

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
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: 8/04/2020 11:09:17 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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Form 33  
Rule 16.32

**Amended Defence to Further Amended Statement of Claim**

NSD544 of 2019

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Jones Asirifi-Otchere**

Applicant

**Swann Insurance (Aust) Pty Ltd (ABN 80 000 886 680) and another**

Respondents

- 1 As to paragraph 1 of the Further Amended Statement of Claim dated 26 February 2020 and filed on 10 March 2020 ("**FASOC**"), the Respondents say that:
- (a) [not used];
  - (b) the Applicant and Group Members have not suffered loss or damage by or because of the alleged contravening conduct of the Respondents as pleaded in the FASOC;
  - (c) the proceeding is not validly commenced as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth) ("**FCA Act**") on behalf of persons whose claims are not maintainable by reason of being statute-barred and refer to and repeat paragraphs 53 to 58D below;
  - (d) says that by reason of the operation of paragraphs 1(c), 29 and 30 of the FASOC, Group Members are only those persons who acquired and financed a

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Filed on behalf of Swann Insurance (Aust) Pty Ltd and Insurance Australia Limited, the First and Second Respondents

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Motor Vehicle in the circumstances pleaded in paragraphs 29 and 30 of the FASOC,

and on that basis deny the paragraph. Any reference to Group Members in this [Amended](#) Defence, or pleading in response to an allegation involving or referring to Group Members in the FASOC, is intended to be read subject to this denial.

1A As to paragraph 1A of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 1 above and paragraphs 43, 51, 58, 58A, 58B, 58C and 58D below; and
- (b) further say that by reason of paragraph 1A of the FASOC, the Further Amended Originating Application (“**FAOA**”) and the FASOC do not satisfy the requirements of section 33H of the FCA Act because it does not enable persons who otherwise fall within the description contained in paragraph 1 of the FASOC to ascertain whether or not they are Group Members; and
- (c) deny the paragraph.

1B As to paragraph 1B of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 1 above and 43, 51, 58, 58A, 58B, 58C and 58D below; and
- (b) further say that by reason of paragraph 1B of the FASOC, the FAOA and the FASOC do not satisfy the requirements of section 33H of the FCA Act because it does not enable persons who otherwise fall within the description contained in paragraph 1 of the FASOC to ascertain whether or not they are Group Members; and
- (c) deny the paragraph.

2 As to paragraph 2 of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 1, 1A and 1B above; and
- (b) deny the paragraph.

3 In response to paragraph 3 of the FASOC, the Respondents:

- (a) admit that the Applicant purchased two of the Add On Insurance Products issued by Swann, namely, Gapcover Insurance and "WarrantyASSIST" Insurance, on or

about 13 August 2013 at or about the time he purchased a Motor Vehicle, being a 2011 Holden Commodore Omega with registration number ZXT960;

- (b) admit paragraph 3(b);
- (c) admit paragraph 3(c); and
- (d) otherwise do not know and cannot admit the paragraph.

4 As to paragraph 4 of the FASOC, the Respondents:

- (a) admit paragraph 4(a);
- (b) admit paragraph 4(b);
- (c) admit that Swann held an Australian Financial Services Licence (AFS Licence), namely AFSL No. 238292, during the Relevant Period as defined in paragraph 1(a) of the FASOC and further say that Swann ceased to hold that AFS Licence on 14 December 2017.

5 The Respondents admit paragraph 5 of the FASOC.

6 The Respondents admit paragraph 6 of the FASOC.

7 As to paragraph 7 of the FASOC, the Respondents:

- (a) say that clause 2(a) of the Scheme provided that on the Effective Date (as defined therein), Swann agreed to sell and transfer and IAL (as defined therein) agreed to purchase and accept the transfer of all of the Business (as defined therein) and, in particular:
  - (i) the Insurance Contracts (as defined therein) and the Insurance Liabilities (as defined therein); and
  - (ii) the Business Assets (as defined therein) (including, without limitation), the Reinsurance Contracts (as defined therein) and the Business Liabilities (as defined therein),

from Swann in accordance with the terms of the Transfer Agreement (as defined therein), including all right, title, interest, benefit and powers that had arisen, or may in the future have arisen under any of the above;

- (b) say that clause 1.1 of the Scheme provided that “Effective Date” was defined in the Scheme as 1 August 2017, or such other date that the Federal Court of

Australia may have specified as the commencement date of the Scheme should the Scheme have been confirmed by the Court;

- (c) say that clause 4(a) of the Scheme provided that 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 indemnified and kept Swann indemnified from and against all Claims (as defined therein) under or in connection with the Insurance Contracts or Insurance Liabilities; and
  - (iii) each Insurance Contract remained the same contract of insurance, other than the substitution of IAL for Swann as the insurer, and there would be no new contract of insurance created;
- (d) say that clause 10.1(a) of the Scheme provided that with effect on and from the Effective Date, the rights, benefits, and liabilities of policyholders under Insurance Contracts, and of all persons claiming through or under them, on the one hand and IAL on the other hand, would 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;
- (e) say that clause 10.1(b) of the Scheme provided that all proposals, applications, declarations and representations made to Swann on which any Insurance Contract was based should as and from the Effective Date be taken to have been made to and accepted by IAL instead of by Swann;
- (f) say that clause 10.1(c) of the Scheme provided that 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;
- (g) say that clause 10.1(e) of the Scheme provided that policyholders were not required to take any action before or as a result of the Scheme;
- (h) say that clause 10.1(g) of the Scheme provided that upon confirmation of the Scheme by the Federal Court of Australia, the Scheme would become binding on all parties;

- (i) say that clause 10.2 of the Scheme provided that 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, or through automatic payroll 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 have been given to IAL instead of Swann.

- (j) say that clause 10.3 of the Scheme provided that 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 recipient's entitlement, instead of Swann;
- (k) otherwise refer to and rely upon the terms of the Scheme for their full force and effect; and
- (l) otherwise deny the paragraph.

8 The Respondents admit paragraph 8 of the FASOC.

9 The Respondents admit paragraph 9 of the FASOC.

10 In response to paragraph 10 of the FASOC, the Respondents:

- (a) refer to and rely upon paragraphs 1, 1A, 1B, 3 and 6 to 9 above;
- (b) subject thereto, admit paragraph 10 of the FASOC.

11 The Respondents admit paragraph 11 of the FASOC save that:

- (a) the Add On Insurance Products did (rather than “purported to”) provide the cover described in the paragraph subject to the terms and conditions of relevant policies; and
  - (b) on or about 6 August 2016, Swann sold its distribution rights in respect of Add On Insurance Products in connection with motor vehicles (but not motor cycles) to Eric Insurance Limited and thereafter did not issue Add On Insurance Products in connection with motor vehicles through Motor Vehicle Dealers.
- 12. The Respondents admit paragraph 12 of the FASOC.
- 13. The Respondents admit paragraph 13 of the FASOC.
- 14. As to paragraph 14 of the FASOC, the Respondents refer to and repeat paragraphs 4 and 11-13 above, and subject thereto admit the paragraph.
- 14A As to paragraph 14A, the Respondents:
  - (a) say that paragraph 14A(a) of the FASOC is embarrassing and deny the paragraph;
  - (b) as to paragraph 14A(b), say that to the extent the reference to “other consumer-orientated general insurance products” is a reference to:
    - (i) *all* other consumer-orientated general insurance products, deny the paragraph; and

## Particulars

[ASIC Report 622](#), Table 3

Table 3: Claims ratio (in cents) for lenders by CCI product (FY 2011–18)

Lender	Credit card	Personal loan	Home loan
Suncorp	3.86	11.22	32.67
Citigroup	4.80	n/a	n/a
ANZ	6.90	13.88	41.15
Latitude	9.76	21.35	n/a
Westpac	11.76	20.30	29.89
NAB	14.22	29.17	23.02
CBA	16.00	14.89	28.08
People's Choice	29.40	18.10	31.56
Bendigo	32.31	13.50	30.60
BoQ	n/a	11.77	24.90
CUA	n/a	12.32	31.43

**Note:** The claims ratio data contains claims and premium data for policies sold during and prior to ASIC's review.

- (ii) *some* consumer-orientated general insurance products, admit that Claims Loss Ratios were lower for some consumer-orientated general insurance products but otherwise deny the paragraph.

14B The Respondents deny paragraph 14B of the FASOC.

14C As to paragraph 14C of the FASOC, the Respondents:

- (a) admit paragraph 14C(a);
- (b) admit paragraph 14C(b), but say that not all of the Add On Insurance Products were single term multiple year insurance products;
- (c) admit paragraph 14C(c);
- (d) admit paragraph 14C(d), and say that Swann's strategy during the Relevant Period was focused on driving sustainable profitable growth through:
  - (i) focusing on non-commodity products, where price leadership and business scale were less important, as Swann was unable to compete on price with commodity insurance products (such as comprehensive motor vehicle insurance);
  - (ii) providing a differentiated product/service offering to agents and consumers; and



- (iii) distribution in niche markets where Swann had an opportunity to take a market leadership position;
- (e) admit paragraph 14C(e), and say that consumer awareness of the Swann brand was less important in the Motor Vehicle Dealer sales channel than other sales channels through which the Add On Insurance Products were sold given the nature of the sales process in the Motor Vehicle Dealer sales channel;
- (f) admit paragraph 14C(f), save to the extent the “sales-driven” culture is described as “strong”, and say that Swann relied on leveraging its:
  - (i) sales and results driven culture;
  - (ii) end to end business model;
  - (iii) lack of bureaucracy; and
  - (iv) niche focus,to provide a differentiated product and service offering to Motor Vehicle Dealers and consumers;
- (g) in response to paragraph 14C(g1), the Respondents:
  - (i) deny that Swann employees were paid commissions; and
  - (ii) otherwise admit the paragraph;
- (g) admit paragraph 14C(g2), and say that Swann relied on leveraging its:
  - (i) sales and results driven culture;
  - (ii) end to end business model;
  - (iii) lack of bureaucracy; and
  - (iv) niche focus,to provide a differentiated product and service offering to Motor Vehicle Dealers and consumers;
- (h) as to paragraph 14C(h):
  - (i) refer to and repeat paragraph 15 below; and
  - (ii) subject thereto, admit the paragraph;
- (i) deny paragraph 14C(i);

- (j) deny paragraph 14C(j1);
- (j) deny paragraph 14C(j2) and say that the authorised representative agreements which governed the contractual arrangements between Swann and Motor Vehicle Dealers required Motor Vehicle Dealers to obtain Swann’s consent prior to being appointed as an authorised representative of any other person who was the holder of an AFSL, which consent could be withheld or granted at Swann’s absolute discretion;

**Particulars**

Clause 3(c) of the Template Authorised Representative Agreement (as defined in paragraph 16(a) below).

