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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: NSD544/2019
File Title: JONES ASIRIFI-OTCHERE v SWANN INSURANCE (AUST) PTY LTD
ABN 80 000 886 680 & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 28/09/2020 3:50:32 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Second Further Amended Statement of claim

No. NSD544 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations Division

This Further Amended Statement of Claim is amended pursuant to the Order of Justice Gleeson dated 25 September 2020

JONES ASIRIFI-OTCHERE

Applicant

SWANN INSURANCE (AUST) PTY LTD (ACN 000 886 680)

First Respondent

INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)

Second Respondent

(Respondents)

A. PARTIES AND GROUP MEMBERS

The Applicant and the Group Members

1. This proceeding is commenced as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) by the Applicant on his own behalf and on behalf of all persons, who subject to paragraphs 1A and 1B below:
 - a. at any time during the period 1 January 2008 to 1 August 2017 inclusive (the **Relevant Period**) purchased one or more of the add on insurance products referred to in paragraph 11 of this Amended Statement of Claim (**Add On Insurance Products**) at or around the time they purchased a motor vehicle or motor cycle (**Motor Vehicle**);
 - b. were policyholders under one or more contracts of insurance with the First Respondent (**Swann**);

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(include state and postcode)

- c. have suffered loss or damage by or because of the contravening conduct of the Respondents as pleaded in this Amended Statement of Claim; and
- d. were not during the Relevant Period, and are not, any of the following:
 - i. a director, an officer, or a close associate (as defined in section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**)) of any of the Respondents; or
 - ii. a judge or the Chief Justice of the Federal Court of Australia or a Justice or the Chief Justice of the High Court of Australia

(Group Members).

- 1A. A person, other than a person whose claim is governed by the law of the Northern Territory (**Northern Territory Claimant**), who purchased an Add On Insurance Product on or prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an artificial person) is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, any or all of the mistakes pleaded in paragraph 43 below, prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an artificial person).
- 1B. A Northern Territory Claimant who purchased an Add On Insurance Product on or prior to 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an artificial person) is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, any or all of the mistakes pleaded in paragraph 43 below, prior to 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an artificial person).
- 2. As at the date of the commencement of this proceeding, there are seven or more Group Members.
- 3. The Applicant:
 - a. purchased two of the Add On Insurance Products issued by Swann, namely, Gapcover Insurance and "WarrantyASSIST" Insurance, on or about 13 August 2013 at the time he purchased a Motor Vehicle, being a 2011 Holden Commodore Omega with registration number ZXT960;
 - b. purchased a contract of insurance with Swann for Gapcover Insurance dated 13 August 2013 with the policy number 17583859; and

- c. purchased a contract of insurance with Swann for “WarrantyASSIST” Insurance dated 13 August 2013 with the policy number 17583860.

The Respondents

- 4. At all material times, Swann:
 - a. was a corporation and capable of being sued;
 - b. was a person and a corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
 - c. held an Australian Financial Services Licence (**AFS Licence**), namely AFSL No. 238292.
- 5. At all material times, the Second Respondent (**IAL**):
 - a. was a corporation and capable of being sued;
 - b. was a person and a corporation within the meaning of the *ASIC Act*; and
 - c. held an AFS Licence namely AFSL No. 227681.

B. SCHEME FOR THE TRANSFER OF SWANN’S INSURANCE BUSINESS

- 6. In or about 2017, Swann and IAL entered into a scheme for the transfer of Swann’s insurance business to IAL under Part III, Division 3A of the *Insurance Act 1973* (Cth) (**Insurance Act**).

Particulars

Scheme for the Transfer of the Insurance Business of Swann
Insurance (Aust) Pty Ltd to Insurance Australia Limited (**Scheme**).

- 7. Relevantly, it was a term of the Scheme that:
 - a. On the Effective Date, Swann agreed to sell and transfer and IAL agreed to purchase and accept the transfer of all of the Business including the Insurance Contracts and the Insurance Liabilities from Swann in accordance with the terms of the Transfer Agreement, including all right, title, interest, benefit and powers that have arisen, or may in the future arise under any of the above.

Particulars

Clause 2(a) of the Scheme.

The capitalised terms “Business”, “Insurance Contracts”, “Insurance Liabilities” and “Transfer Agreement” were defined in clause 1.1 of the Scheme. The reference to those terms in this paragraph 7 should be read as a reference to those terms as so defined.

- b. The Effective Date was defined in the Scheme as 1 August 2017, or the date that the scheme was approved by the Federal Court of Australia (**Effective Date**).

Particulars

Clause 1.1 of the Scheme.

- c. On and from the Effective Date:
 - i. Swann transferred to IAL and IAL accepted the transfer of the Insurance Contracts and the Insurance Liabilities;
 - ii. IAL assumed and took over and was required to indemnify and keep Swann indemnified from and against all Claims under or in connection with the Insurance Contracts or Insurance Liabilities;
 - iii. each Insurance Contract remained the same contract of insurance, other than the substitution of IAL for Swann as the insurer; and
 - iv. no new contract of insurance would be created.

Particulars

Clause 4(a) of the Scheme.

The capitalised term “Claims” was defined in clause 1.1 of the Scheme. The reference to “Claims” in this paragraph 7 should be read as a reference to that term as so defined.

- d. With effect on and from the Effective Date, the rights, benefits and liabilities of policyholders under the Insurance Contracts, and of all persons claiming through or under them, on the one hand and IAL on the other hand, were to be the same in all respects as they would have been if the Insurance Contracts had been issued or entered into by IAL instead of Swann.

Particulars

Clause 10.1(a) of the Scheme.

- e. All proposals, applications, declarations and representations made to Swann on which any Insurance Contract was based would as and from the Effective Date be taken to have been made to and accepted by IAL instead of by Swann.

Particulars

Clause 10.1(b) of the Scheme.

- f. Any policyholder under an Insurance Contract or other person having any claim on or obligation to Swann under or in respect of an Insurance Contract would, as and from the Effective Date, have the same claim on or obligation to IAL in substitution for that person's claim on or obligation to Swann irrespective of when such claim or obligation arose.

Particulars

Clause 10.1(c) of the Scheme.

- g. Policyholders were not required to take any action before or as a result of the Scheme.

Particulars

Clause 10.1(e) of the Scheme.

- h. Upon confirmation of the Scheme by the Federal Court of Australia, the Scheme became binding on all parties.

Particulars

Clause 10.1(g) of the Scheme.

- i. On and from the Effective Date, all directions, authorities, mandates or instructions given to Swann:
 - i. to deduct premiums or fees payable in respect of the Insurance Contracts (including by debiting a bank account/credit card, through automatic payroll deductions or through electronic bank transfer); or

- ii. to use, disclose or obtain information in the course of carrying on the Business (including personal information within the meaning of the *Privacy Act 1988* Cth)),

were deemed to be given to IAL instead of Swann.

Particulars

Clause 10.2 of the Scheme.

- j. On and from the Effective Date, IAL:
 - i. had the obligation to provide all commissions, remuneration and other benefits (whether monetary or non-monetary) to any person in respect of an Insurance Contract or related services; and
 - ii. was entitled to seek repayment of such commissions, remuneration or other benefits (whether originally provided by IAL or Swann) in excess of the recipients' entitlement instead of Swann.

Particulars

Clause 10.3 of the Scheme.

- 8. On 20 July 2017, the Federal Court of Australia made orders pursuant to section 17F(1) of the Insurance Act that the Scheme take effect from 12.01am on 1 August 2017.

Particulars

Insurance Australia Limited in the Application of Insurance Australia Limited (No 2) [2017] FCA 980 at [1(b)] and [2].

- 9. On and from 1 August 2017:
 - a. all of the insurance business of Swann, including all of the insurance products and insurance liabilities as well as certain assets and liabilities related to Swann, were transferred to IAL;
 - b. IAL indemnified Swann against all present, future or contingent claims, losses, liabilities, costs and expenses that might arise in connection with Swann's Add On Insurance Products;

- c. the transfer of Swann's insurance business did not change the terms of any insurance contract, or affect any claim in respect of any insurance contract issued by Swann, other than that IAL became the insurer;
- d. policyholders continued to have the same rights and obligations under or in respect of any insurance contract or claim, but with IAL as the insurer;
- e. all outstanding claims related rights and liabilities of Swann in respect of the insurance contracts were transferred to IAL such that any claims arising under or in connection with any insurance contract must be made against IAL, rather than Swann;
- f. all premiums and other amounts payable to or recoverable by Swann under the insurance contracts would be payable and recoverable by IAL; and
- g. any policyholder under an insurance contract or other person who had a claim or an obligation to Swann in respect of an insurance contract would have the same claim or obligation to IAL in substitution for his or her claim on or obligation to Swann irrespective of when such a claim or obligation arose.

Particulars

Insurance Australia Limited in the Application of Insurance Australia Limited [2016] FCA 1387 at [16].

- 10. By reason of the matters pleaded in paragraphs 1, 3 and 6 to 9 above, the claims of the Applicant and the Group Members against Swann as pleaded in this Further Amended Statement of Claim are, and further or alternatively are also, claims against IAL.

