0001.0127.0001 at 4478.

⁷⁵ Transcript of Proceedings (Day 56, 18 September 2018) 6089–92.

⁷⁶ Transcript of Proceedings (Day 56, 18 September 2018) 6091–2.



thin margins on their car sales, they rely on sales of other products for profitability and that IAG had seen examples of this resulting in inappropriate sales. IAG acknowledged that it viewed the car dealerships, not the ultimate customer, as their customer.⁷⁷

65. We submit that the sale of a particularly low-value array of products unlikely to benefit a customer in circumstances where the sales process is designed to make it difficult for people to make good decisions constitutes unconscionable conduct, especially in circumstances where the sales people are incentivised and encouraged to sell large volumes of inappropriate and expensive products to customers, and whose profitability or otherwise is in fact reliant on these sales. One action alone might not be considered unconscionable conduct, but taken together, we submit that the sales process, IAG's remuneration structure, the low value of the policies and the impact on more vulnerable consumers must be considered unconscionable conduct.
66. We submit that a claims ratio of 10% is sufficiently low to warrant a finding of unconscionable conduct in the circumstances as described above. Despite this, we submit that it is more appropriate for the Commission to use the figures relating to the period FYE2009 to FYE2016 only, that is, 8.3% for the products sold through car dealerships.
67. In the alternative, should the Commission consider it cannot make a recommendation for a finding of unconscionable conduct relating to the sale of add-on insurance sold through car dealerships generally, we submit that it is open to the Commission to find that IAG engaged in unconscionable conduct in relation to specific products that were particularly low value, taking Protection Plus Insurance (2.2%) and Walkaway Insurance (3.4%) as examples of the lowest value policies sold through car yards.
68. The duty of utmost good faith requires insurers to have due regard to the insured's legitimate interests as well as its own interests.⁷⁸ We submit that an insured's interests must include their financial interests and by selling insurance in this way for the reasons outlined above, IAG failed to have due regard to their insureds' financial interests. We submit that in relation to IAG's duty of utmost good faith, IAG in fact prioritised the financial interests of the car dealerships over the interests of its customers, and accordingly breached its duty of utmost good faith as required by section 13 of the IC Act.

Sale of add-on insurance in circumstances where no benefit to customer

69. IAG sold low-value insurance policies through car dealers, in circumstances which encouraged and incentivised them to sell policies regardless of whether the policy provided any value to the customer. This resulted in sales where the policy provided no value to the customer, or where customers paid premiums for cover in excess of what they could benefit from. We submit that

⁷⁷ Transcript of Proceedings (Day 56, 18 September 2018) 6098.

⁷⁸ *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, 12 [15].



this constitutes both unconscionable conduct and a breach of IAG's duty of utmost good faith under section 13 of the IC Act.

70. After consultation with ASIC, IAG identified:⁷⁹

- a. 1,935 customers who were unlikely to be able to claim on their insurance as the insured value of their vehicle was more than the amount borrowed;
- b. 127 customers for whom the GapCover policy that they were sold was unnecessary, because it duplicated cover held by them;
- c. 41,039 customers who were sold a more expensive level of cover than they needed;
- d. 13,527 customers who did not receive rebates under their GapCover policy when they paid out their loan early, even though cover under those policies had ended;
- e. 7 customers who were charged twice for roadside assistance; and
- f. 31 customers who were sold life insurance when they were under the age of 30.

71. We submit that the sale of policies in the circumstances identified above at paragraph 70 must amount to unconscionable conduct. IAG was aware of the limitations of its policies and the facts which rendered the policies unlikely to benefit the customers should have been apparent to IAG. The sale of policies in the circumstances outlined above was invariably inappropriate. The terms of the insurance policies were evidently unsuited to the needs of these customer and were 'most unlikely ever to confer a benefit,⁸⁰ or insureds were paying for cover in excess of what they could possibly require, meaning they received no benefit at all for the additional premium paid.