- (k) as to paragraph 14C(k):
  - (i) say that in the 2014 financial year, some Motor Dealers were paid transaction commission, marketing support payments, overrides payments and incentive payments that together comprised between 29% and 74% of the amount of the total premium paid in respect of certain Add On Insurance Products;
  - (ii) say that the payment of commission on Add On Insurance Products sold through Motor Vehicle Dealers was a feature of the business model adopted by manufacturers and distributors of Add-On Insurance Products in the Relevant Period; and

**Particulars**

ASIC Report 492, Table 4

**Table 4: Average maximum commissions paid to car dealers (FY15)**

Product	Average maximum commission
CCI (business use)	36%
GAP insurance	55%
Loan termination insurance (business use)	46%
Tyre and rim insurance	51%
Mechanical breakdown insurance	58%

Note: Average maximum commission is an average of the maximum commission payable by each of the insurers on each product they offer. These averages are not weighted based on the proportion of insurance sold by each insurer.

- (iii) otherwise deny the paragraph, and
- (l) otherwise deny the paragraph.

Pleadings in response to the allegations containing the defined term “Swann Business Model” and references to the defined term “Swann Business Model” in the remainder of this [Amended](#) Defence are to be understood as subject to this paragraph 14C.

15. As to paragraph 15 of the FASOC, the Respondents:
  - (a) refer to and repeat paragraphs 16 to 28C below (other than paragraphs 23AA, 23A, 27A and 28B below, on the basis that paragraphs 23AA, 23A, 27A and 28B of the FASOC are not pleaded, in paragraph 15 of the FASOC, to be part of the Swann Sales System); and
  - (b) subject thereto, otherwise admit the paragraph.
- 15A The Respondents admit paragraph 15A of the FASOC.
16. As to paragraph 16 of the FASOC, the Respondents:
  - (a) say that, from time to time during the Relevant Period or part thereof, there existed a form of template authorised representative agreement between Swann and Motor Vehicle Dealers which were bodies corporate (“**Template Authorised Representative Agreement**”);
  - (b) subject to (c) below, say that the contractual arrangements between Swann and the Motor Vehicle Dealers were governed by authorised representative agreements which were broadly on the terms of the Template Authorised Representative Agreement;
  - (c) refer to and rely upon the full terms of any individual Authorised Representative Agreement between Swann and a Motor Vehicle Dealer for their full force and effect;
  - (d) otherwise deny the paragraph.
17. As to paragraph 17 of the FASOC, the Respondents:
  - (a) say that clause 2.1 of the Template Authorised Representative Agreement provided that:
    - (i) Swann authorised the Intermediary (as defined therein) and the Intermediary accepted the authorisation to provide the Authorised Services (as defined therein) on Swann’s behalf on the terms of the Template Authorised Representative Agreement;

- (ii) the Intermediary agreed that in providing the Authorised Services, it would do so in accordance with the terms of the Template Authorised Representative Agreement;
- (b) say that clause 2.3 of the Template Authorised Representative Agreement provided that despite anything else therein, the Intermediary may carry out the Authorised Services in its own right or through an Authorised Representative duly authorised in accordance with clause 7;
- (c) otherwise refer to and rely upon the terms of the Template Authorised Representative Agreement for their full force and effect; and
- (d) otherwise deny the paragraph.

18 As to paragraph 18 of the FASOC, the Respondents

- (a) say that clause 26.1 of the Template Authorised Representative Agreement provided that Authorised Representative had the meaning given in section 761A of the Corporations Act and included the Intermediary and an individual who was an employee or non-employee of the Intermediary who was authorised by Swann to provide the Authorised Services under an Authorisation Agreement;
- (b) say that clause 2.1 of the Template Authorised Representative Agreement provided that Swann authorised the Intermediary (as defined therein) and the Intermediary accepted the authorisation to provide the Authorised Services (as defined therein) on Swann's behalf on the terms of the Template Authorised Representative Agreement;
- (c) say that:
  - (i) clause 26.1 of the Template Authorised Representative Agreement provided that "Authorised Services" was defined in the Template Authorised Representative Agreement as the services described in the Authorised Services Schedule and Authorisation Notice (which was defined to mean the Schedule A1 to the Template Authorised Representative Agreement entitled Authorised Services Schedule and Authorisation Notice) to be performed in relation to the Approved Products (as defined in the Template Authorised Representative Agreement);

- (ii) clause 26.1 of the Template Authorised Representative Agreement provided that “Approved Products” was defined to mean the financial products set out in the Products and Commission Schedule (being Schedule B-1), or any other financial products issued by Swann agreed by the parties, and in which the Intermediary had been Appropriately Trained (as defined in the Template Authorised Representative Agreement);
- (d) say that clause 2.6 of the Template Authorised Representative Agreement provided that the parties agreed that the relationship between it and the Licensee (sic) was one of agent (on the part of the Intermediary) and principal (on the part of the Licensee), and was not one of employer and employee, joint venture or partnership;
- (e) say that clause 5.5 of the Template Authorised Representative Agreement provided that in the course of providing any Authorised Services in accordance with the Template Authorised Representative Agreement, the Intermediary agreed to comply with all policies, procedures, guidelines and any reasonable requirement or direction given to it by Swann including in relation to:
  - (i) the provision of the Authorised Services by the Intermediary on behalf of Swann;
  - (ii) compliance with the Applicable Laws (as defined therein) by the Intermediary or Swann;
  - (iii) enabling Swann to monitor the provision by the Authorised Representative of any Intermediary in accordance with the Template Authorised Representative Agreement;
  - (iv) making documents and information available to Swann which related to the provision of Authorised Services by the Intermediary on behalf of Swann;
- (f) otherwise refer to and rely upon the terms of the Template Authorised Representative Agreement for their full force and effect; and
- (g) otherwise deny the paragraph.

19. As to paragraph 19 of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 11(b) above; and

(b) subject thereto, admit paragraph 19 of the FASOC.

20. As to paragraph 20 of the FASOC, the Respondents:

(a) say that clause 6.1 of the Template Authorised Representative Agreement provided that, unless otherwise agreed, Swann would pay the Intermediary Commission (as defined therein) or other benefits as set out therein for Insurance Policies (as defined therein) arranged by the Intermediary on Swann's behalf under the Template Authorised Representative Agreement, in accordance with the rates and in the manner set out in the Products and Commission schedule and clause 6 of the Template Authorised Representative Agreement, and that the Intermediary was only entitled to Commission or other benefits when Swann had accepted the risk, and Swann had been paid the Premium (as defined therein) in cleared funds;

**Particulars**

Schedule C-1 to the Authorised Representative Agreement between Swann and Sawicki Group Pty Ltd trading as Bay City Holden provided for Commissions ranging between 20% and 51% of the premium.

(b) say that clause 6.2 of the Template Authorised Representative Agreement provided that:

- (i) Commission (as defined therein) would be paid to the Intermediary only and not to a third party unless otherwise agreed between the parties;
- (ii) Commission would be accompanied by a statement of transactions, the timing and manner of which would be agreed between the parties from time to time;
- (iii) the rate of commission might be varied by Swann from time to time upon Swann giving thirty days' notice in writing to the Intermediary;

(c) refer to and rely upon the terms of Schedule B1 of the Template Authorised Representative Agreement for their full force and effect;

(d) say that Authorised Representatives were paid in accordance with the Authorised Representative Agreements between them and Swann; and

(e) otherwise deny the paragraph.

21 As to paragraph 21 of the FASOC, the Respondents:

- (a) say that some Authorised Representatives could be and were paid additional amounts to the Commissions through the Incentive Scheme; and
- (b) otherwise deny the paragraph.

22 As to paragraph 22 of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 21 above;
- (b) say that from time to time during the Relevant Period or part thereof, there existed template Incentive Scheme for Eligible Products Agreements (each a **“Template Incentive Agreement”**);
- (c) say that the non-commission incentive arrangements could include:
  - (i) marketing subsidies, which may have been payable to a Motor Vehicle Dealer or to the parent company of a dealer group, on the basis of agreed gross written premium targets;
  - (ii) performance or volume bonuses, which may have been payable to a Motor Vehicle Dealer or the parent company of a dealer group, in the event that the group exceeded the agreed gross written premium targets; and
  - (iii) product mix bonuses, which may have been payable to the parent company of dealer groups, provided annual gross written premium targets were met and the dealer group sold an agreed mix of products; and
- (d) otherwise deny the paragraph

23 As to paragraph 23 of the FASOC, the Respondents:

- (a) say that the Ignition Program was open to employees of some Authorised Representatives other than motorcycle dealers up to 5 August 2016, and to employees of some Authorised Representatives who were motorcycle dealers up to October 2017;
- (b) the Ignition Program awarded points to participating individuals for every eligible Swann insurance product sold, with one ignition point having a value of \$1 and with points being able to be redeemed for a selection of goods and services that could be redeemed on particular products through an online portal, or at least

from 2011 onwards, for credit on a card which could be used like a “cash debit card” to purchase goods and services directly from participating retailers;

- (c) not all Add On Insurance Products were eligible insurance products for the purpose of the Ignition Program;
- (d) from time to time between 2009 and 2016, additional points were allocated in respect of the sale of certain insurance products during special promotions or “supercharged campaigns”, a “supercharge” being a multi-policy promotion that encouraged participants to sell a minimum number of products within a customer deal;
- [\(e\) admit paragraph 23\(c\);](#) and
- ~~(f)~~ otherwise deny the paragraph.

