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

SIXTH ROUND OF PUBLIC HEARINGS: LIFE INSURANCE

SUBMISSIONS ON BEHALF OF THE TAL GROUP

A. INTRODUCTION

1. These submissions respond to the findings proposed by Counsel Assisting in relation to TAL. Specifically, TAL responds to the proposed findings of:

   (a) misconduct propounded by Counsel Assisting, being four in total, along with a further potential finding of misconduct raised by the Commissioner during the closing oral address of Counsel Assisting;

   (b) conduct that fell below community standards and expectations as propounded by Counsel Assisting, being seven in total; and

   (c) the potential causes of the above conduct, with Counsel Assisting enumerating four potential causes.

2. In so responding, reference is made to the three insured persons whose claims were the subject of cross-examination. Those persons are referred to in these submissions consistently with how Counsel Assisting has referred to them.[1]

B. FINDINGS OF MISCONDUCT

3. The proposed findings of misconduct are addressed under the five sub-headings below.

(i) Acknowledged misconduct in relation to the First Insured's claim

4. The first category of misconduct referred to by Counsel Assisting in her closing address[2] was the misconduct which was acknowledged by TAL and in particular by Ms van Eeden in her statement (Ex 6.180),[3] and which TAL accepts. As to this category, Ms van Eeden acknowledged that TAL adopted an approach of seeking to avoid the claim, rather than to support the insured, in particular by:

   (a) the retention of an external investigator, who was retained as a means to avoid paying the First Insured's claim.[4] As Ms van Eeden acknowledged in her statement, the

[1] Namely, the **First Insured** is the person the subject of Rubric 6-77 and Exhibit 6.180; the **Second Insured** is the person the subject of Rubric 6-45 and Exhibit 6.179; and the **Third Insured** is the remaining person about whom Ms van Eeden was cross-examined, but in respect of whom no statement was tendered.
[2] T 6481.41-47.
[3] Statement of Loraine van Eeden of 5 September 2018 at [189(a)] (Ex 6.180).
[4] T 5704.16-19.

communication with, and the information disclosed to, that investigator was inappropriate and totally unprofessional,[5] as was the level of surveillance, which was excessive and "*very personal and highly intrusive*";[6]

(b) the misuse of the daily activities diary, which was used for the ulterior purpose of seeking to disprove and avoid paying the First Insured's claim,[7] rather than as a rehabilitation tool (although such a tool was not appropriate in this case).[8] In relation to this matter, TAL's continued insistence on the completion of the diary, notwithstanding the medical evidence presented by the First Insured as to the adverse effects it was having on her,[9] was unacceptable, unprofessional and constituted misconduct (as was accepted by Ms van Eeden in her statement);[10]

(c) the untrue statements to the First Insured, namely: (i) the obligation to complete the daily activities diary was a requirement of the policy terms, rather than something being insisted upon by TAL;[11] and (ii) the "*diary had been used on a majority of* [TAL's] *claimants*";[12] and

(d) the use of bullying, intimidatory and offensive communications and tactics, including: (i) refusing to accept responsibility for requiring the daily activities diary; (ii) informing the First Insured that her benefits could be delayed or suspended if the diary was not completed; (iii) the content of the 10 March 2014 letter informing the First Insured of the declinature of her claim on the grounds of fraud, and setting out in detail in that letter the significant surveillance activities that had been undertaken; and (iv) informing the First Insured that she was breaching tax laws by failing to declare her benefits in her tax return.[13]

5. As was accepted by Ms van Eeden in her statement (Ex 6.180), the above conduct breached TAL's obligation of utmost good faith under s 13 of the *Insurance Contracts*

[5] Statement of Loraine van Eeden of 5 September 2018 at [189(a)(i)-(ii)] (Ex 6.180) and T 5707.26-28.
[6] T 5710.37-38. See also 5711.04-12 (deeply inappropriate and not how to treat any claimant).
[7] T 5712.22-5713.02 and Statement of Loraine van Eeden of 5 September 2018 at [189(a)(v)] (Ex 6.180).
[8] T 5712.31-46.
[9] Ex 6.180.74 [TAL.500.052.0065] (medical certificate of 11 December 2013 from Dr Crimston) and Ex 6.180.75 [TAL.052.1050] and Ex 6.192 [TAL.500.065.0022] (medical certificate of 24 December 2013 from Dr Bramston).
[10] Statement of Loraine van Eeden of 5 September 2018 at [189(a)(v)] (Ex 6.180). T 5722.31-41 and 5747.42-5748.02.
[11] Statement of Loraine van Eeden of 5 September 2018 at [189(a)(iii)] (Ex 6.180) and T 5748.04-5749.11.
[12] T 5712.15-20. The italicised statement is contained in Ex 6.180.73 [TAL.500.052.1041].
[13] Statement of Loraine van Eeden of 5 September 2018 at [189(a)(iii)] (Ex 6.180). See also T 5717.16-5718.36 and T 5750.46-5751.16, with the relevant documents containing the communications being Ex 6.180.75 [TAL.500.052.1050] (payment could be delayed if diary not completed), Ex 6.180.76 [TAL.003.001.0477 @ .0477-0488] (refusing to accept responsibility for requesting the diary), Ex 6.180.90.1 [TAL.003.002.0239] (10 March 2014 letter), and Ex 6.198 [TAL.500.052.1921] (strategy to advise First Insured about breaching tax laws).

Act 1984 (Cth), breached professional standards, and, where noted above, was conduct that was misleading.[14]

(ii) Breach of duty of utmost good faith by alleging the Second Insured breached that duty

6. As contended for by Counsel Assisting,[15] TAL accepts that in its letter of 3 July 2014 (informing the Second Insured that her policy had been avoided)[16] it was inappropriate to have informed her that, in addition to TAL having formed the view that the Second Insured had breached her duty of disclosure, she had also breached her obligation of utmost good faith in circumstances where the evidence indicated that the non-disclosure of her prior history of depression had been innocent.[17] Ms van Eeden, who had accepted in her statement that this conduct fell below community standards and expectations,[18] also accepted that this communication was itself a breach of TAL's obligation of utmost good faith,[19] from which concession TAL does not resile.[20] Importantly, the Commission would accept, and there was no cross-examination to the contrary, that TAL has ceased this practice.[21]

(iii) Systemic breach of duty of utmost good faith by alleging breaches of that duty

7. Consistent with paragraph 6 above, and as contended for by Counsel Assisting,[22] TAL acknowledges that (up until mid-2017, when the practice ceased)[23] in respect of those cases where a policy was avoided because of innocent non-disclosure (*cf.* fraudulent non-disclosure), TAL breached its duty of utmost good faith when it alleged (in advising of the avoidance) that it was of the opinion that the policyholder had breached their duty of utmost good faith by reason of their non-disclosure.

