

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

SUBMISSIONS ON BEHALF OF SELECT AFSL

Introduction

1. These submissions address those of Counsel Assisting made on 6 July 2018¹ following Mr Howden's appearance before the Commission on 4 and 5 July 2018.
2. The Commission's Terms of Reference require inquiry into whether any relevant *conduct...might have amounted (to be contrasted with did amount) to misconduct*; and whether any relevant *conduct, practices, behaviour or business activity...fall below community standards and expectations*.
3. Findings on those issues are serious matters and may have significant reputational and financial implications. As such, the Commission should apply the *Briginshaw* standard:

...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. [citations omitted]²
4. Further, the Commission should take into account that although witnesses were given some advance notice of the areas to be covered by being requested to finalise statements in response to Rubrics, there was no advance notice given of the matters that would be put or the allegations that might be made. The position is to be contrasted with there being a pleading that gives the witness advance notice of those matters and enables him or her:
 - a. to reflect; and

¹ T4136.31 to T4143.10

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J

- b. to consider such other contemporaneous material as might be available to assist in recalling events

so as to be able to give a full and fair answer.

5. Counsel Assisting addressed Select AFSL under the headings of possible misconduct,³ conduct falling below community standards⁴ and the causes of any misconduct⁵. Counsel Assisting invited submissions addressing each of the findings identified by her under those headings as open;⁶ and these submissions therefore follow that structure.
6. It should be observed at the outset that Select accepted (and continues to accept, as confirmed by Mr Howden in his evidence) that the two issues raised by the Commission in respect of Select, being the spike in sales to postcodes with a residency of Aboriginal and Torres Strait Islander people of 15% or more and the dealings with Ms Marika, were unacceptable and resulted from inappropriate conduct on the part of its representatives; Select has already refunded several customers and continues to be in discussion with ASIC about a mediation scheme in respect of the sales spike⁷ and Ms Marika was refunded her premiums; Select's systems were altered and improved as a result;⁸ and the relevant representatives were dismissed. Further, for its own commercial reasons, Select elected to cease selling funeral insurance in March 2018.⁹
7. Finally, although Counsel Assisting noted that Select did not consent to a voluntary disclosure to the Commission,¹⁰ she correctly noted that by contrast with other financial services bodies, it had not been invited or required to do so by the Commission; and she made no criticisms of Select in that regard in her submissions.

³ T4141.9

⁴ T4142.14

⁵ T4142.37

⁶ T4143.7 to 8

⁷ See Mr Howden's witness statement in response to Rubric 4-23 at paragraphs 28.7 to 28.11: WIT.0001.0073.0030 to 0031

⁸ See for example Mr Howden's witness statement in response to Rubric 4-23 at paragraphs 28.12 to 28.16: WIT.0001.0073.0032 to 0033

⁹ See Mr Howden's witness statement in response to Rubric 4-23 at paragraph 2.1 (WIT.0001.0073.0003), Select's response to NP-495 (RCD.9999.0060.0001) and T3963 et seq, noting that it was not suggested to the contrary by Counsel Assisting in her submissions (although in any event it is only the fact of the cessation that is relevant)

¹⁰ In respect of which it provided a full response to the invitation to St Andrew's: ASIC.0025.0003.1020/BOQ.0001.0106.0104

Possible misconduct

(i) Personal advice (section 952C of the Corporations Act)¹¹

8. Contrary to Counsel Assisting's submission, section 952C of the *Corporations Act* 2001 (Cth) does not prohibit the giving of personal advice. It imposes a liability for failing to give a required disclosure document or statement in certain circumstances that have not been addressed.
9. Counsel Assisting contended that personal advice was given by:
 - a. advice that Ms Marika could have more than one funeral insurance policy in place at one time;
 - b. a suggestion that Ms Marika would cease to be covered by her existing funeral insurance policy when she stopped working.
10. As to the former, that is not personal advice, but is rather a general statement of fact that you (as in any person) can have two policies, which it has not been suggested is incorrect; and this is reinforced by the representative's statement at the same time that this is a common practice.¹²
11. As to the latter, the representative did not state that Ms Marika's existing policy would cease to cover her upon stopping work. Rather he stated that other people with work policies had told him that they expire when they stop working,¹³ which is a statement of fact and is not advice personal to Ms Marika.
12. There was then no personal advice given to Ms Marika; and no potential breach of section 952C has been established.

