

# Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

## Sixth Round of Hearings

### Submissions in Response to Closing Submissions of Counsel Assisting

#### Filed on Behalf of Youi Pty Ltd

#### Introduction

- 1 Youi Pty Ltd (**Youi**) welcomes the opportunity to provide these submissions in respect of the two case studies that Youi was involved in during Round 6 of the Commission's hearings. These submissions respond to the written closing submissions of Counsel Assisting dated 21 September 2018.<sup>1</sup>
- 2 As noted at [1] of the Closing Submissions:
  - (a) Ms Sasha Murphy appeared before the Commission and gave evidence in relation to a claim that she made to Youi following damage suffered to her home following a hail storm in Broken Hill, New South Wales, in November 2016; and
  - (b) Mr Glenn Sutton appeared before the Commission and gave evidence in relation to a claim he made to Youi following damage to his home caused by Tropical Cyclone Debbie, in Queensland, in March 2017.
- 3 Mr Jason Storey appeared at the Commission and gave evidence on behalf of Youi.<sup>2</sup> Mr Storey is the Chief Operating Officer, Claims Services at Youi.<sup>3</sup>
- 4 Mr Bert Bakker also gave evidence but was not summonsed to appear by the Commission.<sup>4</sup> Mr Bakker is the Chief Operating Officer, Actuarial and Analytics at Youi.<sup>5</sup>
- 5 Youi submits that none of the matters considered by the Commission and identified in the Closing Submissions supports a finding that Youi:
  - (a) may have engaged in misconduct;
  - (b) engaged in conduct falling below community standards and expectations; or

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<sup>1</sup> RCD.0027.0001.0001. The written submissions of Counsel Assisting will be referred to as the **Closing Submissions**.

<sup>2</sup> Mr Storey gave a witness statement in relation to Ms Murphy's claim (Rubric 4-15) (Exhibit 6.359) and in relation to Mr Sutton's claim (Rubric 4-21) (Exhibit 6.360).

<sup>3</sup> Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, [1].

<sup>4</sup> Mr Bakker gave witness statements dated 8 June 2018 concerning Rubric 4-05 (Exhibit 6.327), 22 June 2018 concerning Rubric 4-05A (Exhibit 6.328), 30 August 2018 concerning Rubric 6-57 (Exhibit 6.261) and 19 September 2018 concerning Rubric 6-57A (Exhibit 6.421).

<sup>5</sup> Exhibit 6.327, Witness statement of Bert Bakker dated 8 June 2018, [1].

(c) engaged in conduct that has the potential to undermine the effectiveness of external dispute resolution mechanisms.

6 In the absence of cogent evidence to support such findings, Youi submits that the Commissioner should not make the findings suggested by Counsel Assisting.

### Opening remarks

7 Counsel Assisting's approach to the consideration of issues concerning Youi and whether it engaged in misconduct (as defined in the Terms of Reference<sup>6</sup>) was to examine two case studies involving claims made under Youi's home insurance policies following natural disasters and whether, in certain limited respects, Youi may have breached the General Insurance Code of Practice (**Code**) or the duty of utmost good faith.

8 No submission is made by Counsel Assisting that any of the conduct of Youi which is characterised by Counsel Assisting as potential misconduct:

(a) is attributable to the particular cultural and governance practices of Youi, or to broader cultural or governance practices in the relevant industry or subsector; or

(b) is systemic either to Youi or the relevant industry or subsector.

9 That is unsurprising when consideration is given not only to the two case studies themselves but to the wider context in which these two claims occurred.

10 *First*, the two case studies selected by Counsel Assisting, it may be assumed, represent the high-water mark of potential misconduct. In both cases, as described in more detail below, Counsel Assisting did not contextualise the relevant timeline or the responsibility for events that were out of Youi's control (for example, both properties suffered serious defects, they were not built according to applicable building codes and there were limitations on the timely availability of suitable tradespeople in remote locations).

11 These two case studies are not only unrepresentative of the vast majority of cases dealt with by Youi, particularly following natural disasters, but are case studies which Counsel Assisting has sought to portray in the worst possible light. No attention was given to the many claims that were dealt with in an outstanding manner by Youi in difficult circumstances or the care and attention that Youi tried to bring to those affected by these events.

12 *Secondly*, the context in which these claims occurred ought to inform any proper consideration of the alleged misconduct. For the period over which the Commission sought information regarding Youi's handling of natural disaster insurance claims:

(a) Youi received over 13,000 claims arising from natural disasters under home and/or contents policies as a result of 24 declared natural disasters;<sup>7</sup>

(b) in the 2016/2017 financial year (the year relevant to the case studies), Youi received over 3,200 natural disaster claims, took an average of 94 days to completely resolve those claims with a median time of 67 days, and which

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<sup>6</sup> Transcript, 12 February 2018, 2 – 7.

<sup>7</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [10]-[11].

resulted in 21 complaints and 10 referrals to the Financial Ombudsman Service (**FOS**);<sup>8</sup>

- (c) as at 20 June 2018, Youi had received 2,145 claims arising from Tropical Cyclone Debbie, 94.59% of those claims were resolved within 12 months of the cyclone and 98.09%, were entirely resolved by 20 June 2018;<sup>9</sup>
- (d) with respect to home insurance policies more generally, in 2017:<sup>10</sup>
  - (i) Youi received 18,011 claims;
  - (ii) within 12 months all but 277 (2%) claims had been resolved;
  - (iii) only 53 (0.29%) claims involved a FOS dispute;
- (e) with respect to home insurance policies more generally, in 2018:<sup>11</sup>
  - (i) Youi received 14,830 claims;
  - (ii) within 12 months all but 3 (0%) claims had been resolved;
  - (iii) only 24 (0.16%) claims involved a FOS dispute;
- (f) Youi applied its Claims Catastrophe Plan, which was updated in November 2017, to guide staff and management to deliver an effective response and actions in the event of a natural disaster or catastrophe by:<sup>12</sup>
  - (i) timely identification and classification of events to enable swift responses for customers including by categorising claims by severity at lodgement for the purposes of prioritising assessment and resources to the most urgent claims;
  - (ii) open communication with front line claims and assessing staff, including by claims managers being responsible for providing updates to front-line staff throughout catastrophe events;
  - (iii) specialised training, including claims staff receiving training on how to have conversations with customers affected by stress or negative emotions, including during catastrophe events, and ongoing training to assist front-line staff and operational management in responding to customer's needs;
  - (iv) dedicated resourcing, as multi-location and time-zone customer call centre operations provided reserve capacity and flexibility of coverage in the event of increased call volumes; the employment of its own in-house assessing and claims resources, both in major metropolitan areas and significant regional centres, allowing Youi to mobilise resources and service customers in disaster affected areas timeously; use of catastrophe specific seconded positions including onsite catastrophe event managers to ensure dedicated oversight and management;

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<sup>8</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [12]-[13] and Annexure A.

<sup>9</sup> Exhibit 6.328, Witness statement of Bert Bakker concerning Rubric 4-05A dated 21 June 2018, at [1]-[3].

