

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

**ROUND 2: FINANCIAL ADVICE
TOPIC 5: THE DISCIPLINARY REGIME FOR THE FINANCIAL ADVICE PROFESSION
CASE STUDY: FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA LTD**

**– SUBMISSIONS ON BEHALF OF SAM HENDERSON,
HENDERSON MAXWELL FINANCIAL PLANNING PTY LTD
AND HENDERSON MAXWELL PTY LTD –**

Introduction

1. This submission is provided on behalf of Sam Henderson, Henderson Maxwell Financial Planning Pty Ltd and Henderson Maxwell Pty Ltd (collectively the **HM entities**). It is provided in accordance with the Commissioner's oral directions at the conclusion of the Round 2 hearings.¹
2. This submission responds to the 6² specific findings which Counsel Assisting suggested were open to be made regarding the HM entities.³

¹ T1986-1987

² Namely:

1. "Mr Henderson may have breached his obligation under section 961B of the Corporations Act to act in the best interests of Ms McKenna" (T1982:11);
2. Mr Henderson may have breached "...his obligation under section 961G of the Corporations Act to only provide advice to Ms McKenna if it would be reasonable to conclude that the advice was appropriate to her" (T1982-14);
3. Mr Henderson may have breached "...his obligation under section 961J to give priority to Ms McKenna's interests over his own interests and the interests of Henderson Maxwell in circumstances where, if Ms McKenna had implemented Mr Henderson's advice, Henderson Maxwell stood to earn a significant amount in ongoing investment management fees" (T1982:16);
4. "Henderson Maxwell may have committed an offence under section 952E(1) of the Corporations Act by giving a defective financial services guide dated 25 January 2016";
5. That Henderson Maxwell Pty Ltd's conduct fell below community standards and expectations as it is "...responsible for the conduct of its 30 employees, and an employee impersonated Ms McKenna in telephone calls with Ms McKenna's superannuation funds on at least five occasions;" (T1982:30); and
6. That Sam Henderson's conduct fell below community standards and expectations "...in response to the complaint made against him to the FPA, including his failure to provide adequate assistance to the FPA with its investigation, and his personal criticisms of Ms McKenna" (T1982:35).

³ T1982:9-36

Error regarding deferred / defined benefits in SaSS

3. As a preliminary matter, and regarding the error in the draft Statement of Advice (SOA), any consideration of suggested open findings 1 and 2⁴ must occur with the following in mind:

- 3.1 Mr Henderson readily conceded that the draft SOA contained an error in relation to the suggested roll over of Ms McKenna's SaSS⁵ superannuation.⁶ He was genuinely mistaken regarding the nature of the deferred benefit.⁷ He continued to erroneously describe it as a "*defined*" benefit in the paraplanner instruction⁸ and SOA.⁹ His mistaken understanding continued until it was corrected in his own telephone conversation with SaSS on 10 January 2017;¹⁰
- 3.2 The SOA was stated to be a draft on 14 December 2016;¹¹
- 3.3 Mr Henderson was clear with Ms McKenna that he was not seeking Ms McKenna's authority to proceed with implementing the draft SOA at the 14 December 2016 meeting, but instead wanted her to have time to consider the advice prior to the 10 January 2017 meeting.¹² Ms McKenna accepts that she was told so;¹³

⁴ Which relate in part to Mr Henderson's error regarding the proposed rolling out part of Ms McKenna's superannuation.

⁵ State Authorities Superannuation Scheme.

⁶ There are many instances of this occurring, both at the 10 January 2017 meeting and, for example, T1762:27

⁷ T1756:20, T1758:25, T 1781:45, Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0689 - FPA.0006.0001.0690, at paras 3.12 -3.14

⁸ HEN.0002.0001.0017

⁹ Exhibit 2.196 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.00009, FPA.0011.0003.00011, FPA.0011.0003.00020, FPA.0011.0003.00021, and FPA.0011.0003.0045

¹⁰ T1765:30-47

¹¹ T1739:45; T1764:15; and Exhibit 2.201, Statement and exhibits dated 5/04/2018, WIT.001.009.0006 at paragraph 19.

¹² Exhibit 2.201, Statement and exhibits dated 5/04/2018, WIT.001.009.0006 at paragraph 19.

