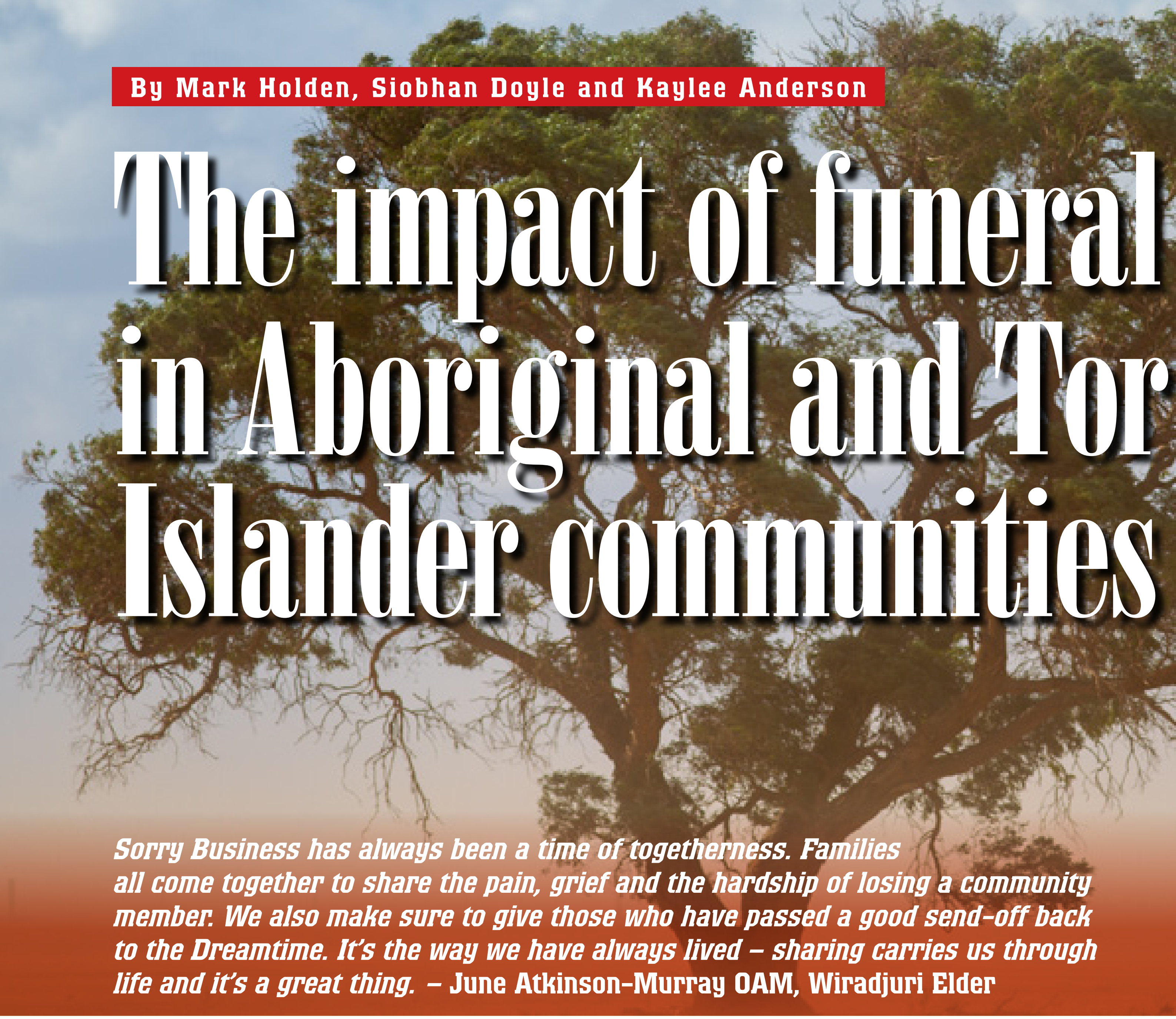

By Mark Holden, Siobhan Doyle and Kaylee Anderson

The impact of funeral in Aboriginal and Tor Islander communities

***Sorry Business has always been a time of togetherness. Families all come together to share the pain, grief and the hardship of losing a community member. We also make sure to give those who have passed a good send-off back to the Dreamtime. It's the way we have always lived – sharing carries us through life and it's a great thing.* – June Atkinson-Murray OAM, Wiradjuri Elder**