8. In respect of the proposition that such conduct was systemic, Ms van Eeden accepted in cross-examination that there "*would have been many cases of innocent non-disclosure in which* [an allegation of breach of s 13 would have been made which] *would have been very unfair to the policyholder*".[24] While understandably a precise number was not sought in cross-examination, for completeness, the table below (which sets out claims based on either a physical or mental condition where the claim was not paid or the policy

---

[14] Statement of Loraine van Eeden of 5 September 2018 at [188]-[189(a)] (Ex 6.180).
[15] T 6482.01-04.
[16] Ex 6.179.80 [TAL.001.001.0175 @ .0176].
[17] Statement of Loraine van Eeden of 31 August 2018 at [110] (Ex 6.179).
[18] Statement of Loraine van Eeden of 31 August 2018 at [110] (Ex 6.179).
[19] T 5772.06-07.
[20] See C Larkin, 'Uberrima Fides - Quo Vadis? Where to from Here?' (1995) 7 *Bond Law Review* 18 at 33, who notes that an allegation of a breach of duty of utmost good faith by an insurer against an insured may in itself be a breach of the duty if the allegation cannot be substantiated.
[21] See T 5771.44-5772.21 and Statement of Loraine van Eeden of 31 August 2018 at [113(a)] (Ex 6.179).
[22] T 6482.04-15.
[23] T 5771.44-5772.21.
[24] T 5772.09-11.

was avoided for non-disclosure) demonstrates that until the practice ceased in mid-2017, the total number of potential policyholders affected was something less than 497 over a four year period (fewer because of any instances of fraudulent non-disclosure):[25]

(Years 1 July to 30 June)	2013 – 2014	2014 – 2015	2015 – 2016	2016 – 2017	Total
Total claims based on a physical or mental condition	14,931	15,041	15,870	16,570	**62,412**
Total avoided/not paid for non-disclosure	101	128	120	148	**497**
% of claims	***0.68%***	***0.85%***	***0.76%***	***0.89%***	***0.80%***

(iv) Systemic breach of utmost good faith by its approach to investigations

9. The fourth finding of misconduct contended for by Counsel Assisting is that, at least until 2013, TAL systemically breached its duty of utmost good faith to its policyholders in its approach to investigating claims.[26] In particular, the submission was that Ms van Eeden had conceded in cross-examination that:[27]

   (a) until at least 2013, TAL, in investigating a claim, would go out and call for every kind of report from policyholders' medical practitioners, and would seek out medical information that extended well beyond the claimed condition; and

   (b) the purpose of undertaking these investigations was to determine whether TAL might be entitled to avoid a policy on the basis of non-disclosure.

10. However, the submission in paragraph 9(a) above was not the evidence. In particular, in her evidence concerning calling *"for every kind of report"* Ms van Eeden was not describing TAL's approach to all claims, even in the early years. Instead, Ms van Eeden's evidence was that *"if a claim was very early…in terms of the policy duration period"* TAL would go out and call for every type of record.[28] Further, Ms van Eeden confirmed that the process later formalised in TAL's *Underwriting and Disclosure Review Guide for Claims* (**the Underwriting Guide**)[29] was already in place prior to that time.[30] That process did not apply to all claims, but rather was limited to claims where either: (i) the information presented at the time of the claim was inconsistent with that presented at policy application; or (ii) where (as was the case in respect of each of the First to Third Insureds)[31] a claim was made very early in the life of the policy,[32] which can properly and reasonably prompt an inquiry as to whether all relevant matters were disclosed at the time of application.

---

[25] Statement of Loraine van Eeden of 31 August 2018 at [11] (Ex 6.179).
[26] T 6482.15-16.
[27] T 6482.17-21.
[28] T 5666.41-46.
[29] Ex 6.183 [TAL.500.013.3180 @ .3193] (see cl 4.1).
[30] T 5680.20-30.
[31] T 5681.45-5682.04 and 5786.14-33.
[32] T 5666.44 and Statement of Loraine van Eeden of 31 August 2018 at [60] (Ex 6.179).

11. That is not a breach of TAL's duty of utmost good faith, nor was the contrary put to Ms van Eeden. Instead, the above-described approach to investigations was the process adopted throughout the industry at the relevant time, a fact about which Ms van Eeden was not challenged.[33] The practice, accordingly, cannot constitute conduct that contravened a professional standard or a recognised and widely adopted benchmark for conduct. To the contrary, the practice was accepted industry-wide. Nor can such conduct amount to a contravention of the duty of utmost good faith on the grounds that it infringed *"commercial standards of decency and fairness"*,[34] given that it accorded with the process adopted throughout the industry at the relevant time (as opposed to the present).

12. In light of the above matters, there is no sound basis for the Commission to find that TAL systemically breached its duty of utmost good faith to its policyholders by the manner in which it conducted its investigations up until 2013. This is particularly so where such investigations were not undertaken for an illegitimate or *mala fides* purpose (with the First Insured's claim being an aberration in this regard).

13. Ms van Eeden accepted that the approach adopted by TAL in its investigations was *"not acceptable"*, and that was why the process later changed.[35] She equally conceded (in the course of cross-examination in relation to the Third Insured) that the non-targeted approach to investigations in that case failed to meet community standards and expectations.[36] TAL does not resile from these concessions. It does not, however, concede that such conduct constituted misconduct, as stated above.

14. Finally, it is appropriate to respond to Counsel Assisting's remarks in her closing address regarding TAL's present policy in undertaking *"general reviews"*.[37] Whilst these remarks have not been specifically incorporated into particular findings of misconduct (or the like), it is appropriate to address the contention propounded by Counsel Assisting that a *"general review"* under TAL's Underwriting Guide[38] amounts to a *"fishing expedition"*.