<sup>10</sup> Exhibit 6.261, Witness statement of Bert Bakker concerning Rubric 6-57 dated 30 August 2018, at [57] and Annexure C.

<sup>11</sup> Exhibit 6.261, Witness statement of Bert Bakker concerning Rubric 6-57 dated 30 August 2018, at [57] and Annexure C.

<sup>12</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [15]-[20].

- (v) committed service providers which Youi maintains strong relationships with, that are required under Youi's standard operating procedures to engage with and update Youi as to their ongoing capacity;
  - (vi) event specific mandates for disasters, which involves a complex management claim review committee being established to effectively deal with resolution of large loss or potentially contentious claims, and a catastrophe management committee being formed and meeting daily to make timely decisions on operational matters which can then be communicated to Youi's staff;
  - (vii) proactive communications with customers, for example in the event of an impending catastrophe Youi communicates with its customers via its website, Facebook and by sending text messages; Youi warns customers to assist them in preparing for the event and mitigating their risk, and advises them to contact Youi if they need to make a claim;
- (g) Youi's processes are designed to ensure that it complies with the obligation in clause 9.2 of the Code for Youi to respond to catastrophes in an efficient, professional and practical way, and in a compassionate manner, including by:<sup>13</sup>
- (i) operating flexible and scalable contact centre operations in South Africa, New Zealand and Australia that 'follow the sun' (i.e. are always available) and by allowing customers to notify Youi of claims online;
  - (ii) employing its own skilled and experienced in-house assessing and claims resources;
  - (iii) maintaining catastrophe-specific service provider and logistical support partner relationships to ensure timely mobilisation to impacted regions and response to customer needs;
  - (iv) front line staff and management receiving specific induction and ongoing training and development on Youi's Code obligations; and
  - (v) reviewing its global CAT plan after significant events to ensure prior learning is assimilated into operating procedures and systems.
- (h) Youi has in place robust policies and procedures for monitoring compliance with the Code (as required by clause 13.2(a)) and for reporting of a "significant breach" of the Code (as required by clauses 13.3)<sup>14</sup> and in the period since 1 January 2013 Youi has had to report two significant breaches, none of which related to natural disasters, to claims handling, or to complaints.<sup>15</sup>

13 Further, it is not asserted in the Closing Submissions that any of the changes made to Youi's systems and procedures, which were identified in the evidence before the Commission, are insufficient to address the issues identified.

<sup>13</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [32].

<sup>14</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [52]-[58].

<sup>15</sup> Exhibit 6.327, Witness statement of Bert Bakker concerning Rubric 4-05 dated 8 June 2018, at [59] and Annexure B.

## Issues addressed

14 The Closing Submissions raise the following particular issues which are addressed in these submissions:

- Issue 1:** Whether Youi may have engaged in misconduct by failing to handle Ms Murphy's and Mr Sutton's claims in an honest, fair, transparent and timely manner, as required by cl 7.2 of the Code.<sup>16</sup>
- Issue 2:** Whether Youi may have engaged in misconduct, in relation to each of those claims, by failing to respond to a catastrophe in an efficient, professional and practical way and in a compassionate manner, as required by cl 9.2 of the Code.<sup>17</sup>
- Issue 3:** Whether Youi may have engaged in misconduct in relation to the complaint sent by Ms Murphy on 2 November 2017 and the complaint sent by Mr Sutton on 9 October 2017, by failing to respond to the complaint in writing and by failing to tell the insured the decision in relation to the complaint or the reasons for that decision, as required by cl 10.13 of the Code.<sup>18</sup>
- Issue 4:** Whether Youi may have engaged in misconduct by breaching its duty of utmost good faith to Ms Murphy and Mr Sutton.<sup>19</sup>
- Issue 5:** Whether Youi engaged in conduct that fell below community standards and expectations by including a term in its home insurance policies that excluded from cover any "additional costs resulting from your buildings or any part thereof not being compliant with the most recent building codes, law and regulations".<sup>20</sup>
- Issue 6:** Whether the causes of the possible misconduct or conduct falling below community standards and expectations, asserted in the Closing Submissions, was attributable, at least in part, to the way in which Youi remunerated its claims handling staff.<sup>21</sup>
- Issue 7:** Whether by not recording a mobile telephone call between a Youi claims assessor and Ms Murphy's partner has the potential to undermine the effectiveness of external dispute resolution mechanisms, and underscores the importance of the requirement in the Code for general insurers to respond to complaints in writing.<sup>22</sup>
- Issue 8:** Whether the conduct of Youi, in not responding to Mr Sutton's complaint dated 9 October 2017, has the potential to undermine the effectiveness of external dispute resolution mechanisms.<sup>23</sup>

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<sup>16</sup> Closing Submissions, at [33].

<sup>17</sup> Closing Submissions, at [34].

<sup>18</sup> Closing Submissions, at [35].

<sup>19</sup> Closing Submissions, at [36].

<sup>20</sup> Closing Submissions, at [37].

<sup>21</sup> Closing Submissions, at [40].

<sup>22</sup> Closing Submissions, at [43].

<sup>23</sup> Closing Submissions, at [44].

## Issue 1

### Clause 7.2 of the Code

15 The Closing Submissions assert that it is open to the Commissioner to find that Youi may have engaged in misconduct by failing to handle Ms Murphy's and Mr Sutton's claims in an honest, fair, transparent and timely manner, as required by clause 7.2 of the Code, in the following respects:

(a) as to Ms Murphy's claim:

- (i) by not informing Ms Murphy of issues Youi had identified with Builder A or reallocating her claim to another builder (presumably earlier than it actually did reallocate to another builder);<sup>24</sup>
- (ii) by not doing enough to address the initial delay in Builder A not commencing work until 4 October 2017;<sup>25</sup>
- (iii) by not taking adequate steps to ensure Builder A had undertaken make safe works in October 2017 or that further make safe works were adequate;<sup>26</sup>
- (iv) by the delay in the completion of the works until May 2018, which prevented remediation works being completed in Ms Murphy's backyard;<sup>27</sup>

(b) as to Mr Sutton's claim:

- (i) by not taking proactive steps to check make safe works or find a more permanent solution;<sup>28</sup>
- (ii) by the delays in the repair works;<sup>29</sup>
- (iii) by the delays in reimbursing Mr Sutton for temporary accommodation costs.<sup>30</sup>

16 For the reasons given below, this assertion ought to be rejected.

17 *First*, the obligation in clause 7.2 of the Code to "conduct claims handling in an honest, fair, transparent and timely manner, in accordance with this section" relates to the whole of the claims handling process for the customer in question and the particular timetables set out in clause 7 of the Code. Therefore, the conduct of the insurer ought to be considered as a whole and not examined with an eye keenly attuned for any delay in an individual step or interaction in the course of the extensive dealings between the insurer and the insured during the claim.

18 The only steps contemplated by clause 7 and which are therefore subject to the particular timeliness requirement in clause 7.2 are not ones that are the subject of complaint by Ms Murphy or Mr Sutton. They relate to the timeframes for making a

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<sup>24</sup> Closing Submissions, at [4].