(ii) Oral product disclosure statement (section 992A(3)(e) of the Corporations Act)

13. Section 992A(3)(e) of the *Corporations Act* 2001 (Cth) (as modified by regulation 7.8.22A of the *Corporations Regulations* 2001 (Cth)) requires that an option of receiving the information in the product disclosure statement orally is given.

¹¹ T4141.9

¹² SAF.0001.0001.0087 at about point 3

¹³ SAF.0001.0001.0086 at about point 9 and SAF.0001.0001.0087 at about point 3

14. The section only applies, however, in the case of an unsolicited telephone call. The product disclosure statement was played to Ms Marika on 9 September 2015,¹⁴ whereas Ms Marika had previously agreed on 24 August 2015 to receive the telephone call from Select.¹⁵ There was then no potential breach of section 992A(3)(e).
15. Counsel Assisting also made comments about the possibility of a breach having occurred on other occasions in relation to other customers, but the Commission could and should make no finding in this regard since no evidence was presented in relation to other customers and Mr Howden was not asked about that issue.

(iii) Unconscionable conduct by Select (sections 12CA and 12CB of the ASIC Act)

16. Counsel Assisting contended that Select engaged in unconscionable conduct contrary to section 12CA or 12CB of the ASIC Act 2001 (Cth), relying upon Ms Marika's "expressed wish not to purchase the insurance and her lack of understanding about the product that she was purchasing and the consequences of the purchase".
17. The question of unconscionability is to be judged in all the circumstances existing at the time the insurance was purchased. Thus whatever Ms Marika may have said in her evidence to the Commission (and it is important to note that Mr Howden's admissions were in the context of that evidence), it is the communications between Ms Marika and Select at the time she purchased the insurance that are relevant and determinative.
18. Ms Marika agreed to purchase the insurance during the telephone call on 9 September 2015. That call was in response to her having agreed on 24 August 2015 to receive the call and a quote for funeral insurance.¹⁶
19. There was a telephone call on 25 August in which Ms Marika stated that she could not have two policies and that she did not wish to cancel her existing policy,¹⁷ but that call dropped out;¹⁸ there was in fact nothing preventing her having two policies (as subsequently occurred); the relevant call on 9 September began with

¹⁴ SAF.0001.0001.0085 at 0098 at about point 8

¹⁵ SAF.0001.0001.0080 at about point 9 and SAF.0001.0001.0081 at about point 8

¹⁶ SAF.0001.0001.0080

¹⁷ SAF.0001.0001.0082 at 0084 at about points 5 to 6

¹⁸ SAF.0001.0001.0084

Ms Marika acknowledging that she would receive a quote and apologising for having been busy;¹⁹ and that call then proceeded without her stating at any time that she did not wish to purchase insurance from Select.²⁰

20. As to the product and the consequences, it is submitted that upon a full and fair reading of the transcript of the telephone call on 9 September, there was nothing to suggest that Ms Marika did not understand that she was purchasing funeral insurance to cover herself and a number of members of her family, which insurance had various benefits;²¹ and that the premium would be \$60.17 per fortnight, which was to commence the following Tuesday.²²
21. On the basis of the communications between Ms Marika and Select at the time she purchased the relevant insurance, Counsel Assisting's assertions of unconscionability are not made out.

(iv) Unconscionable conduct by the representatives (sections 12CA and 12CB of the ASIC Act)

22. Counsel Assisting submitted that the two representatives engaged in unconscionable conduct by having "used Select's referral program to actively target Aboriginal and Torres Strait Islander people for potential sales".
23. Select merely notes that those representatives were not called to give evidence and these matters were not put to them. They were therefore not given the opportunity of providing any innocent explanation for their conduct (although Select does not submit that there was one) or making any legal submission as to the characterisation of that conduct.