Being prepared for your own or a loved one's funeral is for many people, and for many cultures, essential. This is particularly the case for many Aboriginal and Torres Strait Islander[1] peoples and communities because of the cultural importance of Sorry Business and the high costs involved. Sorry Business is a time of cultural practices including funerals and related cultural activities following the death of a community member. It is a culturally important period for Aboriginal peoples and communities to be able to mourn the loss of a loved one. Sorry Business can be expensive. Average funeral costs range from at least $6,000 up to $15,000.[2] But in Aboriginal communities there are also additional, related expenses for the deceased's family and community, including long-distance travel, headstones, funeral clothes, catering, hire costs and accommodation; so, for many people, funeral costs can be much higher.

Many Aboriginal peoples take up funeral insurance, funeral expenses funds and other products in the marketplace. However, these products contain cumulative financial risks and impacts, which can leave many people in financial hardship or without enough funds when the time comes.

For consumer advocates, products marketed to assist people with their funeral costs and expenses have long been a concern. With many disadvantaged consumers deeply concerned about being a 'burden' on their family, the funeral insurance sector has created a business model that exploits people's basic vulnerabilities and needs, crowding the marketplace with advertising, high-pressure sales and marketing of funeral products. Funeral insurance is not just advertised on TV – it's sold door-to-door, through cold-calling and signups in community halls and events. Funeral insurance in Australia is big business.

WHAT IS FUNERAL INSURANCE?

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal

Commission) heard evidence about two types of funeral products: funeral life insurance policies and funeral expenses policies.

Funeral life insurance policies provide a policyholder's family with a lump sum payment to pay for funeral expenses when they die. The policyholder usually pays monthly or fortnightly premiums for a fixed amount of cover from $5,000 to $20,000 payable on the death of the nominated life, to a nominated recipient.[3] The nominated recipient may apply the benefit as they think fit. The insured is not saving for funeral costs with funeral insurance but is buying insurance to meet those costs in the future. The person is insured and able to claim costs only if they continue to pay premiums.

Funeral expenses policies differ in that they will only pay funeral costs up to a nominated limit. Importantly, the payout will not exceed the substantiated expenses for the funeral.

Whether both funeral life insurance policies and funeral expenses policies are life policies under the *Life Insurance Act 1995* (Cth) and contracts of life insurance under the *Insurance Contracts Act 1984* (Cth) is a contentious issue and will depend on the wording of the policies. Further, the consumer protection provisions of Chapter 7 of the *Corporations Act 2001* (Cth) have until recently applied only to funeral life insurance policies, not funeral expenses policies.[4] Funeral benefit policies – funeral plans and bonds – continue not to be regulated as 'financial products' but do have to be registered in NSW,[5] Queensland,[6] South Australia,[7] Victoria[8] and Tasmania.[9]

WHAT ARE THE ISSUES WITH FUNERAL INSURANCE AND FUNERAL EXPENSES POLICIES?

A number of well-documented problems apply equally to funeral insurance and funeral expenses policies. There are also some problems that have arisen specific to funeral expenses policies as a result of the lack of regulatory oversight. Until recently, companies offering funeral expenses policies were not required to hold an Australian Financial Services Licence (AFSL) and were therefore not bound by the general conduct obligations and anti-hawking protections under the *Corporations Act*. These latter issues were of so much concern – particularly with respect to the disproportionate impact on the Aboriginal community – that the Royal Commission recommended funeral expenses policies be subject to the same regulatory oversight as funeral insurance.[10]

Before examining the impact of the lack of regulatory oversight of funeral expenses policies and its impact upon the Aboriginal community, it is important to understand the fundamental problems with funeral insurance more generally.

Funeral insurance is unaffordable

Many funeral insurance products are 'stepped' policies where the premiums for funeral insurance increase as you get older, becoming unaffordable as a person ages. People living on the age pension or any other Centrelink benefits, for example, are unlikely to be able to afford the rising costs of premiums, and if they miss out on payments, the policy is cancelled, and all monies that have been paid go to the insurer.

ASIC found in 2014 that the number of cancellations was 80 per cent of policies sold.[11] The main reason: costs.[12]

Funeral insurance is a low-value product

Unless the policyholder dies in the 5–10 years subsequent to taking out a policy, people end up paying more in insurance premiums than the actual cost of the funeral. This is particularly the case where a younger person is signed up to a funeral expenses policy. Further, there are significant exclusions (including only covering accidental death) that usually apply in the first years that can deny a payout.