15. TAL accepts that Ms van Eeden agreed with this proposition in cross-examination.[39] However, there is a danger and an attendant unfairness in seizing upon a concession given at a high level of generality with respect to a protean term such as *"fishing expedition"*, especially when adopted by a non-lawyer. In particular, in a legal context, a fishing expedition connotes a process by which a party to litigation, who has already

[33] T 5666.43.
[34] *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [15] per Gleeson CJ and Crennan J. See also at [257] per Callinan and Heydon JJ.
[35] T 5668.06-07.
[36] T 5784.13-18 and 5784.43-5785.06.
[37] T 6477.18-20 and 6479.37-39.
[38] Ex 6.183 [TAL.500.013.3180].
[39] T 5681.35-43.

pleaded their case, with the attendant obligation to have had a proper basis to do so, endeavours *"not to obtain evidence to support his case, but to discover whether he has a case at all"*.[40]

16. This is not the sense in which Ms van Eeden was using the expression *"fishing expedition"*. In particular, both the Underwriting Guide and Ms van Eeden's attendant evidence make clear that a *"general review"* does not take place routinely, but instead where there is a basis to justify investigating an insured's prior medical history (for instance, where a claim is made early in a policy's life, which may, where the existing facts so indicate, suggest that material matters were not disclosed at application).[41]

17. It is one thing to accept (as Ms van Eeden did,[42] and as TAL accepts) that historically TAL's information-gathering processes were too wide and, in that colloquial sense, were a *"fishing expedition"*. It is another, and quite wrong, to suggest that there was a routine engaging in fishing expeditions come what may. There was always a rational trigger of one kind or another for a *"general review"*. In that regard, we draw attention to the following passage from the Underwriting Guide (cl 4.1) relating to a *"general review"*:[43]

> *"…if the claim amount and duration is very small and there is little or no information to suggest material non-disclosure, it may not be commercially viable to review further. If however, the claim amount is large and/or for a lengthy duration, and/or there is another concurrent policy(s) in force* ***and there is information that suggests relevant information has not been disclosed that may have an impact on any of these****, TAL should ensure a thorough review is undertaken"* (emphasis added)

18. When Ms van Eeden was cross-examined about this document, she was not asked about the emboldened words.[44] They are, however, an important pre-condition to a *"general review"* and one that is at odds with the legal (as opposed to any broader, colloquial) sense of the term *"fishing expedition"*.

19. Further, Ms van Eeden was not challenged on her evidence as to the further changes that have occurred since the production of the Underwriting Guide in September 2016.[45] In particular, she was not challenged as to the more targeted approach now taken to the collection of information, including by reason of:

---

[40] *Commissioner for Railways v Small* (1938) 38 SR 564 at 575 per Jordan CJ (Davidson and Owen JJ agreeing); *Commissioner of Police (NSW) v Tuxford* [2002] NSWCA 139 at [27] per Brownie AJA (Spigelman CJ and Ipp JA agreeing).
[41] Ex 6.183 [TAL.500.013.3180 @ .3193].
[42] T 5667.30-5668.07.
[43] Ex 6.183 [TAL.500.013.3180 @ .3193].
[44] 5682.06-25.
[45] See Statement of Loraine van Eeden of 5 September 2018 at [200(e)]-[200(g)] (Ex 6.180).

(a) the input of expert opinions via TAL's 'round table' forums (in place since the end of 2017), so as to devise appropriate claims management strategies;[46]

(b) revising, in January 2018, its *Claims Assessment Guide Plan*, to limit the information gathered and investigations undertaken in assessing a claim;[47] and

(c) training (since June 2018) for its claims personnel from TAL's Chief Medical Officer as to the type of medical information to be requested in assessing a claim.[48]

20. The Commission should accept that these improvements have refined, narrowed and focused TAL's investigations and information gathering processes.

(v) Misconduct by reason of aggravating the First Insured's mental health condition

21. During the closing address of Counsel Assisting, the Commissioner inquired whether he could find that TAL engaged in misconduct (or, failing that, conduct falling below community standards and expectations) if it was open to find that TAL exacerbated the First Insured's mental health condition by the handling of her claim.[49] This finding is dependent upon the following, which matters are addressed below:

(a) whether Dr Dinnen, in his July 2017 report, attributed any part of the observed decline in the First Insured's medical condition to any conduct by TAL; and

(b) if so, whether the steps taken by TAL in the handling of the First Insured's claim were sufficiently well based in contractual rights, powers or privileges.

22. As to (a), no part of Dr Dinnen's report attributes to TAL, or its conduct in handling the First Insured's claim, responsibility for the observed decline in the First Insured's mental health.[50] TAL accepts that, in his report, Dr Dinnen recorded the First Insured's expressed *"fearfulness and anger…towards the insurance process"*.[51] However, this was not incorporated into Dr Dinnen's diagnosis of the First Insured's present condition, being: *"Adjustment disorder with anxiety and depressed mood. This was triggered by work place problems as described in the original report but now has a life of its own"*.[52] Indeed, Dr Dinnen expressly noted *"No other factors are evident now or in the past"* in relation to *"other factors contributing to* [the First Insured's present] *condition"*.[53] Therefore, it would not be open to the Commission to find to the contrary.

---

[46] Statement of Loraine van Eeden of 5 September 2018 at [200(f)] (Ex 6.180).
[47] Statement of Loraine van Eeden of 5 September 2018 at [200(e)] (Ex 6.180) and Ex 6.180.159 [TAL.500.009.0106].
[48] Statement of Loraine van Eeden of 5 September 2018 at [200(g)].
[49] T 6484.22-37.
[50] Ex 6.202 [TAL.500.052.2311].
[51] Ex 6.202 [TAL.500.052.2311 @ .2312].
[52] Ex 6.202 [TAL.500.052.2311 @ 2320].
[53] Ex 6.202 [TAL.500.052.2311 @ .2320].

23. While question (b) does not arise, solely for completeness, this was not a case where the relevant steps taken and powers exercised by TAL had no possible source in the underlying contract (as opposed to being a case, as admitted by TAL, where some of these powers were invoked inappropriately). Thus:

(a) as to the daily activities diary, a possible source of the power to have required this (in appropriate cases, of which the First Insured's claim was not one) is cl F.2.4 of the policy terms, which provided that the First Insured was to provide in respect of a claim *"any other information required by* [TAL]*"*.[54] That term also stated: *"Payment of a Benefit is subject to proof of your entitlement in such a manner as we may reasonably require"*;

(b) equally, TAL was empowered to require the First Insured to attend upon medical practitioners for medical examinations – see cl F.2.5: *"The Life Insured must undergo at our expense any medical examination or examinations which we may require"*;[55]

(c) in relation to the collection of prior medical reports, the First Insured authorised this via consent forms executed and returned at the time of her initial claim;[56] and

(d) because this took place from public locations, the surveillance conducted in relation to the First Insured (while wholly inappropriate as conceded above) did not require a contractual premise or the First Insured's consent.