(v) Failure by Select to notify ASIC (section 912D of the Corporations Act)

24. Counsel Assisting submitted that Select failed to notify ASIC pursuant to section 912D of the *Corporations Act 2001* (Cth), which was required where there had been breaches of the obligations under section 912A that were significant. Counsel Assisting relied upon the matters specified in section 912A(aa)

¹⁹ SAF.0001.0001.0085 at about point 4

²⁰ SAF.0001.0001.0085 to 0103

²¹ See for example SAF.0001.0001.0087 to 0094 and 0097

²² See for example SAF.0001.0001.0094 and 0097 to 0099

(management of conflicts of interest) and section 912A(ca) (ensuring compliance with financial services laws), but gave no particulars or specifics in relation to that submission.

25. The two matters that arise on the evidence are the spike in the sale of funeral insurance to postcodes with a proportion of Aboriginal and Torres Strait Islander people of 15% or above; and the sale to Ms Marika.
26. As to the former, this was notified to ASIC and discussions continue.²³ Thus Counsel Assisting's submission as to the failure to notify ASIC can only arise out of the sale to Ms Marika. Given the lack of particulars or specificity, the Commission could make no finding in relation to any other issue in this regard.
27. Section 912D only requires notification after becoming aware of the breach, which on Mr Howden's evidence was only when he received the request from the Commission for a statement in response to Rubric 4-31, being on 1 June 2018.
28. Bearing in mind that what was disclosed at that time was an incident relating to a single customer and a product that Select was no longer selling at that time, it is submitted that any breach of the obligations under section 912A was not "significant", having regard to the matters specified in section 912D(1)(b).
29. In any event, even if there was an obligation to report arising out of the dealings with Ms Marika becoming known to Mr Howden, those matters have now been fully exposed in public in the Commission in which ASIC has been involved and in respect of which ASIC has made submissions.

(vi) Failure by the representatives to act with the utmost good faith (section 13 of the Insurance Contracts Act)

30. Counsel Assisting submitted that the two representatives may have acted otherwise than with the utmost good faith, which appears to be put on the basis of "taking advantage of people in postcodes with high proportions of indigenous clients".
31. Select merely notes that those representatives were not called to give evidence and these matters were not put to them. They were therefore not given the

²³ See Mr Howden's statement in response to Rubric 4-23 at pages 30 to 31: WIT.0001.0073.0030 to 0031

opportunity of providing any innocent explanation for their conduct (although Select does not submit that there was one) or making any legal submission as to the characterisation of that conduct.

Community standards

(i) Obtaining contact details of Ms Marika's family and friends

32. Counsel Assisting submitted that it was inappropriate for the representative to induce Ms Marika to provide the names and contact details of family and friends.
33. Although Select notes that the representative was not called to give evidence, it does not wish to make any submission to the contrary.

(ii) The use of a referral programme

34. Counsel Assisting submitted that it fell below community standards to use a referral program without "adequate safeguards to ensure that the program would not be abused".
35. Counsel Assisting noted that the referral program carried with it a risk of abuse. She did not suggest, however, that a referral program itself was inappropriate; and the Commission would be aware that such programs are commonly used as a sales incentive. The submission was that adequate safeguards were not in place, although it was not specified or particularised what they ought to have been.
36. Select's referral operated by means of the completion of a written referral form, an example of which was tendered to the Commission.²⁴ It included the following:

Make sure you get your friends' or relatives' permission to refer them.

Terms and Conditions: By returning this REFER A FRIEND form, you confirm that you have obtained your friends'/relatives' permission to disclose their details and for us to contact them.

37. Had Select's systems been followed, there would have been no problem. The issue with Ms Marika was that the representative chose to ignore those systems and

²⁴ SAF.0004.0001.0066 to 0067

instead sought details of family and friends from Ms Marika on the telephone when those persons had not agreed to their details being provided.

38. No system of referral could completely remove the possibility of abuse and it is submitted that the system that Select had in place, but which was ignored by the representative, did not fall below community standards and expectations.

