

Case Study Submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Round 4 Hearing

Legal Aid NSW

Introductory remarks

Legal Aid NSW welcomes the opportunity to provide written submissions following Round Four of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Commission**).

This submission provides comment on the recommended findings in relation to the case studies of Ms Tracey Walsh and Ms Kathy Marika. A further submission on the general questions will be provided in due course.

The Commission has highlighted critical systemic issues in the conduct of funeral insurers in the sale and marketing of insurance products to Aboriginal and Torres Strait Islander people and communities (**Aboriginal people**, for brevity).

Through its casework experience Legal Aid NSW has observed that the conduct highlighted in the two funeral insurance case studies is apparent across the funeral insurance sector, and that the impact of this conduct leads to particularly harsh outcomes for vulnerable Aboriginal people and communities.

Case study: Tracey Walsh

Legal Aid NSW agrees that the recommended findings outlined in Ms Orr SC's closing address are open to the Commission on the evidence before it. We are of the view that the following additional findings are open to the Commission in relation to the case study of Tracey Walsh:

1. By failing to adequately warn its policyholders that they may pay more under their policies than they will ever be entitled to receive by way of benefit, and by failing to provide an upfront estimate of the total cost of the policy, the Aboriginal Community Benefit Fund (**ACBF**) may be in breach of its duty of utmost good faith to consumers as outlined in section 13 of the *Insurance Contracts Act 1984* (Cth) (Insurance Contracts Act). The duty of utmost good faith includes failure to disclose facts that are material to the contract. Ms Orr SC recommended that the Commission find that this conduct falls below community standards. We are of the view that it also constitutes a breach of the Insurance Contracts Act.
2. ACBF's use of their health classification scheme, which involves charging consumers with disclosed health conditions a higher premium, may be in breach of the *Disability*

Discrimination Act 1992 (DDA Cth) and other relevant state based discrimination legislation. While an insurer is permitted by section 46(2) of the DDA to discriminate against a person with a disability, the decision must be “based upon actuarial or statistical data on which it is reasonable to rely”; and be “reasonable having regard to the matter of the data and other relevant factors”. Alternatively, “where no such data is available and cannot be reasonably obtained, the discrimination must be reasonable having regard to any other relevant factors”. ACBF CEO, Bryn Jones, did not provide any indication in his evidence that the decision to charge Ms Walsh a higher premium due to her mental health conditions was based on data that would fall within the terms of section 46(2). While we accept these questions were not put to him directly by the Commission, the CEO’s lack of understanding of the regulatory environment and examples of other misconduct by ACBF suggest this data is unlikely to exist.

3. ACBF’s use of their health classification scheme may be in breach of the Racial Discrimination Act 1975 (Cth). Section 9(1A) of the RDA makes it unlawful to indirectly discriminate against someone on the basis of their race. Section 13 amplifies section 9(1A) by making it specifically unlawful to indirectly discriminate against someone in the provision of goods and services.¹ ACBF’s health classification scheme means that consumers are required to present without certain health conditions (such as diabetes, heart condition, stroke, high blood pressure, kidney disease) in order to access a lower premium level. It is well-known that these particular health characteristics disproportionately affect Aboriginal people. Consequently, to access certain products, Aboriginal people are likely to pay more than non-Aboriginal people. Further, based on our longstanding casework experience, we are not aware of any evidence, actuarial or otherwise, that the health classification scheme is reasonable in the circumstances. There is no such evidence before the Commission. By making it harder for Aboriginal people to access funeral insurance, it impinges their right to economic development and the right to live in full dignity by enjoying affordable goods and services. It may therefore be unlawful under sections 9(1A) and 13 of the RDA. Where the Commission is not in a position to make this finding, we are of the view the issue of discrimination in relation to the ACBF product should be raised as conduct that falls below community standards.
4. The conduct described at pages 4233-4235 of the transcript may constitute unconscionable conduct in breach of sections 12CA, or 12CB of the *ASIC Act 2005* (Cth) (ASIC Act).