C. CONDUCT BELOW COMMUNITY STANDARDS AND EXPECTATIONS

24. As with the findings of misconduct, each of these proposed findings as to conduct falling below community standards and expectations is addressed under individual sub-headings.

(i) Inadequate training and oversight of case managers

25. We next address the contentions by Counsel Assisting regarding a lack of adequate systems to train and oversee case managers.[57] TAL accepts (and as was accepted by Ms van Eeden in her statements)[58] that, on the evidence before the Commission, it is open to find that until 2017[59] TAL engaged in conduct that failed to meet community standards and expectations by failing to ensure that it had adequate systems in place to deliver structured training or induction training on TAL's claims philosophy and to oversee senior level case managers. TAL accepts that, in the case of the First and Third Insureds,

[54] Ex 6.180.130.5 [TAL.003.001.0388 @ .0407]. As Ms van Eeden stated in cross-examination, whilst a daily activities diary was not appropriate in this case, it is an established rehabilitation tool used by insurers in some mental health claims (T 5712.31-46).
[55] Ex 6.180.130.5 [TAL.003.001.0388 @ .0408].
[56] Ex 6.180.15 [TAL.500.052.0936 @ .0945-0946].
[57] T 6482.24-28.
[58] Statement of Loraine van Eeden of 5 September 2018 at [193]-[194] (Ex 6.180) and T 5781.01-12.
[59] T 5760.10-11

this led (in whole or relevant part) to a number of inappropriate actions being taken and a failure by TAL to correct them in a timely manner. Specifically, TAL acknowledges:

(a) as revealed by the First Insured's claim, and contrary to the position that now prevails,[60] there was no mandatory induction training of new employees in relation to TAL's claims philosophy to align those employees' claims philosophy with that of TAL (prior to this there was on-the-job training in this respect);[61] and

(b) in relation to both the First and Third Insureds, there was insufficient oversight of senior level case managers,[62] which, in the case of the First Insured, failed to prevent the conduct set out at paragraph 4 above occurring and, in relation to the Third Insured, failed to prevent a case manager communicating to that insured reasons for the avoidance of her policy that were inconsistent with the decision of the Claims Decision Committee (**CDC**).[63] As set out below, these matters have been remedied by improvements to TAL's systems and procedures.

(ii) Failure to have robust systems to avoid conflicts of interest

26. Counsel Assisting contended that, at least until 2016, TAL failed to have in place robust systems to avoid potential conflicts of interest in relation to some of its decision-making processes, therein constituting conduct that failed to meet community standards and expectations.[64] This, Counsel Assisting stated, manifested itself in two ways:[65] (a) in relation to the First Insured, permitting a case manager to sit on the CDC when the committee was determining that case manager's recommendation; and (b) in relation to the Third Insured, permitting a claim to be remitted from the Internal Dispute Resolution (**IDR**) team to the original case manager after the IDR team had indicated that the case manager had taken the wrong approach in relation to the assessment of the claim. TAL responds to these submissions as follows.

27. TAL accepts that it would be open on the evidence for the Commission to find that permitting a case manager to sit on the CDC fell below community standards and expectations. This is not, however, because of any "*conflict of interest*", it is rather because the CDC's decision-making should have been independent from the case manager. This practice has ceased and the Commission would so find.[66]

28. As to the remitter to the original case manager from the IDR team, in respect of the Third Insured, TAL accepts that the failure of the case manager on that remitter to have adhered

[60] T 5760.05-14 and Statement of Loraine van Eeden of 5 September 2018 at [200(a)] (Ex 6.180).
[61] Statement of Loraine van Eeden of 5 September 2018 at [194] (Ex 6.180) and T 5759.40-5760.14.
[62] Statement of Loraine van Eeden of 5 September 2018 at [193] (Ex 6.180); T 5759.11-26 and T 5781.01-12.
[63] T 5780.14-37.
[64] T 6482.28-29.
[65] T 6482.30-35.
[66] T 5723.39-42.

to the IDR team's recommendation fell below community standards and expectations, as Ms van Eeden acknowledged.[67] However, TAL does not accept that the then prevailing practice of remitting from the IDR team to the original case manager of itself fell below community standards and expectations.

29. Ms van Eeden's evidence was that this process worked "*most of the time*".[68] True it is that Ms van Eeden also accepted, notwithstanding this, that the process was "*inappropriate*" having regard to the need for independence.[69] Ms van Eeden's evidence, both in her statement and orally, was that the process has changed, with claims no longer remitted to the original case manager.[70] On the whole of the evidence, it is not open to find to the requisite (*Briginshaw*) standard that Ms van Eeden's concession that the process was inappropriate carried with it a concession that this was so readily foreseeable at the relevant times as to fall below community standards and expectations, as opposed to being made with the benefit of hindsight. It is quite wrong to reason from an improvement to a process to a conclusion that prior to the improvement, the process fell below these standards. The evidence does not permit a conclusion that TAL persisted in adhering to the former process of remitter to the same case manager in the face and knowledge of empirical evidence and experience showing that this was prejudicing the independence of the process.

30. To be clear, none of the above is a concession that these matters had a systemic effect on the claims-handling decisions that were made: see paragraph 56 below.

(iii) Failure to have in place adequate systems to ensure IDR performed a robust review

31. Counsel Assisting contended that TAL failed to have adequate systems in place to ensure that its IDR team conducted a robust analysis of declined claims independently of the claims team (which deficiency manifested itself in relation to the First Insured's claim).[71]

32. TAL acknowledges that (and as Ms van Eeden accepted in her statement),[72] in respect of the First Insured's claim, the file does not indicate that the IDR team performed a robust review of the decision to avoid her policy.[73] As Ms van Eeden accepted in her statement (Ex 6.180), this failed to meet community standards and expectations.[74]

[67] T 5781.17-36 and T 5783.18-23.
[68] T 5782.43-44.
[69] T 5782.26-30.
[70] T 5781.38-5782.16.
[71] T 6482.37-40.
[72] Statement of Loraine van Eeden of 5 September 2018 at [190(a)] (Ex 6.180).
[73] Statement of Loraine van Eeden of 5 September 2018 at [190(a)] (Ex 6.180) and T 5690.32-5691.02.
[74] Statement of Loraine van Eeden of 5 September 2018 at [190(a)] (Ex 6.180).