(iii) The subsequent telephone call

39. Counsel Assisting submitted that “it was inappropriate for a Select representative to dissuade Ms Marika from cancelling her policies a week after she took them out by offering her one month’s free coverage in circumstances where Ms Marika had expressed serious concerns about affordability”.
40. When Ms Marika took out the insurance on 9 September, she expressed no concern about affordability;²⁵ and indeed she expressly confirmed that the premium was affordable.²⁶ When she spoke to the representative on 16 September, she gave as the reason why it was not affordable the fact that she was “not working at the moment”.²⁷
41. In response to that, Ms Marika was offered a month for free and her response was that “anything like that, would help” and her confirming that she was “at the moment...struggling”.²⁸
42. This was not suggestive of a permanent problem with affordability, but rather a temporary problem brought about by being temporarily out of work.
43. Further, she later confirmed that a premium free month “would be mostly appreciated”;²⁹ and that she was happy to be given a bit of space to October, when she expected to be back at work.³⁰
44. It is submitted that it was not inappropriate for Select to make this offer, particularly in view of the indication from Ms Marika that this was only a temporary issue with affordability arising from her being temporarily out of work; and Ms

²⁵ SAF.0001.0001.0094 and 0097

²⁶ SAF.0001.0001.0097

²⁷ SAF.0001.0001.0122 at about point 10 to 0123 at about point 2

²⁸ SAF.0001.0001.0123 at about point 5

²⁹ SAF.0001.0001.0124 at about point 8

³⁰ SAF.0001.0001.0125 at about point 2

Marika's immediate response was to accept the offer whilst stating that she would be back at work by the following month.

45. The conduct of Select must be judged on the basis of the communications between Select and Ms Marika at the time rather than the evidence she gave to the Commission; and on that basis the offer (which was apparently willingly accepted) of a premium free month while remaining insured could not be said to be conduct below community standards or expectations.
46. Further, it was not suggested to Mr Howden that the conduct of this call fell below standards or expectations.³¹

(iv) An upfront estimate

47. Although ASIC had recommended that an upfront of estimate of the total cost of policies be given, there was no legal requirement to do so. Further, as is apparent from Mr Howden's evidence,³² there are several variables and giving upfront estimates for all of them would be a complicated and most likely confusing exercise.
48. By way of example, if one took the three forms of premiums (fixed, capped and stepped), two genders (male and female) and two smoking categories (smoker and non-smoker) and treated the add-ons as two categories (with or without accidental death and accidental serious injury), there would be 24 different permutations even before considering the age of the insured, the date of death (for which ASIC recommended three ages) and the amount of cover to be taken.
49. In the absence of any legal requirement and at least considerable uncertainty as to how ASIC's recommendation could practically be achieved, it could and should not be said that to fail to give estimates was below community standards and expectations.

³¹ See also Mr Howden's evidence on this issue at T3983.11 to T3984.20

³² T3899.31 to T3901.23

Causes

50. Counsel Assisting submitted that there were three causes of “the misconduct”. It is not identified in that context what is said to constitute the misconduct; and it is important that such a label is not used without specificity. Such a label could only be applied to conduct in respect of which Counsel Assisting was critical in her submissions and then, of course, only when such submissions are accepted notwithstanding any submissions made above.
51. Further it would be more appropriate to use the language of the Terms of Reference rather than an undefined and potentially unfair and pejorative term such as misconduct.
52. Select accepts (and has always accepted) that the spike in sales to postcodes with a higher percentage of Aboriginal and Torres Strait Islander residents resulted from inappropriate targeting by sales representatives; that the sale to Ms Marika should not have proceeded until Ms Marika had been given an opportunity of reviewing her work policy; and that Ms Marika should never have been asked for details of her friends and family, at least unless and until they had given their express consent. Each of these was a failure by the relevant representatives, who were dismissed as a result.

(i) Select’s sales training

53. The marketing and selling of funeral insurance by telephone calls is not unlawful and indeed is explicitly regulated by the *Corporations Act*. Select did not engage in cold calling and thus only approached people who had already expressed an interest in receiving a call from them about funeral insurance, being “warm leads”. As Mr Howden informed the Commission, even those warm leads will sometimes start the conversation by saying that they are not interested, but become interested once they hear the detail of the product.³³ Even though there is no statutory obligation, Select then had a rule of practice that if the objection persisted, they would terminate the call; and the number of objections that would lead to a termination was reduced over time.

