

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

SECOND ROUND OF PUBLIC HEARINGS: FINANCIAL ADVICE

SUBMISSIONS OF NATIONAL AUSTRALIA BANK – IMPROPER CONDUCT CASE STUDY¹

A. INTRODUCTION

1. NAB's case study related to specific instances of improper conduct by individual financial advisers. In particular, the conduct which was the focus of Senior Counsel Assisting's opening address, cross-examination of Mr Andrew Hagger and of the available findings proposed in Senior Counsel Assisting's closing address, concerned the incorrect witnessing of binding, non-lapsing beneficiary nomination forms, of which Mr Bradley Meyn's conduct was an example. The identification of Mr Meyn's conduct subsequently led to NAB becoming aware of a broader practice relating to incorrect witnessing of beneficiary nomination forms within NAB's advice business.
2. The conduct of Mr Meyn and the steps taken by NAB to address the incorrect witnessing of beneficiary nomination forms were addressed in a statement of Mr Hagger² (Chief Customer Officer, Consumer Banking and Wealth Management and a member of the NAB Executive Leadership Team), who gave evidence at the hearing.
3. This submission addresses the findings proposed by Senior Counsel Assisting in relation to the NAB case study during her closing submissions on 27 April 2018.
4. In summary, NAB submits that the evidence shows that:
 - a) With respect to Mr Meyn's conduct, NAB's response was, with one exception, thorough, timely and appropriate.

Mr Meyn's conduct was identified by NAB less than a month after it occurred. Mr Meyn was suspended on the same day and his employment was terminated 7 days later. NAB promptly remediated the affected clients by arranging for them to sign new nomination forms. A review of all 42 of Mr Meyn's files was also completed by NAB within a month of his termination and no further instances of incorrect witnessing by Mr Meyn were identified. Mr Meyn's conduct was also the subject of consideration by three NAB internal review panels – the Professional Standards Committee (**PSC**), Events Panel and Wealth Breach Review Committee (**Wealth BRC**).

¹ Filed by NAB pursuant to the grant of leave given by the Commissioner pursuant to paragraph 1(d) of the order granting leave to appear dated 10 April 2018.

² WIT.0001.0022.0001, Statement of Andrew Paul Hagger dated 5 April 2018 with Exhibit AH-1 tendered as Exhibit 2.178 (**Hagger Statement**), in response to Rubric 2-9.

The one exception to the thorough, timely and appropriate response to Mr Meyn's conduct was the delay in voluntarily notifying ASIC of Mr Meyn's termination as an adviser who presented a "serious compliance concern", which in the circumstances, Mr Hagger accepted should have occurred approximately 3 months earlier than it in fact did. Those circumstances included a further element of dishonest conduct by Mr Meyn over and above Mr Meyn's conduct concerning the incorrect witnessing of beneficiary nomination forms, as outlined below.

- b) As to the broader beneficiary nomination issue, NAB's conduct is a model example of a thorough, timely and appropriate response to improper conduct. Upon becoming aware of the Meyn conduct, NAB promptly used Mr Meyn as a case study in communications across NAB Financial Planning (**NAB FP**) and encouraged employees to self-report instances of the conduct. When further instances of incorrect witnessing were identified, they were investigated and regular updates were provided to, inter alia, the Wealth BRC. Following a considered examination of the issue by NAB, the incorrect witnessing of beneficiary nominations was reported to ASIC pursuant to s 912D of the *Corporations Act 2001* (Cth) (**Corporations Act**).

NAB has taken a range of steps to remediate the impact of incorrect witnessing on clients. Those steps include communicating with clients, arranging for nomination forms to be re-signed, liaising with the applicable trustees and, where necessary, providing a trustee with a letter of comfort so as to ensure that no client or trustee suffers financial loss by reason of the incorrect witnessing issue.

Both before and since its s 912D report to ASIC, NAB undertook a targeted communication campaign to ensure its advisers were aware of the importance of correct witnessing procedures and made specific changes to its monitoring and supervision policies to enhance its ability to prevent and detect this type of conduct. NAB also ensured that employees with management oversight of the conduct of financial advisers – from Regional Wealth Executives through to Mr Hagger himself – were the subject of consequence management (through one or both of conduct gates and remuneration).

- c) More generally, throughout the period from 2013 to present, NAB has put in place a range of measures to prevent, detect and remedy dishonest conduct: these are summarised in the Statement of Mr Hagger at [31] – [81] and Annexure B to that statement. These measures are illustrative of the broader context which would need to be taken into account in considering whether, in particular, the findings which Senior Counsel Assisting submitted are available on the evidence are established. These initiatives also furnish evidence of a cultural shift within NAB from an adviser-centric to a customer-centric culture.

