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

ROUND 6 - INSURANCE

SUBMISSIONS ON BEHALF OF AAI RE NATURAL DISASTER CASE STUDIES

INTRODUCTION

1. These submissions are filed by AAI Limited (**AAI**) – the general insurance arm of the Suncorp Group – in response to the Closing Submissions of Counsel Assisting dated 21 September 2018 (**CS**). The CS address two broad issues in relation to AAI arising from the Natural Disaster Case Studies:

   (a) It deals with AAMI's Complete Replacement Cover (**CRC**) and the Wye River Bushfire, suggesting that AAI may have engaged in one type of misconduct and that it may have fallen below community standards/expectations in six respects.

   (b) The CS addresses the response of AAI to a home insurance claim made by Mr and Mrs Heald following a storm in the Hunter Valley in 2015, suggesting that AAI may have engaged in five types of misconduct and that it may have fallen below community standards/expectations in four respects.

2. These issues will be addressed in turn.

CRC AND THE WYE RIVER BUSHFIRE

Introduction

3. On Christmas Day 2015, a bushfire in the Wye River region of Victoria broke containment lines and spread rapidly, impacting Wye River and Separation Creek.[1] At 10am on Boxing Day 2015, AAI declared an Event and allocated the Event a Catastrophe Code.[2] AAI took multiple further steps over the following days.[3] By 27 December 2015, 334 properties in the area had been affected, with 116 destroyed.[4]

---

1 Statement of Gary Dransfield, 24 June 2018, Exhibit 6.369, SUN.9999.0007.0001 at 0016, [36].

2 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0016, [39].

3 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0016-0025, [37]-[69].

4 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0016, [36].

4. In responding to claims made following the bushfire, AAI encountered a number of difficulties which were beyond its control. In particular, there were delays:[5]

   (a) in obtaining Council plans, which were required for the preparation of a scope of works;

   (b) in the clearance of affected properties;

   (c) in the Colac Council providing a Bushfire Attack Level, without which a scope of works could not be finalised;

   (d) caused by damage during site clearance;

   (e) in the Colac Council making decisions on stormwater management, underground power requirements and minimum land capability requirements; and

   (f) caused by difficulties contacting affected policyholders, some of whom were not locally resident (or were overseas).

5. 28 of AAI's policies in the Wye River region were CRC policies.[6] CRC cover was introduced by AAMI in 2006 to address under-insurance. In February 2014, it was changed from being the standard form of cover to an optional alternative to "sum insured" cover.[7] The proportion of customers that have opted into the CRC option under policies which have that option available has been reducing since that time.[8]

6. Claims for total losses under CRC policies can take longer to settle than "sum insured" policies because there are additional steps that can arise before a scope of work can be finalised and quotes obtained (such as, for claims resulting from a bushfire, the assignment of a Bushfire Attack Level or obtaining Council permits). By contrast, sum insured policies may not require a scope of works or detailed quotes to be prepared before a total loss can be settled.[9]

---

5 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0026, [74].

6 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0027, [76].

7 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0008, [19]; Exhibit 6.369.76, SUN.0760.0302.0618.

8 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0011, [31].

9 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0034-0035, [92].

Evidence

7. The submissions in the CS as to the evidence are incomplete or not supported by the evidence in a number of respects.

8. At CS [50] it is submitted that "Mr Dransfield did not accept AAI's actions were the source of the delays". That submission is correct as far as it goes.[10] Aside from the matters identified in Mr Dransfield's statement,[11] no further cause of the delays is identified by Counsel Assisting (or was put to Mr Dransfield).

9. At CS [51] it is submitted that Mr Dransfield accepted that where AAI chose to cash settle a claim it would do so on the basis of the lowest quote that was sufficient and appropriate. It is clear in context that Mr Dransfield was talking about the situation "generally", rather than any invariable rule.[12] As to the contention that Mr Dransfield accepted that there were "significant differences" between the amounts offered by AAI to cash settle some Wye River claims and the quotes received by customers from other builders, see further [26] below.

10. At CS [52] it is submitted that ASIC's powers are limited because of the exclusion of the handling of insurance claims from the definition of a "financial service" in r 7.1.33 of the *Corporations Regulations 2001* (Cth). Any suggestion that ASIC's powers are limited in this area must be assessed by reference to ASIC's powers under Pt IA and Pt II of the *Insurance Contracts Act 1984* (Cth), which give ASIC certain powers in respect of the handling of insurance claims: see, in particular, s 11B(a), (b) and 14A.

11. At CS [53] it is submitted that "on numerous occasions" throughout "this period",[13] representatives from AAI met with Members of Parliament. This submission is not open on the evidence. That proposition was not accepted by Mr Dransfield, nor was it put to him.

12. At CS [58] it is submitted that, in late 2016, ASIC expressed concerns to AAI that its advertising of the CRC product may be misleading. That submission is not supported by Tr 6309. Nor is it

---

10 See Tr 6286.36 (which relates to the period up to April 2016).

11 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0026, [74].