Case study: Kathy Marika

Legal Aid NSW agrees that the recommended findings outlined in Ms Orr SC’s closing address are open to the Commission on the evidence before it. We are of the view that the

¹ *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs J)

following additional findings are open to the Commission in relation to the case study of Kathy Marika:

5. In the course of selling the funeral insurance policies to Ms Marika in September 2015, Select breached its obligations under section 12DA of the ASIC Act to not engage in conduct that is misleading or deceptive. The evidence shows that at various points in the conversation with Ms Marika, the sales representative suggested directly or indirectly that this product was suitable for Ms Marika, was required, would not expire, was affordable and was cheaper than alternatives. In addition, the sales representative used sales tactics that confused Ms Marika about the nature of the product, the need for the product, the use of her family and friend's phone numbers and the entitlement to vouchers. In particular, in the conversation about the accidental cover, the sales representative allowed Ms Marika to believe it could be used when she was sick or had an infection or required the hospital. It was misleading not to clarify with Ms Marika that the insurance only covered accidents.
6. In the course of selling the funeral insurance policies to Ms Marika in September 2015, Select breached section 12 DB(1)(g) of the ASIC Act which prohibits a person from making false or misleading representations with respect to the price of services. The evidence shows that in the phone calls with Ms Marika, the sales representative said that the product was "priced up to 50% cheaper and as you can imagine you don't want to be spending too much". This may also breach section 1041E of the Corporations Act because it was "likely to induce" Ms Marika into entering the contract, and it appears that the sales representative did "not care" if the representation was true. In addition the conduct is likely to be in breach of section 1041G of the Corporations Act because overall it was "dishonest conduct".
7. In the course of selling the funeral insurance policies to Ms Marika in September 2015, Select breached section 12 DB(1)(h) of the ASIC Act which prohibits a person from making false or misleading representations concerning the need for any services. Ms Marika gave evidence that in the phone calls, the sales representative told her that people often take out insurance in addition to insurance with superannuation, that most people take out funeral insurance for their whole family, and that Ms Marika would cease to be covered by her existing funeral insurance policy when she stopped working. The sales representative was clearly suggesting that Ms Marika needed this service in addition to the insurance she already had. Furthermore, these statements are not necessarily true. This conduct is also likely to breach the obligations set out in section 1041E of the Corporations Act because it was "likely to induce" Ms Marika into entering the contract, and it appears that the sales representative did "not care" if the representation was true. In addition the

conduct is likely to be in breach of section 1041G of the Corporations Act because overall it was “dishonest conduct”.

8. At lines 30-35 of page 4141 of the transcript, Ms Orr SC recommends to the Commission a finding of unconscionable conduct based on specified conduct. We are of the view that the conduct outlined above, in addition to that raised by Ms Orr SC, supports a finding of unconscionable conduct in contravention of the ASIC Act and a breach of the duty of utmost good faith in contravention of the Insurance Contracts Act.
9. In the dealings Select had with Ms Marika on 16 September 2015 in which she attempts to cancel the product, Select may have engaged in unconscionable conduct, and/or misleading and deceptive conduct in breach of the ASIC Act, breached the duty of utmost good faith in the Insurance Contracts Act and the prohibition on dishonest conduct in section 1041G of the Corporations Act. The evidence shows that Ms Marika asked to cancel the product. The representatives did not allow Ms Marika to do so. In the first call, Select did not respond to her query and deferred her decision to cancel by getting someone to call her back. In the second call, Select again did not respond to her request, suggesting that she get a month free. Select suggest in evidence a P-3984 that the conduct was not unfair. Given Ms Marika is attempting to exercise her cooling off rights, the failure to respond to her request to cancel, to defer the decision and to offer a free month without discussing her request is misleading and dishonest. Ms Orr SC recommended that the Commission find that this conduct falls below community standards. We are of the view that it also breaches consumer protection laws.
10. Select’s use of referral selling, combined with an incentive program and encouragement to use high pressure sales tactics, constitutes unconscionable conduct. Section 12CB(4)(b) of the ASIC Act allows a finding of unconscionable conduct in relation to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. We are therefore of the view that Select’s use of its referral scheme in contravention of prohibitions on referral selling in the ASIC Act, coupled with the incentive program and sales training, is in all the circumstances unconscionable. One action on its own might be merely unfair but the combined use of the referral scheme, the incentive program and the sales tactics in the context of sales of funeral insurance, a product predominantly purchased by vulnerable consumers, meant that Select where departing from community standards in such a way that the conduct can be seen to be against conscience.² Ms Orr SC recommended that the

² [Ipstar Australia Pty Ltd v APS Satellite Pty Ltd \[2018\] NSWCA 15](#) at [195]

Commission find that this conduct falls below community standards. We are of the view that it also breaches consumer protection laws.