C. THE ADD ON INSURANCE PRODUCTS

- 11. At all material times during the Relevant Period, Swann issued the following Add On Insurance Products:
 - a. Loan Protection Insurance (**LPI**), which was a consumer credit insurance (**CCI**) product which purported to cover the insured's loan repayments in the event of a loss covered by the type of cover the insured had selected, being Life, Hospitalisation, Disablement, Involuntary Unemployment or Trauma (or a combination of these);

Particulars

The terms and conditions upon which LPI was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the Loan Protection Insurance Policy Schedule.

Further particulars may be provided after discovery and evidence.

- b. from 1 January 2008 to on or about 1 February 2015, Walkaway Insurance, which was a CCI product which purported to cover the difference between the balance of the insured's loan in respect of the Motor Vehicle and the assessed value of the vehicle (up to the policy limit), where the insured sought to return their vehicle to the Motor Vehicle dealer;

Particulars

Walkaway Insurance was replaced by Protection Plus Insurance from on or about 1 February 2015.

The terms and conditions upon which Walkaway Insurance was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the Walkaway Insurance Policy Schedule.

Further particulars may be provided after discovery and evidence.

- c. from on or about 1 February 2015, Protection Plus Insurance (**PPI**), which was a CCI product which purported to cover the difference between the balance of the insured's loan in respect of the Motor Vehicle and the assessed value of the vehicle (up to the policy limit), where the insured sought to return their vehicle to the Motor Vehicle dealer;

Particulars

The terms and conditions upon which PPI was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the PPI Policy Schedule.

Further particulars may be provided after discovery and evidence.

- d. Gapcover Insurance, also referred to as Purchase Price Protection Insurance, which purported to cover the balance due under the insured's loan contract for the Motor Vehicle (up to the policy limit) if the vehicle was a total loss and

the comprehensive insurance policy was limited to covering either the market or agreed value of the vehicle;

Particulars

The terms and conditions upon which Gapcover Insurance was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the Gapcover Insurance Policy Schedule.

Further particulars may be provided after discovery and evidence.

- e. Motor Vehicle Mechanical Breakdown Insurance, also known as “WarrantyASSIST” Insurance or Motor Vehicle Extended Warranty Insurance (**MBI**), which purported to cover the parts and labour required in the repair or replacement of components of the Motor Vehicle that became defective in material or workmanship during the warranty period set out in the policy; and

Particulars

The terms and conditions upon which MBI was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the MBI Policy Schedule.

Further particulars may be provided after discovery and evidence.

- f. Tyre and Rim Insurance, which was designed to cover the cost of repairing or replacing tyres and/or rims on the insured’s Motor Vehicle if they were damaged during the period of insurance.

Particulars

The terms and conditions upon which Tyre and Rim Insurance was issued were set out in the Product Disclosure Statement and Insurance Policy, the Loan Contract and the Tyre and Rim Insurance Policy Schedule.

Further particulars may be provided after discovery and evidence.

- 12. Each of the Add On Insurance Products was:

- a. a financial product within the meaning of section 12BAA of the ASIC Act and sections 763A and 763C of the Corporations Act.

- b. Not used
13. During the Relevant Period, the Applicant and the Group Members purchased one or more of the Add On Insurance Products from Swann.

Particulars

The Applicant refers to and repeats paragraph 3 above.

Particulars of the purchase by Group Members of one or more of the Add On Insurance Products will be provided at an appropriate stage in the Proceedings.

14. By reason of the matters pleaded in paragraphs 4 and 11 to 13, during the Relevant Period:
- a. Swann was, in trade or commerce, engaged in the supply of financial services to the Applicant and the Group Members within the meaning of section 12BAB of the ASIC Act; and
 - b. Swann provided a financial service within the meaning of sections 766A and 766C of the Corporations Act.
 - c. Not used.

Claims Loss Ratio of Add On Insurance Products

- 14A. During the Relevant Period, the ratio of net claims paid out to customers on each of the Add On Insurance Products, to the net premiums earned on each of the Add On Insurance Products (**Claims Loss Ratio**) was:
- a. low; and/or
 - b. significantly lower, or in the alternative, lower, than the Claims Loss Ratio for other consumer-orientated general insurance products, including other motor-vehicle related insurance, such as comprehensive motor vehicle insurance.

Particulars

- 1. Swann Insurance Business Plan 2010-2014 dated 27 March 2009 [IAG.500.209.9253].

2. Pricing Review - Warranty and Tyre & Rim dated July 2012 [IAG.503.009.0292].
3. Email from Pamela Dascolias to Gulshan Singh dated 31 March 2016 [IAG.900.050.8227].
4. Further particulars may be provided by way of expert evidence or after further discovery at an appropriate stage in the Proceedings.

14B. The Claims Loss Ratio of an insurance product, such as an Add On Insurance Product, is accepted within the insurance industry as a proxy for or in the alternative a means of assessing, the value of the product to the insured, and a low Claims Loss Ratio indicates that the product is of low or no material value to the customer.

Particulars

1. Email from Pamela Dascolias to Gulshan Singh dated 31 March 2016 [IAG.900.050.8227].
2. Add-On Insurance Review dated 25 October 2016 [IAG.500.106.3746].
3. Self-assessment of governance, accountability and culture dated November 2018 [IAG.900.056.2363].
4. ASIC Report 492: A Market that is failing consumers: The sale of add-on insurance through car dealers.
5. Meeting Notes of the IAG Consumer Advisory Board for the meeting held 20 June 2016 [IAG.503.002.9443].
6. Further particulars may be provided by way of expert evidence or after further discovery at an appropriate stage in the Proceedings.

Swann's Business Model

14C. During the Relevant Period, Swann adopted a business model that:

- a. sought to grow or, in the alternative, maintain its market share and profits derived from the sale of Add On Insurance Products;

- b. focused on offering “single term multiple year” insurance products, such as the Add On Insurance Products, in which:
 - i. the premium of the policy would usually be paid in an initial transaction at the commencement of the insurance policy, rather than paid in instalments over time;
 - ii. the term of the policy lasted for a number of years; and
 - iii. the policy was not one which would be periodically renewed by the insured;
- c. was significantly weighted towards issuing new “single term multiple year” insurance policies, such as the Add On Insurance Products, in order to maintain and grow revenue, rather than:
 - i. focusing on the renewal of existing insurance policies; or
 - ii. reducing costs and overhead;
- d. focused on developing and selling “non-commodity products”, such as the Add On Insurance Products, in which it was not necessary to compete, or alternatively substantially less necessary to compete, on the basis of the price of the product to the end customer (being the insured) as compared to other products within the insurance industry, including comprehensive motor vehicle insurance;
- e. was not focused on building public awareness of the Swann brand and products amongst the customers who would ultimately purchase its products (being the insured);
- f. relied on a strong “sales-driven” culture within Swann;
- g. relied upon setting sales targets for Swann employees to meet, and incentivising Swann employees to meet or exceed those sales targets, by means of payments of bonuses and commissions to those employees;
- g. relied upon a “lack of internal bureaucracy” within Swann;
- h. was highly reliant on sales of insurance products through Motor Vehicle dealers in Australia (**Motor Vehicle Dealers**) (motor vehicle dealers up until August 2016) using the Swann Sales System (as defined in paragraph 15 below), such as the Add On Insurance Products, in order to maintain or grow revenue and profits;

- i. was focused upon designing insurance products, such as the Add On Insurance Products, to be of value to Motor Vehicle Dealers, rather than the ultimate customers of the products (being the insured);
- j. was focused upon demonstrating the value of insurance products, such as the Add On Insurance Products, to Motor Vehicle Dealers, rather than the ultimate customers of the products (being the insured);
- j. sought to “lock in” Motor Vehicle Dealers to ensure that they would sell Swann insurance products, including the Add On Insurance Products, to their customers (being the insured) rather than a competitor’s insurance products; and
- k. was reliant upon paying substantial rates of commission (direct or indirect) on Add On Insurance Products sold through Motor Vehicle Dealers to those Motor Vehicle Dealers, which varied from approximately 29% up to approximately 74% of the value of the premium, in order to maintain or grow revenue and profits by means of the sales of Add On Insurance Products.

(the **Swann Business Model**).

Particulars

1. Swann Overview – Presentation to Duncan West CEO – CGU dated May 2008 [IAG.500.214.8917].
2. Insurance Business Plan 2010-2014 dated 27 March 2009 [IAG.500.209.9253].
3. 7 reasons why The Bradstreet Group should be with Swann Insurance dated 7 September 2009 [IAG.500.207.6213].
4. 2009 National Sales Conference Presentation dated 10 May 2010 [IAG.500.205.2725].
5. Swann Insurance Business Plan FY 2013 dated 18 May 2012 [IAG.900.099.2295].
6. FY16 Portfolio Strategy & Planning dated 2015 [IAG.800.158.3340].
7. Report for IAG Risk Committee dated 27 July 2015 [IAG.500.107.4135].