B. DESCRIPTION OF THE MISCONDUCT AND NAB'S INVESTIGATION AND RESPONSE

5. Before turning to the findings which Senior Counsel Assisting submitted are available on the evidence, it is necessary to describe the nature of the misconduct, outline how it came to light and summarise NAB's investigation and response to it.

Identification and investigation of Mr Meyn's conduct

6. Mr Meyn was employed by NAB as a financial adviser from February 2016 to December 2016.³
7. In October 2016, Mr Meyn presented a financial plan to two clients (a married couple) in Muswellbrook, New South Wales. Muswellbrook is a significant distance from Mr Meyn's office.⁴ At that meeting, each client signed a MLC Insurance Non-Lapsing Binding Nomination Form nominating the other as the beneficiary of their benefit in the event of death. The form included express instructions requiring: (a) the client's signature to be witnessed by two witnesses; and (b) the percentage portion of the benefit which was nominated to be specified in the form.⁵ Whilst Mr Meyn properly witnessed the signatures of each client, there was no second witness present and the forms did not specify the percentage portion of the benefit which was nominated.⁶ Mr Meyn later procured another NAB employee, who was at a different location, to sign each form purportedly as a second witness.⁷
8. Subsequently, the forms were rejected by the superannuation trustee as they did not nominate a percentage portion.⁸ Mr Meyn amended the forms to complete the missing percentages, initialled the changes with the (wrong) clients' initials and, on 9 November 2016, provided the amended forms to the trustee.⁹
9. The misconduct was identified on 22 November 2016 by a NAB Regional Wealth Executive (**RWE**) completing a routine quarterly compliance check of Mr Meyn's client files.¹⁰ The RWE noticed that the second witness had been located at a different rural location to Mr Meyn, and also identified an irregularity in the initialling of the forms.¹¹
10. On that same date, Mr Meyn was provided with a letter informing him that his employment and letter of authority had been suspended pending the completion of NAB's investigation.¹²

³ Hagger Statement at [126].

⁴ Cf Hagger XXN T1678.1-7.

⁵ See Hagger Statement at [127]; nomination forms for each client, being Exhibits 2.180 (NAB.080.016.5643; see in particular instructions at .5658) and 2.181 (NAB.080.016.5603; see in particular instructions at .5618).

⁶ Hagger Statement at [128].

⁷ Hagger Statement at [128].

⁸ Hagger Statement at [128].

⁹ Hagger Statement at [128]; amended nomination forms Exhibit 2.182 (NAB.080.016.5569) and Exhibit 2.183 (NAB.080.016.5679).

¹⁰ RWEs report in to NAB FP and play a leadership role in managing NAB FP advisers: Hagger XXN T1695.15-18.

¹¹ Hagger Statement at [129], [144].

¹² Hagger Statement at [130]; Hagger Statement, tab 31, NAB.080.016.5585.

11. Mr Meyn provided NAB with a statement on 24 November 2016, confirming that he knew at the time his conduct was wrong but he was motivated by his desire to organise the matters discussed with the two clients as quickly as possible.¹³
12. Subsequently, at a meeting on 1 December 2016, Mr Meyn's employment was terminated with immediate effect.¹⁴ At that meeting, Mr Meyn informed NAB of an additional instance where a binding nomination form had been incorrectly witnessed (on 16 November 2016) and provided details of the affected clients (a married couple).¹⁵
13. Mr Meyn's conduct was considered at a meeting of the PSC on 9 December 2016.¹⁶
14. In late 2016, all 42 of Mr Meyn's files were reviewed. No further instances of incorrect witnessing were identified.¹⁷
15. Mr Meyn's conduct was considered by a Wealth BRC on 25 January 2017.¹⁸ At that stage, the Wealth BRC considered that the event was not a breach that was reportable to ASIC under s 912D of the Corporations Act (noting that only 2 incidents had so far been identified).¹⁹ Further, at that meeting, the General Manager, Risk and Advice noted that Mr Meyn did not currently fit the criteria for voluntary notification to ASIC as a serious compliance concern.
16. At this juncture, it is important to emphasise the key distinction between reporting to ASIC under s 912D of the Corporations Act (which concerns a breach by the licensee of its obligations under s 912A) and voluntary notification to ASIC of departures of specific advisers in circumstances where there are serious compliance concerns.²⁰ As explained by Mr Hagger in his statement at [67] and expanded upon by him in cross-examination, the latter is a voluntary process implemented by NAB in 2015, which has continued to evolve over time. In particular, Mr Hagger outlined that whilst the process had been instigated by correspondence between NAB and ASIC in February 2015, ASIC clarified in a meeting which Mr Hagger attended on 1 May 2017 that they did not need to know about all advisers, but wanted to be notified of misconduct situations.²¹ Mr Hagger noted that there is a balance to be struck between the timeliness of these voluntary reports, and the information ASIC wants to see in the reports.²² Mr Hagger accepted that, on the basis of his current knowledge and with the benefit of hindsight, the view expressed by the General Manager, Risk and Advice in January 2017

¹³ Hagger Statement at [131]; Hagger Statement, tab 32, NAB.080.016.5587.