12 See Tr 6288.19-30.

13 This being an undefined term.

supported by the documentary evidence, which suggests that concerns about misleading advertising were not raised until February 2017 (at the earliest)[14] and, more likely, March 2017.[15]

13. The last sentence of CS [58] is incomplete. ASIC said only that there were similarities between the previous advertising materials and *some* of the new advertising materials.[16]

14. At CS [63] there is a reference to Mr Dransfield acknowledging the cost of paying the infringement notices was approximately 0.001 percent of CRC policy total premium income. Mr Dransfield was willing to accept this figure put to him by counsel "on the fly".[17] In fact, the correct figure is 0.01 percent.

Suggested available finding of misconduct

15. At CS [66] it is contended that, by representing in its CRC advertising materials that AAMI would repair or rebuild an insured's house no matter the cost, AAI may have engaged in conduct that is misleading or deceptive. The Commission should not find that AAMI engaged in conduct that was misleading or deceptive.[18]

16. The existence of misleading or deceptive conduct must be determined in light of all the relevant circumstances and context of the particular claimed conduct (here, representations). That was not attempted in cross-examination, nor in the CS.[19] A finding of misleading conduct as an instance of misconduct – especially insofar as there is any suggestion that it was done deliberately for financial gain – is not lightly to be found.[20]

---

14 Exhibit 6.378, ASIC.0027.0001.0559.

15 Exhibit 6.369.47.2, SUN.0760.0302.0553.

16 Exhibit 6.378, ASIC.0027.0001.0559.

17 Tr 6322.11.

18 Mr Dransfield's acceptance that a misleading impression was given without regard to the specific context of each advertisement, nor by reference to the CRC PDS, which was referred to in a number of the advertisements: Tr 6307.25-31. It is not clear what is intended by the suggestion that Mr Dransfield accepted that *three* aspects of the representation were incorrect: cf CS [66].

19 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [109]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102]; *Yorke v Lucas* (1985) 158 CLR 661 at 675.

20 Note *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–2.

17. Here, a critical aspect of the context in which the CRC advertising representations were made was the way in which insurance policies are sold and in particular the role played by the CRC Product Disclosure Statement (**CRC PDS**).[21]

18. The primary concern raised appears to be that the CRC advertising materials did not refer to the possibility that a CRC policy might be satisfied by way of a cash settlement. That possibility appears clearly on the face of the CRC PDS, which stated:[22]

> If we agree to pay a claim for loss, theft or damage to the building, we will decide if we will:
>
> - repair damage to the building;
> - rebuild the building;
> - *pay you what it would cost us to repair or repair the building*;
> - pay you the building sum insured shown on your certificate of insurance;
>
> Note: This does not apply if you have selected the Complete Replacement Cover option.
>
> - give you a voucher, store credit or stored value card for the amount it would cost us to repair or rebuild and item.
>
> *If we rebuild (or pay you what it would cost us to rebuild)*, we will do so on a 'new for old' basis.
>
> *If we repair (or pay you what it would cost us to repair)*, we will at our option do so on a 'new for old' basis or repair to a similar condition to what the building was in before the loss or damage occurred.

19. Further, despite these clear terms, Mr Dransfield's evidence was that if the customer insisted on AAI managing a rebuild, it would do so,[23] and he gave the example of AAI doing so for two separate elderly customers affected by the Wye River fire.

20. A further aspect of the context is that many insureds prefer a cash settlement, for a variety of reasons. For example, a customer may not wish to rebuild anything (or rebuild in that area), a

---

21 Exhibit 6.370.1.3, SUN.0760.0100.0003.

22 Exhibit 6.370.1.3, SUN.0760.0100.0003 at 0047 (emphasis added). See also at 0004 ("AAMI Home Building Insurance with the Complete Replacement Cover option covers insured damage or loss to your home building for the total amount it would cost to us repair or rebuild it. When you have selected the Complete Replacement Cover option, we repair or rebuild insured damage or loss to your home or pay the cost of repairing or rebuilding to the same size and standard of your current home.").

23 Tr 6293.14-23.

customer may wish to build something different, a customer may wish to use their own repairer or a customer may have already completed the repair work and wish to be reimbursed.[24]

21. In this context, there can have been no real doubt in the market that cash settlement was a possibility under the CRC policy. Assessed fairly, the CRC advertising material represented that AAMI would ***fund*** a repair or rebuild, not that AAMI would itself do the repair or rebuild in every case. It is difficult to see why a person would reasonably think that AAMI would invariably undertake to repair or rebuild even when an insured did not want anything rebuilt, wanted a materially different home or had a contrary preference. Nor would a reasonable person think that Suncorp would do the repair or rebuild ***itself*** (ie without subcontracting).

