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

Submission – and

POLICY QUESTIONS ARISING FROM MODULE 6

The following submission relates to -

E. CLAIMS HANDLING

17. Should the obligations in section 912A of the Corporations Act 2001 (Cth) apply to all aspects of the provision of insurance, including the handling and settlement of insurance claims?

18. Should ASIC have jurisdiction in respect of the handling and settlement of insurance claims?

Background

1. On October 3rd 2012 I purchased a property at . Prior to settlement, I took out and Contents Insurance issued by under policy number

2. In January 2013, I noticed cracking appear in the internal walls of the property. I retained a local engineer, to inspect the property and determine the cause of the cracking. attended at the property on several occasions in February and March 2013. During March 2013, , in conjunction with a plumber, determined that there had been an escape of liquid, which had caused the cracking in the walls of the property. On 20 March 2013, I lodged a claim with .

3. In May 2013, appointed an assessor to assess my claim. On 3 May 2013, the assessor, , attended the property and noted damage to the lounge room, hallway, bedrooms 1 and 3, play room, pantry, external brick work and footings. was engaged to provide a full report on the damage and the cause. He provided a report on 6 June 2013.

4. determined that damage to the property had been caused by leaking drainage systems at the property. On 2 July 2013, sought instructions as to whether cover would be granted for the damage caused by the leaking drainage system. The assessor was subsequently informed by that the claim for resultant damage from

the leaking pipe would be covered as would the engineering and plumbing exploration costs. Mr [redacted] was requested to prepare a scope of works.

5. A further site inspection occurred in March 2014.

6. [redacted]s report of 8 July 2014 noted that underpinning the existing footings was not required to improve the bearing strength of the foundation soils. He recommended using resin grout injection into the foundation soils as a practical means to limit ongoing distress and to provide re-support where required to the bluestone block footing system. [redacted] recommended that repair works to internal damaged areas should proceed based on recommendations outlined in his revised Amended Scope of Work dated 21 March 2014. The scope of works noted that the works were required to ensure that observed building damage could be satisfactorily repaired to protect the long term integrity of the residence. **It is was never clear why these repair works were not authorised and carried out at that time. Mr [redacted]'s retainer was terminated in about August 2014 and [redacted] Engineers were appointed by [redacted] to inspect and report on the damage.**

7. **[redacted]'s retainer was terminated in about October 2014 for reasons unclear and [redacted] appointed [redacted]s.**

8. [redacted] provided a report on 17 October 2014. [redacted] Engineers noted that, at the time of their inspection all of the problems with the storm water and sewer pipes had been rectified or were in the process of being rectified. It was noted that a recent plumbing check showed no plumbing leaks were occurring in any of the pressure pipes to the property. Checks were also conducted to make sure that no problems were occurring with leaks in the irrigation pipes.

9. Subsequently, in October 2014, [redacted] informed [redacted] that the cracking repair work would be accepted under the policy. In particular, [redacted] informed the consultant at [redacted] on 29 October 2014 that the underpinning and resin grout injections would be covered, as well as the internal repairs, as they had been noted by the engineer to be required as a direct cause of the escape of liquid event which caused the movement. **I was informed and requested to obtain a quotation for re-instatement.**

10. Of note, my property is a Heritage property, of particular significance. In the circumstances, it was not unreasonable for the scope of works to have been prepared by an expert with experience in repair methods appropriate for Heritage properties. With the consent of [redacted] appointed a Heritage engineer and architect to attend the site and prepare a scope of works in order for the builder to quote. Subsequently a scope of works was prepared by [redacted], heritage architect and [redacted], heritage engineer.

11. [redacted] noted in December 2014 that the remedial action to halt the cracking of the residence from the previous uncontrolled leaks was to underpin the masonry walls. He determined that lesser interventions than underpinning were unlikely to achieve stability of the footings. He also noted that there was a need for some other structural works to reinstate the property as follows:

(a) Re-pointing of mortar joints;

(b) Crack stitching to re-establish the integrity of the brickwork;

(c) Re-stumping of the west end buildings; and

(d) Re-stumping or packing out the sunken stumps to the north western dining room.