¹⁴ Hagger Statement at [132]; Hagger Statement, tab 33, NAB.080.016.5593.

¹⁵ Hagger Statement at [133]; Hagger Statement, tab 34, NAB.080.016.5584.

¹⁶ Hagger Statement at [135]; Hagger Statement, tab 35, NAB.072.001.0981.

¹⁷ Hagger Statement at [134].

¹⁸ Hagger Statement, tab 37, NAB.005.164.0004 at 0006.

¹⁹ NAB understands this to be a reference to the two client groups referred to in the section describing Mr Meyn's conduct above.

²⁰ As to this distinction and the voluntary process of notification to ASIC as a serious compliance concern, see generally Macaulay XXN at T1905.30-1906.6.

²¹ Hagger XXN at T1674.40-47.

²² Hagger XXN at T1689.16-17.

that Mr Meyn did not fit the serious compliance concern criteria was incorrect.²³

17. In any event, following further internal consideration within NAB, ASIC was soon informed. An email update was provided to ASIC on 19 May 2017, a verbal update was provided on 1 June 2017, and by letter dated 5 June 2017 NAB notified ASIC of Mr Meyn as an adviser who presented a serious compliance concern.²⁴
18. No financial loss was suffered by the four affected clients as a result of Mr Meyn's conduct. Once the conduct was identified, the RWE completing the review arranged for new nomination forms to be signed by the two first identified clients, and determined that the forms in respect of the second two identified clients (another married couple) had not been submitted, due to the decision of the clients not to proceed with the applicable advice.²⁵

Identification and investigation of broader beneficiary nomination conduct

19. In January 2017, the existence of Mr Meyn's conduct was used as a case study and shared with NAB FP advisers, as a preventative measure.²⁶
20. This led to other instances of this type of misconduct being identified, including through self-reporting by NAB staff (an example of which was considered by the Event Panel on 3 March 2017).²⁷ A further three events were raised in February 2017, six events in March 2017 and eight events in April 2017.²⁸
21. On 18 May 2017, NAB contacted ASIC by phone to bring the beneficiary nominations conduct to its attention, and provided an email update on 19 May 2017.²⁹
22. In light of the discovery of further cases of incorrect witnessing, on 23 May 2017, Mr Steele (General Manager, NAB FP) sent an email to all NAB FP employees. That email set out the correct witnessing process, called for self-reporting by 31 May 2017, described the likely consequences for the employees involved in the misconduct and emphasised the potential benefit of self-reporting.³⁰
23. On 22 May 2017, a memorandum was prepared for the Wealth BRC to allow it to consider multiple instances of incorrect witnessing as a new breach event.³¹ That memorandum was considered by the Wealth BRC on 25 May 2017.³²

²³ Hagger XXN at T1675.1-3.

²⁴ Hagger Statement at [141]; Hagger Statement, tab 40, NAB.065.002.5881.

²⁵ Hagger Statement at [160].

²⁶ Hagger Statement at [138].

²⁷ Hagger Statement at [147], tab 41, NAB.005.164.0041.

²⁸ As referred to in Hagger Statement, tab 43, NAB.020.009.9493 at .9494.

²⁹ Hagger Statement at [150].

³⁰ Hagger Statement at [148]; Hagger Statement, tab 42, NAB.005.137.0535.

³¹ Hagger Statement at [149]; Hagger Statement, tab 43, NAB.020.009.9493.

³² Hagger Statement at [149]; Hagger Statement, tab 44, NAB.005.021.0488.

24. A further meeting of the Wealth BRC occurred on 31 May 2017. At that meeting, the Committee determined that, on the basis of the information then available to it, the beneficiary nominations conduct was reportable to ASIC under s 912D.³³
25. On 15 June 2017, NAB reported the matter to ASIC (**Breach Notification**).³⁴ That report was made within 10 business days as required by s 912D(1B).³⁵
26. On 17 July 2017, Mr Steele provided an update to NAB FP employees on the outcome of the ongoing investigation.³⁶