22. A further concern appears to be that, by using the words "no matter the cost", AAMI represented that it would write a blank cheque if there was an insured event. It can be accepted that, if that were the representation made, it would be inaccurate. However, that representation was not conveyed. That question is to be assessed by reference to the effect of the conduct on reasonable members of the class.[25] In context, the reference to "no matter the cost" was a reference to the distinction between a "sum insured" policy (which has a pre-determined cap) and a CRC policy (where there is no cap on the amount that AAMI would pay to fund repair or rebuild). It is not a reasonable construction to interpret the CRC advertising material as containing a representation that AAMI would pay an ***unlimited amount*** or pay an amount reflecting whatever new build the insured wanted. No reasonable person would understand that an insurer would, or could sensibly, make such an open-ended promise. Reasonable consumers can be expected to have some degree of common sense and some grasp of practical realities. The representation was to repair or rebuild – that is, to return to a previous state – not to carry out whatever new and improved building might be desired. The CRC advertising material would be interpreted to mean that there was no cap by way of a "sum insured" on the repair or rebuild funds. That position is confirmed once regard is had to context and, in particular, the CRC PDS, as quoted at [18] above. It is clear from the CRC PDS that AAMI would only repair or rebuild on a "new for old basis"[26].

---

24 At Tr 6292.35-37, Tr 6293.1-8, Tr 6295.37-43, Tr 6383.45-6384.3; Exhibit 6.368,SUN.9999.0005.0001 at 0019, [47]; and Exhibit 6.370, SUN.9999.0017.0001 at 0005, [17].

25 *Campomar Sociedad Limited v Nike International Limited* (2000) 202 CLR 45 at [102]-[103].

26 Reinstatement, that is putting the policyholder back into the same position they were in before the insured loss ("new for old"), is a key principle to contracts of general insurance. It is to be contrasted with betterment, which involves the improvement of the underlying insured property to a state above its original condition.

Suggested conduct falling below community standards and expectations

23. As to the first of the six respects in which it is said that AAI's conduct fell below community standards and expectations (CS [68]), AAI agrees that it should have done more to keep policyholders affected by the Wye River bushfire informed as to the progress of their claims and could have better explained the delays it was facing when trying to complete the scope of works.[27] This deficiency should be assessed in context. The delays which AAI faced in handling CRC policies were largely or wholly beyond its control, in particular there were delays in dealings with the local council plans, including in relation to the allocation of a Bushfire Attack Level, which was particularly relevant to these claims.[28] AAI could not know with any reasonable certainty how long those delays would last at the time the event response was being initiated, or the time they were being experienced.

24. As to the second respect (CS [69]), AAI agrees that it should not have charged premiums on renewed home and/or contents policies for customers whose homes had been destroyed in the Wye River bushfire. That was an error and was remediated. It should nevertheless be clarified that there is nothing per se wrong in AAI continuing to charge instalment premiums on a policy in respect of a home which has been destroyed during an annual period of insurance.[29] Customers who have a policy often elect to pay premiums monthly (rather than upfront for the whole year). If an insured has elected to pay premiums monthly on an annual policy, and there is an insured event in the first month of the year's policy, it is not inappropriate for an insurer to insist on payment of the monthly premiums for the balance of the term of the policy. An insured who elects to pay monthly is not in (and should not be in) a better position than an insured who elects to pay upfront. This position is common industry practice, as recognised by ASIC, [30] and is made clear in the CRC PDS.[31]

---

27 Note Tr 6299.9-18; Exhibit 6.369, SUN.9999.0007.0001 at 0034-35, [89], [91]-[92].

28 See Exhibit 6.369, SUN.9999.0007.0001 at 0026, [74].

29 See Tr 6300.22-28.

30 Exhibit 6.369.46, SUN.0760.0301.1656.

31 Exhibit 6.370.1.3, SUN.0760.0100.0003 at .0053. Further, in situations where a contract of insurance remains on foot (eg if the building damage does not amount to a total loss), an insurer is required by section 58(2) of the *Insurance Contracts Act 1984* (Cth) to send out a notice of renewal not later than 14 days before the expiry date.

25. AAI disputes the third respect in which it is suggested that AAI's conduct fell below community standards and expectations (CS [70]), namely cash settling claims based on the lower of the quotes obtained by it.

(a) AAI cash settled claims in accordance with the CRC PDS, ie it paid out the amount that it would cost AAI to repair or rebuild. The CRC PDS is clear: AAI will pay the amount it would cost ***AAI*** to repair or rebuild.

(b) AAI is not under a duty to pay out an amount reflecting whatever quote an insured obtains, which may or may not reflect market prices or the scope of works.

(c) The price an insured can obtain for a repair or rebuild is not always higher than the price AAI can obtain.[32]

(d) AAI holds its repairers and builders to the prices provided in a quote. At the time of quoting, repairers and builders are not generally aware of whether they will be required to rebuild at the price quoted or there will be a cash settlement.[33] There is thus nothing theoretical about the price quoted – it is the price for which the residence can be, and may actually be, rebuilt.