8. Email chain entitled "Emerging risk in relation to add-on insurance" dated 15 February 2016 [IAG.900.059.3995]
9. Swann remuneration arrangements [IAG.800.091.2650] dated 8 October 2019.
10. Email chain entitled "RE: Article in todays news" dated 12 January 2018 [IAG.900.043.8741].
11. Deep Dive Issues Narrative dated 22 May 2018 [IAG.800.089.6325].
12. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

Swann's System for the Sale of Add On Insurance Products

15. From a date prior to the commencement of the Relevant Period but not known to the Applicant, Swann designed, implemented and operated a system for the sale of Add On Insurance Products which comprised at least the following elements:
 - a. the sale of the Add On Insurance Products to the Applicant and the Group Members by Motor Vehicle Dealers on behalf of Swann (as pleaded in paragraphs 16 to 18);
 - b. the payment of commissions and incentives to the Motor Vehicle Dealers for the sale of the Add On Insurance Products (as pleaded in paragraphs 19 to 23);
 - c. the provision of sales training by Swann to the Motor Vehicle Dealers for the purpose of the sale of the Add On Insurance Products (as pleaded in paragraphs 24 to 27);
 - d. the provision of a front end sales system for Motor Vehicle Dealers to utilise when selling the Add On Insurance Products (as pleaded in paragraphs 28 to 28A); and
 - e. the regular assessment of the performance of Motor Vehicle Dealers against sales targets, and taking of remedial action against Motor Vehicle Dealers who failed to meet sales targets (as pleaded in paragraph 28C).

(the Swann Sales System).

- 15A. The Swann Sales System was designed to:

- a. satisfy the particular needs of Swann's business created by the Swann Business Model; and
- b. increase Swann's market share, revenue and profit, or maintain its market share, revenue and profit, given the nature of the Swann Business Model.

Motor Vehicle Dealers as Authorised Representatives of Swann

16. During the Relevant Period, Swann entered into standard form authorised representative agreements with Motor Vehicle Dealers for the sale of Swann's products including the Add On Insurance Products (**Authorised Representative Agreement**).
17. Under the Authorised Representative Agreement entered into by Swann and a Motor Vehicle Dealer, Swann appointed the Motor Vehicle Dealer, and each of its employees, as an authorised representative of Swann (**Authorised Representative**).

Particulars

Clauses 2.1 and 2.3 of the Authorised Representative Agreement.

18. Relevantly, it was a term of each Authorised Representative Agreement that:
 - a. Authorised Representative had the meaning given in section 761A of the Corporations Act and included the Motor Vehicle Dealer and any individual who is an employee or non-employee of the Motor Vehicle Dealer who was authorised by Swann to provide the Authorised Services under the Authorised Representative Agreement.

Particulars

Clause 26.1 of the Authorised Representative Agreement.

- b. Swann authorised the Authorised Representative and the Authorised Representative accepted the authorisation to provide the Authorised Services on Swann's behalf and the Authorised Representative agreed it would provide the Authorised Services in accordance with the terms of the Authorised Representative Agreement.

Particulars

Clause 2.1 of the Authorised Representative Agreement.

- c. The term “Authorised Services” was defined as Swann’s authorisation to the Authorised Representative to sell the Add On Insurance Products and any other products as may be agreed between the parties.

Particulars

Clause 26.1 and Schedule B1 of the Authorised Representative Agreement.

- d. The parties agreed that the relationship between the Authorised Representative and Swann was one of agent and principal, and was not one of employer and employee, joint venture or partnership.

Particulars

Clause 2.6 of the Authorised Representative Agreement.

- e. In the course of providing any Authorised Services in accordance with the Authorised Representative Agreement, the Authorised Representative agreed to comply with all policies, procedures, guidelines and any reasonable requirement or direction given to it by Swann including in relation to, inter alia:
 - i. the provision of the Authorised Services by the Authorised Representative on behalf of Swann;
 - ii. compliance with the Applicable Laws by the Authorised Representative or Swann;
 - iii. enabling Swann to monitor the provision by the Authorised Representative of any Authorised Services in accordance with the Authorised Representative Agreement; and
 - iv. making documents and information available to Swann which related to the provision of Authorised Services by the Authorised Representative on behalf of Swann.

Particulars

Clause 5.5 of the Authorised Representative Agreement.

Commissions and Incentives

19. At all material times during the Relevant Period, Swann engaged Authorised Representatives to sell its Add On Insurance Products. The use of the Authorised Representatives derived greater sales, profit and market share for Swann.
20. At all material times during the Relevant Period, pursuant to the Authorised Representative Agreement, each Authorised Representative was remunerated by Swann through commissions, with different rates of commission attaching to the different Add On Insurance Products (**Commissions**), ranging between 20 percent and 51 percent of the premium.

Particulars

Clause 6.1 and 6.2 of the Authorised Representative Agreement.

Schedule B1 of the Authorised Representative Agreement.

21. At all material times during the Relevant Period, each Authorised Representative was paid additional amounts to the Commissions through an incentive scheme for the sale of Add On Insurance Products (**Incentive Scheme**).
22. Under the Incentive Scheme, each Authorised Representative received the following:
 - a. marketing subsidies calculated based on:
 - i. the gross written premiums for the financial year; and
 - ii. a factor called "Group Product Mix" which was calculated by reference to the mix of different Add On Insurance Products sold to consumers;

Particulars

Agreement regarding Incentive Scheme for Eligible Products (**Incentive Agreement**).

Further particulars may be provided after discovery and evidence.

- b. performance bonus commissions; and

Particulars

A performance bonus commission was calculated and payable annually to the Authorised Representative, in arrears, in accordance with the table provided in the Incentive Agreement, based on the gross written premiums met during the target period.

- c. a product mix bonus.

Particulars

A product mix bonus was calculated and payable in arrears in accordance with the table in the Incentive Agreement, based on the gross written premiums written over the duration of the target period in the Incentive Agreement for the combination of CCI and Tyre & Rim Insurance products, expressed as a percentage of the total premium written by the Authorised Representatives in respect of all Add On Insurance Products distributed by the Authorised Representatives during the target period.

23. At all material times during the Relevant Period, Swann also remunerated employees or independent contractors of the Authorised Representatives through the following incentive programs (**Employee Incentive Programs**):

- a. the Ignition Incentive Program, which usually rewarded employees or independent contractors of Authorised Representatives with 20 or 25 points (or 48 points for those who had provided an ABN to Swann before 1 January 2009), each equivalent to \$1 in value, for every Add On Insurance Product sold, that could be redeemed on particular products through an online portal or, at least from 2011 onwards, for credit on an Eftpos Debit card which could be used to purchase goods and services directly (**Reward Points**); and

Particulars

The Ignition Incentive Program applied to:

1. Walkaway Insurance;
2. PPI;
3. Gapcover Insurance; and

4. Tyre and Rim Insurance.

Ignition Procedure Manual dated 15 July 2010 [IAG.803.004.2496].

Ignition Procedures Manual dated April 2011 [IAG.803.004.2541].

Ignition Procedures Manual dated October 2011
[IAG.803.004.2753].

Ignition Incentive Program Administrators Manual V1.0 dated 11
September 2012 [IAG.803.004.2841].

Ignition Incentives Program Administrators Manual version 4 dated
December 2014 [IAG.500.051.5739].

MV Agent Ignition Rules dated 24 June 2016 [IAG.500.051.5648].

Further particulars may be provided by way of evidence or after
further discovery at an appropriate stage in the Proceedings.

- b. between at least 2009 and 2016, Swann provided short-term bonus programs known as the “Ignition Supercharged Multi Policy Incentive” which allowed employees or independent contractors of Authorised Representatives to accrue:
- i. 50 Reward Points when they sold a bundle of at least 3 Add On Insurance Products in the same transaction and 75 Reward Points when they sold a bundle of 4 or more Add On Insurance Products in the same transaction (between 2009 and 2015); and
 - ii. 60 Reward Points when they sold a bundle of two or more Add On Insurance Products in the same transaction (in 2016).

Particulars

1. Email chain between Andrew Hickman and various recipients from 13 to 16 February 2009 [IAG.500.210.0031].
2. The Ignition Supercharged Multi Policy Incentive was offered during at least:
 - A. 1 March 2009 to 30 April 2009 [IAG.500.211.6284];
 - B. 1 July 2012 to 30 September 2012 [IAG.500.051.5705];

- C. 7 October 2013 to 31 December 2013 [IAG.309.001.0001];
 - D. 3 February 2014 to 30 April 2014 [IAG.500.051.5697];
 - E. 2 March 2015 to 30 April 2015 [IAG.309.001.0003], [IAG.309.001.0005], [IAG.309.001.0007]; and
 - F. 24 May 2016 to 30 June 2016 [IAG.500.051.4881], [IAG.500.051.4883], [IAG.500.051.4885].
3. Advertisements with respect to the Ignition Supercharged Multi Policy Incentive encouraged Authorised Representatives to “Enter some figures in the highlighted figures below to see what you could earn!” and included a calculator which would allow them to calculate the number of Reward Points they could earn based on the number of policies they would sell to each customer, and the number of customers they would expect to sell to over the course of a month.
 4. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- c. Swann transferred to Motor Vehicle Dealers a payment for Fringe Benefits Tax liability in respect of Reward Points which had been redeemed by their employees.

Particulars

The particulars to paragraph 23a are repeated.

23AA. At all relevant times during the Relevant Period, the Authorised Representatives, being Motor Vehicle Dealers, earned very thin margins on the motor vehicles they sold and therefore the income generated by the Commissions, Incentive Scheme and Employee Incentive Programs represented the most important source or alternatively a significant source of profits for Authorised Representatives.