ASIC found in 2014 that the amount insurers paid was only 33 per cent of the premiums collected in that same year.[13]

Funeral insurance policies are often sold using inappropriate channels or techniques

Funeral insurance is often sold using high-pressure sales practices, both in the initial application and in subsequent offers to increase benefits.[14] Cold-calling and unsolicited sales have been rife. Vulnerable Australians have been misled about the costs of the premiums – particularly when they enter these contracts over the phone. Consumers often aren't told that the premiums will rise or the extent by which they will rise. Many consumers who have contacted the Insurance Law Service believe that the insurance company keeps the premiums they pay in an account, perhaps like an endowment policy.

ASIC found that there has been a tendency in the industry to over-rely on disclosure by the insurer in the product disclosure statements to explain how the policy operates and the key features. Disclosure does not protect consumers from unsuitable products, given the almost saturation advertising of funeral insurance on television which targets vulnerable people with exploitative marketing slogans, or how these slogans are passed around Aboriginal families and communities by word-of-mouth.

Concerns about cold-calling led ASIC to ban outbound telephone sales of funeral insurance in January 2020.[15] A ban on all forms of unsolicited selling (or 'hawking') of insurance was recommended by the Royal Commission,[16] but at the time of writing is still to be implemented by the Government. Even with these positive reforms, consumer groups remain concerned that funeral insurance will continue to be sold using emotionally manipulative advertising and new unfair sales tactics.

FUNERAL INSURANCE, FUNERAL EXPENSES POLICIES AND THE ABORIGINAL COMMUNITY

The Royal Commission revealed systemic failures on the part of some funeral insurance providers to meet community standards and expectations. Commissioner Hayne noted 'evidence pointing to predatory behaviour by insurers and salespeople'.[17] In the final report, Commission Hayne found that:

> 'Aboriginal and Torres Strait Islander people, especially those living regionally or remotely, may have been particularly likely to be sold funeral insurance policies in circumstances where those policies held little value for them.'[18]

The cultural significance of Sorry Business and funerals, and the high expenses involved, have led to many in the Aboriginal community taking up funeral insurance or funeral expenses plans. The Aboriginal community has been targeted by funeral expenses providers.

In 2018, the Indigenous child mortality rate was twice the rate for non-Indigenous children.[19] There are also higher rates of suicide in Aboriginal communities.[20] Intergenerational disadvantage, higher prevalence of disease, poor access to health services and other social determinants such as education, income and employment[21] have contributed to the lower life expectancy rates within Aboriginal communities.[22]

With the lower rates of life expectancy and attributing factors, the 'promise' of a product to pay for funeral expenses is an attractive option. However, for many Aboriginal peoples funeral insurance can be particularly poor value and expensive. Where people are reliant on a fixed income, this can result in high cancellation rates due to affordability issues, especially where the costs of policies increase with age.[23]

For many who are already struggling with finances, the amount paid into these products is rarely worth it. For example, at the time of the Royal Commission, ACBF Holdings Pty Ltd (ACBF), trading under the name 'Aboriginal Community Benefit Fund' or 'Aboriginal Community Funeral Plan,' now known as 'Youpla' – a funeral expenses policy provider – had 16,190 policies where customers potentially will pay more than the benefit amount and 754 policies where customers had already paid more than the benefit amount.[24] The average amount insured for ACBF's customers as at 30 June 2013 was the lowest of all the funeral insurers ASIC surveyed, at $6,639, with the industry average being $8,859. ACBF's claims payout ratio of only 13.9 per cent was the lowest percentage of all the insurers ASIC surveyed.

This has had significant financial impacts on the Aboriginal community.

Olive[25] is a 70-year-old Aboriginal woman. In 1999, a door-to-door salesman, whom she recognised as an Aboriginal classmate from her primary school, knocked on her door. Through this salesman, Olive signed up for funeral expenses policies for herself and her grandson (a teenager at the time). Over 19 years Olive paid over $10,000 in premiums for a $6,000 benefit when she dies, and over $4,000 in premiums over 22 years for a $15,000 benefit when her grandson dies. Olive did not understand what she had signed up to and that she would not get all her money back if she cancelled her policy.