(e) AAI prices its insurance policies on the basis of its obligations. The price of insurance would likely increase if AAI were to start pricing its policies on the basis of some other undefined standard. That itself would be contrary to community interests and expectations.

(f) For prudential reasons, APRA expects AAI and other general insurers to have a robust claims management process. This is so that insurers can meet their obligations under the *Insurance Act 1973* (Cth) and related prudential standards.[34]

(g) AAI's shareholders, who also form part of the community, expect AAI to act in a commercially prudent way when handling insurance claims. It is consistent with commercial prudence for AAI to handle claims in accordance with the applicable PDS and not some other undefined standard.

---

32 Tr 6288.37-43.

33 Exhibit 6.638.38, SUN.0773.0003.0015 (template Claims Procurement Agreement), clause 6; Exhibit 6.325.37, SUN.0773.0003.0111 (template Master Services Agreement), clause 6. See further Tr 6384.5-10.

34 See Prudential Standard CPS 220 Risk Management [26(d)] and Prudential Practice Guide CPS 220 [38]; Prudential Practice Guide GPG 240 Insurance Risk, pages 5-6.

(h) There is also insufficient evidence to support the submission at CS [70]. The relevant scopes of works and quotes from the Wye River claims were not put to Mr Dransfield in cross-examination, to permit him to respond to the proposition that AAI's conduct fell below community standards.

(i) In the circumstances, it is not open to make this finding.

26. At CS [70] (see also CS [51]) it is also contended that three particular Wye River cases raised serious concerns about whether cash settlement sums were sufficient to allow policyholders to repair or rebuild their own homes on a new for old basis. This contention is not supported by the evidence.[35] While accepting that there were significant differences between the amounts initially offered by AAI and the amounts proposed by policyholders, Mr Dransfield gave evidence to the following effect.

(a) The first example he was taken to by Counsel Assisting was in the form of "a high level estimate based on square metreage of the home"[36] and not a quote against the scope of works.

(b) Also in relation to the first example, it was AAI's expectation (which ultimately eventuated) that there would be a process with the customer to achieve a reconciled scope of works and a quote from the customer's builder against that quote.[37] This was evident from the claim summaries, including in the case of the second example.[38]

(c) At the time that the relevant quotes were made, there were items included in the quotes from panel builders for all three examples which were provisional sums that AAI expected may change[39] and, in respect of which, customers were informed that the settlement amount may need to be adjusted upwards subsequently.[40]

---

35 CS fn 170 (which refers to Tr 6289-90) does not support this contention.

36 Tr 6290.2-3; Exhibit 6.369.33, SUN.0760.0300.0120. .0120 also indicates that a full and final settlement was negotiated with the customers in question, including an allowance for compensation due to delays.

37 Tr 6290.37-42.

38 Exhibit 6.369.33, SUN.0760.0300.0120 at 0121 ("this quote was sent to our Building Consultant – Sergon, to identify and detail any key differences between the quotes").

39 Tr 6291.6-14.

40 Tr 6292.3-7.

(d) AAI would seek to reinstate the property to the same standard and size that it was at the time of the insured event, and it was often the case that customers did not wish to reinstate the exact building that was there but instead wished to do something different.[41]

27. At CS [71] it is contended that AAI's conduct fell below community standards and expectations in a fourth respect by launching an advertising campaign in early March 2017 even though ASIC had drawn attention to similarities between the messaging of advertising materials that it was investigating and advertising materials that AAI was proposing to launch. AAI disputes that contention.

(a) At the relevant time, ASIC was investigating the issue, but had not reached a conclusion. AAI is not obliged to pre-empt the view of a regulator that is conducting an investigation. Even that view may be subject to curial determination.

(b) AAI genuinely believed that the proposed advertising campaign satisfactorily and appropriately conveyed the way in which the CRC product worked and that it was a good product that should be communicated to consumers.[42] The community does not expect insurers to refrain from advertising good products through a campaign which the insurer believes is satisfactory.

28. At CS [72] (also CS [64]), it is contended that AAI's conduct fell below community standards and expectations in a fifth respect by having a term in the CRC Supplementary PDS (**CRC SPDS**)[43] which "has been recognised by government and industry as a potentially unfair contract term". The reference given is to a Treasury paper issued in June 2018.[44] The relevant term provides that a cash settlement will reflect the cost to AAI of conducting the repair or rebuild. AAI disputes this contention.

(a) The Treasury paper is prepared by government, not industry. It seeks views from industry (the latter, ex hypothesi, have not yet been incorporated).

---

41 Tr 6295.40-43, also Tr 6384.12-18.

42 Tr 6315.44-47; Tr 6316.10-11.

43 Exhibit 6.369.2, SUN.0760.0200.0033.

44 Exhibit 6.405, RCD.0021.0025.0001.

(b) The Treasury paper does not state that a term of the kind included in the CRC SPDS is unfair. The paper proposes that a list of terms be included in legislation that "may be unfair", but that the legislation would not "prohibit the use of these terms or create a legal presumption that they are unfair".[45] It is not contrary to community expectations to have a term which is not prohibited or presumed to be unfair.