23AA. As to paragraph 23AA of the FASOC, the Respondents:

- (a) admit that Motor Vehicle Dealers earned very thin margins on the motor vehicles they sold;
- (b) say that Motor Vehicle Dealers derived revenue from a number of products, including margin on trade-ins, motor vehicle extras (such as optional extras, accessories, paint protection, rust-proofing, fabric protection and tinting), parts and servicing, motor vehicle finance, comprehensive insurance and Add On Insurance Products; and
- (c) otherwise do not admit the paragraph.

23A As to paragraph 23A of the FASOC, the Respondents refer to and repeat paragraphs 15, and 19-23AA above, and 31-32 below and, subject thereto:

- (a) admit paragraph 23A(a);
- (b) deny paragraph 23A(b);
- (c) deny paragraph 23A(c) and further say that at all relevant times during the Relevant Period, Authorised Representatives were instructed to make available a copy of the product disclosure statements and policy schedules;
- (d) say that Swann and its Authorised Representatives were not required, nor lawfully able, to disclose all information material to an individual’s decision



whether to purchase an Add On Insurance Product because that would have involved the provision of personal financial product advice; and

### **Particulars**

Schedule A–1 to the Template Authorised Representative Agreement provided that the Intermediary (as defined therein) was authorised by the Licensee (as defined therein) to provide, in relation to the Approved Products (as defined therein), general financial product advice only.

The Authorised Representative Agreement between Swann and Sawicki Group Pty Ltd trading as Bay City Holden included acknowledgments signed by Nicole Olive and Fiona Doussett which stated: “I acknowledge that I have received the Authorisation Notice (as defined in the Authorised Representative Agreement) from Swann Insurance advising that I am authorised to Deal and provide General Advice only in Swann Insurance products as detailed in the Notice, and that the information above is correct”

- (e) otherwise deny the paragraph.
- 24 The Respondents admit paragraph 24 of the FASOC.
- 25 The Respondents admit paragraph 25 of the FASOC and say that the training included the following topics:
- (a) general advice;
  - (b) privacy;
  - (c) General Insurance Code of Practice; and
  - (d) products.
- 26 As to paragraph 26 of the FASOC, the Respondents:
- (a) admit paragraph 26(a);
  - (b) as to paragraph 26(b):
    - (i) say that some training materials from time to time referred to presenting customers with multiple options, “packages” or “menus”; and
    - (ii) otherwise deny the sub-paragraph;

- (c) as to paragraph 26(c):
  - (i) say that some training materials from time to time referred to using the “400% Rule” or “100% Rule”, or by selling “100% of Products” to “100% of customers” “100% of the time”; and
  - (ii) otherwise deny the sub-paragraph;
- (d) as to paragraph 26(d):
  - (i) say that some training materials from time to time referred to, in relation to LPI, MBI, Gapcover and Tyre and Rim policies, a hypothetical future need or problem which could then be solved by the benefits of the particular Add On Insurance Product; and
  - (ii) otherwise deny the sub-paragraph;
- (e) deny paragraph 26(e);
- (f) deny paragraph 26(f);
- (g) as to paragraph 26(g):
  - (i) refer to and repeat paragraph 26(a);
  - (ii) admit that some of the training provided to Authorised Representatives from time to time instructed Authorised Representatives to refer to the features or benefits of the Add On Insurance Products but say that the features of the Add On Insurance Products included policy exclusions and eligibility criteria; and
  - (iii) otherwise deny the paragraph;
- (h) as to paragraph 26(h):
  - (i) say that some training materials from time to time referred to selling LPI, Gapcover, MBI and Tyre and Rim policies prior to providing the receipt for the customer’s deposit on their motor vehicle purchase; and
  - (ii) otherwise deny the sub-paragraph;
- (i) as to paragraph 26(i):
  - (i) say that some training materials from time to time for Gapcover and LPI referred to asking the lender to extend the term of finance so that repayments would be of a lower amount; and
  - (ii) otherwise deny the sub-paragraph;
- (j) as to paragraph 26(j):

- (i) say that some training materials from time to time referred to how to address customer concerns relating to Add On Insurance Products; and
- (ii) otherwise deny the sub-paragraph;
- (k) deny paragraph 26(k);
- (l) as to paragraph 26(l):
  - (i) refer to and repeat paragraphs 31(f), 31(g), 31(h), 31(i), 31(j) and 31(k);
  - (ii) say that LPI, Walkaway, PPI and Gapcover presuppose the existence of a loan;
  - (iii) refer to and rely upon the terms of the product disclosure statement and policy schedule for each Add On Insurance Product which set out the terms and conditions for the cover provided;
  - (iv) say that some training materials from time to time referred to “protected loans” or words to similar effect in relation to LPI; and
  - (v) otherwise deny the sub-paragraph;
- (m) as to paragraph 26(m):
  - (i) say that some training materials from time to time for Gapcover and LPI referred to informing the customer of the repayments they would be required to make rather than the interest rate of the finance product being offered by Authorised Representative; and
  - (ii) otherwise deny the sub-paragraph; and
- (n) as to paragraph 26(n):
  - (i) say that some training materials from time to time for LPI and Gapcover provided training which Authorised Representatives could use where customers indicated that they intended to finance their motor vehicle purchase using third party sources or cash; and
  - (ii) otherwise deny the sub-paragraph.

27 The Respondents refer to and repeat paragraphs 24 to 26(a), above, and admit the paragraph.

27A As to paragraph 27A of the FASOC, the Respondents:

- (a) subject to paragraphs 26(b) to (n) above, admit paragraph 27A(a);

- (b) say that Swann and its Authorised Representatives were not required, nor lawfully able, to disclose all information material to an individual's decision whether to purchase an Add On Insurance Product because that would have involved the provision of personal financial product advice; and

**Particulars**

Paragraph 23A(d) above.

- (c) otherwise deny the paragraph.

28 The Respondents admit paragraph 28 of the FASOC.

28A As to paragraph 28A of the FASOC, the Respondents:

- (a) as to paragraph 28A(a):
  - (i) admit that the Activ8 Sales System contained a feature that allowed Authorised Representatives to automate and customise the selling of "package" or "menu" bundles of multiple Add-On Insurance Products;
  - (ii) say that the use of this feature by Authorised Representatives was optional; and
  - (iii) otherwise deny the paragraph
- (b) admit paragraph 28A(b), but say that commission on CCI products was limited to a maximum of 20% for sales to consumers;
- (c) admit paragraph 28A(c);
- (d) as to paragraph 28A(d):
  - (i) say that, the Activ8 Sales System contained links to an electronic version of the product disclosure statements for the Add On Insurance Products, which could be printed and provided to the customer;
  - (ii) further say that Authorised Representatives were provided with hard copies of product disclosure statements to provide to prospective customers; and
  - (iii) otherwise deny the paragraph;
- (e) as to paragraph 28A(e), the Respondents:
  - (i) refer to and repeat paragraph 23A(d);
  - (ii) say that, before a purchase of any Add On Insurance Products could be completed, Activ8 required Authorised Representatives to obtain from the

customer an acknowledgment that a copy of the product disclosure statement had been made available for the customer's consideration before they acquired the product, by means of a prompt screen similar to the screen below:

### Acknowledgements Screen

#### Acknowledgements

I authorise Swann or any other organisation to send me offers in writing, by phone, or other electronic means of products and services which may be beneficial to me.

I declare that the information I have provided is truthful and accurate and I understand that the insurer's decision to insure me is based upon the honesty and accuracy of that information. I am not aware of any other matter which may affect the insurer's decision to insure me or which may affect the terms and conditions of that decision. The vehicle I am insuring is not damaged and is in sound working order.

I acknowledge that a copy of the Product Disclosure Statement (PDS) for the product has been made available to me for my consideration, before I acquired the product, and that I have considered the information in the PDS in making my decision to purchase this product. I acknowledge that I may have been provided with general financial product advice which does not take into account my personal circumstances, needs or financial objectives. Accordingly I will consider the appropriateness of any such advice in light of my circumstances, needs or objectives.

- (iii) further say that Authorised Representatives were required to provide product disclosure statements to retail customers before the customer completed a proposal or was issued with a contract of insurance; and
- (iv) deny the paragraph.

#### **Particulars**

Clause 5.10(d) of the Template Authorised Representative Agreement provided that the Intermediary (as defined therein) will perform its functions in accordance with the Compliance Guidelines.

The Compliance Guidelines for Swann Intermediaries dated March 2013 required that an up to date PDS be provided to a retail customer before the customer completes a proposal or is issued with a contract of insurance.

28B As to paragraph 28B of the FASOC, the Respondents;

- (a) admit paragraph 28B(a);
- (b) say that Swann and its Authorised Representatives were not required, nor lawfully able, to disclose all information material to an individual's decision whether to purchase an Add On Insurance Product because that would have involved the provision of personal financial product advice; and

**Particulars**

Paragraph 23A(d) above.

- (c) otherwise deny the paragraph.

28C As to paragraph 28C, the Respondents:

- (a) admit that Swann monitored the sales performance of some Authorised Representatives from time to time, including by means of the activities referred to in paragraphs 28C(a) to paragraph 28C(d); and
- (b) otherwise deny the paragraph.