¹³ T1738.40, McKenna Statement to FPA – see FPA.0012.0001.0397 at para 61 and FPA.0012.0001.0422 at para 103(b)

- 3.4 Mr Henderson confirmed the error immediately prior to the 10 January 2017 meeting;¹⁴
- 3.5 Mr Henderson corrected the error with Ms McKenna at commencement of the 10 January 2017 meeting,¹⁵ acknowledged his mistake¹⁶ and has taken steps to remedy it through training and enhanced checking;¹⁷
- 3.6 Ms McKenna did not sign the relevant clauses of the advice, nor did she act on the advice;¹⁸
- 3.7 Ms Henderson is confident that the error would have been identified prior to any implementation.¹⁹
4. Despite Mr Henderson's admitted error, the SOA could not have been implemented prior to the 10 January 2017 meeting²⁰ and was corrected immediately at the commencement of the 10 January 2017 meeting.
5. Importantly, items 11.1, 11.2 and 13 in the SOA clearly demonstrate that the SOA was of no force or effect until it was signed. It was never signed.
6. Whilst no analogy is perfect, one can consider a solicitor providing advice to a client. The client and the solicitor meet to discuss the circumstances in which the advice is sought (meeting 1). At that meeting, the solicitor tells the client that the advice will be prepared and would like the client to return once the relevant issues have been considered and the advice prepared in draft form. The next meeting occurs at which the solicitor provides the draft advice to the client (meeting 2). At meeting 2, the

¹⁴ T1780:35

¹⁵ Exhibit 2.201, Statement and exhibits dated 5/04 2018, WIT.001.0019.0006 at paragraph 22.

¹⁶ T1741:5-10, T1770:15 - T 1771:10, FPA.0011.0002.0191, FPA.0011.0002.0213, HEN.0002.0001.0001, WIT.0900.0002.0021

¹⁷ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681_) at FPA.0006.0001.0692 para 4.2 and FPA.0006.0001.0695 para 6.2 -6.3

¹⁸ T1739:25 – T1740:5

¹⁹ T1780:30

²⁰ Even if Ms McKenna had taken the advice and gone elsewhere to implement it, the advice was peculiar to products offered by the HM Entities, and so could not have been implemented, without alteration, elsewhere.

solicitor arranges for the client to return for a third meeting once the client has considered the draft advice. The next meeting occurs (meeting 3), prior to which the solicitor and/or the client identifies the error and the solicitor corrects it. The advice is never implemented. It is difficult to see how those circumstances could arise to a breach of professional duties, given the draft nature of the advice, the identification of the error prior to completion / implementation of the advice and the fact that the advice was never implemented.

7. Similarly, in the present situation, a draft advice containing an error was provided, the error was corrected prior to the meeting at which the advice was to be accepted and implemented and the advice was never acted on. In those circumstances, based on the error alone, the Commission should not find breaches of the duty to act in the client's best interests and to provide appropriate advice.
8. Given the foregoing considerations, in so far as suggested open findings 1 and 2 relate to the error in the draft advice, they are not open to be made.

Suggested open finding 1: Sam Henderson breach of s961B (provider must act in the best interests of the client)

9. The "best interests" duty in s961B(1) can be satisfied by the provider proving each of the matters set out in s961B(2). That evidential burden falls on the provider.²¹ In the inquisitorial setting of a Royal Commission, a provider does not carry the burden, much less so has the opportunity, to address each of those items. This is especially so when the allegation of a breach of s961B is made after the witness has left the witness box. In those circumstances, and despite the Commission's administrative functions, it would be ultimately unfair to make such a finding. Such a finding is appropriately left to a Court following an adversarial hearing at which the burden of

²¹ s961(2) "...if the provider proves that the provider has done each of the following..."

proof can be discharged and the evidence fully tested.²² The following submissions are made under cover of that position and address each of the potentially relevant matters under s961B(2).

10. In relation to the error in the advice, the submissions at paragraphs 3 to 8 are adopted and repeated.
11. Ms McKenna explained her “goals and objectives” to Mr Henderson in the electronic questionnaire²³ and in the 7 November 2017 meeting.²⁴ Mr Henderson made contemporaneous notes of those goals and objectives.²⁵ The SOA recorded the details of Ms McKenna’s personal circumstances.²⁶ The SOA identified a number of Ms McKenna’s objectives, her financial situation and the needs she disclosed to Mr Henderson.²⁷ The SOA contained the methodology for achieving Ms McKenna’s stated objectives.²⁸ Further, at the first meeting Mr Henderson explained how the plan would more effectively achieve her objectives than her current arrangements.²⁹ Whilst part of the subject matter of the advice (Ms McKenna wanting advice in assisting her children into property while attending to her own planning) was not explicitly identified in the SOA, it was identified through the particular advice provided.³⁰ Mr Henderson clearly considered Ms McKenna’s relevant circumstances and indeed, apart from the error, stands by the advice.³¹ Mr Henderson agreed that the SOA could have more

²² In which ASIC is the prosecutor carrying the evidential burden to satisfy the Court that a civil penalty provision has been contravened.