(c) The Treasury paper contains proposals that are expressly subject to "comment".[46] The proposals may or may not become law. The community does not expect an insurer to adopt proposals by a government agency which have not been legislated or even the subject of a final recommendation by the agency.

(d) The Treasury paper was released in June 2018, which was after both the CRC SPDS (January 2018)[47] and underlying PDS (in force since at least 1 January 2015).[48] The community would not expect AAI to have predicted that Treasury would thereafter release a paper inviting comment on a proposal relating to similar terms.

(e) The CRC PDS (and CRC SPDS) are clear: AAI is only obliged to fund the amount that it would cost AAI to repair or rebuild. The community does not expect AAI to depart from the clear terms of its product disclosure statement.

(f) The terms in the Treasury paper and those in the CRC SPDS question are not, in any event, by any means identical.

29. It is ultimately a meaningless exercise to suggest that terms in the CRC SPDS may have been unreasonable by reference to a Treasury discussion paper about possible legislative reform, containing discussion of different terms, and which was released subsequently to adoption of the CRC SPDS.

30. At CS [73], it is contended, sixthly, that the definition of "reasonable cost" in the CRC SPDS "may have been confusing to policyholders"[49] and that the inclusion of such a definition fell below

---

45 Exhibit 6.405, RCD.0021.0025.0001 at 0022.

46 Exhibit 6.405, RCD.0021.0025.0001 at 0004.

47 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0009, [24].

48 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0009, [24].

49 CS fn 173 (which refers to Tr 6325) does not support this contention. A matter does not become evidence merely because it is a proposition put by Counsel Assisting, particularly where (as here) the witness denied the proposition.

community standards and expectations. The relevant term is a definition of "reasonable cost" to the following effect:[50]

> **Reasonable cost**
>
> means the amount we determine. Reasonable cost is the lesser amount of any quotes obtained by us and/or by you. Discounts may be available to us through our suppliers.

31. AAI disputes the contention that this may have been confusing and that its inclusion in the CRC SPDS fell below community standards and expectations.

    (a) There is no evidence that the term "may have been confusing" to policyholders, or anyone.

    (b) The concept of "reasonable cost" is clearly defined as the lesser amount of the quotes obtained by AAI or the insured. That is not confusing. The common law, including that part relating to construction of contracts, is replete with reference to notions of reasonableness. Such references are not unfair.

    (c) Even if it be assumed that the term "may" be confusing, the fact that a contract has a term that may be confusing does not entail that there is conduct that falls below community expectations. It can be said of many contracts that they may be confusing to some people.

32. It is a matter for the Commission whether, on a correct understanding of the facts, AAI's conduct fell below community standards and expectations. Whether AAI's conduct, considered as a whole, meets that standard should be evaluated in a context which includes (i) AAI's willingness to admit its deficiencies where appropriate; (ii) the measures which AAI has implemented since the Wye River fires to ensure that AAI can better respond to similar events in the future.[51]

Potential causes of misconduct / conduct falling below community standards/expectations

33. At CS [74] (see also CS [59]) it is submitted that one potential cause of "the conduct relating to AAI's advertising material was an internal culture that favoured growing the business over compliance". That finding is not open.

34. The evidence referred to is that of Mr Dransfield at Tr 6316.4-35. The effect of Mr Dransfield's evidence was (i) that AAI believed that the marketing materials were not misleading and were appropriate and (ii) that AAI made a business decision to go ahead with it. Mr Dransfield also

---

50 Exhibit 6.369.2, SUN.0760.0200.0033.

51 See Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0037, [94].

gave evidence that AAI was highly conscious of the potential reputational risk of ASIC action[52] but, considering AAI's view of the materials, considered that risk to be low.[53] Mr Dransfield did not give evidence that growing the business was favoured over compliance. No such proposition was put to him. It does not follow that a company is favouring growth over compliance merely because the company proceeds with advertising which a regulator is investigating. That is particularly so where the company genuinely believes the advertising to be appropriate.

35. Mr Dransfield accepted that AAI could not have "certainty" that its materials would not be found to be misleading.[54] But if businesses were only permitted to take decisions when ***certain*** of their position, the economy would involve a great deal less activity.

36. At CS [74] it is submitted that "[t]he lack of value placed on compliance may also be demonstrated by AAI's continued insistence that its advertising was not false or misleading, despite its acceptance that certain representations were incorrect, and despite having received and paid infringement notices relating to that advertising". The Commission should not accept this submission:

    (a) The submission does not cite any evidence in support.

    (b) Mr Dransfield's acceptance that, if the CRC advertising material carried certain representations then those representations were incorrect,[55] was ultimately qualified by his observation that his answers were given "in the absence of review of the PDS".[56] The content of the CRC advertising material cannot be assessed without reference to the product that was actually being advertised, and the terms of that product were set out in the PDS.