John[26] is a 58-year-old Aboriginal man living in a remote community at the tip of the Cape York Peninsula. He is isolated, doesn't have any family around him and when he came to the Financial Rights Legal Centre, was receiving only a Centrelink benefit. He had paid over $12,000 in insurance premiums over the past three or four years. Our solicitor obtained all the sales recordings from the various companies as part of its investigation. In one recording John was told he was just being called to provide more information after he had completed a survey, but he was signed up on the spot. In another he was asked whether he had funeral insurance already and he replied "I think so", but the salesperson proceeded to sign him up to another policy anyway. The worst example occurred when he answered the phone and said "I'm not having a good day, I'm in hospital" but the sales representative persisted with the hard sell despite his replies being unintelligible most of the time.

Predatory businesses have regularly taken advantage of cultural biases and vulnerabilities of Aboriginal communities. Salespeople can take advantage of 'gratuitous concurrence', which is common in the Aboriginal community. This is a cultural tendency where the person agrees to something even if they do not understand what is put to them, or even if they disagree with it. Some of the reasons why this occurs include that the person does not want to look silly when they do not understand, they want the process over and done with, or they want to be socially amenable to the questioner.[27]

In Olive's case she was approached by a community member, which potentially made her less likely to question the product and service she was signing up to. Whether an organisation is owned and operated by the Aboriginal community can also be very important to Aboriginal peoples. Aboriginal peoples trust kin to understand the community's needs, and trust that those needs will be met and products designed to reflect those particular needs. Companies can exploit this cultural bias or trust to their advantage.

In the evidence of the former Chief Executive of ACBF (now Youpla) at the Royal Commission, Mr Byrn Jones admitted that there was confusion over the years as to whether his organisation was an Aboriginal-owned company.[28] The language and images used in the organisation's branding were evocative of Aboriginal culture, such as promotional material depicting the rainbow serpent or Aboriginal motifs in their colours and designs. The name of the organisation was always described in big, bold letters as 'Aboriginal Community Benefit Fund' or 'Aboriginal Community Funeral Plan'. However, ACBF was owned and operated by non-Aboriginal staff, directors and shareholders.[29]

ACBF focused its marketing activities through Aboriginal services to make it appear that it was associated with and sponsored by the Aboriginal community.[30] ACBF attended Aboriginal community events such as the Koori Knockout with branded merchandise directed at children. Despite these strategies, a cultural audit completed by MURAconnect indicated that ACBF staff were unable to communicate effectively and sensitively with Aboriginal and Torres Strait Islander communities due to their lack of understanding of Aboriginal culture and history.[31]

Putting marketing and sales practices aside, funeral expenses policies remain wholly unsuitable to the needs of the Aboriginal community. Health information was obtained by ACBF when signing up members, for example, and this could result in Aboriginal people paying more than they would if they had obtained funeral insurance from another provider.[32] ACBF's funeral expenses policies did not pay out for suicide until recently,[33] despite higher rates of suicide in Aboriginal communities. ASIC also found that 50 per cent of funeral insurance products sold to Aboriginal peoples were sold to people under 20 years old. As at 2014, approximately two-thirds of ACBF's customers were aged below 30 years of age and approximately one-third below the age of 15.[34] Our organisations hear many stories like Olive's (above) where policyholders were paying for their own plan, and that of multiple children or people in their care, particularly in the funeral expenses fund space.

It is the shocking reality that Aboriginal consumers experience higher infant mortality rates, and services or assistance to meet the costs associated with the burial of children has been identified as a need in some communities.[35] Whether this devastating need should be met and addressed by an insurance or funeral expenses policy taken by kin or the community at large is an important, broader question for society.

WHERE TO FROM HERE?

In April 2020, the *Corporations Act* was amended to remove the exemption allowing some companies managing funeral expenses only policies to operate without an AFSL,[36] and to make it clear that consumer protection laws in the *Australian Securities and Investments Commission Act 2001* (Cth) apply.[37]

This means that organisations relying on the funeral expenses exemption must obtain an AFSL to sell their products. At the time of writing, ACBF (now Youpla) has yet to receive a licence and is therefore prevented from selling existing products.

Two further regulatory developments have been implemented that may assist in improving consumer outcomes. The first is that ASIC now has product intervention powers;[38] proactive powers which enable it to intervene when a product has resulted, will result or is likely to result in significant detriment to consumers. The remit of this power was expanded at the last minute to apply not just to funeral insurance but also to funeral expenses policies.