²³ Exhibit 2.196 Statements and exhibits dated 14/04/2018, at para 10 and exhibit DMcK-1, FPA.0011.0002.0077.

²⁴ Exhibit 2.201, Statement and exhibits dated 5 April 2018, at para 8 and exhibit SH-11; HEN.0002.0001.0016.

²⁵ Exhibit SH-11; HEN.0002.0001.0016.

²⁶ Exhibit 2.196 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0008 and FPA.0011.0003.00015- FPA.0011.0003.00017.

²⁷ s691B(2)(a) *Corporations Act 2001* (Cth).

²⁸ Paraplanner Instruction HEN.0002.0001.0017.

²⁹ Exhibit 2.213 Henderson Response to Investigator’s Report (FPA.0006.0001.0681) at FPA.0006.0001.0688 para 3.10.

³⁰ s961B(2)(b)(i) *Corporations Act 2001* “...(b) identified: (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly)...”; See Exhibit 2.196 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0009 “Consider purchasing one or two investment properties using the equity you have in your home and your strong cashflow. Alternatively, you may help your children purchase their first properties.” And at FPA.0011.0003.0028 Recommendations under clause 5.5 “If you choose to assist your children...”; FPA.0011.0003.0028 See “Assisting your Children”

³¹ T1755:27

clearly explained how his recommendations related to and would achieve Ms McKenna's objectives³² and has taken steps to address this going forward.³³

12. Mr Henderson suggested that Ms McKenna "consider" cancelling income protection insurance but retain her life and total and permanent disability insurance.³⁴ Whilst Ms McKenna did not tick the "insurance" box on the electronic questionnaire, income protection insurance was indeed discussed at the 7 November 2016 meeting, as recorded in Mr Henderson's contemporaneous notes.³⁵ Mr Henderson's evidence was that "*we spoke about insurance in the first meeting. That was noted in my contemporaneous notes taken on the day. She asked me the question whether she should maintain her insurance*".³⁶ Indeed, Ms McKenna confirms that her son said that he did not believe she needed income protection insurance and she told Mr Henderson that "*sick leave is, theoretically, at least, open ended*".³⁷ In any event, Mr Henderson's advice was that Ms McKenna do no more than *consider* cancelling her income protection insurance. With unlimited sick leave (as she said she had³⁸), that would have provided her with [REDACTED] per year further to invest in pursuit of her financial objectives.³⁹ In this context, it cannot be said that the advice to *consider* cancelling her income protection insurance was not responsible and in Ms McKenna's best interests. Mr Henderson understandably stands by his position in this regard.⁴⁰

³² In this regard it should be noted that ASIC's RG 175.247 provides "*We do not expect an advice provider to give 'perfect advice' to establish that the client is likely to be in a better position if the client follows the advice.*"

³³ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0692 para 4.1 – 4.13 and FPA.0006.0001.0700 paras 6.43-6.44

³⁴ Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0029.

³⁵ Exhibit 2.201, Statement and exhibits dated 5 April 2018, at paragraph 8 and exhibit SH-11 HEN.0002.0001.0016.

³⁶ T1762:15-35, Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0686 para 3.7.8, FPA.0006.0001.0689 para 3.10.9 and FPA.0006.0001.0701 para 6.49, Exhibit 2.201 Statements and exhibits dated 5 April 2018, HEN.0002.0001.0016 and HEN.0002.0001.0017

³⁷ FPA.0012.0001.0391 at clause 46.