    (c) The criticisms of the CRC advertising material are not justified for the reasons set out in [18] to [22] above.

    (d) There is no inconsistency between AAI paying an infringement notice from ASIC and maintaining that the advertising that led to the infringement notice was not misleading or deceptive. It is not a condition of the validity of an infringement notice that there in fact be

---

52 Tr 6322.14-38.

53 Tr 6323.27-30.

54 Tr 6316.35-40, referred to CS [59].

55 Tr 6306.47; Tr 6307.8-9.

56 Tr 6307.30-31.

a contravention of the law: see *Australian Securities and Investments Commission Act 2001* (Cth) s 12GXA(1) (**ASIC Act**). Nor is it a condition of the validity of such a notice that ASIC believe that there *was* an infringement of the law. All that there need be is "reasonable grounds to believe" that there has been an infringement. The ASIC Act is clear that payment of an infringement notice does not mean that the person has in fact contravened the relevant provision: s 12GXD(2)(a). The submission at CS [74] is contrary to the intent of s 12GXD(2)(a).

(e) There are perfectly legitimate reasons for which an insurer would pay out an infringement notice while still denying that there was an infringement.[57] The submission at CS [74], if accepted, would deter persons from paying infringement notices and modifying their conduct, which is an outcome which cannot be consistent with community expectations.

AAI, THE HUNTER VALLEY STORM AND THE HEALDS

Introduction

37. Between 20 and 24 April 2015 there was an intense low weather system which brought significant rainfall to a number of regions in NSW.[58] By close of business on 21 April 2015, AAI had received more than 1,700 claims.[59] Within two days, it had received 3,685 claims.[60] By 28 May 2015, AAI had received more than 28,000 home insurance claims.[61] Shortly after the intense low weather system, there were other two other "Events" (a hail event on 25 April 2015 and a "low" event on 30 April 2015) affecting the same regions.[62]

38. In the context of these events, Mr and Mrs Heald made a claim on their policy. AAI accepts that its response to the Healds' claim was deficient. However, AAI's conduct must be evaluated in the circumstances in which it occurred. While these contextual observations do not excuse those deficiencies, they do help explain them.

---

57 See Tr 6321.41-6322.2.

58 Statement of Gary Dransfield, 13 June 2018, Exhibit 6.368, SUN.9999.0005.0001 at 0026, [66].

59 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0026, [69].

60 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0026, [70].

61 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0027, [72]. By that date, approximately a third of claims had been finalised: Exhibit 6.368.69, SUN.0792.0601.0015 at 0017.

62 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0027, [73]. See also Tr 6344.21-25.

39. In the context of those tens of thousands of claims, the Healds' claim was a "complex"[63] one. Its complexity arose from the "dollar value, the nature of the damage, and the nature of the solution required to resolve the damage".[64]

40. AAI has made changes to its processes since the East Coast Low Event which generated the Healds' claim. In particular, AAI has:

    (a) changed its processes so that a claim of the nature of the Healds will be case managed, rather than team managed;[65]

    (b) increased its resourcing for responding to Events, including by engaging a dedicated external contractor;[66]

    (c) established a centralised complaints team;[67] and

    (d) established a high-risk claims team to case manage claims for particular characteristics.[68]

Evidence

41. The CS make a number of submissions as to the facts which are incomplete or are not supported by the evidence.

42. At CS [80] there is a reference to it taking until mid-June for AAI to send a builder to complete a make safe. That is not correct. Mrs Heald acknowledged that a make safe for the balcony railings was undertaken on 12 May 2015.[69]

43. It is not strictly correct to say that the Healds were offered temporary accommodation in March 2017 "two years after the Healds' lawyer raised their entitlement to accommodation": CS [85]. Ms Staggs did not submit that the Healds were entitled to temporary accommodation, only that the case "might be one for urgent Temporary Accommodation".[70] The CS omit to mention that,

---

63 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0040, [101(c)]; Tr 6350.22.

64 Tr 6383.16-17.

65 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0041, [103].

66 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0041, [104].

67 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0041, [105].

68 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0042, [106]. See also Tr 6363.19-22 (addressing how the vulnerability of the Heald family would relate to the case management model).

69 Statement of Bernadette Jodie Heald, 30 August 2018, Exhibit 6.382, WIT.0001.0138.0001 at 0005 [25].

70 Exhibit 6.368.88, SUN.0702.0002.4578.

after Ms Staggs' email, AAI arranged for an assessor to be appointed to attend the property[71] and that the assessor who attended did not report back to AAI that the property was dangerous.[72] That the property was safe to live in was also confirmed in January 2016 by the Healds' engineer.[73]

44. There is no proper basis to find that the engineers appointed by AAI to assess the Healds' property might have been subject to subconscious bias: cf CS [91]-[92]. In response to leading questions, Mr Dransfield accepted that there was a "potential" for subconscious bias, but said that the counterpoint to any potential for subconscious bias is that there is a professional obligation on the expert to fulfil their duties in a professionally competent way.[74] The existence of a hypothetical risk does not take matters very far. More importantly, the Commission should not make any finding of a risk of subconscious bias without hearing from the engineers against whom the allegation is made. A finding of bias, whether subconscious or conscious, is a serious matter and making that finding would involve a denial of procedural fairness to the engineers, from whom the Commission has not heard.