28D As to paragraph 28D of the FASOC, the Respondents:

- (a) as to paragraph 28D(a), say that the processes referred to in paragraph 28C were intended to increase sales of Swann products and thereby protect Swann's market share and profits, which were under threat from its competitors during the Relevant Period;
- (b) say that Swann and its Authorised Representatives were not required, nor lawfully able, to disclose all information material to an individual's decision whether to purchase an Add On Insurance Product because that would have involved the provision of personal financial product advice; and

**Particulars**

Paragraph 23A(d) above.

- (c) otherwise deny the paragraph.

29 The Respondents admit paragraph 29 of the FASOC.

30. As to paragraph 30 of the FASOC, the Respondents:

- (a) say that neither the Applicant nor any Group Member was made the offer referred to at paragraph 30(a) of the FASOC by a Motor Vehicle Dealer acting as an Authorised Representative of the Respondents;
- (b) say that neither the Applicant nor any Group Member applied for the finance referred to at paragraph 30(b) of the FASOC through a Motor Vehicle Dealer acting as an Authorised Representative of the Respondents;
- (c) say that neither the Applicant nor any Group Member entered into a Finance Agreement through the execution of a Finance Agreement by a Motor Vehicle Dealer acting as an Authorised Representative of the Respondents; and

(d) deny the paragraph.

31 As to paragraph 31 of the FASOC, the Respondents:

(a) refer to and repeat paragraphs 23A and 30 above;

(b) say that, beyond the matters pleaded below, the extent to which the Applicant and the Group Members were or were not informed of the matters pleaded in paragraph 31 of the ASOC depends on all of the individual circumstances in which they acquired the relevant Add On Insurance Products, including any enquiries they made as to alternate products and any determination on their part to not exercise cooling off or other cancellation rights;

(c) refer to and rely upon the terms of the product disclosure statement and policy schedule for each Add On Insurance Product which set out the terms and conditions of the cover provided;

(d) and further:

*in specific response to subparagraph 31(a) of the FASOC*

(e) deny subparagraph 31(a) of the FASOC;

(f) say that the Loan Schedule signed by the Applicant contained the following disclosures:

(i) “*You do not have to take out consumer credit insurance unless you want to*”; and

(ii) “*If you take out insurance, the credit provider cannot insist on any particular insurance company*”;

(g) say that on and after 1 July 2010, every financier provided to Group Members who applied for and obtained finance from it the disclosures to the effect pleaded at (b) above;

**Particulars**

Financiers were required to provide these disclosures, pursuant to section 17 of the National Credit Code (being Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)) and regulation 74 of the *National Consumer Credit Protection Regulations 2010* (Cth).

(h) say that the product disclosure statement and policy schedule issued by Swann to the Applicant in relation to Gapcover insurance:

(i) stated: “*It is your choice as to whether or not you insure with us*”;

- (ii) disclosed the extent of the cover provided under the policy;
  - (iii) disclosed the existence of cooling off rights and that the policy could otherwise be cancelled;
- (i) say that the product disclosure statement and policy schedule issued by Swann to the Applicant in relation to Warranty Assist insurance:
- (i) stated: *"It is your choice as to whether or not you insure with us"*;
  - (ii) disclosed the extent of the cover provided under the policy;
  - (iii) disclosed the existence of cooling off rights and that the policy could otherwise be cancelled;
- (j) say that product disclosure statements and policy schedules issued by Swann to Group Members in respect of LPI, Walkaway Insurance, PPI, Gapcover Insurance, and MBI contained disclosures to the same or similar effect to those referred to in (h) and (i) above, including "you are not obliged to purchase this insurance and insurance can be arranged through a different insurer";

**Particulars**

Product disclosure statements issued from time to time during the Relevant Period, including by way of example:

Product disclosure statement for Loan Protection Insurance dated 3 July 2008

Product disclosure statement for Loan Protection Insurance dated 1 December 2015

Product disclosure statement for Walkaway (Consumer – Elite) dated 24 March 2009

Product disclosure statement for Walkaway (Consumer – Elite) dated 5 May 2011

Product disclosure statement for Protection Plus Loan Insurance dated 30 January 2015

Product disclosure statement for Protection Plus Loan Insurance dated 18 April 2016

Product disclosure statement for Gapcover Insurance dated 30 November 2007



Product disclosure statement for Gapcover Insurance dated 1 December 2015

- (k) say that Tyre & Rim Insurance and WarrantyASSIST Insurance are of such a kind that no reasonable person could believe that he or she was obliged to purchase them in order to obtain a loan for the purchase of the Motor Vehicle;

**Particulars**

Neither Tyre & Rim Insurance nor WarrantyASSIST Insurance presuppose the existence of a loan.

- (l) otherwise refer to and rely upon the terms of the product disclosure statement and policy schedule for each Add On Insurance Product which set out the terms and conditions of the cover provided;

*in specific response to subparagraph 31(ab) of the FASOC:*

- (m) refer to and repeat paragraphs 14A, 14B above;
- (n) say that the product disclosure statements for the Add On Insurance Products did not contain the matters pleaded at paragraphs 14A and 14B of the FASOC, and otherwise refers to and repeats paragraph 31(b) above;
- (o) say that there was no market practice in the general insurance industry of disclosing Claims Loss Ratios to customers and further say that at all material times during the Relevant Period, product disclosure statements for general insurance products were not required to disclose Claims Loss Ratios;

**Particulars**

ASIC Regulatory Guide 168, Disclosure: Product Disclosure Statements (and other disclosure obligations)

Corporations Regulations 2001 (Cth) Regulation 7.9.15E and Regulation 7.9.15F

- (p) otherwise deny the paragraph;

*in specific response to subparagraph 31(b) of the FASOC:*

- (q) deny that the Add On Insurance Products had no or no material financial value and otherwise say that they had material value;

**Particulars**

A contract of insurance constitutes, in return for some form of payment from the insured, the provision of protection by the insurer against a

possible eventuality, the occurrence and timing of which (if at all) is inherently uncertain.

The insurance provided by the Add On Insurance Products conferred protection against a number of possible eventualities (“**Protections**”).

The Protections provided to the holders of Add On Insurance Products conferred financial and non-financial benefits, including entitlement to indemnity and peace of mind.

By reason of its acceptance of risk under the Add On Insurance Product policies, Swann was required, consistent with its prudential obligations and sound financial management, to retain capital to ensure it could meet the liabilities it incurred or may incur in the future under the Add On Insurance Products and it did so.

The terms and conditions of the cover provided were set out in the product disclosure statement and policy schedule for each Add On Insurance Product issued to the Applicant and Group Members.

The Applicant and Group Members were best placed to determine whether they required or would benefit from some or all of the Protections.

The amendment of the phrase “no or no material value” in the Statement of Claim to “no or no material financial value” in the ASOC is an admission that the Add On Insurance Products had material value.

*in specific response to subparagraphs 31(c), (cb), (d) and (e) of the FASOC:*

- (r) deny subparagraphs 31(c), 31(cb), 31(d) and 31(e) of the FASOC;
- (s) say that Authorised Representatives made available financial services guides to purchasers of Add On Insurance Products that contained disclosures to the effect that any financial product advice that may be provided to them would be of a general nature only and did not take their personal needs, objectives or financial situation into account, and that staff of Authorised Representatives may receive bonuses based on the sales of all financial products over a period; and

**Particulars**

The Financial Services Guide prepared on 13 August 2013 and issued by Sawicki Group Pty Ltd to the Applicant on or about that date stated:

*“Our staff who provide the authorised financial services are paid a salary for their services and may also receive bonuses based on the volume of sales of all financial products over a period”*

*“In addition to their salary, we may share or pass on a proportion of the commission, volume bonus and sales incentives to our authorised sales staff.”*

*“Any financial product advice we may provide to you will be of a general nature only and has not taken your personal needs, objectives, or financial situation into account.”*

*in specific response to subparagraphs 31(f) and (g) of the FASOC:*

- (t) refer to and repeat paragraph 31(s), above;
- (u) deny paragraphs 31(f) and 31(g) of the FASOC;
- (v) say further that:
  - (i) the MBI Add On Insurance Product provided benefits beyond the existing statutory obligations of the manufacturer or seller of the Motor Vehicle, being ease of claims lodgement, speed of claim approval, transfer of policy, and complaints and dispute handling process;
  - (ii) from at least 2011 the Product Disclosure Statement for MBI contained disclosures to the effect that statutory guarantees could not be excluded, and that MBI provided customers with benefits that are in addition to statutory rights and remedies;

**Particulars**

The product disclosure statement for WarrantyASSIST issued to the Applicant by Sawicki Group Pty Ltd [JAO.001.001.0027] stated:

*Under the Australian Consumer Law (ACL), your vehicle comes with guarantees that cannot be excluded. This insurance provides you with benefits that are in addition to your rights and remedies under the ACL. In summary, these additional benefits include:*

*◆ Ease of claims lodgement – simply return the Vehicle to the selling dealer (or an Authorised service facility), provide them with your policy details and the claim lodgement will be taken care of for you. No claim form is required.*

◆ *Speed of claim approval – over 90% of reported claims are assessed on the same day the claim is reported, so approved repairs are acted on quickly and you get your Vehicle back on the road as soon as possible.*

◆ *Additional benefits – cover is provided for costs relating to towing, car rental, and accommodation.*

◆ *Transfer of policy – we may approve transfer of this policy to the new owner upon private sale of your Vehicle.*