33. However and by contrast, the Third Insured's claim revealed the IDR team performing an appropriate review, which yielded a recommendation contrary to the original decision.[75] The fact that that recommendation was not adopted reflects upon other processes, but not adversely on the review function undertaken by the IDR team.[76] As to the Second Insured, while the IDR team affirmed the decision of the claims team in that case,[77] this was appropriate given the evidence supporting the decision to avoid her policy revealed that the Second Insured had innocently (but nonetheless) breached her duty of disclosure to TAL.[78] Given this, the evidence cannot support a finding that there existed a systemic failure by the IDR team to conduct robust reviews of declined claims.

(iv) TAL failed to engage with FOS in a cooperative and frank way

34. TAL accepts that, as contended by Counsel Assisting,[79] in certain respects (as set out below) it failed to engage with FOS in a frank and cooperative way, being conduct that fell below community standards and expectations.

35. *First*, in relation to the First Insured, TAL made a misleading and incorrect statement to FOS,[80] namely, that the use of a daily activities diary was *"standard practice in the industry"*.[81] TAL accepts that whilst daily activity diaries are established rehabilitation tools,[82] they are not used as standard practice in the assessment of a claim. Whilst not detracting from this concession, this statement was not made as part of an attempt to persuade FOS to find in TAL's favour on the question of the diary. It cannot have been because it was accompanied by a concession that TAL was no longer pressing for the diary[83] (albeit this concession was later reversed).

36. *Secondly*, in relation to the Second Insured, TAL accepts[84] that it delayed (although not deliberately) the communication to FOS of the additional basis on which it was relying to avoid the Second Insured's policy. The relevant CDC decision relying on this additional basis was made on 24 March 2015,[85] whilst TAL's submissions to FOS elucidating this

[75] T 5781.14-18 and 5783.18-27.
[76] *cf.* T 5786.05-06, where the IDR process was agreed to be *"ineffective"*, but that conclusion must be premised on the fact that in the Third Insured's case, whilst the IDR process succeeded in having the claim re-considered and providing a recommendation to the claims team, it did not ultimately translate into a different result upon reassessment by the case manager.
[77] Ex 6.179.95 [TAL.001.001.0179].
[78] See, for instance, Ex 6.179.86 [TAL.500.020.1852 @ .1862-1863, 1917-1919, 1920-1921 and 1923-1926].
[79] T 6482.42-46.
[80] T 5721.15.
[81] Ex 6.180.130.2 [TAL.003.001.0381 @ .0383].
[82] T 5712.32-42.
[83] Ex 6.180.130.2 [TAL.003.001.0381 @ .0383].
[84] T 5778.07-24.
[85] Ex 6.179.106 [TAL.500.020.2166].

additional basis was not made until 7 April 2015,[86] the day before the conciliation conference[87] (although the date of the conference was moved on several occasions).[88]

37. *Thirdly*, as was acknowledged by Ms van Eeden in her statement,[89] TAL's unwillingness to participate in a conciliation conference during the First Insured's second complaint to FOS[90] was conduct that fell below community standards and expectations.

38. *Fourthly*, in relation the First Insured, TAL accepts that, in some respects, it failed to comply with FOS's decisions in a timely manner or, in some instances, until further requested by FOS. Specifically, after the acceptance by the First Insured of the first FOS determination on 1 March 2013 (which reinstated the First Insured's policy),[91] TAL: (a) did not assess and approve the First Insured's claim for benefits promptly, taking until July 2013 to do so;[92] (b) sought to require the First Insured to pay outstanding premiums before paying any benefits,[93] contrary to the intention of FOS's determination (although, following FOS's intervention, this did not occur);[94] and (c) incorrectly calculated interest on a portion of the benefits payable (by approximately $507),[95] which equally occurred after the second FOS determination (by approximately $56).[96]

39. *Finally*, in closing address, the Commissioner inquired whether the preceding conduct could constitute misconduct if it involved a breach of contract between TAL and FOS.[97] This finding should not (and cannot) be made. The terms of reference pertaining to FOS for the relevant period are not in evidence. However, even utilising the terms of reference as they stood as amended as at 1 January 2015,[98] no breach is made out.

40. Addressing *seriatim* the four instances of conduct set out above:

    (a) whilst there is no doubt an implied term of the contract between TAL and FOS that TAL would not knowingly make misrepresentations calculated to lead FOS into error, such a term could not have been breached for the reasons given at paragraph 35 above

[86] Ex 6.179.107 [TAL.001.002.0157].
[87] Statement of Loraine van Eeden of 31 August 2018 at [96] (Ex 6.179).
[88] T 5778.10-11.
[89] Statement of Loraine van Eeden of 5 September 2018 at [190(d)] (Ex 6.180). See also T 5741.24-35.
[90] Ex 6.180.135 [TAL.003.001.0015].
[91] Ex 6.180.125 [TAL.005.001.0084].
[92] See Ex 6.180.56 [TAL.003.002.0174] (on 24 May 2013, TAL approved and paid benefits under the IP policy to 10 July 2012, along with interest) and Ex 6.180.60 [TAL.500.052.2006 @ .2007-2008] (on 5 July 2013, TAL approved and paid benefits under the IP policy to 3 July 2013, along with some interest).
[93] Ex 6.180.50 [TAL.500.052.3093].
[94] Ex 6.180.123 [TAL.005.001.0130 @ .0132-0133] (paragraphs 23 and 25 of the Determination) and Ex 6.188 [TAL.005.001.0073 @ .0073-0074].
[95] Ex 6.180.67 [TAL.005.060.0217 @ .0218-0219].
[96] Ex 6.180.49 [TAL.500.050.1284 @ .1429].
[97] T 6483.01-09.
[98] Ex 6.141 [RCD.0021.0017.0001].

(that is, the misleading statement was accompanied by a concession that TAL was no longer pressing for the diary, albeit this concession was later reversed);

(b) whilst cl 7.2 of FOS's terms of reference obliges a party to produce information on request, none of the above conduct involved FOS requesting information;

(c) FOS's terms of reference do not oblige TAL to participate in a conciliation conference and, although cl 7.3 requires a party to *"do anything else that FOS considers may assist FOS's consideration of the Dispute"*, no conciliation conference was insisted upon by FOS; and

(d) finally, in relation to paragraph 38 above, there was no explicit direction that TAL set off the premiums payable under the policy against any benefits payable to the First Insured. Rather FOS's determination stated (at [23]): *"The FSP is entitled to offset any premiums refunded as a result of the avoidance of the Policy against any benefits payable to the Applicant"*.[99] The fact that TAL initially did not elect to utilise this expressed entitlement (and insisted upon refunded premiums being paid before paying any benefits) was not contrary to the *"letter"* of FOS's determination.[100] As such, and whilst not detracting from the inappropriateness of the conduct, there was no breach of cl 8.7(b) of the terms of reference, which provides for FOS's determinations to be binding when accepted by an insured.