<sup>25</sup> Closing Submissions, at [6].

<sup>26</sup> Closing Submissions, at [8]-[9], [12].

<sup>27</sup> Closing Submissions, at [16].

<sup>28</sup> Closing Submissions, at [21].

<sup>29</sup> Closing Submissions, at [27].

<sup>30</sup> Closing Submissions, at [29].

claim (clause 7.8), accepting or denying the claim (without investigation) (clause 7.9), requiring further information relating to a claim (clause 7.10), appointment of an assessor (clause 7.12), keeping informed of progress of claim (i.e. before decision) (clause 7.13), engagement of external experts to assess the claim (clause 7.15), making a decision to deny or accept a claim (after investigation) (clauses 7.16-7.18), and reasons for denial of claim (clause 7.19). None of those steps for both Ms Murphy and Mr Sutton were completed in other than a timely way.

- 19 Youi accepts that clause 7.20 of the Code provides that where it appoints the builder it accepts responsibility for the quality of the workmanship and materials and agrees to handle complaints about the quality or timeliness of the work or conduct of the repairer under its complaints handling process. Indeed, Youi's policy wording provides that "[if Youi] choose and authorise repairs with a repairer, [Youi] will guarantee the quality of those repairs for as long as [the policyholder is] the owner of the insured property."<sup>31</sup>
- 20 The focus of the Commission's inquiries was the delays in the completion of the repair works. Counsel Assisting did not make any allegation of dishonesty or unfairness or lack of transparency.
- 21 Youi accepts that there were unacceptable delays in the completion of works for both Ms Murphy and for Mr Sutton by Youi appointed builders, and Youi also accepts responsibility to handle complaints about the timely progress of that work. However, those delays do not amount to a contravention of clause 7.2.
- 22 Even if clause 7.2 required Youi to ensure that the repairs were completed in an "honest, fair, transparent and timely manner", it is necessary to consider the handling of the claim as a whole in the context set out above regarding all of the claims that Youi was dealing with in the relevant period and to bear in mind that attention was primarily directed to the timeliness of repairs.
- 23 In relation to Ms Murphy, the evidence of Ms Murphy is that:<sup>32</sup>
- (a) the roof at her home was repaired in May 2018;
  - (b) Ms Murphy is happy with the repairs; and
  - (c) internal repairs (which could not commence until the roof was replaced) were completed by 18 August 2018.
- 24 Some defects that were subsequently identified by Ms Murphy are currently being rectified.<sup>33</sup> Although Counsel Assisting identified the roof repair as occurring 18 months after the hail damage,<sup>34</sup> this is an unfair exaggeration of the timeline. Ms Murphy did not lodge the claim until late January 2017,<sup>35</sup> and did not pay the excess or sign the statement of works to allow the builder to undertake the work until May 2017.<sup>36</sup> That means the works were completed 12 months after the works were approved by Ms Murphy. Even accepting that there were delays caused by Builder A (discussed below) the timeline does not take into account the substantial non-code compliant parts of the house with which the builders had to deal.

<sup>31</sup> See, for example, Tab 2 of Exhibit JS-1, YOU.0004.0001.0001 at .0027.

<sup>32</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [49]; Transcript, Sacha Michelle Murphy, 19 September 2018, 6169 – 6170; Exhibit 6.359, Witness statement of Jason Leonard Storey, 20 September 2018, at [92].

<sup>33</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [49]; Transcript, Sacha Michelle Murphy, 19 September 2018, 6169 – 6170; Exhibit 6.359, Witness statement of Jason Leonard Storey, 20 September 2018, at [92].

<sup>34</sup> Closing Submissions, at [16].

<sup>35</sup> Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [64].

<sup>36</sup> Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [64].

- 25 Similarly, Counsel Assisting identifies that Builder A commenced work on 4 October 2017 and says that this was nearly one year after the damage occurred.<sup>37</sup> Again, this is an unfair exaggeration of the timeline. It was 9 months after the claim was lodged and 4 months after the statement of works was signed by the insured.
- 26 In relation to Mr Sutton, while there is no question that Mr Sutton had earlier been dissatisfied with the handling of his claim, Mr Sutton acknowledged that since a number of months ago, there has been a change in the way that Youi has interacted with him. As Mr Sutton described it “[Youi has] appointed somebody else who has been quite amicable, easy to talk to, forthcoming with information. I get regular updates and phone calls and emails. So there has been a remarkable change.”<sup>38</sup>
- 27 Having regard to all of the evidence of Ms Murphy and Mr Sutton and the evidence of Youi, fairly understood and as a whole, the evidence does not support a finding that Youi contravened clause 7.2 of the Code nor that, as a consequence, it may have engaged in misconduct. The evidence shows that Youi made many attempts to address the issues raised by Ms Murphy and Mr Sutton. While Youi accepts that at times it did not achieve the high levels of service that it demands of itself, and it took longer than it reasonably should have, Youi has taken steps to ensure that all issues have been addressed.

#### *Ms Murphy’s claim*

- 28 *Secondly*, it is important to recall some features in relation to Ms Murphy’s claim. Counsel Assisting’s submits that the claim was lodged in late 2016 or early 2017.<sup>39</sup> The documentary evidence, of which Counsel Assisting was aware, confirmed it was lodged on 25 January 2017.<sup>40</sup> Within two days, Youi sent roofers to inspect the roof and prepare a report.<sup>41</sup> The claim was authorised on 15 February 2017 (that is, liability was accepted by Youi) and this was communicated to Ms Murphy the following day.<sup>42</sup> A scope of works was prepared by Builder A and signed by Ms Murphy some time later on 24 May 2017.<sup>43</sup> Among other contact with Ms Murphy, on 18 July 2017 and 10 August 2017, Youi sent Ms Murphy text messages, as follows:

“Hello, I hope you are well. Just a quick SMS to make sure everything is tracking well with your claim? If you have any concerns, please call 139684 and we will be happy to try and help, otherwise we will be in touch as soon as we have any news.”<sup>44</sup>

- 29 Ms Murphy did not respond to the 18 July 2017 text message but, on 10 August 2017, Ms Murphy called Youi to inform Youi that no repair works had started. Youi immediately contacted Builder A who informed Youi that Builder A had left a number of messages for Ms Murphy to confirm the repair start date, but that those messages were not returned. Youi requested that Builder A again try and contact Ms Murphy or her partner and agree a start date for the works.<sup>45</sup> When Ms Murphy contacted Youi on 29 September 2017 to inform Youi that Builder A had not commenced works, Youi took swift action to follow up Builder A to progress the repair. At this point, further issues were identified in relation to the house’s framework structure not being

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<sup>37</sup> Closing Submissions, at [6].

<sup>38</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6184.

<sup>39</sup> Closing Submissions, at [3].

<sup>40</sup> Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [12].

<sup>41</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0002.

<sup>42</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0004; Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [63(b)].

<sup>43</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0007.

<sup>44</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0008-9.