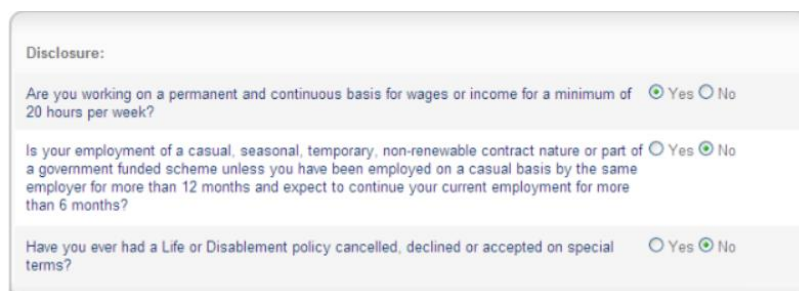
◆ *Complaints and dispute handling process – if you are not satisfied in any way with this policy, the quality of repairs or our service, we have an easy to follow process to help with your complaint, please contact us on 1800 806 601.*

*in specific response to subparagraph 31(h) of the FASOC:*

- (w) deny paragraph 31(h) of the FASOC;
- (x) say that the Loan Schedule issued to the Applicant disclosed the interest rate, the total amount of the loan and the premiums for the Add On Insurance Products he purchased;

*in specific response to subparagraphs 31(i) and (j) of the FASOC:*

- (y) deny subparagraphs (i) and (j) of the FASOC;
- (z) refer to and rely upon the terms of the product disclosure statement for each Add On Insurance Product, which set out the exclusions, exceptions and limits to the cover offered;
- (aa) further say the Activ8 Sales System prompted Authorised Representatives to disclose some exclusions, exceptions and limits to the cover offered by LPI by means of a prompt screen containing the questions below; and



Disclosure:

Are you working on a permanent and continuous basis for wages or income for a minimum of 20 hours per week?  Yes  No

Is your employment of a casual, seasonal, temporary, non-renewable contract nature or part of a government funded scheme unless you have been employed on a casual basis by the same employer for more than 12 months and expect to continue your current employment for more than 6 months?  Yes  No

Have you ever had a Life or Disablement policy cancelled, declined or accepted on special terms?  Yes  No

- (bb) say the Activ8 Sales System prompted Authorised Representatives to disclose the lump sum cost of each Add On Insurance Product by means of a prompt

screen containing the total premium of each Add On Insurance Product selected for purchase by the customer.

- 32 As to paragraph 32 of the FASOC, the Respondents:
- (a) refer to and repeat paragraphs 23A(c) and 31 above;
  - (b) admit that the Applicant and Group Members did not know that the Add On Insurance Products had no or no material financial value (which assertion is denied);
  - (c) otherwise do not know and therefore cannot admit what the Applicant and Group Members did or did not know prior to applying for finance or entering into the Finance Agreement; and
  - (d) otherwise deny the paragraph.
- 33 Not used.
- 34 The Respondents deny paragraph 34 of the FASOC, and further refer to and repeat paragraphs 3, 4, 11 to 14 and 29 to 32 above.
- 34A The Respondents deny paragraph 34A of the FASOC, and further refer to and repeat paragraphs 3, 4, 11 to 14 and 26(b), 26(d), 26(e), 26(f), 26(g), 26(h), 26(i), 26(j), 26(k) and 26(l), above.
- 35 As to paragraph 35 of the FASOC, the Respondents:
- (a) refer to and repeat paragraph 31 above; and
  - (b) deny the paragraph.
- 35A As to paragraph 35A of the FASOC, the Respondents:
- (a) refer to and repeat paragraphs 26(b), 26(d), 26(e), 26(f), 26(g), 26(h), 26(i), 26(j), 26(k) and 26(l), and 35 above;
  - (b) do not know and therefore cannot admit that the Authorised Representatives used one or more of the sales techniques alleged;
  - (c) do not know and therefore cannot admit that if one of the sales techniques alleged had not been used that the Applicant and Group Members would not have purchased the Add On Insurance Products.
- 36 As to paragraph 36 of the FASOC, the Respondents:
- (a) refer to and repeat paragraphs 34, 34A, 35 and 35A above and 59 below;

- (b) deny that the Applicant and Group Members suffered the loss or damage claimed or at all;
- (c) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the failure of the Applicant and Group Members to take reasonable care;

**Particulars**

Paragraph 31(f)-(l) above.

It is inferred that the Applicant and any such Group Members paid no regard to the disclosures there pleaded.

- (d) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), the quantum of any such loss or damage is reduced and damages are not payable to the Applicant and the Group Members to the extent that the Applicant and the Group Members have received:
  - (i) payments pursuant to the remediation program Swann has undertaken in respect of the Add On Insurance Products;
  - (ii) amounts or the benefit of any claims paid by Swann; and/or
  - (iii) benefits referable to the existence of a potential right to indemnity during the currency of the Add On Insurance Product policy;
- (e) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel their Add On Insurance Product policy and claim a rebate as provided for in the relevant product disclosure statement;
- (f) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel the relevant policy and/or claim a rebate after receipt of communications from Swann and/or IAL reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs;

### **Particulars**

From 1 June 2017, Swann and/or IAL sent to existing holders of multi-year Add On Insurance Products annual correspondence reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs.

- (g) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel the relevant Add On Insurance Product policy during the cooling off period provided for in the product disclosure statement.

### **Particulars**

To the extent that it was a term of an Add On Insurance Product that the Applicant or a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Applicant and Group Members had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

37 Not used.

38 As to paragraph 38 of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 15, 26, 28, 28A, 30 and 31 above;
- (b) as to paragraph 38(e):
- (i) refer to and repeat paragraphs 26(b) to 26(n), 28 and 28A and admit the sub-paragraph to the extent that those paragraphs are admitted;
- (ii) to the extent that it is alleged that the Swann Sales System involved:
- (A) sales processes carried out by the Authorised Representatives which had the intention or alternatively the effect of causing the customer to conclude that they had to buy at least one of the Add On Insurance Products; and
- (B) the use of the Activ8 Sales System referred to in paragraph 28 to 28A, to the extent that the alleged features of the Activ8 Sales System is denied,

- deny the sub-paragraph;
- (iii) say that the sale of the Add On Insurance Products occurred in circumstances where the Applicants and the Group Members were afforded a cooling off period during which they could cancel the policy; and
- (iv) otherwise do not know and cannot admit whether the Authorised Representatives used any one or more of the sales processes alleged in the sale of the Add On Insurance Products to the Applicant or any Group Member;
- (c) say that Authorised Representatives were authorised, upon the completion of the required training, to provide Tier 2 general financial product advice, but not personal financial product advice; and
- (d) otherwise deny the paragraph.

38A As to paragraph 38A of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 15 to 28D, 31 and 38 above;
- (b) admit that a purpose or effect of the Swann Sales System was the generation of sales for Swann; and
- (c) otherwise deny the paragraph.

39 As to paragraph 39 of the FASOC, the Respondents:

- (a) admit paragraph 39(a);
- (b) deny paragraph 39(b);

**Particulars**

Paragraph 31 above.

- (ba) deny paragraph 39(ba);

**Particulars**

Paragraphs 14A and/or 14B above.

- (c) say that paragraph 39(c) is embarrassing and deny the paragraph;

**Particulars**

The claims payouts relative to premiums on the Add On Insurance Products were comparable to those issued by other insurers

- (d) deny paragraph 39(d);



### **Particulars**

An individual insurance policy is not of no or no material value in circumstances where the value of the claim or claims made on the policy is less than the premium paid for it.

- (e) deny paragraph 39(e);

### **Particulars**

An individual insurance policy is not of no or no material value in circumstances where the value of the claim or claims made on the policy is less than the premium paid for it.

- (f) say that paragraph 39(f) is embarrassing and deny the paragraph;
- (g) deny paragraph 39(g);
- (h) say that paragraph 39(h) is embarrassing and deny the paragraph;
- (i) as to paragraph 39(i):
  - (i) refer to and repeat paragraphs 31 and 23A above; and
  - (ii) otherwise deny the paragraph;
- (j) as to paragraph 39(j):
  - (i) refer to and repeat paragraphs 23A, 31 and 38A above; and
  - (ii) otherwise deny the paragraph.
- (k) deny paragraph 39(k);
- (l) as to paragraph 39(l), the Respondents:
  - (i) admit that the premiums for identical Add On Insurance Products could vary depending on the level of commission and, for CCI policies, whether the customer was a business or retail customer, save to the extent that this variation is described as “substantial”; and
  - (ii) otherwise deny the paragraph.
- (m) as to paragraph 39(m), the Respondents refer to and repeat paragraph 38(b) above, and:
  - (i) as to paragraph 38(m)(i):
    - (A) refer to and repeat paragraph 26 and admit the paragraph to the extent that paragraph is admitted;

- (B) to the extent that it is alleged that the sales processes carried out by the Authorised Representatives had the intention or alternatively the effect of causing the customer to conclude that they had to buy at least one of the Add On Insurance Products, deny the paragraph; and
  - (C) otherwise do not know and cannot admit whether the sales processes carried out by the Authorised Representatives were consistent with the processes and techniques referred to in paragraph 26(b) to 26(n),
- (ii) as to paragraph 38(m)(ii):
- (A) refer to and repeat paragraph 28A;
  - (B) admit to the extent those paragraphs are admitted; and
  - (C) otherwise deny the paragraph; and
- (n) as to paragraph 39(n), the Respondents refer to and repeat paragraph 28C and admit to the extent that paragraph 28C is admitted, and otherwise deny the paragraph.

40 The Respondents deny paragraph 40 of the FASOC and further refer to and repeat paragraphs 3, 4, 11 to 28D, 31 to 32, and 37 to 39 of the FASOC.

41 The Respondents deny paragraph 41 of the FASOC and refer to and repeat paragraphs 3, 4, 11 to 14, 31 to 32, and 37 to 39 above.

42 As to paragraph 42 of the FASOC, the Respondents:

- (a) deny that the Applicant and the Group Members have suffered the loss or damage claimed or at all;
- (b) further and in the alternative say that, to the extent that the Applicant and Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant and the Group Members;

**Particulars**

Paragraph 31(f)-(l) above.