Particulars

1. 7 Reasons why the Bradstreet Group should be with Swann Insurance dated 7 September 2009 [IAG.500.207.6213].
2. Email from Jeffery Harris to various recipients dated 25 June 2015 [IAG.900.038.3622].

3. Email from Jonathan Nicholson to Peter Harmer dated 11 August 2018 [IAG.900.119.6221].

4. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

23A. At all relevant times during the Relevant Period:

- a. the commission arrangements pleaded at paragraphs 19 to 23 above were put in place with Authorised Representatives in order to incentivise Authorised Representatives to sell Swann's products and thereby protect and increase Swann's market share and profits, which were under threat from its competitors during the Relevant Period;
- b. by reason of the matters pleaded in paragraphs 19 to 23AA above, the commission arrangements pleaded at paragraphs 19 to 23 above incentivised Authorised Representatives to sell as many Add On Insurance Products as possible and, therefore, incentivised Authorised Representatives to sell products to consumers irrespective of whether they were suitable for a consumer's needs;
- c. by reason of the matters pleaded in paragraphs 19 to 23AA above, the commission arrangements pleaded at paragraphs 19 to 23 above made it likely that Authorised Representatives would not disclose to potential purchasers of Add On Insurance Products material information about the Add On Insurance Products that was relevant to their decision whether to proceed with the acquisition of Add On Insurance Products, especially information that would indicate to potential purchasers that the Add On Insurance Product(s) they were considering were not suitable for them or would not represent value for money for them;

Training for authorised representatives

24. At all material times during the Relevant Period, Swann required every new Authorised Representative to undertake induction training using its online training tools and to attend ongoing training delivered by Swann representatives from time to time.

Particulars

Clause 5.5 of the Authorised Representative Agreement.

iLearn from 2010 to 2015.

Success+ from 21 September 2015.

25. At all material times during the Relevant Period, Swann created the content for the training modules for Authorised Representatives and managed the induction process for Authorised Representatives and the ongoing training process for Authorised Representatives.

Particulars

The following teams within Swann were responsible for the training modules and the induction process:

1. the Learning and Development team of Swann;
2. the Sales & Distribution Team of Swann; and
3. Account Managers and Trainers within Swann's National Training Team.

The training modules comprised:

1. Tier 2 – General Advice which was an accredited training program covering the responsibilities of Authorised Representatives under Swann's AFS Licence and their relevant statutory obligations;
 2. B05CMPS WN 201 Privacy Principles at Work;
 3. CMPSWN100 Code of Practice – Overview;
 4. CMPSWN112 Code of Practice – Customer Service; and
 5. CMPSWN116 Code of Practice – Complaints Handling.
26. The induction training for Authorised Representatives, or training subsequently delivered to Authorised Representatives, developed and provided by Swann included the following:
- a. product specific training;

Particulars

The product specific guides developed and provided by Swann included:

1. Consumer Credit Insurance Activity Guide version 3.0;

2. Gapcover Insurance Activity Guide version 1.5;
 3. Gap Cover Content Guide version 1.4;
 4. Protection Plus Activities Guide;
 5. Swann – Protection Plus Module;
 6. Swann Gapcover Insurance Assessment;
 7. Swann Insurance Warranty Assessment;
 8. Swann Loan Protection Insurance Assessment;
 9. Swann Loan Protection Insurance Module;
 10. Swann Motor Vehicle Insurance Module;
 11. Tyre and Rim Insurance Activities Guide Version 1.1; and
 12. Tyre and Rim Insurance Content Guide Version 1.1.
- b. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to present customers with “packages” or “menus” of Add On Insurance Products, each involving the sale of at least two Add On Insurance Products together, with the intention, or alternatively the effect, that this would cause the customer to conclude that they had to buy at least one of the packages or menus offered, including the Add On Insurance Products contained in the package or menu;

Particulars

1. Document titled ‘The Psychology of Menu Selling’ dated 27 July 2016 [IAG.500.105.6887].
2. Document titled ‘Why A Preferred F&I Sales Process’ dated 11 August 2016 [IAG.500.105.7867].
3. Email entitled “February Bottom Line – Thanks for your contribution” dated 11 March 2008 [IAG.500.215.3475].
4. Swann Overview Presentation to Duncan West CEO – CGU dated May 2008 [IAG.500.214.8917].

5. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
 6. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].
 7. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
 8. 2015/2016 National Sales Strategy dated 28 June 2015 [IAG.503.017.0001].
 9. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- c. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to follow the “100% Rule”, “300% Rule” or “400% Rule”, which referred to selling “100% of Products” to “100% of customers” “100% of the time”, additionally, in respect of the “400% Rule” “with “100% enthusiasm”;

Particulars

1. Email entitled “February Bottom Line – Thanks for your contribution” dated 11 March 2008 [IAG.500.215.3475].
2. Swann Insurance Product Range presentation dated 8 April 2009 [IAG.803.017.1499]
3. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].
4. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
5. Swann Insurance & Ladbroke Financial Services presentation dated 29 August 2012 [IAG.803.016.1497].
6. Document titled ‘Why A Preferred F&I Sales Process’ dated 11 August 2016 [IAG.500.105.7867].
7. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- d. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to create in the customer's mind a perceived need to buy one or more of the Add On Insurance Products, by creating in the customer's mind a hypothetical future need or problem which could then be solved by the benefits of one or more of the Add On Insurance Products;

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
2. Welcome: Nissan Dealership Network Presentation dated 2008 [IAG.803.017.9187].
3. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].
4. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
5. Swann Insurance & Ladbroke Financial Services presentation dated 29 August 2012 [IAG.803.016.1497].
6. Tyre and Rim Protection Program dated 27 April 2012 [IAG.802.005.9351].
7. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- e. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives use the "assumptive close technique", which referred to Authorised Representative acting as if a customer had made a decision to purchase one or more Add On Insurance Products before they had actually done so, which would make it difficult for the customer to refuse to purchase the product due to the social cost of acting against the assumed fact;

Particulars

1. Business Development Up-Selling/Cross-Selling Techniques dated June 2011 [IAG.803.003.3289].

2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- f. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to explain the cost of Add On Insurance Products and/or packages of Add On Insurance Products by reference to the daily or weekly cost of such Products or packages or menus of products, rather than the lump sum upfront cost of the Add On Insurance Products, because such technique would make it difficult for the customer to calculate the total cost, reducing the likelihood that the customer would undertake such calculation;

Particulars

1. Business Development Up-Selling/Cross-Selling Techniques dated June 2011 [IAG.803.003.3289].
 2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- g. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to refer to only the benefits or features of such products, or alternatively, the benefits or features of such products;

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
 2. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
 3. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].
 4. Tyre and Rim Protection Program dated 27 April 2012 [IAG.802.005.9351].
 5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- h. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives not to provide a customer with their sales documentation for the purchase of their Motor Vehicle until such time as the Authorised Representative

had attempted to sell the Add On Insurance Products to the customer, as there was a risk that once the customer had received their completed sales documentation they would:

- i. comprehend that it was not necessary to buy any Add On Insurance Products; and/or
- ii. leave the Motor Vehicle Dealership without purchasing Add On Insurance Products;

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
 2. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
 3. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- i. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to initially propose a term of finance of a lesser period than the maximum finance term, in order that if the customer raised objection to the quantum of the regular repayments presented to them by the Authorised Representative (representing, inter alia, the repayment of finance of the Motor Vehicle and Add On Insurance Products), the Authorised Representative could extend the term of any finance so that the regular repayments would be of a lower amount, rather than reducing the number of Add On Insurance Products being sold to the customer;

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
2. Business Manager Sale Skills dated 29 August 2011 [IAG.802.004.8068].
3. Tyre and Rim Protection Program dated 27 April 2012 [IAG.802.005.9351].

4. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- j. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives with techniques to overcome common customer objections to purchasing Add On Insurance Products;

Particulars

1. Swann Overview Presentation to Duncan West CEO – CGU dated May 2008 [IAG.500.214.8917].
 2. Welcome: Nissan Dealership Network Presentation dated 2008 [IAG.803.017.9187].
 3. Tyre and Rim Protection Program dated 27 April 2012 [IAG.802.005.9351].
 4. Responding to Customer Concerns Content Guide V1.0 dated 9 September 2011 [IAG.802.003.0652].
 5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- k. training on how to sell the Add On Insurance Products, by instructing Authorised Representatives to:
- i. present the offer of Add On Insurance Products to customers as being an obligation or responsibility on the part of the Authorised Representative to protect the customer's Motor Vehicle and/or the finance on their Motor Vehicle; and
 - ii. require the customer to sign a document recording that they had decided not to purchase the Add On Insurance Product and would thereby bear the cost of various adverse events occurring;

Particulars

1. Acknowledgement of Offer of Consumer Vehicle Purchase Protection dated 4 November 2007 [IAG.800.164.3078].
2. Tyre and Rim Protection Program dated 27 April 2012 [IAG.802.005.9351].

3. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- i. training on how to sell one or more of the Add On Insurance Products, by recommending that Authorised Representatives sell such Add On Insurance Products as part of the process of, or in conjunction with, the customer obtaining finance for the purchase of a Motor Vehicle, and referring to such Add On Insurance Products as “protecting” (or words or phrases to similar effect) the loan for the purchase of the Motor Vehicle;

Particulars

1. Finance and Insurance Selling Process dated 23 January 2008 [IAG.500.218.8792].
 2. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
 3. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].
 4. Swann Insurance Product Range presentation dated 8 April 2009 [IAG.803.017.1499].
 5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- m. training on how to sell the Authorised Representatives’ preferred finance option for purchasing a Motor Vehicle and Add On Insurance Products, by providing techniques to Authorised Representatives to avoid informing customers of the interest rate of the finance product being offered by them and instead informing the customer of the repayments they would be required to make; and

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
2. Swann Insurance Motorcycle Salespersons Half Day F&I Workshop dated 27 March 2011 [IAG.802.005.1307].

3. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- n. training on how to sell the Authorised Representatives' preferred finance option for purchasing a Motor Vehicle and Add On Insurance Products, by providing techniques to Authorised Representatives to dissuade customers from seeking finance from third party sources or paying for their Motor Vehicle with cash.

Particulars

1. The F&I Road to a Sale dated November 2008 [IAG.802.003.5608].
 2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
27. Upon the completion of the training pleaded in paragraphs 24 to 26a, each Authorised Representative was authorised by Swann to provide Tier 2 general financial product advice under Swann's AFS Licence.
- 27A. At all material times, during the Relevant Period:
- a. the training referred to in paragraphs 26b to 26n above was given to Authorised Representatives to assist Authorised Representatives in selling Swann's products and thereby protect and increase Swann's market share and profits, which were under threat from its competitors during the Relevant Period;
 - b. the training referred to in paragraphs 26b to 26n above was given to Authorised Representatives to cause the Authorised Representatives to sell as many Add On Insurance Products as possible and, therefore incentivised and caused Authorised Representatives to sell products to consumers irrespective of whether they were suitable for a consumer's needs; and
 - c. the training referred to in one or more of paragraphs 26b to 26n above made it likely that Authorised Representatives would not disclose to potential purchasers of Add On Insurance Products material information about the Add On Insurance Products that was relevant to their decision whether to proceed with the acquisition of Add On Insurance Products, especially information that would indicate to potential purchasers that the Add On Insurance Product(s) they were considering were not suitable for them or would not represent value for money for them.

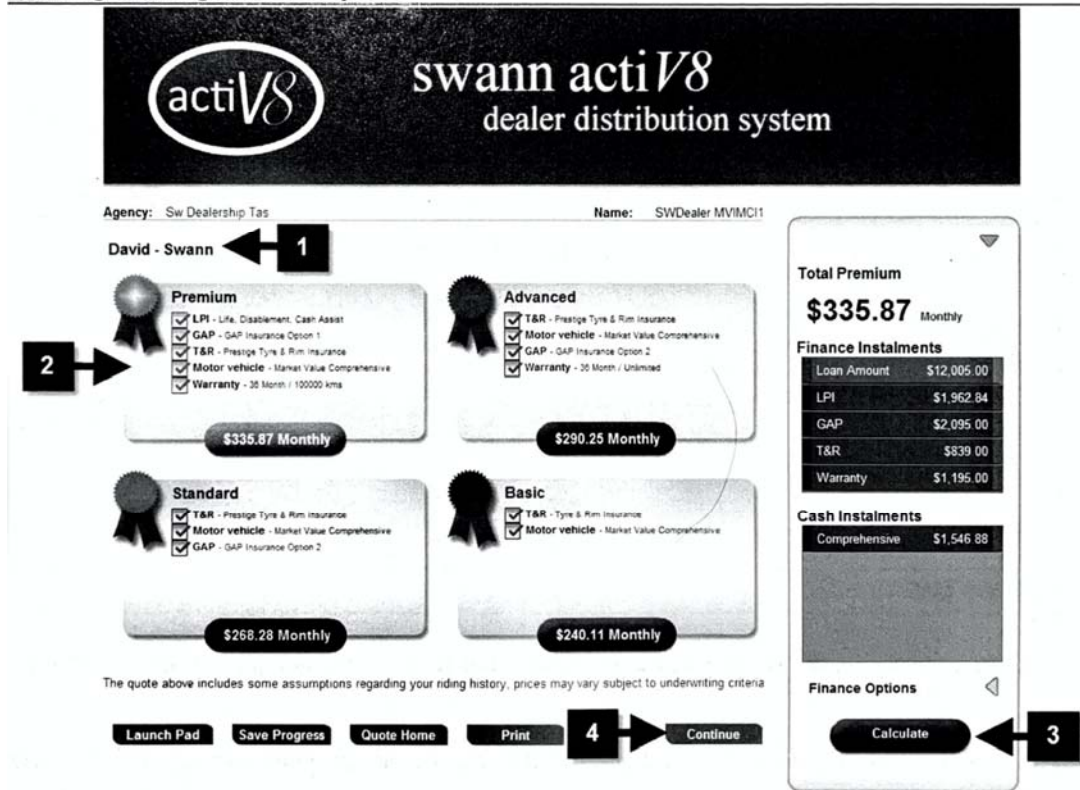
28. At all material times during the Relevant Period, Swann provided a front end sales system to Authorised Representatives, known as “Activ8” (**Activ8 Sales System**).

Particulars

The Activ8 Sales System:

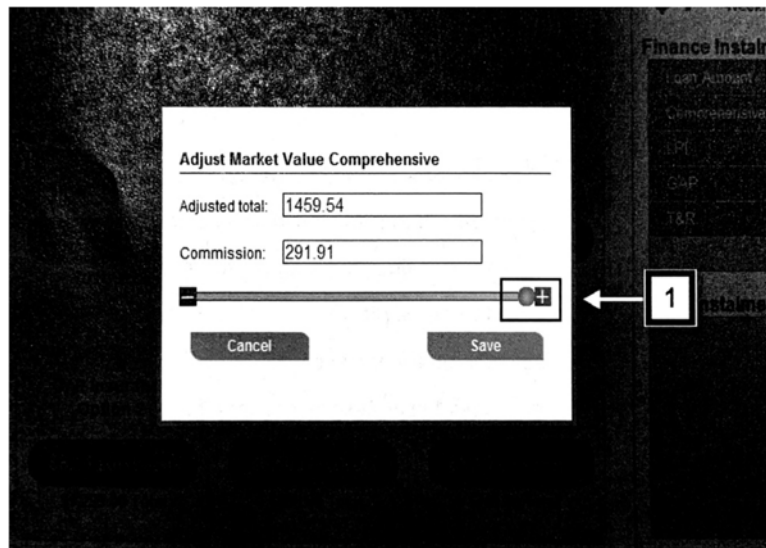
1. Drew information from the Intermediary Profile Database to populate Finance Services Guides (**FSG**) to be issued by Authorised Representatives to policyholders;
 2. Contained current Produce Disclosure Statements (**PDS**) to be issued by Authorised Representatives to policyholders;
 3. Automatically arranged for the dispatch of a PDS and FSG when a new policy was issued to a policyholder;
 4. contained links to Swann’s guidelines and relevant legislation;
and
 5. ensured that an Authorised Representative could only sell either Gapcover Insurance or PPP Insurance product to a policyholder in any one transaction.
- 28A. At all material times during the Relevant Period, the Activ8 Sales System was designed to facilitate and promote the sales of Add On Insurance Products by Authorised Representatives, and in particular the sale of multiple Add On Insurance Products, by means of at least the following features:
- a. the Activ8 Sales System allowed Authorised Representatives to automate and customise the selling of “package” or “menu” bundles of multiple Add On Insurance Products, as referred to in paragraph 26b, by means of automatically loading for new customers any package or menu templates created by the Authorised Representative using a prompt screen similar to that set out below;

Package Selling Screen Capture



b.

the Activ8 Sales System allowed Authorised Representatives to adjust the rates of commission payable to them on certain insurance products by means of a prompt similar to that set out below;



c. the Activ8 Sales System disclosed to Authorised Representatives the commission they would receive in respect of each Add On Insurance Product offered to customers prior to the agreement of the customer to purchase such Add On Products by means of a prompt screen similar to that below;

Premium Adjustment									
Policy	Premiums				Charges			Comm/ Margin	Adj Premium
	Annual		QPR		FSL/ESL	GST	Stamp Duty		
	Retail	Net	Retail	Monthly					
Comprehensive	1459.54	1167.63	1654.76	137.90	0.00	120.62	132.69	291.91	<input type="text"/>
LPI	4580.18	3701.29	--	--	0.00	242.78	342.46	878.89	<input type="text"/>
Life	912.10	713.43	--	--	0.00	0.00	9.03	198.67	
Unemployment	924.40	756.32	--	--	0.00	76.39	84.03	168.08	
Disablement	2013.51	1647.41	--	--	0.00	166.39	183.03	366.10	
Cash Assist	730.17	584.13	--	--	0.00	0.00	66.37	146.04	
GAP	2095.00	1290.00	--	--	0.00	173.14	190.46	805.00	<input type="text"/>
T&R	490.00	295.00	679.81	18.88	0.00	40.50	44.55	195.00	<input type="text"/>

Cancel Save Calculate

- d. the Activ8 Sales System did not provide a feature for the printing of the PDS for Add On Insurance Products, and only dispatched a copy of the PDS following the customer having agreed to purchase the Add On Insurance Products; and
- e. the Activ8 Sales System did not include a feature designed to prompt or cause the Authorised Representative to:
- i. provide any existing copy of a PDS to the customer; or
 - ii. wait for the customer to review and consider the relevant PDS before proceeding to confirm the purchase of the Add On Insurance Products by the customer.