45. The CS assert that Mr Dransfield accepted that a number of aspects of AAI's conduct were "unacceptable": CS [98]. While Mr Dransfield did accept that AAI could and should have taken various steps and did not manage aspects of the Healds' claim in a satisfactory manner, the word "unacceptable" was not a term used by him[75] and is a characterisation supplied by the CS.

46. The CS refer to "broader, systemic issues, identified by FOS" (CS [99]) without explaining what a "systemic issue" relevantly is. The FOS definition of "systemic issue" materially departs from the ordinary understanding of a "systemic issue". For FOS purposes, a "systemic issue" is any issue "that will have an effect" on persons beyond a particular dispute.[76] An issue is systemic for FOS purposes if it will have an effect on a party to a dispute and one other person. The distinction between the FOS definition of "systemic issue" and its ordinary meaning can be readily seen once it is recalled that AAI's issued home and/or contents policies number in the millions and claims

---

71 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0032, [83(b)] and Exhibit 6.368.89, SUN.0702.0002.4581.

72 Exhibit 6.368.74.1, SUN.0702.0004.1269.

73 Dransfield, Exhibit 6.368, SUN.9999.0005.0001 at 0032, [83(e)].

74 Tr 6372.39-42 and 6373.1-5.

75 Except (by adoption) in respect of a different matter: see Tr 6359.35-36.

76 See clauses 11.2(a) and 4.1 of the FOS Terms of Reference as in force at 1 January 2015: Exhibit 6.141, RCD.0021.0017.0001. The current FOS Terms of Reference are available at: https://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf.

per year in the hundreds of thousands.[77] While Mr Dransfield acknowledged that FOS had identified issues that were "systemic" within the FOS meaning, he did not accept that there were systemic issues in any more general sense.[78] Importantly, in each instance, FOS was satisfied that systemic issues it had identified had been resolved by AAI.[79]

Suggested available findings of misconduct

47. The CS assert that is open for the Commission to find five categories of misconduct. The first contention is that AAI may have engaged in misconduct by failing to act with the utmost good faith as required by s 13 of the *Insurance Contracts Act 1984* (Cth): CS [100.1]. Such a finding is serious. The Commission should not accept the submission.

    (a) There is no identification of the conduct said to constitute a failure to act with good faith. Fairness requires some identification when the allegation is one of absence of good faith. Not only is there no particularisation, there is not even a general identification of the impugned conduct.

    (b) It was not put to Mr Dransfield that there was an absence of good faith.

    (c) While matters of fairness, reasonableness and community standards of decency may be relevant to a finding of absence of good faith, conduct is not ipso facto in breach of the duty of good faith merely because it is deficient, in breach of industry standards or falls below community expectations. Put simply, it is quite possible to get things wrong, whilst seeking to act in good faith.

    (d) Any assessment of whether there was a failure to act in utmost good faith would need to take into account the complexity of the Healds' case and the strain on AAI's resourcing following the multiple Events in mid-2015.

    (e) So far as a principal cause of AAI's deficiencies in the Healds' case was AAI's (then) team-managed model,[80] it is unlikely that a corporation's business judgment to manage a case by

---

77 Dransfield, Exhibit 6.369, SUN.9999.0007.0001 at 0008, [19]; Statement of Gary Dransfield, 11 September 2018, Exhibit 6.251, SUN.9999.0021.0001 at 0049-0059.

78 Tr 6376.3-6377.4; 6379.7-6380.5; 6381.17-45

79 Exhibit 6.325.40, SUN.0775.0003.0558; Exhibit 6.325.41, SUN.0771.0004.0009; Exhibit 6.639.94, SUN.0760.0501.0065.

80 Note Tr 6344.3.

a team, rather than through a specific individual, is a judgment which the law would impugn as being inconsistent with the requirement to act with the utmost good faith.