- (c) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), the quantum of any such loss or damage is reduced and damages are not payable to the Applicant

and the Group Members to the extent that the Applicant and the Group Members have received:

- (i) payments pursuant to the remediation program Swann has undertaken in respect of the Add On Insurance Products;
  - (ii) amounts or the benefit of any claims paid by Swann; and/or
  - (iii) benefits referable to the existence of a potential right to indemnity during the currency of the Add On Insurance Product policy;
- (d) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel their Add On Insurance Product policy and claim a rebate as provided for in the relevant product disclosure statement;
- (e) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel the relevant policy and/or claim a rebate after receipt of communications from Swann and/or IAL reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs;

**Particulars**

From 1 June 2017, Swann and/or IAL sent to existing holders of multi-year Add On Insurance Products annual correspondence reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs.

- (f) further and in the alternative say that, to the extent that the Applicant and the Group Members suffered loss or damage (which is denied), such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel the relevant Add On Insurance Product policy during the cooling off period provided for in the product disclosure statement.

**Particulars**

To the extent that it was a term of an Add On Insurance Product that the Applicant or a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Applicant and Group Members had the opportunity to read the product

disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

- (g) refer to and repeat paragraph 36 above; and
- (h) otherwise deny the paragraph.

42A As to paragraph 42A of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 12 above; and
- (b) admit the paragraph.

42B As to paragraph 42B of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 31 above; and
- (b) deny the paragraph.

42C As to paragraph 42C of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 31 and 42B above; and
- (b) deny the paragraph.

42D As to paragraph 42D of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 31, 39, 42B and 42C above; and
- (b) deny the paragraph.

42E As to paragraph 42E of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 14C, 15, 15A, 23A, 26(b) to 26(n), 27A, 28B, 28D, 37, 38, 39 and 42B-42D above; and
- (b) deny the paragraph.

42F As to paragraph 42F of the FASOC, the Respondents:

- (a) refer to and repeat paragraphs 42A to 42E above; and
- (b) deny the paragraph.

42G As to paragraph 42G of the FASOC, the Respondents:

- (a) refer to and repeat paragraph 14 above; and
- (b) admit the paragraph.

- 42H As to paragraph 42H of the FASOC, the Respondents:
- (a) refer to and repeat paragraph 31 above;
  - (b) say that in issuing Add On Insurance Products to Group Members, Swann provided a dealing service;
  - (c) deny that Swann made a false or misleading representation concerning that dealing service;
  - (d) otherwise deny the paragraph.
- 42I As to paragraph 42I of the FASOC, the Respondents:
- (a) refer to and repeat paragraph 42G and 42H above; and
  - (b) deny the paragraph.
- 43 As to paragraph 43 of the FASOC, the Respondents:
- (a) refer to and repeat paragraphs 31 and 32 above;
  - (b) admit that the Applicant and Group Members did not know that the Add On Insurance Products had no or no material financial value (which assertion is denied); and
  - (c) otherwise deny the paragraph.
- 44 As to paragraph 44 of the FASOC, the Respondents:
- (a) refer to and repeat paragraph 43 above;
  - (b) admit that the belief pleaded in paragraphs 43(ab) and 43(a) and 43(e), if held, was incorrect; and
  - (c) otherwise deny the paragraph.
- 45 The Respondents deny paragraph 45 of the FASOC and refer to and repeat paragraphs 43 and 44 above.
- 46 The Respondents deny paragraph 46 of the FASOC and refer to and repeat paragraph 45 above.
- 47 As to paragraph 47 of the FASOC, the Respondents:
- (a) refer to and repeat paragraphs 43 to 46 above;
  - (b) deny the paragraph;

- (c) further and in the alternative if, which is denied, the Premiums are monies had and received by Swann to the use of the Applicant and the Group Members, Swann is not obliged to repay any sums to the Applicant and the Group Members to the extent that the Applicant and the Group Members have received:
- (i) payments pursuant to the remediation program Swann has undertaken in respect of the Add On Insurance Products;
  - (ii) amounts or the benefit of any claims paid by Swann; and/or
  - (iii) benefits referable to the existence of a potential right to indemnity during the currency of the Add On Insurance Product policy;
- (d) further and in the alternative if, which is denied, the Premiums are monies had and received by Swann to the use of the Applicant and the Group Members, such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel their Add On Insurance Product policy and claim a rebate as provided for in the relevant product disclosure statement;
- (e) further and in the alternative if, which is denied, the Premiums are monies had and received by Swann to the use of the Applicant and the Group Members, such loss or damage was caused or contributed to by the Applicant's and the Group Members' failure to cancel the relevant policy and/or claim a rebate after receipt of communications from Swann and/or IAL reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs;

**Particulars**

From 1 June 2017, Swann and/or IAL sent to existing holders of multi-year Add On Insurance Products annual correspondence reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs.

- (f) further and in the alternative if, which is denied, the Premiums are monies had and received by Swann to the use of the Applicant and the Group Members, such loss or damage was caused or contributed to by the Applicant's and the

Group Members' failure to cancel the relevant Add On Insurance Product policy during the cooling off period provided for in the product disclosure statement.

**Particulars**

To the extent that it was a term of an Add On Insurance Product that the Applicant or a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Applicant and Group Members had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

48 In further answer to paragraphs 43 to 47 of the FASOC, the Respondents say that:

- (a) Swann, acting in good faith relied to its detriment on the payment of premiums pleaded by incurring expenditure and/or other disadvantageous consequences that Swann would not have otherwise incurred;

**Particulars**

1. In reliance upon the payment of the Premiums, Swann has discharged its obligations under the Add On Insurance Products either completely (in respect of those policies which have come to an end) or in part (in respect of those policies which continue to be on foot).
2. In reliance upon the payment of a Premium by the Applicant in respect of the Warranty Assist policy purchased by the Applicant, which policy expired on 30 January 2019, Swann and/or IAL have fully performed their obligations under the policy.
3. In reliance upon the payment of a Premium by the Applicant in respect of the GapCover policy purchased by the Applicant, which policy is due to expire on 13 August 2020, Swann and/or IAL have partially performed their obligations under the policy and continue to perform the balance of their obligations under the policy.
4. In reliance on the payment of the Premiums, Swann accepted the risk of paying claims made under the Add On Insurance Product policies purchased by the Applicant and Group Members.

5. By reason of its acceptance of risk under the Add On Insurance Product policies, Swann was required, consistent with its prudential obligations and sound financial management, to retain capital to ensure it could meet the liabilities it incurred or may incur in the future under the Add On Insurance Products and it did so.
6. During the Relevant Period, Swann received the Premium payments on a regular basis and in reliance thereon;
  - (a) paid a portion of the Premium payments to Motor Vehicle Dealers by way of Commission;
  - (b) as a consequence of having received the Premium payments, continued to make expenditures for the purpose of its business comprising the distribution of Add On Insurance Products;
  - (c) took the Premium payments into account in estimating, calculating and directing annual profits; and
  - (d) paid tax on those profits.
- (b) by reason of the change of position pleaded in sub-paragraph (a) above, it would be inequitable in all the circumstances to require Swann to repay the Premiums in whole or in part.

49 In further answer to paragraphs 43 to 47 of the FASOC, the Respondents say that:

- (a) Swann gave good consideration to the Applicant and each Group Member from whom it received the payment of a Premium for an Add On Insurance Product; and

**Particulars**

1. A contract of insurance constitutes, in return for some form of payment from the insured, the provision of protection by the insurer against a possible eventuality, the occurrence and timing of which (if at all) is inherently uncertain.
2. The insurance provided by the Add On Insurance Products conferred protection against a number of possible eventualities (“**Protections**”).



3. The Protections provided to the holders of Add On Insurance Products conferred financial and non-financial benefits including entitlement to indemnity and peace of mind.
4. The Protections included non-insurance benefits, which could include towing and roadside assistance.
5. In respect of those Add On Insurance Product policies where claims were made, Swann and/or IAL have made payments to those policyholders.
6. In reliance upon the payment of the Premiums, Swann has discharged its obligations under the Add On Insurance Products either completely (in respect of those policies which have come to an end) or in part (in respect of those policies which continue to be on foot).
7. In reliance upon the payment of a Premium by the Applicant in respect of the Warranty Assist policy purchased by the Applicant, which policy expired on 30 January 2019, Swann and/or IAL have fully performed their obligations under the policy.
8. In reliance upon the payment of a Premium by the Applicant in respect of the GapCover policy purchased by the Applicant, which policy is due to expire on 13 August 2020, Swann and/or IAL have partially performed their obligations under the policy and continue to perform the balance of their obligations under the policy.

- (b) by reason of the provision of good consideration pleaded in sub-paragraph (a) above, Swann is not obliged to repay to the Applicant and the Group Members the Premiums payments received by it.

50 In further answer to paragraphs 43 to 47 of the FASOC, the Respondents say that, to the extent that the Applicant and/or Group Members have made claims on Add On Insurance Product policies that they purchased:

- (a) the making of such claims constitutes unequivocal words or conduct by which they have elected to take the benefit of those policies; and
- (b) they are not entitled to the repayment of the Premiums paid in respect of those policies.

51 In further answer to paragraphs 43 to 47 of the FASOC, the Respondents say that:

- (a) any such cause of action may or could with reasonable diligence have been discovered by the Applicant and Group Members at the time of, or in the alternative immediately after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product;

### **Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that the Applicant or a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Applicant and Group Members had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

From 1 June 2017, Swann and/or IAL sent to existing holders of multi-year Add On Insurance Products annual correspondence reminding them of the existence of cover and inviting them to ensure that the relevant product continued to suit their needs.

- (b) by reason of the delay of the Applicant and Group Members in commencing these proceedings and the matters pleaded in sub-paragraph (a) above, together with the matters pleaded at paragraph 48 above, it would be inequitable in all the circumstances to require Swann to repay the Premiums in whole or in part.