12. **The liability for the scope of works identified by [redacted] was accepted by [redacted]**

13. My policy provided cover for, amongst other things, loss or damage caused by accidental escape of liquid from any fixed pipe, fixed tank, waterbed or fish tank or fixed item used to hold the liquid. My claim for damage caused by escape of liquid was lodged in March 2013. The cause of the damage was confirmed as being from escape liquid in July 2013 and a decision made to indemnify me shortly afterwards.

14. Under the heading How we settle your claim, the policy states:

"*When we agree to pay a claim for loss or damage:*

We may choose to pay:

- *The reasonable cost of repair, or*
- *The reasonable costs of replacement to new condition with property of the same size and specification or with items as near to original as is currently possible, or*
- *A cash amount. If we agree to pay cash, we'll pay the amount it would reasonably cost to repair or replace the property…*

We will pay:

- *To match materials, items or construction with those that existed before the loss or damage occurred and where this is not possible, with the nearest similar materials, items or construction*
- *Only those costs that directly apply to the part of your property that has suffered the loss or damage…"…*

15. In breach of this policy term, despite an agreement to pay my claim for damage, [redacted] did **not pay my claim for loss or damage at that time**. A decision to indemnify my claim was made in **July 2013**. That decision was reaffirmed in **October 2014**, in **August 2015** and again, in a letter from Westpac on the **29 October 2015**. [redacted] was on notice from **December 2014** when informed by [redacted] that underpinning was necessary to halt the cracking to the residence. [redacted]'s continued breach of contract and negligence caused further damage to my property while it remained unrepaired.

16. The scope of works prepared by [redacted] dated 23 December 2014 made it clear the remedial action to halt the cracking of the residence was to underpin the masonry walls. Almost 12 months passed since that report was obtained and the underpinning had not been authorised. [redacted]'s claims officer informed the assessor at [redacted] in October 2014 that the cost of underpinning was covered by the policy. Despite this, a quotation for the underpinning works was not obtained until May 2015, and the works remain unauthorised.

17. [redacted]'s conduct in failing to authorise or approve the remedial repairs in a timely manner placed me in a position where the damage to my property **continued to increase**. This had a detrimental effect on the value of my asset and, while the property remained in a damaged state, where the structural stability was compromised, there was a risk of personal injury to the occupants of the property, being my four small boys, my husband and myself. On several occasions, I raised concerns with the cracking plaster on the hallway arch. Large pieces of heavy render would fall from a height of 5 metres. Subsequently, the family was cordoned to three rooms within the 20 room property.

18. , heritage architect, prepared a scope of works in January 2015 for the rectification of the damage caused by the escape of water. provided a quotation for the cost of those works. then suggested some of the works were for damage not the result of the escape of water and were intended to put the property to a better standard than that which existed previously. provided no particulars as to which works it contended were not the result of the escape of water, or were intended to put the property to a better standard than that which existed previously. For the avoidance of doubt, were informed that where any of the works in the scope of works prepared by were of a maintenance nature, for example the removal of a holly tree and the cleaning of efflorescence, these works were not included in the quotation provided by . It was always open to to contact to clarify any queries or concerns may have had regarding the works to be performed at the property. did not made any enquiries with those persons.

19. My claim was only for damage caused by the escape of liquid. As noted by and , the escape of liquid destabilised the foundations. Whilst initially recommended resin injections as appropriate rectification works, the **delay in performing these works resulted in the deterioration of the foundations to such an extent that underpinning was required**. This was confirmed by in December 2014. 's negligence in failing to authorise the stabilisation of the foundations in a timely manner resulted in continued damage to my property, in so far as the escape of liquid event caused the cost of repairs to **exceed the sum insured on my policy.**

20. In May and June 2015 I was contacted by , appointed by for the purposes of quoting building work required on the Property. subsequently advised that they were unable inspect the Property.