The same legislation also introduced a new governance regime for the design and distribution of financial products. These obligations will require firms to have appropriate financial product governance processes and controls in place to encourage the development of financial products that are appropriately designed for the consumers for whom they are intended. They will also likely reduce the chance that inappropriate products will be sold to consumers.

Consumer organisations will continue to urge ASIC to further investigate and take action against funeral insurers.

It is also clear that there needs to be a better way to cover funeral expenses for the Aboriginal community. Financial and business support should be considered for small Aboriginal-owned funeral services to provide cheaper services to their communities. Community funds to meet funeral expenses should also be considered.

Until there are alternative products, funeral insurance will unfortunately continue to seem like a viable option for the Aboriginal community, even if it is essentially junk.

WHAT IF YOU HAVE A CLIENT WITH A FUNERAL INSURANCE ISSUE?

Assisting clients with funeral insurance policy issues can be complex, delicate and difficult, since the policy is likely to have originated years before. Genuine and culturally appropriate engagement with the client, and where possible the community, is necessary to work out not only the legal issues, but also the client's need to cover funeral expenses.

Step 1: Find out why the client is there

People commonly need assistance regarding:

1. claims for the death of a relative;
2. claim denials;
3. premium hardship;
4. reinstating a cancelled policy; and
5. getting their premiums back.

Step 2: Learn about the product

Find out who the insurer or fund is, whether the policy is current, and request documents, including:

1. the certificate of currency;
2. the contract;
3. copies of any application or recording; and
4. copies of any notices, like cancellation notices, if applicable.[39]

Step 3: Get instructions from the client

Talk to the client about their recollections. For example:

1. How did they find out about the insurer? TV, word of mouth, did someone come to their house?
2. How long ago was it?
3. How did they apply for the product? Did they complete an application form, or were they asked questions by someone? Do they remember what they were told?
4. What did they think they were buying? How did they come to that belief – is it something they were told by the salesperson?
5. Do they remember getting any calls or letters? What were they about?

Be aware of the effect of gratuitous concurrence in how the client engages with you, but also in their interactions when they purchased the product or subsequently.

Step 4: Think about the likely remedy

This will depend on what your client wants.

To make a claim on the contract, their ability to do this will depend on if they have a current policy and if the terms are met. If the policy has been cancelled, review the plan terms or the specific requirements of the relevant legislation to determine whether there has been a valid cancellation.

Seeking a refund on premiums paid can be challenging. If the policy could have paid out if an event occurred while the person was insured, then the client may have received a benefit. Where a policy was useless with no real benefits or egregious sales practices were involved, arguments may be stronger.

If the client wants to keep the contract but is struggling to pay the premiums or is concerned to limit premiums to the amount of benefit available, it may be possible to negotiate a cap on benefits with lower payments or even with no further repayments if the person has been paying for a long time.[40] Reducing potential benefits to reduce the costs may also be an appropriate solution for some clients.

Step 5: External review of the decision

One advantage of dealing with most insurers or AFSL holders is that they have a membership with an external dispute resolution scheme, such as the Australian Financial Complaints Authority (AFCA).[41] AFCA is a free dispute resolution process: it hears both sides and makes a determination that is binding on the insurer but not the consumer. The consumer retains the right to go to court.