52 The Respondents deny paragraph 1 under subheading G of the FASOC and further say in response to sub-paragraph (d) thereof that the Applicant and Group Members are not entitled to interest from such date to the extent that they were eligible to participate in the remediation program Swann has undertaken in respect of the Add On Insurance Products, or to the extent they were entitled to cancel their policy, but did not do so.

### **Limitation**

*ASIC Act s 12GF: original group members, original claims*

53 In further answer to the whole of the FASOC and the claims for relief set out in the Further Amended Originating Application of the Applicant filed 10 March 2020 ("FAOA"), if, which is denied, any Group Member (other than a person who became a Group

Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the Amended Originating Application of the Applicant filed 15 August 2019 (“AOA”) and the Amended Statement of Claim of the Applicant dated 26 July 2019 (“ASOC”) has a cause of action for breach of section 12DA, 12DF or 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) (“ASIC Act”) on the basis of the matters pleaded in the Statement of Claim (“SOC”) prior to its amendment in the ASOC, any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

#### **Particulars**

The Originating Application (“**OA**”) was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The Statement of Claim (“**SOC**”) was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

*ASIC Act s 12GF: new group members, claims raised in the SOC and ASOC*

53A In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of section 12DA, 12DB, 12DF or 12CB of the ASIC Act, on the basis of the contents of the SOC and/or ASOC, any such cause of action that accrued before 14 August 2013 is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

#### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

*ASIC Act s 12GF: original group members, new claims raised in the ASOC*

53B In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of 12DA, 12DF or 12CB of the ASIC Act on the basis of the amendments to the SOC set out in the ASOC (other than the deletion of the words “being natural persons” from the definition of group members therein), or for breach of section 12DB of the ASIC Act (as set out in the ASOC), any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The AOA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

*ASIC Act s 12GF: original group members, new claims raised in the FASOC*

53C In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of 12DA, 12DB, 12DF or 12CB of the ASIC Act on the basis of amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013; or
- (h) 9 March 2014; or
- (i) 10 March 2014,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

## **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The AOA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

*ASIC Act s 12GF: new group members, new claims raised in the FASOC*

53D In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of section 12DA, 12DB, 12DF or 12CB of the ASIC Act on the basis of the amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

- (a) 14 August 2013; or
- (b) 9 March 2014; or
- (c) 10 March 2014,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

### *Corporations Act s 1041I: original group members, original claims*

54 In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who is a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 1041H of the Corporations Act 2001 (Cth) (“Corporations Act”) on the basis of the matters pleaded in the SOC prior to its amendment in the ASOC, any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013,

is not maintainable by operation of section 1041I(2) of the Corporations Act.

**Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

*Corporations Act s 1041I: new group members, claims raised in the SOC and ASOC*

54A In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of sections 1041E or 1041H of the Corporations Act, on the basis of the contents of the SOC and/or ASOC any such cause of action that accrued before 14 August 2013 is not maintainable by operation of section 1041I(2) of the Corporations Act.

**Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

*Corporations Act s 1041I: original group members, claims raised in the ASOC*

54B In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 1041H of the Corporations Act on the basis of the amendments to the SOC set out in the ASOC (other than the deletion of the words "being natural persons" from the definition of group members therein), or for breach of



section 1041E of the Corporations Act (as set out in the ASOC), any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013,

is not maintainable by operation of section 1041I(2) of the Corporations Act.

### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The AOA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

54C In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 1041E or 1041H of the Corporations Act on the basis of amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013; or
- (h) 9 March 2014; or
- (i) 10 March 2014,

is not maintainable by operation of sub-section 1041I(2) of the Corporations Act.

#### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words “being natural persons” from the definition of group members

as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The AOA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

*Corporations Act s 1041I: new group members, new claims raised in the FASOC*

54D In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of section 1041E or 1041H of the Corporations Act on the basis of the amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

(a) 14 August 2013; or

(b) 9 March 2014; or

(c) 10 March 2014,

is not maintainable by operation of sub-section 1041I(2) of the Corporations Act.

**Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

*Corporations Act s 991A: original group members, original claims*

55 In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who is a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 991A of the Corporations Act on the basis of the matters pleaded in the SOC prior to its amendment in the ASOC, any such cause of action that accrued before:

- (a) 8 April 2013;
- (b) 9 April 2013; or
- (c) 10 April 2013,

is not maintainable by reason of section 991A(3) of the Corporations Act.

**Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

*Corporations Act s 991A: new group members, claims raised in the SOC and ASOC*

55A In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of section 991A of the Corporations Act on the basis of the contents of the SOC and/or ASOC, any such cause of action that accrued before 14 August 2013 is not maintainable by operation of section 991A(3) of the Corporations Act.

### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

### *Corporations Act s 991A: original group members, claims raised in the ASOC*

55B In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 991A of the Corporations Act on the basis of the amendments to the SOC set out in the ASOC (other than the deletion of the words “being natural persons” from the definition of group members therein), any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013,

is not maintainable by operation of section 991A(3) of the Corporations Act.

### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court’s Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The OA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

*Corporations Act s 991A: original group members, new claims raised in FASOC*

55C In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a cause of action for breach of section 991A of the Corporations Act on the basis of amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

- (a) 8 April 2013; or
- (b) 9 April 2013; or
- (c) 10 April 2013; or
- (d) 29 July 2013; or
- (e) 30 July 2013; or
- (f) 14 August 2013; or
- (g) 15 August 2013; or
- (h) 9 March 2014; or
- (i) 10 March 2014,

is not maintainable by operation of sub-section 991A(3) of the Corporations Act.

## **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The AOA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

### *Corporations Act s 991A: new group members, new claims raised in FASOC*

55D In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a cause of action for breach of section 991A of the Corporations Act on the basis of the amendments to the ASOC set out in the FASOC, any such cause of action that accrued before:

- (a) 14 August 2013; or
- (b) 9 March 2014; or
- (c) 10 March 2014,

is not maintainable by operation of sub-section 991A(3) of the Corporations Act.

### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

56 Not used.

57 Not used.

*Mistake: original group members, original claims*

58 In further answer to the whole of the ASOC and the claims for relief set out in the AOA, if, which is denied, any Group Member (other than a person who is a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a claim for monies had and received by Swann to the use of the Group Members on the basis of the matters pleaded in the SOC prior to its amendment in the ASOC:

- (a) any such cause of action that is governed by the law of:



- (i) New South Wales and arose before 8 April 2013 or 9 April 2013 or 10 April 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013, is not maintainable by reason of section 14 of the *Limitation Act 1969* (NSW);
- (ii) Victoria and arose before 8 April 2013 or 9 April 2013 or 10 April 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013, is not maintainable by reason of section 5 of the *Limitation of Actions Act 1958* (Vic);
- (iii) Queensland and arose before 8 April 2013 or 9 April 2013 or 10 April 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013, is not maintainable by reason of section 10 of the *Limitation of Actions Act 1974* (Qld);
- (iv) Tasmania and arose before 8 April 2013 or 9 April 2013 or 10 April 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013, is not maintainable by reason of section 4 of the *Limitation Act 1974* (Tas);
- (v) South Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
- (vi) Western Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);
- (vii) the Northern Territory and arose before 8 April 2016 or 9 April 2016 or 10 April 2016, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2016 or 9 April 2016 or 10 April 2016, is not maintainable by reason of section 12 of the *Limitation Act 1981* (NT); or
- (viii) the Australian Capital Territory and arose before 8 April 2013 or 9 April 2013 or 10 April 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013, is not

maintainable by reason of section 11 of the *Limitation Act 1985* (ACT);  
and

**Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

- (b) any such cause of action may or could with reasonable diligence have been discovered by the Group Member at the time of, or in the alternative immediately after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product.

**Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Group Member had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

*Mistake: new group members, claims raised in the SOC and ASOC*

58A In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a claim for monies had and received by Swann to the use of the Group Members on the basis of the contents of the SOC and/or ASOC:

- (a) any such cause of action that is governed by the law of:

- (i) New South Wales and arose before 14 August 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2013, is not maintainable by reason of section 14 of the *Limitation Act 1969* (NSW);
- (ii) Victoria and arose before 14 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013, is not maintainable by reason of section 5 of the *Limitation of Actions Act 1958* (Vic);
- (iii) Queensland and arose before 14 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013, is not maintainable by reason of section 10 of the *Limitation of Actions Act 1974* (Qld);
- (iv) Tasmania and arose before 14 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013, is not maintainable by reason of section 4 of the *Limitation Act 1974* (Tas);
- (v) South Australia and arose before 14 August 2013 is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
- (vi) Western Australia and arose before 14 August 2013 is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);
- (vii) the Northern Territory and arose before 14 August 2016, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2016, is not maintainable by reason of section 12 of the *Limitation Act 1981* (NT); or
- (viii) the Australian Capital Territory and arose before 14 August 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2013, is not maintainable by reason of section 11 of the *Limitation Act 1985* (ACT); and

#### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to

take effect from the date those orders were made, being 14 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

- (b) any such cause of action may or could with reasonable diligence have been discovered by the Group Member at the time of, or in the alternative immediately after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product.