<sup>45</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0009.

compliant with the relevant building code, and that further works would be required.<sup>46</sup> Following the receipt of reports from other builders, notwithstanding the policy exclusion, these further works were authorised by Youi on 22 November 2017 and Youi recommended that the works be undertaken by another builder in place of Builder A.<sup>47</sup> Following the preparation of quotations, this was formally authorised on 15 February 2018.<sup>48</sup> The repairs to the roof, including the significant structural upgrades and upgrades to make it compliant with the relevant building code, were completed in May 2018. The internal works were commenced on or around 22 May 2018 and these works were completed by 18 August 2018.<sup>49</sup> It needs to be recalled that, in the words of Ms Murphy, the house is “old”, and so required more effort to repair to the requisite standard.<sup>50</sup>

- 30 *Thirdly*, while there have been delays in repairing the damage to Ms Murphy’s home, Youi has worked to have these repairs completed in the challenging circumstances of a catastrophe in a remote area where available trades are in short supply.<sup>51</sup> It is open on the evidence for the Commissioner to accept that natural disasters present particular challenges to insurers such as obtaining the services of reliable builders and other tradespeople to attend to repairs in a timely fashion. There is no benefit to Youi for these repairs to not be completed in a timely and workmanlike way. None was suggested by Counsel Assisting. In fact, it would be contrary to Youi’s interests to allow substandard repairs to occur given the terms of the Youi building insurance policy oblige Youi to provide a lifetime guarantee on repairs that are undertaken by its appointed service providers.<sup>52</sup>
- 31 There is no doubt that the performance of Builder A was not acceptable. Builder A’s substandard performance was why Youi stopped allocating new work to Builder A and ultimately did not retain Builder A on its panel of approved builders from 5 October 2017, and from undertaking any further works on Ms Murphy’s home from 22 November 2017.<sup>53</sup>
- 32 *Fourthly*, it was not put to Mr Storey in cross-examination by Counsel Assisting that a failure of Youi to conduct its claims handling in respect of Ms Murphy’s claim in an honest, fair, transparent and timely manner could amount to misconduct.
- 33 Rather, when asked whether Youi told Ms Murphy about the issues that Youi had identified with Builder A and give her a chance to ask for a different builder to do the works at her house, Mr Storey’s response was “*No, I don’t believe that occurred*” and when asked whether Youi should have, Mr Storey stated “*Well, with the benefit of hindsight, it certainly should have*”.<sup>54</sup>

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<sup>46</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0009 - .0014.

<sup>47</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0016.

<sup>48</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0022-23.

<sup>49</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [49]; Transcript, Sacha Michelle Murphy, 19 September 2018, 6169 – 6170; Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [92].

<sup>50</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [3].

<sup>51</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6209 – 6210.

<sup>52</sup> See, for example, Tab 2 of Exhibit JS-1, YOU.0004.0001.0001 at .0024.

<sup>53</sup> See Tab 53 of Exhibit JS-1, YOU.0029.0001.0001 at .0019.

<sup>54</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6210 – 6211.

34 Mr Storey was then asked by Counsel Assisting the following questions:<sup>55</sup>

5 Do you think that Youi's obligation under clause 7.2 of the code to handle claims in a fair and transparent manner required it to do so?---Yes.

Do you think that Youi's obligations under clause 9.2 of the code to act in an efficient, professional and practical manner required it to do so?---Yes.

10 Do you think that Youi's duty of utmost good faith required it to do so?---Yes.

Do you accept that Youi ought to have allocated another builder to Ms Murphy's claim after these issues with builder A emerged?---Yes, definitely.

35 As set out in [33] above, Mr Storey's responses were given with the "benefit of hindsight". There is no evidence before the Commission to suggest, for example, that at the time Builder A was authorised by Youi, Youi was acting in anything other than a fair and transparent manner having regard to the circumstances. Rather, at that time, Youi approved the claim quickly and appointed Builder A to attend to the repairs. Builder A had been appointed to undertake numerous repairs in the area by Youi and other insurers.<sup>56</sup> Also, although later Youi raised issues with Builder A regarding it obtaining statutory insurance for its building works, the evidence was that Builder A said that it would forward a copy of the insurance to Youi prior to undertaking the works on Ms Murphy's home<sup>57</sup> and that as it had already measured the site and ordered materials for the job, it was in a position to proceed with it.<sup>58</sup>

36 *Fifthly*, later, following a series of questions relating to the Environmental Protection Authority (**EPA**), Counsel Assisting had the following exchange with Mr Storey:<sup>59</sup>

You accept in relation to Ms Murphy's claim that Youi failed to conduct its claims handling in an honest, fair, transparent and timely manner?---Yes.

37 This exchange must be viewed fairly and in context, having regard to the evidence as to the involvement of the EPA that immediately preceded it. Ms Murphy's evidence was that she raised the issues of lead in her backyard with Youi on 6 October 2017.<sup>60</sup> It was not the case that Youi then ignored Ms Murphy's concerns regarding lead in her backyard. As set out in [29] above, at around this time further structural issues were identified in relation to Ms Murphy's home that required repair. The identification of these additional repairs and the necessary work involved in addressing them caused delay in repairing Ms Murphy's home. The additional works were authorised by Youi on 22 November 2017, given to another builder to undertake and were completed in May 2018.<sup>61</sup> The evidence of Ms Murphy is that the EPA would dig up the ground and replace it with loam once the roof had been repaired.<sup>62</sup> It is not clear on the evidence whether that has, in fact, occurred since completion of the roof repairs in May 2018. Ms Murphy did not give any evidence about this.

38 Further, Ms Murphy's evidence regarding exposure to lead must be considered as a whole: Ms Murphy and her family had been living in Broken Hill for a considerable

<sup>55</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6211.

<sup>56</sup> Exhibit 6.340, Emails concerning Youi Broken Hill Update, YOU.0007.0001.0784 at .0784.

<sup>57</sup> Exhibit 6.340, Emails concerning Youi Broken Hill Update, YOU.0007.0001.0784 at .0787.

<sup>58</sup> Exhibit 6.340, Emails concerning Youi Broken Hill Update, YOU.0007.0001.0784 at .0787.

<sup>59</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6234.

<sup>60</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [28].

<sup>61</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018, at [49]; Transcript, Sacha Michelle Murphy, 19 September 2018, 6169 – 6170; Exhibit 6.359, Witness statement of Jason Leonard Storey concerning Rubric 4-15 dated 20 September 2018, at [92].

<sup>62</sup> Exhibit 6.330, Witness statement of Sacha Michelle Murphy, 20 June 2018 [13]; Transcript, Sacha Michelle Murphy, 19 September 2018, 6160.

amount of time and she was aware of lead issues in the community, Ms Murphy's family were exposed to lead in the backyard of their property, presumably for the entire time that they resided at the property. Two of her children returned test results for lead levels above those prescribed, prompting more regular monitoring and soil testing. None of these factors are connected to any repair work done to the roof. Although Youi acknowledges that any delay to the roof repairs caused further delay to the EPA remediation works, it is important to emphasise that neither the natural disaster, nor any of the events during the claims process caused or exacerbated the level of lead contamination at the property.