Particulars

1. Sales Process – Activ8 dated 23 January 2008 [IAG.500.218.8794].
2. Swann Overview Presentation to Duncan West CEO – CGU dated May 2008 [IAG.500.214.8917].
3. 7 Reasons why The Bradstreet Group should be with Swann Insurance dated 7 September 2009 [IAG.500.207.6213].
4. Swann Insurance ActiV8 V2.0 dated August 2011 [IAG.803.017.2852].

5. Swann Insurance Activ8 V2.0 Standard Products dated July 2014 [IAG.803.004.2000].
6. Swann Insurance Activ8 V3.0 Standard Products dated May 2015 [IAG.803.003.2064].
7. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

28B. At all material times during the Relevant Period:

- a. the Activ8 Sales System referred to in paragraphs 28 to 28A above was designed to, and was used to, assist Authorised Representatives to sell Swann's products and thereby protect and increase Swann's market share and profits, which were under threat from its competitors during the Relevant Period;
- b. the Activ8 Sales System referred to in paragraphs 28 to 28A above was designed to, and was used to, cause the Authorised Representatives to sell as many Add On Insurance Products as possible, and therefore incentivised and caused Authorised Representatives to sell products to consumers irrespective of whether they were suitable for a consumer's needs; and
- c. the Activ8 Sales System referred to in paragraphs 28 to 28A above made it likely that Authorised Representatives would not disclose to potential purchasers of Add On Insurance Products material information about the Add On Insurance Products that was relevant to their decision whether to proceed with the acquisition of Add On Insurance Products, especially information that would indicate to potential purchasers that the Add On Insurance Product(s) they were considering were not suitable for them or would not represent value for money for them.

Enforcement of sales targets by Authorised Representatives

28C. At all material times during the Relevant Period, Swann supervised and reported on the sales performance of Authorised Representatives against overall sales and Add On Insurance Product mix targets, benchmarks or budgets, and required that the Authorised Representatives meet or exceed those overall sales and Add On Product Mix targets, benchmarks or budgets, including by means of:

- a. weekly monitoring of sales results against targets and reporting of such results to management of the Authorised Representative;

- b. monthly reviews between Swann representatives with Authorised Representatives including regarding all aspects of the Finance and Insurance division of the Authorised Representative;
- c. individualised measurement of the sales performance of employees or independent contractors of Authorised Representatives against other employees or independent contractors within the Authorised Representative, and against “Swann and industry benchmarks”; and
- d. taking remedial action in respect of underperformance against such targets, such as escalating that underperformance to supervisors of the Authorised Representative, formulating action plans, providing incentives to achieve sales targets, providing training to the Authorised Representative, and encouraging menu or package selling as referred to in paragraph 26b above.

Particulars

1. IAG Group Risk Assurance – Swann Dealer Sales dated 7 June 2007 [IAG.803.011.1766]
2. Swann Overview Presentation to Duncan West CEO – CGU dated May 2008 [IAG.500.214.8917].
3. 7 Reasons why The Bradstreet Group should be with Swann Insurance dated 7 September 2009 [IAG.500.207.6213].
4. 2015/2016 National Sales Strategy dated 29 June 2015 [IAG.503.017.0001].
5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

28D. At all material times during the Relevant Period:

- a. the processes referred to in paragraph 28C above were used to compel, or alternatively, strongly incentivise, Authorised Representatives to sell Swann’s products and thereby protect Swann’s market share and profits, which were under threat from its competitors during the Relevant Period;
- b. the processes referred to in paragraph 28C above were used to compel, or alternatively, strongly incentivise, Authorised Representatives to sell as many Add On Insurance Products as possible and, therefore, would cause Authorised

Representatives to sell products to consumers irrespective of whether they were suitable for a consumer's needs; and

- c. the processes referred to in paragraph 28C above made it likely that Authorised Representatives would not disclose to potential purchasers of Add On Insurance Products material information about the Add On Insurance Products that was relevant to their decision whether to proceed with the acquisition of Add On Insurance Products, especially information that would indicate to potential purchasers that the Add On Insurance Product(s) they were considering were not suitable for them or would not represent value for money for them.

D. MISLEADING OR DECEPTIVE CONDUCT

29. During the Relevant Period, the Applicant and the Group Members purchased a Motor Vehicle from a Motor Vehicle Dealer which was an Authorised Representative.

Particulars

1. The Applicant refers to and repeats paragraph 3.
 2. Particulars of the purchase by Group Members will be provided at an appropriate stage in the Proceedings.
30. At or around the time of the purchase of the Motor Vehicle, the Applicant and the Group Members:
 - a. were offered the opportunity, by the Authorised Representative, to obtain finance for the purchase of the Motor Vehicle;
 - b. applied for finance through the Authorised Representative, with the finance application completed and submitted by the Authorised Representative;
 - c. were successful in his or her application for finance; and
 - d. entered into a finance agreement with the financier, which was executed by the Authorised Representative on behalf of the financier and under which the financier provided a loan for the purchase of the Motor Vehicle and one or more of the Add On Insurance Products (**Finance Agreement**).

Particulars

1. On 13 August 2013, the Applicant entered into a finance agreement with Macquarie Leasing for \$38,459.64 with \$3,180

payable to Swann in insurance premiums. The Loan Schedule was signed by the Applicant and witnessed by Sam Cowling of Baycity Holden, Melbourne.

2. Particulars of the finance agreements entered into by the Group Members will be provided at an appropriate stage in the Proceedings.
31. The Applicant and the Group Members were not, at any stage prior to applying for finance or entering into the Finance Agreement, informed, either sufficiently or at all, of one or more of the following facts:
- a. that the Add On Insurance Products were optional and that acquisition of one or more of the Add On Insurance Products was not a condition of obtaining finance for the purchase of the Motor Vehicle;
 - ab. the matters referred to in paragraphs 14A and 14B;
 - b. that the Add On Insurance Products had no or no material financial value;
 - c. that the Authorised Representatives were financially incentivised, encouraged, compelled, forced and/or strongly urged by Swann to sell as many insurance products as possible, including Add On Insurance Products, to them;
 - cb. that it was likely that they had incomplete information about whether the Add On Insurance Product(s) they were considering were suitable for them or would represent value for money for them;
 - d. that the Add On Insurance Products may not be suitable for the Applicant or Group Members;
 - e. that the Add On Insurance Products offered coverage that may overlap with other insurance coverage already held by the Applicant and Group Members, such as life insurance or total and permanent disability insurance;
 - f. that the cover provided by the MBI Add On Insurance Product referred to in paragraph 11.e was unnecessary, or in the alternative, may be unnecessary, given the provisions of the *Trade Practices Act 1974* (Cth) or, after 1 January 2011, the *Australian Consumer Law*;
 - g. in the alternative to f, that there were only limited features of the MBI Add On Insurance Product which provided benefits beyond the existing statutory

obligations of the manufacturer or seller of the Motor Vehicle pursuant to the provisions of the *Trade Practices Act 1974* (Cth) or, after 1 January 2011, the *Australian Consumer Law*;

- h. that, given the Finance Agreement:
 - i. they would pay interest charges on the premiums, and therefore pay a greater amount for those Add On Insurance Products than they would pay if they did not finance those premiums;
 - ii. the quantum of that additional cost referred to in 31hi;
 - iii. purchasing a single premium policy may result in the Applicant and Group Members incurring greater interest charges in respect of the Add On Insurance Products than they would incur should they pay the same premium by cash in instalments;
- i. that the Add On Insurance Products had important exclusions, exceptions and limits to the cover offered; and
- j. the total lump sum cost of each of the Add On Insurance Products being offered to them and/or the total cost of all of the Add On Insurance Products being offered to them.

Particulars

Prior to entering into the Finance Agreement, the Applicant was not informed, either sufficiently or at all, of the matters in paragraphs 31a to 31j.

As to the matters in paragraph 31a, the Applicant refers to and repeats the matters pleaded in, and the particulars to, paragraph 26b, 26h, 26k and 26l.

As to the matters in paragraph 31ab, 31b, 31cb, and 31d:

1. the Add On Insurance Products had low and in some cases negligible claim payouts relative to the premiums that were paid by the Applicant and the Group Members;
2. the Add On Insurance Products had no or no material financial value to policyholders as the amount they would claim under

the relevant Add On Insurance Product policy would not, or was unlikely to, ever exceed the cost of the premium paid for that product;

3. the Add On Insurance Products provided no or no material financial value to policyholders as the amount of the average claim under the relevant Add On Insurance Product policy would be less than or similar to the average premium paid for that product;
4. the cap that applied to the maximum payable under individual or multiple claims under the relevant Add On Insurance Product policy was low compared to the loss that a policyholder would likely suffer if the covered event occurred;
- 4A. the cap that applied to the maximum payable under individual or multiple claims under the relevant Add On Insurance Product policy was low compared to the amount paid by the policyholder in premiums;
5. the Add On Insurance Products had restrictions on cover such that policyholders were not eligible, or were unlikely to be able to, make a claim; and/or
6. on 15 December 2017, Insurance Australia Group Limited and Swann agreed with ASIC to implement a remediation program to refund 67,960 policyholders \$39 million paid in premiums for the Add On Insurance Products.
7. the matters in paragraph 14A and 14B are repeated.