³⁸ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0701 para 6.49

³⁹ T1763:35 – see Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0016 clause 2.6

⁴⁰ T1763:25-35

13. In relation to SMSFs,⁴¹ Mr Henderson's evidence differed from Ms McKenna's evidence. He considered that he and Ms McKenna "*had a reasonable discussion about*" SMSF's at the 7 November 2016 meeting.⁴² He said "*I felt in the first meeting we discussed what those options were and that we had collectively come to the agreement that a self-managed super fund was suitable for Ms McKenna.*"⁴³ His position is that Ms McKenna did not raise any objection to receiving advice regarding a SMSF at either the 7 November 2016 or the 14 December 2016 meetings, but that the first time she did so was in her letter of complaint.⁴⁴ Mr Henderson was emphatic that he does not push clients into establishing SMSFs.⁴⁵ The data provided in his second statement supports that proposition⁴⁶. Mr Henderson's position was that he considered this to be "*a natural progression for a person in her circumstances*".⁴⁷ Ms McKenna's lack of opposition to that discussion is confirmed in her annotations to the SOA in which she stated that she "*I do not recall broaching this with you; however, I would not be opposed to considering this option if, all other things considered, it is financially well-advised to establish a [SMSF].*"⁴⁸ The fact that Ms McKenna, shortly after the first meeting, did "not recall" discussing SMSF's stands in stark contrast to her evidence over a year later in the witness box as to Mr Henderson's alleged persistence in this regard.⁴⁹
14. As to whether Mr Henderson conducted a reasonable investigation as to financial products which might achieve Ms McKenna's objectives,⁵⁰ it would be a strained interpretation of s961B(2)(e) if a financial planner who had a good understanding of

⁴¹ The submission in relation to SMSF's proceeds on the basis that Mr Henderson's error regarding the nature of the SaSS benefit is a separate issue.

⁴² T1755:20-30

⁴³ T1762:5

⁴⁴ Para 3.22.3 and 6.14 Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681).

⁴⁵ T1755:18

⁴⁶ Exhibit 2.200 Statements and exhibits dated 29/03/2018 para 46 and Exhibit 2.201 Statements and exhibits dated 5/04/2018 para 38, both as amended by Exhibit 2.202 Corrections to Statements Exhibit 2.200 and 2.201

⁴⁷ T1755:20-30

⁴⁸ Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-8 at FPA.0012.0001.0087.

⁴⁹ T1732-1733

⁵⁰ s961B(2)(e)

products available in the market was required to record and provide written advice as to each available product in every SOA produced. Rather, properly construed, s961B(2)(e) means that a financial planner who is aware of products and makes an informed decision as to which to recommend will have complied with the relevant requirements.⁵¹ Mr Henderson's evidence is that the HM entities variously research all the managed accounts available and are satisfied with the operation of Henderson Maxwell Managed Account.⁵² Indeed, the recommended account was considered suitable for Ms McKenna, as she specifically stated that she did not wish to manage her investments.⁵³ Mr Henderson's evidence was that he did not believe the PSSap account needed to be changed and made no recommendation about it.⁵⁴

15. As to whether Mr Henderson gave the advice based all judgements in advising Ms McKenna on her relevant circumstances,⁵⁵ he should be found to have complied with that obligation, given his evidence was that:

15.1 in his professional judgement and experience, Ms McKenna holding property within super would be the best option to create wealth due to her high tax bracket and the benefits of gearing in super;⁵⁶

15.2 *"notwithstanding the error made on research, then yes, I'm confident of the advice and I still look back at it now and think that it's – it's satisfactory. What is not satisfactory, obviously, was the error around the research."*⁵⁷

⁵¹ ASIC guidance in ASIC Regulatory Guide 175: Licensing Financial product advisers – Conduct and disclosure states at 175.347 "In some cases, an advice provider can conduct a reasonable investigation into financial products under s961B(2)(e) by investigating the products on their AFS licensee's approved product list" and at 175.349. "Advice providers are expected to exercise judgement in determining whether s961B(2)(e) requires them to consider products that are not on their AFS licensee's approved product list.

⁵² T1760:45 – see also T1752:40

⁵³ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0081) at FPA.0006.0001.0690 paras 3.15 – 3.21, and FPA.0006.0001.0696 para 6.16). For general observations regarding suitability of HMMA for clients, see FPA.0006.0001.0683 paras 2.7-2.21

⁵⁴ T1763:45, see also Exhibit 2.213 Henderson Response to Investigator's Report - FPA.0006.0001.0681 at FPA.0006.0001.0689 (para 3.10.8)

⁵⁵ s961B(2)(f) Corporations Act 2001

⁵⁶ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0697 para 6.32-6.24

⁵⁷ T1763:10

16. In any event, the evidence is clear that this was draft advice which was never finalised or implemented. It is difficult to see how a draft in which an error was identified prior to finalisation could be found to be an “advice” for the purposes of s961B(1).