### *Mr Sutton's claim*

- 39 *Sixthly*, it is also important to recall some features in relation to Mr Sutton's claim. The claim was lodged on 27 March 2017.<sup>63</sup> That day, Youi authorised "make-safe" works and temporary accommodation for Mr Sutton.<sup>64</sup> After reports and quotes were obtained, Youi authorised Mr Sutton's claim on 7 April 2018.<sup>65</sup> Further make-safe works were authorised on at least three further occasions, and Youi agreed to extend temporary accommodation to Mr Sutton beyond the policy limit, authorised works by Mr Sutton's preferred builder and commissioned reports from two engineers.<sup>66</sup> Most recently, on 16 August 2018, Mr Sutton confirmed to Youi that he is "okay with the proposed repair timeframe and is happy with his temporary accommodation".<sup>67</sup>
- 40 It is to be remembered that, as at 20 June 2018, Youi had received 2,145 claims arising from Tropical Cyclone Debbie. Within 4 months since the cyclone, 64.20% of those claims had been resolved, within 6 months 78.14% had been resolved, within 12 months 94.59% had been resolved, and as at 20 June 2018, 98.09% had been resolved.<sup>68</sup>
- 41 *Seventhly*, and specifically in relation to issues raised in the Closing Submissions regarding make safe works, Youi has authorised make safe works on at least four occasions.<sup>69</sup> There is no doubt that on one occasion there was a long gap between a tarpaulin being required and one being installed. The evidence of Mr Storey in this regard is that Youi had instructed another make safe and that the assessor went partway to actually authorising the make safe but "didn't hit the go button" and that this was "very unfortunate".<sup>70</sup> This was clearly an isolated oversight by the assessor but does not rise as high as conduct that would be considered to not be fair, honest, transparent and timely.
- 42 *Eighthly*, and specifically in relation to the issues raised in the Closing Submissions regarding delays in repairs to Mr Sutton's home, the evidence is that the main reason for delay had been matters arising during the course of repairs and attempted repairs to Mr Sutton's home that have, on multiple occasions, required updates to scopes of works. This has been necessary to make Mr Sutton's house compliant with the relevant building code and, for example, to deal with issues such as termite damage found in the house.<sup>71</sup> Even Mr Sutton accepted a delay of seven or eight weeks to

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<sup>63</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 6-21 dated 20 September 2018, at [12].

<sup>64</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 6-21 dated 20 September 2018, at [55(a)].

<sup>65</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 6-21 dated 20 September 2018, at [55(b)].

<sup>66</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 6-21 dated 20 September 2018, at [55].

<sup>67</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 6-21 dated 20 September 2018, at [Annexure A, item 83].

<sup>68</sup> Exhibit 6.328, Witness statement of Berk Bakker concerning Rubric 4-05A dated 22 June 2018, at [1] – [3].

<sup>69</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 4-21 dated 20 September 2018, at [55].

<sup>70</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6242.

<sup>71</sup> See Tab 61 to Exhibit JS-2, YOU.0029.0001.0068.

obtain an engineer's report was due to the engineer's circumstances and not the fault of Youi.<sup>72</sup>

- 43 Counsel Assisting's description of the timeline for repairs and the need to replace the entire roof<sup>73</sup> and Mr Sutton's evidence regarding his request for an engineer's report again do not tell the whole story. Mr Sutton's evidence was that he expressed concern initially about structural damage<sup>74</sup> and that the engineer's report subsequently "agreed with" Mr Sutton that the entire roof was damaged and needed replacement.<sup>75</sup> However, an examination of the engineer's report<sup>76</sup> shows not that the engineer was of the view that there was structural damage but that the roof sheeting had been inadequately fixed, using clips that were not pierce fixed with cyclonic screws and that defective construction should therefore be considered as a cause of the damage. In other words, it was not a structural defect as a result of the cyclone that led to the conclusion that the entire roof needed replacing; it was the inadequate fixings used in the original installation of the roof.
- 44 Similarly, although Counsel Assisting correctly submitted that the Suttons' home had still not been repaired by the time of the hearing,<sup>77</sup> Counsel Assisting did not ask Mr Sutton about the commencement of work on 1 August 2018, nor about the (new) "framing issues" identified by the builder, nor about the proposed timeframe for further work with which Mr Sutton was "happy".<sup>78</sup> Failure to draw the Commission's attention to those matters paints an incomplete and inaccurate picture of the current status of Mr Sutton's claim.
- 45 *Ninthly*, and specifically in relation to the issues raised in the Closing Submission regarding temporary accommodation, while there were undoubtedly some delays in Youi reimbursing temporary accommodation costs to Mr Sutton, Youi recognised that it was "not ideal" for its claims advisers based in South Africa to be managing claims outside of core Australian business hours and made a change so that any claims lodged outside of core business hours are handed over to the claims team based in Australia to be managed from then until completion.<sup>79</sup> Mr Sutton's claim was transferred to an Australia based claims adviser in January 2018.<sup>80</sup> Further, Mr Sutton gave evidence that he "no longer [has] to chase the temporary accommodation payments. It's in fact in advance so [Youi is] in credit until mid-November."<sup>81</sup>
- 46 *Tenthly*, when he was giving evidence, it was not squarely put to Mr Storey by Counsel Assisting that a failure of Youi to conduct its claims handling in respect of Mr Sutton's claims in an honest, fair, transparent and timely manner could amount to an allegation of misconduct.
- 47 Mr Storey accepted that Youi failed to conduct its claims handling process in an honest, fair, transparent and timely manner. He did so after Counsel Assisting put four propositions to him regarding Mr Sutton's house being exposed to the elements during the period of the claims handling process, delays in the reimbursement of

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<sup>72</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6178.

<sup>73</sup> Closing Submissions, at [23].

<sup>74</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6177.

<sup>75</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6178.

<sup>76</sup> See Tab to Exhibit JS-2, YOU,0005.0001.0357.

<sup>77</sup> Closing Submissions, at [27].

<sup>78</sup> Exhibit 6.360, Witness statement of Jason Leonard Storey concerning Rubric 4-21 dated 20 September 2018, at [Annexure A, Items 80-83].

<sup>79</sup> Transcript, Jason Leonard Storey, 20 September 2018, 6261.

<sup>80</sup> Transcript, Jason Leonard Storey, 20 September 2018, 6262.

<sup>81</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6184.

temporary accommodation expenses and delays in dealing with Mr Sutton's claim. This evidence of Mr Storey must be viewed in that context.