21. On or around early July 2015, I provided (had been terminated by) with quotations from builders for the proposed repairs;

22. **In August 2015, recommended that settle the Claim for the 'sum insured' – being one million and thirty thousand dollars - on the basis that the <u>cost of the required repairs exceeded the sum insured.</u>**

23. On 7 August 2015, I was informed by a Claims Consultant in the claims department at that as the amount of repairs exceeded the sum insured on the policy, the claim would be settled by way of a cash settlement for the amount of the sum insured as at the date of loss, that is, the amount of $1,030,000. also sent an email to me on 7 August 2015 acknowledging that I had raised concerns relating to the settlement being based on the sum insured at the date of loss and also noting that would contact our my mortgage holder and request confirmation as to whether they required any funds from the settlement.

23. In the 2 and a half years since the initial Claim was lodged on 20 March 2013 multiple assessors, engineers, builders and consultants were appointed to attend and inspect the Property. In excess of 40 inspections occurred. Multiple reports were prepared and submitted to including reports detailing the scope of work required to remedy the issues with the Property. On August 21st 2015 from requested a quantity surveyor attend the property **<u>after</u> the offer to settle for the sum insured had been made.** (Transcript of this exists). On the basis that it could not possibly be necessary to delay or create any further reports and begin the process again, I engaged for representation.

24. Throughout the two and half year period in which the Claim was on foot, I was required to manage the problems and damage associated with the Property which in some circumstances required certain sections of the Property to be cordoned off and deprived us of using all the

amenities of living in our home. In addition to this, I suffered from the stress of managing multiple personnel attending my home to investigate and assess the Claim. I was very eager to finalise the Claim and resolve what had a very long, drawn out and stressful ordeal.

25. requested a tele - conference between parties which occurred on 19 November 2015 and continued to request a further report on the cause of damage. **I did not agree to the proposal**.

26. On November 26, 2015, advised of the full quantum of the claim, including items such as interest due to delay and emergency accommodation that by this stage was very much required. advised that I was willing to compromise the full quantum to expedite the process. Ms. Kemp advised **was in breach of contract, negligence and estoppel.** advised that if they continued to refuse to pay my claim I would commence proceedings.

27. On December 1, 2015 advised that I was also concerned that 's continued failure to pay my claim to enable repairs was causing me to contravene provisions of the *Heritage Act* 1995 (Vic) and in the event that enforcement action was taken against me in that regard, I would look to Westpac to compensate me for any costs incurred as a consequence.

28. On December 15, 2015 offered a cash settlement of $600,000. made this offer in accordance with the principles applied in *Calderbank v Calderbank* (1975) 3 All ER 333 and by Mr Justice Gillard in *MT Associates Pty Ltd v Aqua-Max Pty Ltd* [2000] VSC 163. They reserved the right to produce this letter to the Court on the question of costs.

29. The $600,000 offer was divided by $75,000 for alternative accommodation and storage of contents and $525,000 for the demolition, repair and replacement costs. As the offer for the 'sum insured' of $1,030000 had previously been made in August 2015, this offer was declined.

30. In order for the Calderbank offer to be effectively relied upon and if it was not accepted, the offer must have shown to have been a genuine attempt to compromise the claim and that it was unreasonable for me not to have accepted the offer. It was not clear to me on the face of the offer that it represented a genuine compromise.

31. I considered this approach to be a breach of 's utmost duty of good faith and, in any event, it begged the question that, if considered it had the information necessary to determine and finalise my claim in June 2013, why did it not do so? This was particularly concerning having regard to the fact that since that time further damage had continued to be sustained to my property by reason of the weakened foundations in circumstances where had acknowledged and accepted that the damage to the foundations was caused by the escape of liquid and was covered by the policy.