Suggested open finding 2: Sam Henderson breach of s961G (resulting advice appropriate to the client)

17. s961G required Mr Henderson to only provide advice to Ms McKenna if it was reasonable to conclude that the advice is appropriate to her.
18. In relation to the error in the advice, the submissions at paragraphs 3 to 8 above are adopted and repeated.
19. The HM entities variously research all the managed accounts available and are satisfied with the operation of Henderson Maxwell Managed Account.⁵⁸
20. Otherwise, the submissions in relation to s961B are also relevant to the suggested breach of s961G, including that a draft advice is not “advice” for the purposes of s961G.

Suggested open finding 3: Sam Henderson breach of s961J (conflict of interest)

21. The obligation in s961J is to give priority to the client’s interests when a provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of the provider.
22. It is self-evident a person providing financial advice does so for financial reward. As such it is unsurprising that Ms McKenna was charged a fee for the service. That fee alone could not be a breach of s961J.

⁵⁸ T1760:45 – see also T1752:40

23. Mr Henderson's understanding from his conversation with Ms McKenna was that she was looking for an ongoing relationship with Henderson Maxwell.⁵⁹ His advice regarding management of investments by Henderson Maxwell must be seen in that light. Importantly, his position is that he would have given the same advice regardless of his own interests.⁶⁰
24. Initial fees were disclosed in the SOA.⁶¹ So too were brokerage fees⁶² and ongoing financial planning fees.⁶³ The SOA also made it clear that Henderson Maxwell Pty Ltd and its employees may have an interest in the products recommended and that the adviser is entitled to a share of the revenue generated.⁶⁴ Mr Henderson specifically discussed fees with Ms McKenna at the 14 December 2016 meeting.⁶⁵ In any event, Henderson Maxwell's fees are comparable with other investment products and services.⁶⁶
25. Importantly, Mr Henderson did not recommend that Ms McKenna make changes to her PSSap account.⁶⁷ Nor did he recommend that Ms McKenna use Henderson Maxwell Accounting.⁶⁸ Were he preferring his own interests over Ms McKenna's one can imagine he would have done both.
26. Further, Mr Henderson's evidence was that the Henderson Maxwell Managed Account is a service which is in effect provided by Henderson Maxwell through a structure provided by Managed Account Holdings Limited.⁶⁹

⁵⁹ T1755:10

⁶⁰ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0702 at para 6.54- 6.55)

⁶¹ Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0039 at item 11.1.

⁶² Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0040 at item 11.1.

⁶³ Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0041 at item 11.2.

⁶⁴ Exhibit 2.197 Statements and exhibits dated 14/04/2018, DMcK-6 at FPA.0011.0003.0042 at item 11.2.

⁶⁵ T1763:5

⁶⁶ Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0697 para 6.20 -6.24 1)

⁶⁷ T1763:45, see also - Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0689 para 3.10.18 and FPA.0006.0001.0690 para 6.17.1(b) and FPA.0006.0001.0702 at para 6.55.2 re conflict of interest.

⁶⁸ Para 6.55.5 Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0702 para 6.55.5

⁶⁹ T175220 – T1752:30

27. Mr Henderson confirmed that Henderson Maxwell does consider whether there might be other managed account services that offer clients a better return or lower fees. Based on that consideration, Henderson Maxwell uses a number of alternative services, depending upon the needs of the particular client.⁷⁰
28. In any event, there is no evidence to show that priority was not given to Ms McKenna's interests. Nor is there comparative evidence adduced to suggest that Ms McKenna would have been better served by other products in the market.

Suggested open finding 4: Henderson Maxwell Pty Ltd breach of s952E(1) (defective Financial Services Guide)

29. Counsel Assisting's submission relates to the provision of the Financial Services Guide dated 20 January 2016 (**FSG**) in circumstances where it:
- 29.1 recorded that Mr Henderson held, rather than had previously been studying for, a Masters of Commerce; and
- 29.2 did not disclose that Mr Henderson (at that time) had an interest in an entity known as Managed Accounts Holdings Limited.
30. s952E(1) creates a strict liability offence,⁷¹ for which the defence of "*honest and reasonable mistake of fact*" is available to an accused.⁷²
31. The Commission's processes are inquisitorial, not adversarial. In order to make a finding of misconduct amounting to criminal conduct (albeit in an administrative process), the Commission would have needed to explore with the HM entities any facts as to which its relevant officers were honestly and reasonably mistaken. If such facts existed, they would provide a complete defence. It is respectfully submitted that

⁷⁰ T1752:35-40 – see also T1760:45

⁷¹ Section 952E(1); *Criminal Code Act 1995*, s6.1.