48. The second to fifth contentions are that AAI breached various clauses of the General Insurance Code of Practice (**the Code**), namely, cl 7.2 (relating to conducting claims handling in an honest, fair, transparent and timely manner), cl 7.13 (relating to keeping an insured informed as to the progress of their claim at least every 20 business days), cl 9.2 (relating to responding to Catastrophes in an efficient, professional and practical way) and cl 10.5 (relating to making information available to customers about the right to make an internal complaint). AAI accepts that it breached clauses 7.2, 7.13 and 10.5 of the Code in so far as they applied to the Healds' claim and failed to respond to the Healds' claim in an efficient, professional and practical way and in a compassionate manner, and repeats paragraphs 101(a) to (d) of Mr Dransfield's statement.[81]

Suggested findings of conduct falling below community standards and expectations

49. As to the second respect, identified at CS [103] (relating to AAI's internal claims handling process), AAI accepts that too many people were involved in the Healds' claim and the Healds' complaint.[82] AAI also accepts that its failure to settle the matter promptly after the FOS determination caused a delay and added to the strain on the Healds.[83]

50. As to the third respect (CS [104]), AAI accepts that it could and should have moved more quickly to resolve the difference of opinion between the experts and could and should have offered to fund the Healds to engage their own engineer earlier.[84]

51. As to the fourth respect, CS [105] asserts that AAI acknowledged that AAI's failure to accept the substance of the Burke Engineering report in June 2016 and resolve the matter in favour of the Healds at that time constituted conduct that fell below community standards and expectations. That assertion is not supported by the evidence referred to at CS fn 253 or at all. Nor did Mr Dransfield accept that this conduct fell below community standards or expectations. AAI does accept that by the time it received the Burke Report on 7 June 2016 it should have attempted to

---

81 Dransfield, Exhibit 6.368 SUN.9999.0005.0001 at 0040-41 and Tr 6372.4.

82 Tr 6344.3-4; Tr 6350.17-23; Tr 6371.45-6372.2.

83 Tr 6371.12-13.

84 Exhibit 6.368, SUN.9999.0005.0001 at 0040, [101(a)] and Tr 6371.25-28.

resolve the dispute.[85] It is not possible to know whether any such attempts would have been effective.

52. It is a matter for the Commission whether, on a correct understanding of the facts as set out above, there was conduct falling below community standards and expectations in the claimed four respects.

Potential causes of misconduct / conduct falling below community standards/expectations

53. There is no evidence to support a generalised finding that there was an "inadequacy of AAI's internal systems and processes in handling claims and disputes arising from those claims": cf CS [106]. If this finding was to be proposed, it ought to have been put to Mr Dransfield. AAI accepts that there were deficiencies in the handling of the Healds' claim and dispute. These deficiencies were related to the fact that the claim was received at a time when a series of natural disasters had occurred in Australia one after the other, and the claim (along with the large number of other natural disaster claims) was then team-managed rather than case-managed. This issue has now been addressed including by introduction of a broader case management model and increasing the scalability of AAI's Events capacity.[86] These deficiencies may also have been related to the absence of an internal policy expressly requiring AAI to take into account the insured's vulnerability,[87] an issue which has also now been addressed. The assessment of the deficiencies in the handling of the Healds' claim cannot be divorced from the context, which involved the Healds claim being a "complex" one while AAI was dealing with a large number of claims at the time.[88]

54. The clear effect of Mr Dransfield's evidence was that the deficiencies in dealing with the Healds' claim arose because of the particular circumstances of that claim, which were unusual. Nothing in the evidence supports a finding that those deficiencies reveal any broader problem with AAI's internal systems or processes. Further, Mr Dransfield's evidence about the cause of the deficiencies in handling the Healds' claim was not challenged. It is not open to the Commission

---

85 Exhibit 6.368, SUN.9999.0005.0001 at 0040, [101(a)].

86 Exhibit 6.368, SUN.9999.0005.0001 at 0041, [103], [104].

87 Exhibit 6.368, SUN.9999.0005.0001 at 0042, [106]. See also Tr 6383.19-22 (addressing how the vulnerability of the Heald family would relate to the case management model).

88 See paragraphs 37 to 40 above and Exhibit 6.368, SUN.9999.0005.0001 at 0041, [101(c)].

to make a finding about the cause of the deficiencies in handling the Healds' claim which is to the contrary of Mr Dransfield's unchallenged evidence.

55. There is no evidence to support the assertions at CS [107] that AAI did not have mechanisms in place to ensure effective and clear communications with policyholders and/or that (unspecified) matters which required escalation and consideration were (generally) not dealt with effectively by AAI. The assumption underpinning those assertions is the proposition that, if something occurred in the case of the Healds, it must have been because there were no policies to prevent it and/or because of a generalised problem. That assumption is not sound. The unchallenged evidence is that the Healds' claim was complex and arose in the context of a number of Events, placing a strain on AAI's resources. In that context, there can be no inference from that which occurred in the Healds' claim to any more general position. The evidence is that since at least 1 January 2013, AAI has had policies and practices in place to ensure efficient and compassionate communications in the case of Events.[89] In particular, all staff involved in managing Events are required to attend communication training.

1 OCTOBER 2018

J K KIRK SC
ELEVEN WENTWORTH

D LLOYD
12 WENTWORTH SELBORNE

D HUME
SIX WENTWORTH

---

89 Exhibit 6.325, SUN.9999.0004.0001 at 0013, [54]-[55] (and attachments thereto).