(v) Failure to afford procedural fairness

41. Consistent with what was contended by Counsel Assisting,[101] TAL accepts that, up until mid-2017 (and as was the case in respect of the Second and Third Insureds,[102] although not in respect of the First Insured[103]), it generally failed to afford a policyholder an opportunity to address TAL (and the material it was relying upon) prior to TAL deciding to avoid their policy. As Ms van Eeden stated in her statement in relation to the Second Insured, it would have been appropriate to have written to her, setting out the medical evidence obtained by TAL from its investigations along with its preliminary view, and to have invited submissions from her.[104] As such, TAL accepts (as did Ms van Eeden in her statement)[105] that such conduct fell below community standards and expectations.

---

[99] Ex 6.180.123 [TAL.005.001.0130 @ .0132]. See also at [25]: *"The FSP may offset any premiums refunded to the Applicant"*.
[100] T 6478.11.
[101] T 6483.11-15.
[102] T 5771.01-02 and 5784.20-41; Statement of Loraine van Eeden of 31 August 2018 at [113(c)] (Ex 6.179).
[103] See Ex 6.180.32.2 [TAL.004.001.0202] and Ex 6.180.36 [TAL.004.001.0179] (correspondence of 12 and 16 July 2010).
[104] Statement of Loraine van Eeden of 31 August 2018 at [106] (Ex 6.179).
[105] Statement of Loraine van Eeden of 31 August 2018 at [106] and [113(c)] (Ex 6.179).

42. This concession, however, does not translate into TAL having been legally obliged to have afforded the Second and Third Insureds an opportunity to have responded to TAL's preliminary decision to avoid their policies for non-disclosure and the material being relied upon in support of that decision (*cf.* the position where a policy obliged TAL to form an opinion as to a matter, being a pre-condition to the payment of a benefit).[106]

(vi) Inappropriate communications by TAL to policyholders

43. Consistent with that submitted by Counsel Assisting,[107] and as Ms van Eeden accepted in her statements, several aspects of the way in which TAL communicated with the First to Third Insureds fell below community standards and expectations, specifically:

    (a) in respect of the First Insured, that conduct referred to at paragraphs 4(c) and (d) above. This conduct has been remedied by increased training, including in empathetic communications with policyholders,[108] as well as greater oversight in relation to claims decisions (including in respect of claims denial decisions – see paragraph 54 below – and the use of expert forums to manage claims – see paragraph 19 above);

    (b) in respect of the Second Insured, it was inappropriate to have left her with the impression that she may be liable to repay to TAL the benefits she had received (in circumstances where her claim and non-disclosure had not been fraudulent).[109] This practice ceased from last year,[110] and the Commission would find as much; and

    (c) in respect of the Second and Third Insureds, the absence of procedural fairness (see paragraph 41 above). The Commission would find that this practice has changed.[111]

(vii) Inadequate systems in place to avoid serious administrative errors

44. As Ms van Eeden acknowledged in her statement in respect of the First Insured's case,[112] a number of administrative errors were made, which constituted conduct falling below community standards and expectations. Whilst regrettable, they were isolated and were not present across the other case studies examined. It is not open to the Commission to find, based solely on the First Insured's unique case, that TAL failed to have in place adequate systems to prevent these sorts of administrative errors. Further, and contrary to

---

[106] See *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113 at 77,536-77,537 per McLelland J; *Wyllie v National Mutual Life Association of Australasia* (1997) 217 ALR 324 at 342 per Hunter J; *Sayseng v Kellogg Superannuation* [2003] NSWSC 945 at [81]-[88] per Bryson J (affirmed [2005] NSWCA 214 at [36]).
[107] T 6483.15-17.
[108] Statement of Loraine van Eeden of 5 September 2018 at [200(c)] (Ex 6.180).
[109] Statement of Loraine van Eeden of 31 August 2018 at [111] (Ex 6.179) and T 5770.11-16 and 5773.01-05.
[110] Statement of Loraine van Eeden of 31 August 2018 at [111] (Ex 6.179) and T 5773.07-13.
[111] T 5770.35-47.
[112] Statement of Loraine van Eeden of 5 September 2018 at [191] (Ex 6.180); T 5749.19-41, 5757.01-19 and 5761.32-34.

this contended for finding,[113] Ms van Eeden gave evidence, unchallenged in cross-examination, that these errors are addressed when they occur.[114]

D. POTENTIAL CAUSES OF THE ABOVE CONDUCT

45. The four possible causes for the above conduct are addressed individually below.

(i) Inadequate training and oversight

46. Generally consistent with what was contended before the Commission,[115] TAL accepts that one of the causes of the conduct described above was the inadequate oversight of senior case managers and the lack of training provided to its case managers as to TAL's claims philosophy. Specifically, TAL has acknowledged (as Ms van Eeden did in her statement: Ex 6.180),[116] that the above conduct was the result of:

(a) there being no mandatory induction training for new employees in relation to TAL's claims philosophy so as to ensure those employees' claims philosophy aligned with that of TAL. Prior to this there was on-the-job training,[117] with the contrary position having now prevailed since 2017 with a two-week induction programme.[118] We refer to the submission in closing address that TAL did not have any *"mandatory induction training for new TAL employees"*.[119] The evidence does not support so broad a conclusion. Ms van Eeden's statements were confined to induction training related to TAL's claims philosophy,[120] and the Commission would so find;

(b) likewise, TAL did not have in place structured and on-going training programmes in relation to its claims philosophy[121] (which has now changed)[122]. However, the closing submission that Ms van Eeden had conceded that this was the case more broadly in respect of training for claims handling and processes[123] is not made out when Ms van Eeden's evidence is considered fairly and as a whole; and

(c) as exhibited by the First and Third Insureds' case studies, there was insufficient oversight of senior case managers.[124] Importantly, as set out in paragraphs 19 above and 54 below, this has been improved via greater oversight over claim declinature and policy avoidance decisions, as well as the engagement of expert forums (e.g. 'round