⁷² *Criminal Code Act 1995*, ss6.1 and 9.2.

it would be most unfair and in error to make a finding of a breach of s952E(1) given the state of the evidence. The following submissions are made under cover of that position.

32. Mr Henderson's evidence regarding the recording of him holding a Masters in Commerce in the Financial Services Guide should be accepted an administrative error which was overlooked.⁷³

33. In relation to the shareholding:

33.1 Henderson Maxwell had appointed managedaccounts.com.au (formerly Investment Administration Services) as its managed account provider some years before Mr Henderson acquired shares on the float of the company.⁷⁴ Mr Henderson did not think about it being a "material holding"⁷⁵, because firstly, it did not influence the decision to appoint Investment Administration Services and second, Henderson Maxwell started using other managed account providers, such as Hub24, and platform providers, such as Netwealth, BT and Macquarie two to three years ago and has "*started to use those more and more as the industry has innovated*".⁷⁶

33.2 On this evidence, Mr Henderson's shareholding in Managed Accounts Holdings Limited was not a matter that required inclusion in Henderson Maxwell's FSG under s942B.⁷⁷

⁷³ T1754:10 "Was that correct at 20 January 2016, did you have a Masters of Commerce?---I did not. I studied a Masters of Commerce. I think this was taken over from a previous bio and we've since removed that in the next iteration of the financial services guide." See also Exhibit 2.226 FPA.0019.001.0154 at P-10:10 where Mr Henderson states "whoever put together version 3 didn't talk to me. ... That's why we did version 4. So I removed it."

⁷⁴ T1753:20

⁷⁵ T1753:20

⁷⁶ T1749:20, 1752:40 and 1753:15

⁷⁷ s942B(1)(f) Corporations Act 2001 (Cth) requires FSG's to disclose *information about any associations or relationships between the providing entity, or any related body corporate, and the issuers of any financial products, being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any of the authorised services*"

Suggested open finding 5: Henderson Maxwell Pty Ltd's conduct fell below community standards and expectations (telephone calls)

34. Mr Henderson's uncontested evidence was that:

34.1 at the 7 November 2016 meeting, Ms McKenna provided a signed authority which authorised the HM entities to communicate with, amongst others, SaSS. That document is in evidence;⁷⁸

34.2 following the 7 November 2016 meeting, the HM entities sent Ms McKenna's authority to SaSS. A record of that transaction is in evidence;⁷⁹

34.3 it was upon on Mr Henderson's telephone call to SaSS on 10 January 2017 that he learned that SaSS could not locate a copy of Ms McKenna's authority. His telephone call with SaSS that day confirms this;⁸⁰

34.4 whilst Mr Henderson instructed a customer service officer to telephone SaSS, at no time did he authorise, instruct or know that the customer service officer would impersonate Ms McKenna.⁸¹

35. The customer service officer was clearly not acting with authority,⁸² but rather was on a frolic of her own. It must be remembered that the HM entities were in receipt of a signed authority which had been sent to SaSS. That document gave the HM entities the right to obtain all information the employee was obtaining while impersonating Ms McKenna. On discovering what she had done, the employee was questioned and, while she was not terminated, an entirely appropriate reason was given for that.⁸³

⁷⁸ Exhibit 2.216, Letter of authority, McKenna to Henderson Maxwell, 7 November 2016.

⁷⁹ Exhibit 2.217, File note concerning Ms McKenna, 7 November 2016.

⁸⁰ T1765-1766

⁸¹ T1765:33; Exhibit 2.201, Statement and exhibits dated 5/04/ 2018, at paragraph 31 to 34.

⁸² T1758:10

⁸³ T1758:16-24: *"I wanted to terminate her employment. I took counsel with my general manager at work. He convinced me not to terminate her employment. Instead, we gave her a warning. It was borderline. In hindsight, I should have persisted with my gut reaction, which was to terminate her. I feel that I would have – and should*

36. Whilst the employee should not have impersonated the client, and arguably should have been terminated, it cannot be found that Henderson Maxwell's conduct (as opposed to the employee's conduct) fell below community standards and expectations. The available criticism against Henderson Maxwell is in reality only the failure to terminate the employee – an outcome on which reasonable minds can differ. It does not fall short of community expectations.