Notes: 1 'Aboriginal' for the purpose of this article refers to both Aboriginal and Torres Strait Islander peoples and nations. The authors acknowledge the traditional owners and custodians of the land they work on and give respect to the Elders both past and present. **2** Choice, *How much do funerals cost?* (20 September 2019) <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/funerals-investigation-how-much-do-funerals-cost>. **3** Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC), *Interim Report*, Vol. 1, 263, <https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf> (FSRC *Interim Report*). **4** That is, issuers of funeral life insurance policies must do all things necessary to ensure that the financial services they provide are provided efficiently, honestly and fairly; issuers of funeral expenses insurance fall outside those requirements. **5** NSW Government, Fair Trading, <https://www.fairtrading.nsw.gov.au/buying-products-and-services/buying-services/funerals>. **6** Queensland Government, <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/regulated-industries-licensing-and-legislation/personal-services-industries-regulation/funeral-industry-regulation/rules-about-selling-pre-paid-funerals>. **7** Government of SA, Attorney-General's Department, Consumer and Business Services, <https://www.cbs.sa.gov.au/resources/pre-paid-funerals>. **8** Victoria State Government, Consumer Affairs Victoria, <https://www.consumer.vic.gov.au/licensing-and-registration/funeral-providers/running-your-business/pre-paid-funerals>. **9** Tasmanian Government, Consumer, Building and Occupational Services, <https://www.cbos.tas.gov.au/topics/products-services/prepaid-funerals>. **10** There are issues that arise specific to funeral benefit policies – for a full exploration of these see: Choice, *Funerals Investigation Part 3: Should you get a prepaid funeral?* (2019) <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/funerals-investigation-should-you-get-a-prepaid-funeral>. **11** ASIC, REP 454 Funeral insurance: A snapshot (29 October 2015) <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-454-funeral-insurance-a-snapshot/> (accessed 9 May 2020). **12** Ibid. **13** Ibid. **14** FSRC, *Final Report,* 279, <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> (FSRC *Final Report*). **15** ASIC, 19-335MR ASIC to ban unfair cold call sales of direct life insurance and CCI (4 December 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/> (accessed 22 June 2020). **16** FSRC, *Final Report*, above note 14, 284. **17** FSRC *Interim Report*, above note 3, 264. **18** FSRC *Final Report,* above note 14, 286. **19** 141 per 100,000, see <https://ctgreport.niaa.gov.au/child-mortality>. **20** FSRC, Transcript of Proceedings Day 37 (2018) 3862 (FSRC transcript). **21** Australian Government, AIHW, *Australia's Health 2016,* <https://www.aihw.gov.au/getmedia/5d39a104-a2d5-4ab5-900c-697ee0e5a1d8/ah16-5-8-main-contributors-indigenous-life-expectancy-gap.pdf.aspx>. **22** Estimated to be 8.6 years lower than that of the non-Indigenous population for males (71.6 years compared with 80.2) and 7.8 years for females (75.6 compared with 83.4). See <https://www.aihw.gov.au/reports/life-expectancy-death/deaths/contents/life-expectancy>. **23** ASIC, above note 11. **24** Royal Commission Witness Statement of Mr Bryn Jones, WIT.0001.0054.0001, [15.1]–[15.2]. **25** Not her real name, story is based on a FRLC client. **26** Not his real name, source FRLC de-identified case study C142857 adapted from the submission to the FSRC. **27** D Eades, *Aboriginal English and the Law*, Queensland Law Society, 1992, 51; see also 'Banking royal commission: Life insurer benefited from "gratuitous concurrence"', *The Australian*, 3 July 2018, <https://www.theaustralian.com.au/business/banking-royal-commission-life-insurer-benefited-from-gratuitous-concurrence/news-story/f8f27b87108d42f266b317b232d4bb25>. **28** FSRC *Interim Report,* above note 3, Vol. 2, 448. **29** FSRC, Bryn Jones, 4 July 2018, 3789. **30** Ibid, 3834. **31** MURAconnect, Cultural Audit Report – Aboriginal Community Benefit Fund (2018) ACBF.0003.0001.0114. **32** FSRC transcript, above note 20, 3844. **33** See note 24 above, [21.3]. **34** ASIC, Analysis of the Funeral Insurance Sector in Australia, ASIC.0025.0003.1757. **35** J Poulsen, 'The bodies of 17 babies have not been collected by their families and lie unclaimed in the Alice Springs Hospital morgue', *NT News,* 2 February 2015, <https://www.ntnews.com.au/news/northern-territory/the-bodies-of-17-babies-have-not-been-collected-by-their-families-and-lie-unclaimed-in-the-alice-springs-hospital-morgue/news-story/1765a1e70dd3ee5b8e54d5f42f0d6392>. **36** Sch 2 of the Financial Sector Reform (Hayne Royal Commission Response – *Protecting Consumers (2019 Measures)) Act 2020* (Cth) (*Protecting Consumers Act*). A further amendment is currently in exposure draft that will look to restrict the use of terms 'insurer' and 'insurance' only to those firms that have a legitimate interest in using terminology regarding insurance: Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020. **37** Ibid, *Protecting Consumers Act.* **38** *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth). **39** FRLC has a sample letter generator on their website: <https://financialrights.org.au/sample-letters/letter-to-insurer-requesting-documents/>. **40** ACBF CEO Bryn Jones did give evidence in the FSRC that the ACBF was looking into the financial viability of not requiring further payments from customers once they reach their maximum benefit amount – FSRC transcript, above note 20, 3797–8. **41** <www.afca.org.au>.

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