³³ T3914.42 to T3915.25

54. In the absence of a statutory requirement, it is submitted that it is reasonable to seek to continue notwithstanding an objection, particularly if that occurs at the stage where the customer has not yet been informed about the detail of the product; as long as there is (as in the case of Select) a recognition that in the presence of a persisting objection, the call must be terminated. Contrary to Counsel Assisting's submissions, such a practice is not "aggressive" and it does "permit potential purchasers to exit the selling process".

(ii) Select's remuneration and incentive structure

55. As Mr Howden informed the Commission, in a sales environment staff need to be incentivised with targets and this is how the industry, and in particular the call-centre structure, operates.³⁴ Counsel Assisting appears to be critical of any system with incentives and targets, but this is common across the sales industry and indeed the financial services industry. In the absence of it being unlawful, Select should not be criticised for using such structures.

56. There is then always the risk in such a structure of representatives abusing the system in order to achieve additional commission or other incentives. As Mr Howden stated, Select has continued to evolve its structure and systems over time so as to minimise that risk. Thus, for instance, the commission went from being based on the premium to a flat rate per policy.³⁵ There was also a very detailed script and training setting out the requirements in dealing with customers. The systems and scripts had been designed with the aid of an external industry expert engaged specifically for that purpose³⁶ and approved by the relevant insurer, St Andrew's³⁷ and they continued to evolve over time (including in accordance with requests from St Andrew's).³⁸

57. The particular incentive schemes that appear to have led to the sales spike in 2015, such as the Vespa prize, were therefore not incentives where none previously existed, but rather additional incentives on top of existing ones. It appears that the nature or magnitude of the additional incentives led

³⁴ T3909.28 to T3910.13

³⁵ See also T3923.31 to T3925.3

³⁶ See Mr Howden's witness statement in response to Rubric 4-42 at paragraph 4: WIT.0001.0074.0002

³⁷ T3966.31

³⁸ T3970.5 to 6

representatives into failing to follow the practices required of them. As such, it will clearly not be repeated and has formed part of Select's learning experience from which its protocols and structures continue to be refined.

(iii) Internal systems

58. Counsel Assisting criticised Select's systems for failing to stop misconduct and for failing to detect misconduct.
59. In a system that depends upon an interaction between an individual and a customer, there can be no system that will guarantee to eliminate misconduct. The risk of such conduct was minimised by Select using of scripts and training (as discussed in the previous section (ii) above), both of which continued to evolve with experience.
60. As for detection, the most strict system would be for every telephone call of every operative to be listened to by a quality assurance member of staff, but this would not be practicable (both as a general principle and considering that a single person would need to listen to every call in order to pick up patterns) and even then would still be subject to human error on the part of the reviewing operative.
61. It was therefore reasonable to have a quality assurance system based upon sampling the telephone calls with a higher sampling for more junior agents; and any identified issues leading to further calls being reviewed, feedback and training being given to the representative and potential disciplinary action.³⁹
62. As for the representatives responsible for the sales spike in 2015, no previous problems of this kind had been identified with them⁴⁰ and when it was identified the issue was addressed with their termination. That was not an inadequate system, but rather a failing due to human error.⁴¹
63. As for the issue with Ms Marika, quality assurance listened to the call of 9 September 2015 in which the sale was made, which led to Ms Marika being refunded her premiums. There was human error, however, which meant that the

³⁹ T3936.30 to T3938.13 and see also Mr Howden's witness statement in response to Rubric 4-42 at paragraph 7: WIT.0001.0074.0003

⁴⁰ T3936.14 to 18 and see also Mr Howden's witness statement in response to Rubric 4-31 at paragraph 13.5: WIT.0001.0057.0009

⁴¹ As Mr Howden accepted in his witness statement in response to Rubric 4-42 at paragraphs 5 to 6: WIT.0001.0074.0002

subsequent call of 10 September 2015 was not listened to at that time and the matter was not brought to Mr Howden's attention (until he received the Rubric from the Commission on 1 June 2018).⁴² That was not an inadequate system, but rather a failing due to human error.⁴³

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25 July 2018.

⁴² T3980.23 to T3982.2

⁴³ As Mr Howden accepted in that evidence and see also his witness statement in response to Rubric 4-31 at paragraph 13: WIT.0001.0057.0009