32. The letter of offer made no reference to the payment of interest pursuant to section 57 of the *Insurance Contracts Act* by reason of the delays by in payment my claim. In that regard, in an email of 17 August 2015, acknowledged that I was entitled to interest on any cash settlements for the period that Westpac or its representatives had unreasonably delayed the claim. specifically stated:

> "Upon review of the claim it has been determined that there has been six months of unnecessary delays. The interest that would be applicable to this would be 5.96% per annum and the exact $ amount will be calculated once the settlement figure has been established."

33.It was not clear from the terms of the letter whether the offer of $600,000 was purported to include interest pursuant to section 57 of the *Insurance Contracts Act* or whether it was

acknowledged by [redacted] that, in the event the offer was accepted, that interest would be payable in addition to that amount. I requested [redacted] clarify their position in that regard.

34. Ms. [redacted] then requested a response by 22 December 2015.

35. On the 22nd December 2015, [redacted] received a response from [redacted] They concluded that “In short, it is difficult to state what repairs are necessitated as a result of escape of liquid from leaking pipes during the period of insurance.” Further, they stated, “We clarify that our offer of settlement is inclusive of interest.” It was somewhat perplexing to me that [redacted] now appeared to have resiled from their position and was attempting to settle my claim for an amount which was less than the amount which it has already offered to me on 7 August 2015. As far as I was aware, there was no new information which was received by [redacted] since that offer was made that would support the position now being taken by [redacted]
In the event that [redacted] had received new information, we requested they provide us with a copy immediately.

36. [redacted] responded, “[redacted] appear to be attempting to rely upon reports obtained in 2013 to now limit the amount it wishes to pay for our client's claim, despite having made an offer in August 2015 to pay an amount significantly higher. We consider this approach to be a breach of [redacted]'s utmost duty of good faith and, in any event, it begs the question that, if [redacted] considers it had the information necessary to determine and finalise our client's claim in June 2013, why did it not do so? This is particularly concerning having regard to the fact that since that time further damage has continued to be sustained to our client's property by reason of the weakened foundations in circumstances where [redacted] has acknowledged and accepted that the damage to the foundations was caused by the escape of liquid and is covered by the policy.”

37. On the 12th of February, [redacted] received an offer from [redacted] [redacted], [redacted] increased the offer to me to $900,000.

38. This amount was still shy of the original offer of the ‘sum insured’ and considerably short from the real costs of repair. [redacted] proposed a mediation to [redacted] in a final attempt to resolve the matter without litigation.

39. On the 4th March 2016, [redacted] agreed to a mediation.

40. On the 29th of April, [redacted] advised that [redacted] had retained ‘PlanCost’ to assist with the assessment of damage and a view to ‘finalising a scope of works’. They requested [redacted] (who had been previously dismissed by [redacted] attend.

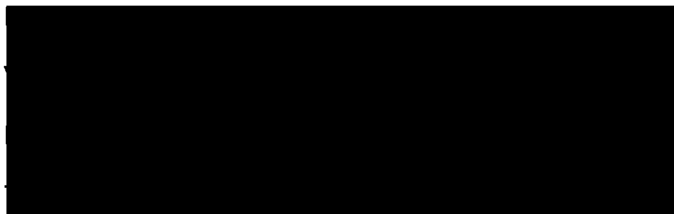
41. I rejected the request as a further attempt to delay and coagulate the issue. On the 6th of May 2016 after receiving correspondence from [redacted] confirmed that K [redacted] on behalf of [redacted] may refuse to mediate, despite previous agreement, and stated….

> “….However, [redacted] did say to me in my conversation with him yesterday "the mediation may be over very quickly". My concern about all of this is that [redacted] will come along to the mediation and, despite the previous offers that they have made, will take the view that all offers are off the table and will not be prepared to negotiate further on this because they believe that they don't have a scope of works with which to assess the loss and damage. Whilst you and I can see the nonsense in that position, particularly having regard to the fact that they have made several offers to you, including an offer of the sum insured and a recent offer of $900,000. If they had no scope of works, it begs the question on what basis have they calculated the offers that have been made? Nevertheless, if [redacted] do refuse to negotiate at the mediation, there is nothing that I, or the mediator can do to compel them to do so. Such conduct will not get us anywhere and will just waste yours and Justin's time and money in coming to Melbourne for the mediation..”