As to the matters in all paragraphs, the Applicant refers to and repeats the matters pleaded in paragraphs 23A, 27A, 28B and/or 28D above.

As to the matters in paragraph 31f and 31g, the Applicant refers to Presentation to Honda dated 12 May 2011 [IAG.803.017.6471]

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

32. By reason of the matters pleaded in paragraph 31, prior to applying for finance or entering into the Finance Agreement, the Applicant and the Group Members did not know one or more of the matters pleaded in paragraph 31 above, each of which constitute material information that would have been relevant to the decision of the Applicants and Group Members whether to proceed with the purchase of Add On Insurance Products.
33. Not used.
34. By reason of the matters pleaded in paragraphs 3, 4, 11 to 14 and 29 to 32, Swann:
- a. engaged in conduct in trade or commerce in relation to financial services that was misleading or deceptive or was likely to mislead or deceive in contravention of section 12DA(1) of the ASIC Act;
 - b. engaged in conduct in trade or commerce that was liable to mislead the public as to the nature, characteristics and the suitability for their purpose of financial services in contravention of section 12DF(1) of the ASIC Act; and
 - c. engaged in conduct in this jurisdiction in relation to a financial product or a financial service that was misleading or deceptive or was likely to mislead or deceive in contravention of section 1041H(1) of the Corporations Act.
 - d. Not used.
- 34A. Further and/or in the alternative to paragraph 34, by reason of the matters pleaded in paragraphs 3, 4, 11 to 14 and the Authorised Representatives seeking to sell Add On Insurance Products following the instructions given to them by Swann referred to in paragraphs 26b, 26d, 26e, 26f, 26g, 26h, 26i, 26j, 26k, 26l, Swann:
- a. engaged in conduct in trade or commerce in relation to financial services that was misleading or deceptive or was likely to mislead or deceive in contravention of section 12DA(1) of the ASIC Act;
 - b. engaged in conduct in trade or commerce that was liable to mislead the public as to the nature, characteristics and the suitability for their purpose of financial services in contravention of section 12DF(1) of the ASIC Act; and
 - c. engaged in conduct in this jurisdiction in relation to a financial product or a financial service that was misleading or deceptive or was likely to mislead or deceive in contravention of section 1041H(1) of the Corporations Act.
35. Had the Applicant and the Group Members known one or more of the matters pleaded in paragraph 31 they would not have purchased the Add On Insurance Products.

- 35A Further to paragraph 35, had the Authorised Representatives not used one more of the sales techniques they were instructed by Swann to use, and referred to in paragraphs 26b, 26d, 26e, 26f, 26g, 26h, 26i, 26j, 26k, 26l above, the Applicant and the Group Members would not have purchased the Add On Insurance Products.
36. By reason of the matters pleaded in paragraphs 34 and 35, and/or paragraphs 34A and 35A, the Applicant and the Group Members have suffered loss or damage:
- a. by the conduct of Swann in contravention of sections 12DA(1) and 12DF(1) of the ASIC Act, and claim damages pursuant to section 12GF(1) of the ASIC Act; and
 - b. by the conduct of Swann in contravention of section 1041H(1) of the Corporations Act, and claim damages pursuant to section 1041I(1) of the Corporations Act.
 - c. Not used.

Particulars

The loss or damage suffered by the Applicant and Group Members comprises the premiums paid to Swann for the Add on Insurance Products (**Premiums**) together with the interest and other costs (such as GST and stamp duty) incurred in respect of the Add On Insurance Products.

Further particulars of loss and damage may be provided after discovery and evidence.

E. UNCONSCIONABLE CONDUCT

37. Not used.
38. The Swann Sales System involved the sale of the Add On Insurance Products to the Applicant and the Group Members in one or more of the following circumstances:
- a. the bundling of the Add On Insurance Products with the purchase of a Motor Vehicle which was financed by way of a loan;
 - b. the sale of multiple Add On Insurance Products irrespective of the purchaser's particular needs;
 - c. the sale of the Add On Insurance Products without the purchasers being informed, either sufficiently or at all, of the matters pleaded in paragraph 31;

- d. the Applicant and Group Members were offered Add On Insurance Products without first being asked whether they would be interested in purchasing such products;
 - e. the Applicant and Group Members were subject to a sales process utilising one or more of the sales techniques referred to in paragraphs 26b to 26n above, using the Activ8 software referred to in paragraph 28 to 28A above;
 - f. the Applicant and Group Members were subject to a sales process which was structured in a way that prompted the Applicant and Group Members to disengage through decision fatigue, information overload, complex product offerings and multiple options of product combinations, constraining the Applicant and Group Members' ability to make an informed purchasing decision;
 - g. the price of Add On Insurance Products was anchored to the price of the Motor Vehicle purchased by the Applicant or Group Member, thereby distorting the Applicant's and Group Members' perception of the cost of the Add On Insurance Products by making the relatively small cost of the insurance appear trivial, and distracting from the question of whether the Add On Insurance Products offered value for money; and
 - h. one or more of the following occurred:
 - i. the Applicant and Group Members were not encouraged to review and consider the PDS and/or FSG in respect of the Add On Insurance Products;
 - ii. the Applicant and Group Members were not given sufficient time to review the PDS and/or FSG in respect of the Add On Insurance Products; and/or
 - iii. the Applicant and Group Members were given the PDS and/or FSG in respect of the Add On Insurance Products at an inappropriate stage in the selling process.
- 38A. By reason of the matters pleaded in paragraphs 15 to 28D and 38, the purpose or effect of the Swann Sales System was to encourage or require Authorised Representatives to adopt a sales process predominantly focused on generating sales for Swann by emphasising the benefits of the products, distracting from the true value of the products to the Applicant and Group Members (if any), and not disclosing the facts pleaded in paragraph 31 above.

39. At all material times during the Relevant Period, Swann was aware of the following matters:
- a. the Add On Insurance Products were optional to purchase and purchasers of Motor Vehicles were not obliged to purchase the products in order to obtain a loan for the purchase of the Motor Vehicle;
 - b. the Add On Insurance Products had no or no material financial value;
 - ba. the matters in paragraphs 14A and 14B;
 - c. the Add On Insurance Products had low and in some cases negligible claim payouts relative to the premiums that were paid or liable to be paid by policyholders;
 - d. the Add On Insurance Products had no or no material financial value to policyholders as the amount they would claim under the relevant Add On Insurance Product policy would not, or was unlikely to, ever exceed the cost of the premium paid for that product;
 - e. the Add On Insurance Products provided no or no material financial value to policyholders as the amount of the average claim under the relevant Add On Insurance Product policy would be less than or similar to the average premium paid for that product;
 - f. the cap that applied to the maximum payable under individual or multiple claims under the relevant Add On Insurance Product policy was low compared to the loss that a policyholder would likely suffer if the covered event occurred;
 - g. the Add On Insurance Products had restrictions on cover such that policyholders were not eligible, or were unlikely to be able to, make a claim;
 - h. the cap that applied to the maximum payable under individual or multiple claims under the relevant Add On Insurance Product policy was low compared to the amount paid or liable to be paid by the policyholder in premiums;
 - i. Authorised Representatives were incentivised by Swann to sell as many Add On Insurance Products to consumers as possible and that in doing so, such Authorised Representatives were likely to emphasise the benefits of Add On Insurance Products to prospective purchasers and not disclose to prospective purchasers the matters pleaded in paragraph 31 above;

- j. Swann had not put in place any adequate systems to ensure that prospective purchasers were provided with all material information about the Add On Insurance Products, including the matters pleaded in paragraph 31, and there was therefore a substantial risk that prospective purchasers would acquire Add On Insurance Products that had no value or no material financial value or in the alternative which were not suitable for their needs;
- k. the premiums for some of the Add On Insurance Products offered to the Applicant and Group Members were far greater than premiums for similar, or superior, products offered by other insurers through different sales channels, including life insurance policies and total and permanent disability policies;
- l. in respect of some of the Add On Insurance Products, the premiums for identical Add On Insurance Products varied substantially between customers with identical risk profiles;
- m. that the sales processes carried out by Authorised Representatives would:
 - i. be consistent with the processes and techniques referred to in paragraph 26; and
 - ii. use the Activ8 software with the features referred to in paragraph 28A; and
- n. the Authorised Representatives would be subject to the processes referred to in paragraph 28C.

Particulars

The Applicant refers to and repeats the particulars to paragraph 31 and also refers to document headed "Attribution of cause for the Swann add on insurance disclosure..." dated 7 February 2018 [IAG.800.089.6312].