- 48 Again, as set out in [17] above, whether clause 7.2 of the Code has been breached must be viewed in the context of the whole claims handling process, not in relation to each isolated individual step or interaction with the customer. The evidence before the Commission is that Mr Sutton is now happy with Youi.<sup>82</sup>

## Issue 2

### Clause 9.2 of the Code

- 49 The Closing Submissions assert that it is open to the Commissioner to find that Youi may have engaged in misconduct by failing to respond to a catastrophe in an efficient, professional and practical way and in a compassionate manner, as required by clause 9.2 of the Code. For the reasons given below, this assertion ought to be rejected.
- 50 *First*, as with clause 7.2 of the Code, the obligation in clause 9.2 of the Code to "respond to Catastrophes in an efficient, professional and practical way, and in a compassionate manner" relates to a catastrophe as a whole, and not in relation to each individual step or interaction with the customer that has suffered damage to their property as a result of a catastrophe. Mr Storey did not accept the general proposition put to him by Counsel Assisting that Youi's response to Cyclone Debbie was contrary to the requirements in clause 9.2.<sup>83</sup>
- 51 *Secondly*, the unchallenged evidence supports the conclusion that Youi's initial responses to Ms Murphy's and Mr Sutton's claims, in respect of Youi's obligations under clause 9.2 of the Code was efficient, professional and practical. Nothing in the evidence suggested that Youi's responses were other than in a compassionate manner.
- 52 Both claims ultimately involved a greater scope of works than initially anticipated works (primarily due to structures not being built to code). Youi acknowledges that it could have been more efficient and professional in its supervision and management of the builders involved.<sup>84</sup> Youi acknowledges that as a result in some respects the claims of Ms Murphy and Mr Sutton were not handled efficiently or professionally. Youi's handling of aspects of the claims, such as Mr Sutton's temporary accommodation, or the ensuring of make safe works, may therefore be seen as lacking in compassion but not as a result of any deliberate decision, strategy or policy.
- 53 Overall, however, Youi's response to the catastrophes of Cyclone Debbie and the Broken Hill hail storm were, Youi submits, handled in an efficient, professional and practical way, and in a compassionate manner.
- 54 *Thirdly*, the evidence is that Youi has a Claims Catastrophe Strategy<sup>85</sup> that is reviewed bi-annually, and which sets out Youi's response to catastrophes including staff work planning so that Youi can respond to a catastrophe with the right resources to meet the efficiencies and the timeliness required for those events. In a catastrophe Youi can divert its own resources to the catastrophe, including

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<sup>82</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6184.

<sup>83</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6236.

<sup>84</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6189-90.

<sup>85</sup> See Tab 5 to Exhibit JS-1, YOU.0003.0001.0036.

assessors. The staff employed by Youi provide a direct compassionate service to the customers, including by providing advance payments to customers.<sup>86</sup>

- 55 *Fourthly*, Youi otherwise refers to and repeats the submissions that it makes above regarding the issues relating to clause 7.2 with respect to clause 9.2 of the Code.

### Issue 3

#### Clause 10.13 of the Code

- 56 The Closing Submissions assert that it is open to the Commissioner to find that Youi may have engaged in misconduct in relation to the complaint sent by Ms Murphy on 2 November 2017 and the complaint sent by Mr Sutton on 9 October 2017, by failing to respond to the complaint in writing and by failing to tell the insured the decision in relation to the complaint or the reasons for that decision, as required by cl 10.13 of the Code. For the reasons given below, this assertion ought to be rejected.
- 57 *First*, in relation to the complaint made by Ms Murphy on 2 November 2017, this complaint was, in the first instance, addressed by Youi in a telephone call that occurred on 22 November 2018. A note of the telephone call was recorded that day in Youi's complaints notepad.<sup>87</sup>
- 58 Further, Youi responded to Ms Murphy by letter dated 22 November 2018.<sup>88</sup> While it was a system generated letter,<sup>89</sup> the letter did record, in admittedly somewhat brief terms, that the complaint was resolved and that an update had been provided to Ms Murphy, and that the reason for this decision was that an explanation was provided to Ms Murphy over the phone.<sup>90</sup> Taken on its own the system generated letter may have been inadequate but taken with the explanation given over the telephone, the notes of which recorded Ms Murphy's partner as being happy with the explanation and that their concerns had be dealt with,<sup>91</sup> together they are a sufficient contemporaneous record of the resolution of the substance of the complaint.
- 59 *Secondly*, in relation to the complaint made by Mr Sutton on 9 October 2017, Youi responded briefly in writing on four occasions to that complaint between 10 and 20 October 2017.<sup>92</sup>
- 60 Youi acknowledges that these responses did not set out the information required by clause 10.13 of the Code. Youi does not accept, however, that this in and of itself, viewed fairly and in the context of the complaint being otherwise resolved, provides a basis for the assertion that it is open to the Commissioner to make a finding that Youi may have engaged in misconduct.

### Issue 4

#### Duty of utmost good faith

- 61 The Closing Submissions assert that it is open to the Commissioner to find that Youi may have engaged in misconduct by breaching its duty of utmost good faith to Ms

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<sup>86</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6189.

<sup>87</sup> See Tab 53 to Exhibit JS-1, YOU.0019.0001.0006 at .0008.

<sup>88</sup> See Exhibit SM-5, YOU.0002.0001.0210.

<sup>89</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6224.

<sup>90</sup> See Exhibit SM-5, YOU.0002.0001.0210.

<sup>91</sup> See Tab 53 to Exhibit JS-1, YOU.0019.0001.0008.

<sup>92</sup> See YOU.0001.0005.0340, YOU.0001.0003.1910, YOU.0001.0003.1910 and YOU.0001.0003.1964.

Murphy and Mr Sutton. For the reasons given below, this broad assertion ought to be rejected.

62 *First*, the question of whether conduct of an insurer amounts to a breach of the duty of utmost good faith is a legal question that is not always amenable to a simple answer. Despite the long history of the concept of utmost good faith in insurance contracts, Justice Flanagan, in *Matton Developments Pty Ltd v CGU Insurance Ltd (No 2)*,<sup>93</sup> identified that there is no comprehensive definition of the duty of utmost good faith or identification of the types of conduct for which it would be contravened.<sup>94</sup>

63 His Honour articulated the current state of the law as follows:

The most recent authoritative proposition as to what “utmost good faith” requires of an insurer is that of Gleeson CJ and Crennan J in *CGU Insurance Limited v AMP Financial Planning Pty Ltd*:

“Conversely, an insurer’s obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured.”

Just what “due regard to the interests of the insured” would require will, no doubt, depend upon all of the circumstances of the matter under consideration. Nevertheless, as stated by Chesterman J, “[o]ne can readily see how the insurer should be mindful of its insured’s position when defending, suing or compromising”.

However, a lack of utmost good faith is “not to be equated with dishonesty only” and may require the party seeking to claim a breach of the implied term to “not ... be guilty of tainted relevant conduct” in the sense of mutuality and reciprocity of the duty to the other contracting party.

The duty of utmost good faith has been said to:

- impose principles of fairness and honesty;
- compel full and frank disclosure;
- require notice of important obligations;
- necessitate avoidance of conflicts of interest; and
- oblige a timely response to a claim for indemnity.

However, the duty of utmost good faith does not:

- prevent an insurer putting an insured to proof when the insurer is suspicious of a claim or where the insurer has bona fide reservations concerning its obligations to indemnify;
- impose an “obligation in an insurer to coddle its insured and to allow idiosyncratic judicial solicitude to replace principle”;
- require a party to “surrender any commercial advantage which they may seek to take advantage of during negotiations in favour [of] the other party”;

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<sup>93</sup> *Matton Developments Pty Ltd v CGU Insurance Ltd (No 2)* [2015] QSC 72, [242].