[113] See T 6483.26-29.
[114] Statement of Loraine van Eeden of 5 September 2018 at [196] (Ex 6.180).
[115] T 6483.31-37.
[116] Statement of Loraine van Eeden of 5 September 2018 at [193]-[194] (Ex 6.180) and T 5781.01-12.
[117] Statement of Loraine van Eeden of 5 September 2018 at [194] (Ex 6.180) and T 5759.40-5760.14.
[118] T 5759.40-5760.14 and Statement of Loraine van Eeden of 5 September 2018 at [200(a)] (Ex 6.180).
[119] T 6483.37-38.
[120] T 5759.40-5760.14 and Statement of Loraine van Eeden of 5 September 2018 at [200(a)] (Ex 6.180).
[121] Statement of Loraine van Eeden of 5 September 2018 at [194] and [200(a)] (Ex 6.180) and T 5759.40-43.
[122] Statement of Loraine van Eeden of 5 September 2018 at [200(a)] (Ex 6.180) and Statement of Justin Sean Delaney of 27 August 2018 at [45(a)] (Ex 6.123) and Ex 6.123.12 [TAL.500.009.0418].
[123] T 6483.36-37.
[124] Statement of Loraine van Eeden of 5 September 2018 at [193] (Ex 6.180), T 5759.11-26 and T 5781.01-12.

table' discussions) in claims management. Equally, oversight of the use of surveillance has significantly improved with the introduction in November 2016 of a strict policy,[125] consistent with the Life Insurance Code of Conduct,[126] regarding the use of surveillance, which has seen a significant decrease in its use,[127] consistent with that observed industry-wide.[128]

(ii) A purported culture within TAL

47. Contrary to what was articulated by Counsel Assisting in her closing address,[129] for the reasons that follow, there is no sound basis for the Commission to find that there is, or ever has been, a culture within TAL that promotes the declinature of claims, avoidance of policies, or to minimise the financial liability of TAL. Equally absent is any culture promoting misconduct, maltreatment of policyholders, or a lack of respect towards FOS.

48. *First*, the statistics regarding the number of claims that TAL declines, or policies that it avoids, do not reflect a culture within TAL of promoting the declinature of claims or avoidance of policies. As noted by Counsel Assisting,[130] out of the 10 largest life insurers in the Australian market, for the period 1 July 2017 to 30 June 2018:

(a) TAL declined only 2.3% of claims received across all life insurance policies.[131] That placed TAL in the middle of the ten life insurers surveyed, with the middle eight life insurers recording overall declinature rates between 1.2% and 3.3%; and

(b) In respect of income protection (**IP**) claims, TAL again placed in the middle of the ten life insurers, declining only 3.3% of all IP claims, with the middle six life insurers recording declinature rates between 2.9% and 3.6%.[132]

49. These statistics are no recent phenomenon. Over the past five years, TAL has avoided or declined for non-disclosure only 0.73% of claims, as set out below:[133]

(Years 1 July to 30 June)	**2013 – 2014**	**2014 – 2015**	**2015 – 2016**	**2016 – 2017**	**2017 – 2018**	**Total**
Total claims based on a physical or mental condition	14,931	15,041	15,870	16,570	18,722	**81,134**
Total avoided/not paid for non-disclosure	101	128	120	148	92	**589**
% of claims	***0.68%***	***0.85%***	***0.76%***	***0.89%***	***0.49%***	***0.73%***

[125] Ex 6.180.159 [TAL.500.009.0323].
[126] Ex 6.176 [RCD.0021.0023.0001] (specifically cls 8.12 and 10.9).
[127] Statement of Justin Sean Delaney of 27 August 2018 at [68] (Ex 6.123).
[128] T 5787.42-5792.14.
[129] T 6483.41-6484.02.
[130] T 5533.45-5541.18.
[131] Ex 6.113 [RCD.0026.0002.0003].
[132] Ex 6.119 [RCD.0026.0002.0007].
[133] Statement of Loraine van Eeden of 31 August 2018 at [11] (Ex 6.179).

50. *Secondly*, the above statistics are not the product (to the extent they could be) of a culture or approach within TAL of declining claims only to have them reversed via IDR, EDR or other processes. That is to say, the fact that TAL only declines a small percentage of claims or policies is not masking a higher ratio that is ultimately corrected via review mechanisms and curial proceedings. This is borne out by the number of complaints that TAL has received over the last five years, specifically:[134]

(Years 1 July to 30 June)	**2013 – 2014**	**2014 – 2015**	**2015 – 2016**	**2016 – 2017**	**2017 – 2018**	**Total**
Total Claims Notified[135]	14,998	15,694	16,138	16,719	17,978	**81,527**
Complaints made to TAL	169	172	198	263	210	**1,012**
Complaints made to FOS or SCT	114	135	110	98	103	**560**
Complaints to TAL as % of total	***1.13%***	***1.10%***	***1.23%***	***1.57%***	***1.17%***	***1.24%***

51. Relevantly, the percentages are lower when it is appreciated that less than half of the complaints received by TAL in relation to a claim relate to a claim-denial decision.[136]

52. *Thirdly*, these statistics accord with the experience of Ms van Eeden. As she stated in cross-examination in relation to the First Insured's case, TAL has paid over 25,000 claims (presumably during her time at TAL) and she has *"never seen one handled in this way before"*.[137]

53. *Fourthly*, only one of the three case studies examined by the Commission concerned individuals who acted with a motivation to decline the insured's claim. The other two case studies did not reveal such behaviour. In relation to the Second Insured, Counsel Assisting, at one point, sought to suggest that TAL, in or around March 2015, undertook further investigations for the purpose of finding a basis to avoid the Second Insured's policy on a ground related to her claim condition (cervical cancer).[138] Whilst, Ms van Eeden agreed that this appeared to be the case on documents before her:[139]

    (a) the evidence does not disclose that TAL was concerned about the validity of the premise of the original avoidance decision. Instead, a second retro-underwriting opinion was obtained because information pertaining to symptoms related to the Second Insured's cervical cancer (which were extant at the time of policy application) was wrongly redacted when the first underwriting opinion was obtained;[140] and

[134] Ex 6.123.8 [TAL TAL.500.036.0018_0001 @_0010].
[135] Including withdrawn claims.
[136] See the figures in the Statement of Loraine van Eeden of 31 August 2018 at [13] (Ex 6.179). Over the period 1 July 2016 to 30 June 2018, only 221 of the 498 claims-related complaints pertained to a claims denial decision.
[137] T 5722.40-41.
[138] T 5776.33-40.
[139] T 5776.33-40.
[140] Ex 6.208 [TAL.500.020.0200].