Suggested open finding 6: Sam Henderson's conduct fell below community standards and expectations (assistance to FPA and criticisms of Ms McKenna).

37. In his dealings with his professional body, the FPA, Mr Henderson:
- 37.1 was the subject of a disciplinary complaint and disciplinary proceedings; and
- 37.2 at no time suspected that his private dealings with the FPA and his criticisms of Ms McKenna would be the subject of public consumption, or would otherwise become known to Ms McKenna.
38. As to whether his dealings and alleged lack of assistance to the FPA fall below community standards and expectations, the following can be said:
- 38.1 Mr Henderson's evidence was that his correspondence with the FPA was coloured by the fact that he did not feel as if he was being heard by the FPA;⁸⁴
- 38.2 he did not understand the FPA's process. This was the first and only complaint to the FPA he had dealt with. Rightly or wrongly, he expected more assistance from the FPA;⁸⁵

have done that. We are a small team. It is like a family situation in there on a day-to-day basis, and we felt that the impact would be significant on – on the business and on the rest of the staff."

⁸⁴ T1767:7

⁸⁵ T1792:15-30, T1795:10, T1796:10 (de Gori), Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at para 1.4

38.3 he was guided by the advice and approach of his previous lawyers who, prior to changing representation, appeared to him to result in the FPA investigator making adverse comments about him;⁸⁶

38.4 his personal wish was at all times to be transparent and take responsibility which, upon retaining new lawyers, he felt he was able to achieve;⁸⁷

38.5 it stands squarely in Mr Henderson's favour that despite his understanding that post 30 June 2017 he had no obligation to engage with the disciplinary process, he has continued to do so;⁸⁸

38.6 Once the disciplinary process is complete, he intends to accept the outcome and renew his membership. He wants to use the experience to improve Henderson Maxwell's business.⁸⁹

39. As to Mr Henderson's dealings with the FPA concerning the resolution of the Disciplinary Proceedings, the following can be said:

39.1 Mr Henderson admitted the majority of the breaches found by the Investigating Officer and submitted that they should be characterised as a minor instance of unsatisfactory conduct;

39.2 given the definition in the Disciplinary Regulation⁹⁰, this was entirely reasonable;

⁸⁶ T1775:25

⁸⁷ T1775-1776.

⁸⁸ T1781:20

⁸⁹ T1767:15; T1781:20

⁹⁰ A Minor Instance of Unsatisfactory Conduct is defined as "a Breach that it is appropriate to consider minor in nature, having regards to factors such as a) the impact of the Breach; whether the Breach or its consequences were unintended; c) any acknowledgement by the Member of the Breach; or any remedial action taken by the Member - see Exhibit 2.218 Witness Statement of Mr De Gori dated 20/04/2018, DGD-5 at FPA.0001.0001.0051

- 39.3 the agreed⁹¹ proposal for Summary Disposal of Ms McKenna's complaint which was submitted to the CRC Chair for approval⁹² did not characterise the seriousness of the breaches;
- 39.4 although Mr Henderson and the FPA could not agree on the characterisation of the breaches⁹³, a finding on that is not a prerequisite for Summary Disposal⁹⁴;
- 39.5 at the Directions Hearing on 6 March 2018, the CRC Chair agreed to approve the proposal for Summary Disposal if Mr Henderson accepted two further minor sanctions, which he did (subject to "*some modification*")⁹⁵;
- 39.6 the Investigating Officer did not submit the further version of the Summary Disposal proposal provided by Mr Henderson after the Directions Hearing⁹⁶ to the Chair as an agreed proposal, as is required by the Disciplinary Rules;⁹⁷
- 39.7 the CRC Chair unilaterally amended that document in consultation with the Investigating Officer⁹⁸ to require Mr Henderson to acknowledge that his conduct in relation to admitted breaches "*constitutes a serious breach warranting a disciplinary sanction under Schedule B of the FPA Disciplinary Regulation*";⁹⁹

⁹¹ During December 2017 – 12 February 2018 - see FPA.0019.0001.0086, FPA.0019.0001.0678, FPA.0200.0001.2759, FPA.0200.0001.2726, FPA.0200.0001.2756, FPA.0005.0001.001

⁹² On 12 February 2018 - FPA.0005.0001.002.