In respect of the matters in paragraph 39I, Report to IAG Risk Committee dated 27 July 2016 [IAG.500.107.4135]

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- 40. By reason of the matters pleaded in paragraphs 3, 4, 11 to 14 and 37 to 39, Swann engaged in conduct in trade or commerce that was, in all the circumstances, unconscionable in contravention of section 12CB(1) of the ASIC Act in that:

- a. the bargaining position of the Applicant and the Group Members, on the one hand, and Swann, on the other, was unequal;
- b. Swann used unfair tactics against the Applicant and the Group Members in the sale of the Add On Insurance Products;
- c. Swann unreasonably failed to disclose, either sufficiently or at all, the matters pleaded in paragraph 31;
- d. in certain cases equivalent or superior products could have been acquired by customers through another service provider for a substantially lower premium, for example, life insurance or total and permanent disability insurance;
- e. in respect of some of the Add On Insurance Products, substantially different premiums were charged to customers with substantially identical risk profiles;
- f. the Authorised Representatives failed to comply with the following items of the General Industry Code of Practice:
 - i. prior to 1 July 2014, item 2.4.1 of the General Insurance Code of Practice in force at the relevant time; and
 - ii. after 1 July 2014, item 4.4 of the General Insurance Code of Practice.

Particulars

The Applicant refers to and repeats paragraphs 15 to 28D, 31 to 32 and 37 to 39.

41. Further or in the alternative, by reason of the matters pleaded in paragraphs 3, 4, 11 to 14 and 37 to 39, Swann engaged in conduct that was in all the circumstances unconscionable in contravention of section 991A(1) of the Corporations Act.
42. The Applicant and the Group Members have suffered loss or damage:
 - a. by the conduct of Swann in contravention of section 12CB(1) of the ASIC Act, and claim damages pursuant to section 12GF(1) of the ASIC Act; and
 - b. Not used.
 - c. further or alternatively, because Swann contravened section 991A(1) of the Corporations Act, and seek recovery of the amount of loss or damage pursuant to section 991A(2) of the Corporations Act.

Particulars

The Applicant refers to and repeats the particulars to paragraph 36.

E1. CONTRAVENTION OF SECTION 1041E OF THE CORPORATIONS ACT

- 42A. The Add On Insurance Products were “financial products” within the meaning of s 763A and s 763C of the Corporations Act.

Particulars

The Add On Insurance Products were facilities through which persons purported to manage financial risks. The Applicant refers to and repeats paragraph 12(a).

- 42B. In selling the Add On Insurance Products the Applicant and Group Members, Swann (including through its Authorised Representatives acting as agents of Swann) failed to disclose material information that would have been highly relevant to the Applicant’s and Group Members’ decision whether to purchase the Add On Insurance Products, being the matters pleaded in paragraph 31.
- 42C. By selling the Add On Insurance Products in circumstances where Swann did not disclose or cause its Authorised Representatives to disclose the matters identified in paragraph 31, Swann made a statement and/or disseminated information that was:
- a. materially misleading; and
 - b. likely to induce the Applicant and Group Members, being persons in this jurisdiction as defined in s 9 of the Corporations Act, to acquire Add On Insurance Products.
- 42D. When Swann sold the Add On Insurance Products, Swann ought reasonably to have known that it (including through its Authorised Representatives acting as agents of Swann) was making a statement and/or disseminating information that was materially misleading, because Swann was aware of the matters that were not disclosed to the Applicant or Group Members, as pleaded in paragraph 31.

Particulars

The Applicant refers to and repeats the matters pleaded in and the particulars to paragraph 39.

- 42E. Further or alternatively, when Swann sold its Add On Insurance Products to the Applicant and Group Members, Swann did not care whether it made a statement or disseminated information which was true or false.

Particulars

Swann's state of mind is to be inferred from the matters pleaded at paragraphs 14C, 15 and 15A, 23A, 26b to 26n, 27A, 28B, 28D, 37, 38 and 39 above.

- 42F. By reason of the matters pleaded in paragraphs 42A to 42E inclusive, Swann contravened s 1041E of the Corporations Act.

E.2 CONTRAVENTION OF SECTION 12DB OF THE ASIC ACT

- 42G. In selling the Add On Insurance Products to the Applicant and Group Members, Swann was, in trade or commerce, engaged in the supply of financial services to the Applicant and the Group Members within the meaning of section 12BAB of the ASIC Act.

Particulars

The sale of the Add On Insurance Products constituted dealing in a financial product within the meaning of s 12BAB(1) and s 12BAB(7) of the ASIC Act. The Applicant refers to and repeats paragraph 14(a).

- 42H. By selling the Add On Insurance Products without disclosing the matters pleaded in paragraph 31, Swann made a false or misleading representation in connection with the supply, or possible supply, of financial services, being the sale of the Add On Insurance Products:
- a. concerning the need for those services, within the meaning of s 12DB(1)(h) of the ASIC Act (s 12DB(1)(f) prior to 1 January 2011);
 - b. concerning the services being of a particular standard, quality or value within the meaning of s 12DB(1)(a) of the ASIC Act;
 - c. concerning the price of the services within the meaning of s 12DB(1)(g) of the ASIC Act (s 12DB(1)(e) prior to 1 January 2011); and/or
 - d. on and from 1 January 2011, concerning a requirement to pay for a contractual right that a person has under a law of the Commonwealth, a State or Territory within the meaning of s 12DB(1)(j)(ii) of the ASIC Act.

Particulars

The services being supplied by Swann were the sale of the Add On Insurance Products.

In failing to disclose the matters pleaded in paragraph 31, Swann failed to disclose:

1. features of the Add On Insurance Products that were material to the Applicant's and Group Members' need (or otherwise) for Swann's services. Accordingly, in failing to disclose the matters pleaded in paragraph 31, Swann made a false or misleading representation in connection with the sale of the Add On Insurance Products concerning the Applicant's and Group Members' need for those services.
2. the matters referred to in paragraphs 31ab, 31b, 31cb, 31g, 31i above, accordingly, Swann made a false or misleading representation in connection with the sale of the Add On Insurance Products concerning the standard, quality of value of the services.
3. the matters referred to in paragraph 31h and 31j above, and therefore made a false or misleading representation in connection with the sale of the Add On Insurance Products concerning the price of the services.
4. the matters referred to in paragraph 31f and 31g above, and therefore made a false or misleading representation in connection with the sale of the Add On Insurance Products concerning a requirement to pay for a contractual right that a person has under a law of the Commonwealth, a State or Territory.

42I. By reason of the matters pleaded in paragraphs 42G and 42H, Swann contravened s 12DB of the ASIC Act.

F. MISTAKE

43. By reason of the matters pleaded in paragraphs 31 to 32, the Applicant and the Group Members purchased the Add On Insurance Products and paid the Premiums under one or more of the following causative mistaken beliefs:

- aa. that they had already committed to purchase the Add On Insurance Products at a time prior to them having done so;
 - ab. that they were obliged to purchase the Add On Insurance Products;
 - a. that they were obliged to purchase the Add On Insurance Products in order to obtain a loan for the purchase of the Motor Vehicle;
 - b. that the Add On Insurance Products had material financial value;
 - c. that the Add On Insurance Products were suitable for the Applicant or Group Members;
 - d. that at the time of making the decision to acquire the Add On Insurance Products, they had received from the Authorised Representative and Swann all material information, including some or all of the matters pleaded at paragraph 31, that was relevant to their decision whether to invest in the Add On Insurance Products; and/or
 - e. in the case of the MBI product referred to in paragraph 11.e, that it was necessary to purchase such product in order to obtain rights equivalent to consumer rights arising under the *Trade Practices Act 1974* (Cth) or, from 1 January 2011, the *Australian Consumer Law*.
44. Each of the beliefs pleaded in paragraph 43 was mistaken.
45. The Applicant and the Group Members paid Swann the Premiums by reason of one or more of the mistakes pleaded in paragraphs 43 and 44.
46. By reason of the matters pleaded in paragraph 45, Swann has been unjustly enriched by the receipt of the Premiums at the expense of the Applicant and the Group Members and it would be unconscionable for Swann to retain the Premiums.
47. By reason of the matters pleaded in paragraphs 43 to 46, the Premiums are monies had and received by Swann to the use of the Applicant and the Group Members, and Swann is obliged to repay those sums to the Applicant and the Group Members.

G. RELIEF

1. The Applicant claims, in his own right and on behalf of the Group Members, the relief specified in the application namely:

- a. An order under s 48 of the *Limitation of Actions Act 1936* (SA) that any Group Member who has a claim for monies had and received by Swann to the use of the Group Member that is governed by the law of South Australia and that accrued before 10 April 2013 be granted an extension of time until 10 April 2019;
- b. Damages pursuant to section 12GF(1) of the ASIC Act, sections 991A(2) and 1041I(1) of the Corporations Act.
- c. Further or alternatively, judgment in the full amount of the Premiums mistakenly paid for the Add On Insurance Products.
- d. Interest.
- e. Costs.
- f. Such further order as the Court determines is appropriate.

Date: ~~26 February~~ 28 September 2020




Signed by Paul Reidy
Lawyer for the Applicant

This amended pleading was prepared and settled by Christopher Withers, ~~Kate Lindeman~~ and Rob Clark of counsel and Robert Dick of senior counsel.

Certificate of lawyer

I, Paul Reidy, certify to the Court that, in relation to the second further amended statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~26 February~~ 28 September 2020



Signed by Paul Reidy
Lawyer for the Applicant