<sup>94</sup> *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, 77-78 [257]. (Callinan and Heydon JJ).

- require an insurer to give an assurance, not required to be given under the policy, that it would indemnify the insured for any further damage resulting from reparations for which liability was accepted;
- prohibit an insurer from relying on an assumption against the interests of the insured after inquiries were made of the insured and no information was received; and
- require an insurer to subjugate its interest to that of another party to a contract of insurance, for example requiring an insurer to refrain to seek contribution from a co-insurer.

It follows that the duty of utmost good faith will require an insurer to act in accordance with commercial standards of decency and fairness, and with due regard to the insured's interests, but will not require the insurer to put the interests of the insured above its own. The duty of utmost good faith does not equate to, nor is it synonymous or analogous to, a fiduciary duty. An insurer is legitimately entitled to:

- a reasonable period of time to make further inquiries of all the circumstances giving rise to a claim, including inquiries of the insured and those involved in its occurrence;
- put an insured to proof if suspicious of the bona fides of the claim; and
- decline indemnity if the circumstances giving rise to the claim fall outside the insurable interest or an exclusion clause is applicable to the circumstances.<sup>95</sup>

- 64 Further, in *CGU Insurance Limited v AMP Financial Planning Pty Ltd*,<sup>96</sup> Gleeson CJ and Crennan J accepted the view of the Full Court of the Federal Court, in which the Full Court referred to capricious or unreasonable conduct as sufficient to amount to a breach.<sup>97</sup> Kirby J identified dishonesty, caprice and unreasonableness as accurately expressing the ambit of the duty.<sup>98</sup> Callinan and Heydon JJ suggested the obligation was analogous to the equitable doctrine of the absence of clean hands.<sup>99</sup>
- 65 *Secondly*, Counsel Assisting did not, in cross-examination or otherwise, identify any specific matters that are said to amount to the breach of the duty of utmost good faith; rather, it was put in the more general way as to whether Mr Storey accepted that the handling of the claim by Youi as a whole contravened that duty. Presumably, Counsel Assisting rely on the allegations of contraventions of the Code to support the claim.
- 66 Breach of the duty is a potentially serious matter that may sound in a claim for damages<sup>100</sup> (although no allegation of loss is made here by either Ms Murphy or Mr Sutton) or regulatory sanction by ASIC.<sup>101</sup> Allegations of breach ought to be articulated with precision. The broad allegations made by Counsel Assisting, having regard to the authorities set out above, are insufficient to form the basis for a conclusion that Youi has breached its duty of utmost good faith.
- 67 *Thirdly*, there can be no suggestion that there is a systemic issue at Youi, as that term is applied by FOS,<sup>102</sup> or as “systemic” is commonly understood. There is no substantive suggestion that the issues identified with respect to the two case studies

<sup>95</sup> *Matton Developments Pty Ltd v CGU Insurance Ltd (No 2)* [2015] QSC 72, [243] - [248] (citations omitted).

<sup>96</sup> (2007) 235 CLR 1.

<sup>97</sup> (2007) 235 CLR 1 at [15].

<sup>98</sup> (2007) 235 CLR 1 at [131].

<sup>99</sup> (2007) 235 CLR 1 at [257].

<sup>100</sup> *Insurance Contracts Act 1984 (Cth)*, section 13(1).

<sup>101</sup> *Insurance Contracts Act 1984 (Cth)*, section 14A.

<sup>102</sup> FOS Terms of Reference dated 1 January 2015, clauses 4.1 and 11.2(a).

are widespread throughout Youi. As noted, the case studies selected by Counsel Assisting are not representative of the vast majority of claims that are made to and successfully handled by Youi. Youi's record of disputes lodged with the FOS, which is more positive than the industry average, supports that view.<sup>103</sup>

- 68 *Fourthly*, Youi submits that, in the circumstances submitted above in response to the allegations of contraventions of the Code, the evidence does not support a conclusion that Youi has failed to meet its obligation of utmost good faith to Ms Murphy and Mr Sutton.

## Issue 5

### Policy exclusion

- 69 Youi submits that it is not open to the Commissioner to find that Youi engaged in conduct that fell below community standards and expectations by including a term in its home insurance policies that excluded from cover any "additional costs resulting from your buildings or any part thereof not being compliant with the most recent building codes, law and regulations". This is for the following reasons.
- 70 *First*, Counsel Assisting adduced no evidence of community standards and expectations regarding policy exclusions generally or with respect to building policies on which to base this assertion. None of the case studies examined this issue. None of the industry witnesses were asked to address this issue. None of the regulator witnesses were asked to address this issue.
- 71 There is simply no evidence to support the assertion that the existence of such an exclusion is below community standards and expectations.
- 72 Nor does common experience suggest that community standards and expectations are that a building policy ought not to include such an exclusion. On the other hand, common experience and regulator guidance suggests that the community expects that Product Disclosure Statements for such insurance policies are easy to read, understand and are straightforward. The assertion in the Closing Submissions that policyholders have no idea until they make a claim and the damage is assessed whether or not he or she will be covered for these additional costs is incorrect.<sup>104</sup> The exclusion in Youi's insurance policies is plain and unambiguous: an insured is not covered for any additional costs resulting from the insured's buildings or any part thereof not being compliant with the most recent building codes, law and regulations. A reasonable insured would be in no doubt as to the terms of this exclusion and would be able to make an appropriate assessment of the suitability of the policy accordingly.
- 73 *Secondly*, it is to the benefit of customers that Youi does not always strictly enforce this exclusion. Youi has guidelines in place for assessors to consider not applying the exclusion in certain circumstances. If Youi took the approach of strictly enforcing this exclusion, home owners may become responsible for funding the cost of upgrades to their homes following the occurrence of an insured event.
- 74 As to the application of the exclusion more generally, the issue of whether Youi's or any insurer's reliance on an exclusion is permissible is adequately governed by the existing law. In particular, as discussed above, an insurer is under a duty of utmost

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<sup>103</sup> Letter from Youi to the Royal Commission dated 29 January 2018.

<sup>104</sup> Closing Submissions, at [39].

good faith.<sup>105</sup> Specifically, an insurer may not rely on a provision of the insurance contract (such as an exclusion) if to do so would be a breach of that duty: see s 14(1) of the *Insurance Contracts Act 1984 (Cth)* (ICA). Such a breach may also sound in damages, or be subject to regulatory sanction by ASIC: see s 14A of the ICA. Additionally, s 46 of the ICA may apply to prevent reliance on such an exclusion in circumstances where the insured could not have reasonably known about the defects with the property (a situation posited by Counsel Assisting as giving rise to unfairness).