⁹³ See transcript of directions hearing on 6 March 2018 - FPA.0019.001.0149 - FPA.0019.001.0150 and FPA.0019.001.0013

⁹⁴ Para 75 of the FPA Disciplinary Regulation permits the FPA's Investigating Officer to seek the Conduct Review Commission's Chair to approval to the summary disposal of disciplinary proceedings with the consent of the member, on a number of bases, which may, but do not require substantiation of a breach – see Exhibit 2.218 Witness Statement of Mr De Gori dated 20/04/2018, DGD-5 at FPA.0001.0001.0051

⁹⁵ See transcript of directions hearing on 6 March 2018 - FPA.0019.0001.0155 - FPA.0019.001.0156

⁹⁶ FPA.0019.0001.0042. This version of the proposal is not in evidence, but can be deduced from the differences between FPA.0005.0001.002 and FPA.0019.0001.0014

⁹⁷ FPA.0200.001.0131. Indeed, the FPA's Investigating Officer asked the CRC Chair to discuss it with him, which, it is submitted, is contrary to the requirements of the Disciplinary Rules, which require the Investigating Officer to agree the terms of the proposal with the member, not collaborate with the CRC Chair,

⁹⁸ FPA.0019.001.0178

⁹⁹ This would have significant consequences for Mr Henderson if the agreement were publicised, which the FPA would be free to do if Mr Henderson did not comply with the sanctions.

39.8 the parties then agreed a compromise solution¹⁰⁰ that the matter be summarily disposed of consistently with an ASIC Enforceable Undertaking.¹⁰¹

39.9 the community would expect that someone who found themselves in Mr Henderson's position was concerned to protect their reputation in circumstances where he felt that he had already done everything he could to remedy the situation, by admitting the error, apologising repeatedly, refunding the advice fee and offering further advice without fee;

39.10 moreover, the community would expect that a person facing disciplinary sanctions would, through their legal advisors, seek to achieve the most satisfactory result to them - that is the invariable position of an accused person or a person subject to disciplinary proceedings. No criticism could possibly arise from that approach.

40. Given the above factors, Mr Henderson's dealings with the FPA cannot be found to fall below community standards and expectations.

41. As to whether Mr Henderson's criticisms of Ms McKenna in his correspondence with the FPA fall below community standards and expectations, the following can be said:

41.1 upon Mr Henderson becoming aware of the error, he immediately accepted the error and apologised to Ms McKenna;

41.2 he continued to apologise over the ensuing period;¹⁰²

41.3 he refunded the full fee Ms McKenna had paid;

¹⁰⁰ FPA.0019.0001.0013 and FPA.0019.0001.0014 (which removed the CRC Chair's unilateral characterisation of the breaches as serious)

¹⁰¹ i.e. on the basis that the FPA express concerns regarding Mr Henderson's conduct and that he acknowledge those concerns and agree to certain sanctions.

¹⁰² T1770:15 - T 1771:10, FPA.0011.0002.0191, FPA.0011.0002.0213, HEN.0002.0001.0001, WIT.0900.0002.0021, Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.0006.0001.0695 para 6.4

- 41.4 he offered to provide Ms McKenna further advice at no charge;
- 41.5 he was aware of significant inconsistencies in what Mr McKenna had told the FPA¹⁰³
- 41.6 he was clearly frustrated with the FPA's process;
- 41.7 he believed his dealings with the FPA were confidential;
- 41.8 he had no reason to believe that confidentiality would be broken by the Commission's coercive powers (and so would have felt free to express his frustration without fear of personally offending Ms McKenna);
- 41.9 he has accepted that he should not have used these words and regrets using them.¹⁰⁴
42. Given those circumstances, it is submitted that the community would not find Mr Henderson's criticisms to fall below its standards and expectations.

Other

43. As set out in paragraph 2, this submission only replies to the findings Counsel Assisting submitted were open to be made. If the Commission were to consider other findings, as a matter of natural justice and procedural fairness, they would need to be put to the HM entities, who must be given an opportunity to reply prior to any relevant findings being made.

4 May 2018

Andrew Woods
Isaacs Chambers

Claire Wivell Plater
The Fold Legal

¹⁰³ These are set out in detail in Exhibit 2.213 Henderson Response to Investigator's Report (FPA.0006.0001.0681) at FPA.006.001.0686 - FPA.006.001.0689, based partly on contemporaneous documents, which contradict Ms McKenna's evidence and Mr Henderson's recollections.

¹⁰⁴ T1770:15 -T1770:20