42. Further, in this correspondence from made the allegation that I was in breach of my contractual obligations to for not allowing further investigations. I had made my property available for inspection on many occasions since the claim was notified in 2013. has had ample opportunity to assess the loss and damage of my claim through the multiple engineers and assessors which it appointed since May 2013 and who had attended my property since that time. On that basis we did not understand how could seek to assert that I had failed to provide it with a reasonable opportunity to assess the claim.

43. concluded, “Finally, our client considers your assertion that she has breached her duty of good faith to your client, to be grossly unfair and unreasonable. Our client has agreed to mediate this matter at the invitation of your client. At the time that mediation was first arranged it was not suggested that a further inspection of the property would be required. Our client was ready and willing to mediate this matter on 15 April 2016. However, on 7 April 2016, some 8 days prior to the scheduled mediation, your client requested that it be adjourned to enable it to obtain a further expert report in this matter. Despite our client's strong opposition to this request, she acquiesced to it. Again, at that time there was no indication from your client that a further inspection of the site was necessary. On 29 April 2016, 2 weeks before the scheduled mediation, you informed me that your client required an inspection of the property, in order to be able to assess the quantum of the loss and damage. The insinuation that it is our client's conduct which is going to hamper the mediation progress is strongly resisted. Our client remains ready, willing and able to mediate this dispute on 16 May 2016 and she expects to be an active participant in the process.”

44. Despite strenuous circumstances, mediation occurred on May 16, 2016 at the an offices in the presence of –



Counsel – Within an hour of mediation advised he would not attend and sent a barrister to represent instead.

45. The mediation continued well into the night. made an offer to settle for $750,000 which included our legal costs. This amount was significantly less than the original offer for the sum insured, the subsequent offer of $900,000, contained none of the purported benefits of our premium policy such as emergency accommodation, storage, architects fees, demolition, etc. The amount offered equated to less than half of the real costs of repair.

46. We accepted the offer in exasperation. and advised that if we did not accept the offer, the process could be drawn out another 2 to 5 years. As this was a family home, we did not see any other option but to accept the offer.

47. Within 2 weeks of receiving the funds we rented and moved out of the property as we were in danger of injury due to falling plaster. One of our sons had developed a serious bronchial condition due to the damp.

48. The rental property we moved to was of a low standard and did not accommodate our family or belongings comfortably. We were required to stay in the rental property for 18 months while the major building works occurred.

49. In December 2017, after the major building works were completed, we moved back into the property.

50. While all the major building works have been completed, to this day, the property still remains in an unrepaired state as the settlement funds at mediation were insufficient for the repairs. This has had a detrimental effect on the value of my asset. Further, if a new insured event occurs at the property I am not confident my new insurer would support the claim as they would state the damage is existing.

Conclusion

Our experience was the result of the poor handling and settlement of our claim by

[redacted]

Policy Questions arising from Module 6

17. Should the obligations in section 912A of the Corporations Act 2001 (Cth) apply to all aspects of the provision of insurance, including the handling and settlement of insurance claims?

18. Should ASIC have jurisdiction in respect of the handling and settlement of insurance claims?

a. **[redacted] did not operate efficiently, honestly or fairly.**

b. **There was no regulation to facilitate the dispute resolution and the conduct of [redacted] employees behaved independently, without compliance to laws, code of conduct, their own policy disclosure statements and processes. They behaved as a power unto their own.**

c. **The delays, relinquishment of agreed liability, estoppel, negligence, attempts to intimidate and failure to finally vindicate despite their acknowledgement could have been prevented if the above policy questions were active.**

d. **ASIC should have jurisdiction in respect of the handling and settling of insurance claims <u>without a monetary limit.</u>**

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