- 75 *Thirdly*, Counsel Assisting did not adduce any actuarial or other evidence as to the likely impact of changing or removing the exclusion in building insurance policies and if Youi adopted the suggestion put to Mr Storey during his evidence that the exclusion is an unfair term to have in its policies of insurance (a suggestion he rejected),<sup>106</sup> the removal of the exclusion may have resulted in increased insurance premiums for all policy holders.
- 76 *Fourthly*, the evidence before the Commission was that the exclusion was necessary, particularly where the building contains non-compliant works, such as where people have built structures themselves without seeking any approvals, any structural approvals or engineering and the like, and those works become damaged in a claim.<sup>107</sup>
- 77 *Fifthly*, Mr Storey acknowledged that it may be possible to include a narrower exclusion in Youi's home insurance policies which reflected the circumstances in which the current exclusion is actually applied.<sup>108</sup> However, it is readily apparent from Youi's own internal guidance on the application of this exclusion,<sup>109</sup> that there are a number of variables and discretionary aspects which the assessors are required to consider in determining whether to apply the exclusion or not. Attempting to collate those variables, including the discretionary aspects, into a simple term within the policy Product Disclosure Statement may not be straightforward. On the contrary, attempting to do so may cause uncertainty and confusion in the minds of the customers.

## Issue 6

### Remuneration of claims handling staff

- 78 Youi submits that it is not open to the Commissioner to find that the causes of the possible misconduct or conduct falling below community standards and expectations was attributable, at least in part, to the way in which Youi remunerated its claims handling staff. This is for the following reasons.
- 79 At its highest, Mr Storey's evidence was to the effect that one focus of claims handling staff was the lodgement of new claims and that Youi's previous productivity targets "could" lead to the problems listed in Youi's document titled "Claims Specialisation – Role Split".<sup>110</sup> No other evidence is before the Commission on this issue.
- 80 No element of the case studies relied on the unavailability of claims advisers, other than perhaps one aspect of Mr Sutton's complaint about reimbursement for

<sup>105</sup> *Insurance Contracts Act 1984 (Cth)*, section 13(1).

<sup>106</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6197.

<sup>107</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6196.

<sup>108</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6197.

<sup>109</sup> See Tab 21 to Exhibit JS-1, YOU.0004.0001.0176.

<sup>110</sup> See Exhibit 6.358, Claims Specialisation Role Split, January '18, YOU.0026.0005.0072.

temporary accommodation, which may have been the result of staff unavailability or potentially because the adviser misapplied the policy terms (as Mr Storey speculated). Mr Bakker's evidence that dealt with Youi's remuneration policies was unchallenged.

- 81 There is, therefore, no evidence before the Commission to support the broad conclusion that the causes of all possible misconduct or conduct falling below community standards and expectations was attributable, at least in part, to the way in which Youi remunerated its claims handling staff. Far more would be required, particularly given the evidence of Mr Storey on this topic, for such a conclusion to be reached.
- 82 In any event, at the time of Ms Murphy's and Mr Sutton's claims, claims advisors' performance based remuneration was as follows:<sup>111</sup>
- (a) Quality adjusted claims captured: 40%
  - (b) Turnaround time: 20%
  - (c) Customer Satisfaction Index: 15%
  - (d) Claims Authorised: 10%
  - (e) Claims Payments: 10%
  - (f) Claims Finalised: 5%
- 83 Therefore, 60% of claims advisors' performance based remuneration related to the progression of claims following the point of capture, including claims being finalised, the total payments made to a customer and the customer satisfaction index, being a customer survey sent to customers following claims authorisation.<sup>112</sup> Indeed, this suggests that claims advisors are incentivised to provide a positive overall customer experience.

## Issue 7

### Recording of mobile telephone calls

- 84 Youi submits that it is not open to the Commissioner to find that by not making an audio recording of a mobile telephone call between a Youi claims assessor and Ms Murphy's partner, has the potential to undermine the effectiveness of external dispute resolution mechanisms.
- 85 This is because the evidence before the Commission is that:
- (a) loss assessors attend properties, validate that loss has occurred and prepare scopes of works to guide the quoting process.<sup>113</sup> They spend large amounts of their time away from Youi's offices travelling to and from and attending customer's homes. It would not be efficient or practical for loss assessors to have calls with customers about their claims and for those calls (on mobile phone, when the loss assessor is away from Youi's offices) to be recorded; and

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<sup>111</sup> Exhibit 6.261, Witness statement of Bert Bakker concerning Rubric 5-57 dated 30 August 2018, at [99].

<sup>112</sup> See YOU.0007.0008.2499 at .2508.

<sup>113</sup> Transcript, Jason Leonard Storey, 19 September 2018, 6202.

- (b) for this reason, it is not the usual practice for Youi to record calls made from mobile telephones, although its staff do make file notes of their calls in Youi's SUMMIT system at or about the time of the call.<sup>114</sup>

- 86 It is not correct to conclude, as Counsel Assisting does,<sup>115</sup> that if Ms Murphy had taken her complaint to external dispute resolution there would have been no way of testing any subsequent account given by Youi of what was said in the conversation with Ms Murphy's partner. Youi maintained contemporaneous notes of the conversation. The testing of the account, including any oral evidence about the conversation, would no doubt be informed by examination of those contemporaneous notes.
- 87 In any event, the assertion in the Closing Submissions wrongly implies that an external dispute resolution service would not be able to resolve a dispute between Youi and a customer. An external dispute resolution service would, of course, have access to all relevant records of communication between Youi and the customer, including the written contemporaneous record of the call made by the relevant loss assessor. If such notes were disputed by the customer, external dispute resolution services are well equipped to resolve those issues.
- 88 Youi accepts, however, that it would be prudent for it to record the resolution of complaints in writing. Youi recognises this ought to be part of its complaint handling process.<sup>116</sup>

## Issue 8

### Responding to complaints

- 89 Youi submits that it is not open to the Commissioner to find that the conduct of Youi, in not responding to Mr Sutton's complaint dated 9 October 2017, has the potential to undermine the effectiveness of external dispute resolution mechanisms. This is for the following reasons.
- 90 *First*, while it would have been prudent for Youi to respond to Mr Sutton's claim in writing, the evidence is that Mr Sutton's complaint was addressed.<sup>117</sup> In fact, Mr Sutton gave evidence that Youi later "appointed somebody else who has been quite amicable, easy to talk to, forthcoming with information. I get regular updates and phone calls and emails. So there has been a remarkable change."<sup>118</sup>
- 91 *Secondly*, there is no evidence before the Commission that Mr Sutton was dissatisfied with Youi's response to his complaint or that, if he was unaware of his right to do so, Mr Sutton would have escalated his complaint to external dispute resolution.

**28 September 2018**

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<sup>114</sup> See Exhibit 6.343, Letter from Youi to the Commission dated 22/06/2018, RCD.0014.0023.0001 at .0002.

<sup>115</sup> Closing Submissions, at [43].

<sup>116</sup> Exhibit 6.344, Draft Complaints and IDR Process Report, YOU.0026.0003.0009 at .0034.

<sup>117</sup> See, for example, Tab 61 to Exhibit JS-2, YOU.0029.0001.0068 at .0086 ff.

<sup>118</sup> Transcript, Glenn Wayne Sutton, 19 September 2018, 6184.