72. We submit that it is also open to find that in selling add-on insurance to the customers identified above, IAG breached its duty of utmost good faith under section 13 of the IC Act. The duty of utmost good faith prevents an insurer from encouraging someone into a transaction on the basis of something it knows and does not reveal to the other party.⁸¹ It 'encompasses notions of fairness, reasonableness and community standards of decency and fair dealings'.⁸² IAG was aware of its policy terms and the circumstances which would render the policies useless or of limited value to the customer. Despite this, IAG went ahead and sold policies to these customers. We submit that IAG clearly failed to have 'due regard' to an insured's interest where it provided insurance that insureds could not claim on or where the cover was more extensive (and therefore more expensive) than required. We submit that it is accordingly open to the Commission to find that IAG may have breached its duty of utmost good faith in relation to the sale of these policies to its customers.

⁷⁹ Exhibit #6.304, WIT.0001.0127.0001 at 0008.

⁸⁰ *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926, [94].

⁸¹ *Carter v Boehm* (1766) 3 Burr 1905; (1766) 97 ER 1162.

⁸² *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68, [49].



AAI Limited (AAMI's Complete Replacement Cover Policy)

Available findings of misconduct

73. We strongly support the submissions on findings of misconduct and conduct falling below community standards and expectations outlined in the Closing Submissions of Ms Orr QC on Natural Disaster Case Studies.⁸³

Additional available findings of misconduct

74. We submit that it is also open to the Commission to make further findings of misconduct and against AAI in relation to its practice of cash settling claims based on the lowest quote it obtained to complete the works in relation to the three Wye River cases. We consider this conduct constitutes a breach of the duty of utmost good faith under section 13 of the IC Act and a breach of contract. We also respectfully submit that the Commission recommend that ASIC investigate, with a view to ensuring affected customers are remediated.
75. The policy was called 'Complete Replacement Cover' and was designed to mitigate the risk of underinsurance, but AAI accepted that it would only achieve that purpose if the cash settlement offered by AAI represented the true cost of repairing or rebuilding the home.⁸⁴ AAI accepted in relation to 28 claims relating to the Wye River bushfires where the policy holder had opted into 'Complete Replacement Cover', AAI would cash settle a claim based on the 'lowest quote', and accepted that this could result in such a settlement being insufficient for customer to repair or rebuild themselves.⁸⁵
76. AAI marketed this product on its website, through a direct mail campaign and on the radio.⁸⁶ Below are examples of the sorts of descriptions it used:⁸⁷

'...with our Complete Replacement Cover you can have peace of mind that we cover the repair or rebuilding of your home if it is damaged or destroyed by an insured event, no matter the costs to us.'

"Optional extra: Complete Replacement Cover. Our best protection against underinsurance *with no set limit. We cover the rebuilding of your home, no matter the cost to us* [emphasis added].'

77. Despite this, AAI relied on the policy wording and cash settled using the lowest available quote, rather than what it would in fact ultimately cost a customer to rebuild their home. We submit

⁸³ RCD.0027.0001.0001-23.

⁸⁴ Transcript of Proceedings, Gary Charles Dransfield, 20 September 2018, 6284.

⁸⁵ Transcript of Proceedings, Gary Charles Dransfield, 20 September 2018, 6284-9

⁸⁶ Transcript of Proceedings, Gary Charles Dransfield, 20 September 2018, 6303-5.

⁸⁷ Transcript of Proceedings,, Gary Charles Dransfield, 20 September 2018, 6304-5.



that this practice constitutes a breach of the duty of utmost good faith under section 13 of the IC Act. The duty of utmost good faith 'encompasses notions of fairness, reasonableness and community standards of decency and fair dealing'.⁸⁸

78. We refer to section 14 of the IC Act and submit that AAI was not entitled to rely on the cash settlement clause in these circumstances because this was a breach of the duty of utmost good faith. It follows that in providing a cash settlement to a customer that was not what it would ultimately cost the customer, AAI breached its contract of insurance with its customers.
79. We respectfully submit that the Commission recommend that ASIC investigate all cash settlements made in relation to this policy, with a view to ensuring all customers affected are appropriately remediated.

⁸⁸ *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68, [49].