### **Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Group Member had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

*Mistake: original group members, claims raised in the ASOC*

58B In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC) has a claim for monies had and received by Swann to the use of the Group Members on the basis of the amendments to the SOC set out in the ASOC (other than the deletion of the words "being natural persons" from the definition of group members therein):

- (a) any such cause of action that is governed by the law of:
- (i) New South Wales and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July

- 2013 or 14 August 2013 or 15 August 2013, is not maintainable by reason of section 14 of the *Limitation Act 1969* (NSW);
- (ii) Victoria and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, is not maintainable by reason of section 5 of the *Limitation of Actions Act 1958* (Vic);
  - (iii) Queensland and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, is not maintainable by reason of section 10 of the *Limitation of Actions Act 1974* (Qld);
  - (iv) Tasmania and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, is not maintainable by reason of section 4 of the *Limitation Act 1974* (Tas);
  - (v) South Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
  - (vi) Western Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);
  - (vii) the Northern Territory and arose before 8 April 2016 or 9 April 2016 or 10 April 2016 or 29 July 2016 or 30 July 2016 or 14 August 2016 or 15 August 2016, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2016 or 9 April 2016 or 10 April 2016 or 29 July 2016 or 30 July

2016 or 14 August 2016 or 15 August 2016, is not maintainable by reason of section 12 of the *Limitation Act 1981* (NT); or

- (viii) the Australian Capital Territory and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013, is not maintainable by reason of section 11 of the *Limitation Act 1985* (ACT); and

#### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The ASOC was lodged electronically for filing (without leave) on 29 July 2019, accepted for filing (without leave) on 30 July 2019 and served (without leave) on 30 July 2019.

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

The OA was lodged electronically for filing on 15 August 2019, accepted for filing on 15 August 2019 and served on 15 August 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

- (b) any such cause of action may or could with reasonable diligence have been discovered by the Group Member at the time of, or in the alternative immediately

after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product.

**Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Group Member had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

*Mistake: original group members, claims raised in FASOC*

58C In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any Group Member (other than a person who became a Group Member by reason of the deletion of the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC) has a claim for monies had and received by Swann to the use of the Group Members on the basis of the amendments to the ASOC set out in the FASOC:

- (a) any such cause of action that is governed by the law of:
  - (i) New South Wales and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 14 of the *Limitation Act 1969* (NSW);
  - (ii) Victoria and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July

- 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 5 of the *Limitation of Actions Act 1958* (Vic);
- (iii) Queensland and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 10 of the *Limitation of Actions Act 1974* (Qld);
- (iv) Tasmania and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 4 of the *Limitation Act 1974* (Tas);
- (v) South Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014 is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
- (vi) Western Australia and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014 is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);
- (vii) the Northern Territory and arose before 8 April 2016 or 9 April 2016 or 10 April 2016 or 29 July 2016 or 30 July 2016 or 14 August 2016 or 15 August 2016 or 9 March 2017 or 10 March 2017, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2016 or 9 April 2016 or 10 April 2016 or 29 July 2016 or 30 July 2016 or 14 August 2016 or 15 August 2016 or 9 March 2017 or 10 March 2017, is not maintainable by reason of section 12 of the *Limitation Act 1981* (NT); or



- (viii) the Australian Capital Territory and arose before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 8 April 2013 or 9 April 2013 or 10 April 2013 or 29 July 2013 or 30 July 2013 or 14 August 2013 or 15 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 11 of the *Limitation Act 1985* (ACT); and

### **Particulars**

The OA was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

The SOC was lodged electronically for filing on 8 April 2019, accepted for filing under the Court's Rules on 9 April 2019 and served on 10 April 2019.

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An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

In making that order on 14 August 2019, the Court noted that the date on which the amendments in the AOA and the ASOC, other than the amendments deleting the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC (which take effect from the date of that order), are to take effect is reserved for determination at trial.

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An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

- (b) any such cause of action may or could with reasonable diligence have been discovered by the Group Member at the time of, or in the alternative immediately after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product.

**Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Group Member had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

*Mistake: new group members, claims raised in FASOC*

58D In further answer to the whole of the FASOC and the claims for relief set out in the FAOA, if, which is denied, any person who became a Group Member by reason of the deletion of the words "being natural persons" from the definition of group members as contained in the AOA and the ASOC has a claim for monies had and received by Swann to the use of the Group Members on the basis of the amendments to the ASOC set out in the FASOC:

- (a) any such cause of action that is governed by the law of:
- (i) New South Wales and arose before 14 August 2013 or 9 March 2014 or 10 March 2014, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 14 of the *Limitation Act 1969* (NSW);

- (ii) Victoria and arose before 14 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 5 of the *Limitation of Actions Act 1958* (Vic);
- (iii) Queensland and arose before 14 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 10 of the *Limitation of Actions Act 1974* (Qld);
- (iv) Tasmania and arose before 14 August 2013 or 9 March 2014 or 10 March 2014, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before 14 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 4 of the *Limitation Act 1974* (Tas);
- (v) South Australia and arose before 14 August 2013 or 9 March 2014 or 10 March 2014 is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
- (vi) Western Australia and arose before 14 August 2013 or 9 March 2014 or 10 March 2014 is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);
- (vii) the Northern Territory and arose before 14 August 2016 or 9 March 2017 or 10 March 2017, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2016 or 9 March 2017 or 10 March 2017, is not maintainable by reason of section 12 of the *Limitation Act 1981* (NT); or
- (viii) the Australian Capital Territory and arose before 14 August 2013 or 9 March 2014 or 10 March 2014, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before 14 August 2013 or 9 March 2014 or 10 March 2014, is not maintainable by reason of section 11 of the *Limitation Act 1985* (ACT); and

#### **Particulars**

An order granting leave to file the AOA and the ASOC was made on 14 August 2019.

Order 2 made on 14 August 2019 provided that the amendments deleting the words “being natural persons” from the definition of group members as contained in the AOA and the ASOC are to take effect from the date those orders were made, being 14 August 2019.

An order granting leave to file the FAOA and the FASOC was made on 9 March 2020.

In making that order on 9 March 2020, the Court noted that the date on which the amendments in the FAOA and the FASOC as to take effect is reserved for determination at trial.

The FAOA and the FASOC were lodged electronically, accepted for filing and served on 10 March 2020.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members’ claims have been provided.

- (b) any such cause of action may or could with reasonable diligence have been discovered by the Group Member at the time of, or in the alternative immediately after, or in the alternative within a period of 21 days, 28 days, or 30 days (depending upon the terms of the relevant Add On Insurance Product) from the date of, the purchase of the relevant Add on Insurance Product.

**Particulars**

Paragraphs 31(f)-(l) above.

To the extent that it was a term of an Add On Insurance Product that a Group Member had 21 days, 28 days, or 30 days from the date of purchase of the product to request that it be cancelled, the Group Member had the opportunity to read the product disclosure statement in respect of the product, to make inquiries to determine whether other insurers offered similar insurance on more favourable terms and, if so or if they otherwise desired to do so, to request the cancellation of the Swann-issued product.

**Proportionate liability**

- 59 For the purposes of this proportionate liability defence only, if, which is denied, the Applicant or any Group Member suffered loss or damage that was caused by the actions

of either of the Respondents as alleged in the FASOC, the Respondents say that, by reason of the matters so adopted:

- (a) the claims under:
  - (i) not used;
  - (ii) not used;
  - (iii) section 1041H of the Corporations Act are apportionable claims within the meaning of section 1041L of the Corporations Act; and
  - (iv) section 12DA of the ASIC Act are apportionable claims within the meaning of section 12GP of the ASIC Act;
- (b) in respect of the Applicant, Bay City Holden is a person whose acts or omissions caused the loss that is the subject of the Applicant's claim against the Respondents pleaded in the FASOC;
- (c) in respect of the Group Members, Motor Vehicle Dealers are persons whose acts or omissions caused the loss that is the subject of the Group Members' claims against the Respondents pleaded in the FASOC;

**Particulars to (b) and (c)**

The Respondents had no direct interaction with the Applicant or the Group Members with respect to entry into the Add On Insurance Products.

The Motor Vehicle Dealers were acting as the agents of the financiers with respect to Finance Agreements.

The Motor Vehicle Dealers obtained financial benefits from arranging any Finance Agreements and Add On Insurance Products.

Insofar as any misleading conduct occurred (which is denied), it occurred in the interaction between the Motor Vehicle Dealers and the Applicant and Group Members.

Further particulars may be supplied after discovery or subpoenas.

- (d) the Respondents are concurrent wrongdoers; and
- (e) the liability of the Respondents in relation to each of the Applicant's and/or Group Members' claims pleaded in the FASOC is limited pursuant to:
  - (i) not used;
  - (ii) not used;
  - (iii) section 1041N of the Corporations Act, in respect of claims under section 1041H of the Corporations Act; and

- (iv) section 12GR of the ASIC Act, in respect of claims under section 12DA of the ASIC Act.

### **Goods and services tax**

- 60 In response to the whole of the FASOC, to the extent that the Group Members were entitled to claim input tax credits in respect of goods and services tax paid on premiums for Add On Insurance Products, any entitlement to compensation or other relief (which is denied) is to be reduced by the amount of the input tax credits to which they were entitled.
- 61 In response to the whole of the FASOC, to the extent that the Group Members claimed tax deductions or otherwise reduced their taxable income in respect of any amounts they paid referable to the Add On Insurance Products, any entitlement to compensation or other relief (which is denied) is to be reduced by the amount of the tax deduction or tax benefit so derived.

### **Common questions of law and fact**

- 62 In the premises of the FAOA, the FASOC and this [Amended](#) Defence, the Respondents say that the common questions numbered 7, 11, 12, 15, 16, 17, 18 and 19 in the FAOA are not substantial questions of law or fact common to the claims of the Applicant and the Group Members.

Date: ~~30-8 March~~ [April](#) 2020



.....  
Moira Leonie Saville  
Lawyer for the Respondents  
King & Wood Mallesons

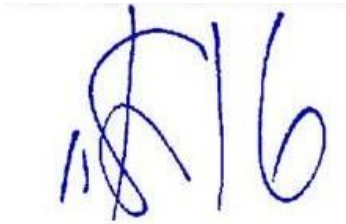
This pleading was prepared by Moira Leonie Saville and Alexander Basil Morris, lawyers, and settled by Jeremy Kirk SC and Fiona Roughley of counsel.

### Certificate of lawyer

I Moira Leonie Saville certify to the Court that, in relation to the Amended ~~e~~Defence filed on behalf of the First and Second Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~30-8~~ March ~~April~~ 2020



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Lawyer for the First and Second Respondents