(b) as stated at paragraph 33 above, there was sufficient evidence to avoid the Second Insured's policy for non-disclosure (and Counsel Assisting did not contend otherwise). Indeed, and as was not challenged, the ultimate settlement reached with the Second Insured, whereby her policy remained avoided, was a *"fair and balanced outcome"*.[141]

54. None of the foregoing is to deny that TAL, as part of its process of continually improving its systems and policies, has enhanced and refined its philosophy and culture. In this respect, TAL's claims philosophy is antithetical to a culture promoting the declinature of claims, which seeks to put the policyholder first and for TAL to act as if it were in the policyholder's shoes.[142] Equally supportive is Ms van Eeden's evidence that since 2016 any decision to decline a claim must be approved by what Ms van Eeden described as "*TAL's senior management*".[143] Likewise is TAL's policy that requires a decision to avoid a policy for non-disclosure of a condition unrelated to the claim to be made by the General Manager, Claims and the Executive Manager of Disputes and Litigation.[144] This senior oversight is contrary to a culture promoting the declinature of claims.

55. *Finally*, in relation to the submission that the case studies have revealed a culture within TAL of inadequate respect for FOS,[145] this finding should not be made. Whilst TAL has acknowledged instances where it failed to engage with FOS in a manner meeting community standards and expectations (see paragraphs 34 to 40 above), those instances were isolated. Finally, the Commission would not be assisted in any way in determining the above questions by referring to evidence relating to a different entity in connection with a different case study. [146] Indeed to do so would be unfair and inappropriate.

(iii) Systemic lack of independence in TAL's decision-making processes

56. Contrary to the submission of Counsel Assisting,[147] the Commission would not find that there was a systemic lack of independence in TAL's decision-making processes. TAL rejects any suggestion that its claims decisions (or IDR reviews) around the time of the First to Third Insureds' claims were affected by a systemic lack of independence. Such a proposition does not accord with: (a) the statistics regarding TAL's claims handling, including complaints received (see paragraphs 48 to 51 above); and (b) Ms van Eeden's evidence that notwithstanding some issues affecting the independence of parts of the

[141] Statement of Loraine van Eeden of 31 August 2018 at [112] (Ex 6.179) and T 5779.34-38.
[142] Ex 6.123.11 [TAL.500.013.1553 @ .1555].
[143] T 5668.23-26.
[144] Statement of Loraine van Eeden of 5 September 2018 at [200(d)] (Ex 6.180); Statement of Justin Sean Delaney of 27 August 2018 at [52(f)] (Ex 6.123); T 5768.01-15; see also Ex 6.123.23 [TAL.500.010.0401 @ .0412-0413] (being TAL's *"Claims Authority and Delegation Guidelines"*, which has documented this requirement).
[145] T 6484.17-20.
[146] See T 6484.17-20.
[147] T 6484.04-08.

claims decision-making process, these generally did not impair the outcome or process (*"most of the time it worked"*),[148] which opinion was based on the above statistics.[149]

57. What TAL does accept in relation to its systems and processes to safeguard the independence of its claims decision-making process is at paragraphs 26 to 29 above.

58. In relation to TAL's IDR team, this has been removed from the operational side of TAL's business and embedded in the dispute resolution area, with a view to enhancing its independence and expertise.[150] The fact that this has improved the independence of the IDR team does not allow the Commission to infer that it previously suffered from a systemic lack of independence. Instead, as Ms van Eeden accepted in cross-examination, it was not located at the time in a manner that enhanced its independence.[151]

(iv) KPIs incentivising poor claims handling

59. Contrary to the submission of Counsel Assisting,[152]the evidence does not establish that TAL's KPIs drove poor claims handling conduct.

60. In cross-examination, Ms van Eeden was taken to the KPIs for a team manager and a case manager for the 2015 TAL financial year.[153] In respect of those KPIs,[154] it was put to her that 50% of a team manager's and a case manager's KPIs related to financial matters and profit targets.[155] Specifically:

    (a) A 30% weighting in respect of a *"profit target"*. Ms van Eeden stated that she believed this related to the overall profit of TAL,[156] which it does, and there is no evidence that points otherwise; and

    (b) Two KPIs, with 15% and 5% weightings respectively, to achieving *"budgeted profit targets by managing claims to outcomes in line with assumptions underpinning loss ratio targets"* in respect of *"Individual team result"* and *"Collective claims result"*.

61. In respect of the first KPI (accounting for 30%), no single claims manager (or team manager) could realistically and materially affect the profitability of a large organisation like TAL in any way.

62. In respect of the other two KPIs, those pertain to finalisation of claims, not specifically to declining claims. As Ms van Eeden stated in cross-examination, KPIs concerned with

[148] T 5782.43-44.
[149] T 5782.46-5783.01.
[150] Statement of Loraine van Eeden of 5 September 2018 at [195] and [202(a)] (Ex 6.180) and T 5760.22-43.
[151] T 5760.39-40.
[152] T6484.08-17.
[153] T 5738.12-21 and 5740.06-15.
[154] Ex 6.123.166 [TAL.500.060.0004].
[155] T 5739.44-46 and 5740.06-15.
[156] T 5738.37-38.

"closing claims" are concerned with effective management of claims, in particular the management of claims within effective times.[157] Targets to close claims (or, indeed, finalise claims) are not to be equated with targets to decline claims, as a claim can, and overwhelmingly is, closed not by declining it, but by accepting it, including sometimes by early payment.[158]

63. TAL acknowledges that the second and third KPIs contain references to *"loss ratios"*. These do not appear in TAL's present KPIs.[159] Ms van Eeden was unable to explain precisely their meaning, although she stated that various matters were incorporated into a loss ratio, being broader than claims numbers.[160] In any event, aggressively declining claims would result in poor scores on other KPIs, particularly those concerned with customer relations.

64. Finally, in 2016, as part of a broader review,[161] KPMG reviewed TAL's KPI Goals Library from 1 June 2015.[162] Whilst those KPIs contained no reference to *"loss ratios"* (nor do they today), KPMG concluded that overall TAL's KPIs were materially consistent with the evaluation criteria of utmost good faith and the principles of treating the customer fairly.[163] It also found that TAL's KPIs did not incentivise negative behaviour such as delaying claims decisions or inappropriately denying claims.[164]

Dated: 1 October 2018

N. J. Beaumont SC
A. J. Macauley

[157] T 5735.13-22.
[158] T 5735.13-17.
[159] See Ex 6.123.168 [TAL.500.060.0006].
[160] T 5739.06-09 and 30-37.
[161] Ex 6.123.5 [TAL.500.006.0004].
[162] Ex 6.123.5 [TAL.500.006.0004 @ .0061].
[163] Ex 6.123.5 [TAL.500.006.0004 @ .0030].
[164] Ex 6.123.5 [TAL.500.006.0004 @ .0030].