NAB's response, including client remediation and consequence management

Client remediation

27. As a matter of priority, NAB took steps to identify and remediate all affected clients. The steps taken were outlined by Mr Hagger in cross-examination³⁷ and were also the subject of Mr Hagger's statement and various exhibited documents.
28. First, at the outset, NAB took steps to define the set of clients where doubts existed as to the validity of the forms.³⁸ As reflected in an email update to ASIC made in March 2018, the final number of impacted clients identified was 2520.³⁹ NAB undertook a comprehensive communication campaign to attempt to alert each and every client to the issue and arrange re-execution of the forms. This included letters and follow-up letters, registered mail, phone calls and direct contact. With respect to all but 250 clients who have not yet returned forms, the position has now been remediated.
29. Secondly, NAB also liaised with the applicable trustees. Mr Hagger gave evidence that, whilst the impacted trustees initially numbered around 27 or 28, there now remains only one trustee for which all forms have not yet been re-executed (NULIS Nominees (Australia) Limited (**NULIS**)).⁴⁰ NULIS is part of the NAB Group. NULIS has indicated that they will treat the forms as valid.⁴¹ Further, Mr Hagger's evidence was that NAB FP had issued a letter of comfort to NULIS "in relation to ... the remote possibility ... that there is some kind of challenge in claim

³³ Exhibit 2.185, NAB.061.005.4860.

³⁴ Hagger Statement, tab 45, NAB.005.021.0488.

³⁵ Section 105 of the Corporations Act provides that, without limiting s 36(1) of the *Acts Interpretation Act 1901*, in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event. On this basis, counting 31 May 2017 but not 15 June 2017, the report on 15 June 2017 was made within 10 business days (not including 12 June 2017, which was the Queen's birthday public holiday in New South Wales).

³⁶ Hagger Statement at [151]; Hagger Statement, tab 46, NAB.005.137.0001.

³⁷ Hagger XXN T1691.4-37.

³⁸ Hagger XXN T1691.8-10.

³⁹ Hagger Statement at [154]; Hagger Statement, tab 50, NAB.005.150.0016.

⁴⁰ Hagger XXN T1691.18-21.

⁴¹ Hagger XXN T1691.29-30.

staking that occurs within those 250 customers".⁴² The practical effect of the letter of comfort is that NAB, rather than NULIS, any other relevant trustee or the potentially impacted clients, will bear the financial consequences in the unlikely event that the forms of impacted clients are sought to be set aside.

Consequence management

30. In response to the beneficiary nomination conduct, a range of consequences were imposed by NAB (in addition to the termination of Mr Meyn's employment referred to above).
31. First, advisers who self-reported were sanctioned with an irreversible "amber" conduct gate.⁴³ This resulted in an automatic reduction of 25% of their short-term incentive payments. The same outcome was also applied to 4 RWEs who self-reported.⁴⁴
32. Secondly, RWEs who had no involvement in the relevant conduct received a 10% reduction in their short-term incentive payments.⁴⁵
33. Thirdly, consequences were also imposed on leaders at all levels within NAB's financial advice business, as reflected in a memorandum entitled "Wealth Advice Leadership Consequence Management".⁴⁶ This memorandum recognised that "senior leaders within Wealth Advice are accountable for setting the tone and culture and it is clear that the culture failed to ensure that advisers and support staff upheld the high standards we expect of them, particularly relating to witnessing beneficiary nomination forms". In accordance with the memorandum, NAB's Wealth Advice leadership team received a 10% short term incentive reduction and relevant members of the NAB FP leadership team received a 25% short term incentive reduction. Mr Miller (EGM, Wealth Advice) received no bonus, including as a result of this issue.⁴⁷
34. During the period when consequence outcomes were being considered, specific concerns were raised with Mr Hagger by two senior leaders within NAB's Wealth Advice business, Mr Steele and Mr Miller, as to the potential harshness of the consequences to be imposed at the leadership level.⁴⁸ In the face of that feedback, Mr Hagger stood his ground.⁴⁹ In cross-examination, Mr Hagger explained that "there's sort of ... an unreasonableness to it, but it's fair. It's what our customers would expect of us, that they often look to ... what's happening at the management level and ... to the leadership level ... And so my response to Mr Miller on this

⁴² Hagger XXN T1691.24-34.

⁴³ NAB uses a system of conduct gates (green, amber and red) to impose consequences on employees for particular types of conduct. For example, an irreversible amber gate results in an immediate 25 per cent reduction in bonus: see Waldron XXN at T116.15-44.

⁴⁴ See Hagger Statement, tab 42, NAB.005.137.0535; Hagger XXN T1684.18-31, T1691.39-41.

⁴⁵ As referred to in an email from Mr Hagger to Andrew Thorburn (NAB's Chief Executive Officer) dated 3 November 2017, Exhibit 2.189, NAB.005.309.0009.

⁴⁶ Exhibit 2.186, NAB.005.346.0001 (undated but prepared on 2 November 2017 through NAB's human resources division: see Hagger XXN T1692.4-8).

⁴⁷ Hagger XXN at T1699.15-16; Exhibit 2.188, NAB.005.346.0004.

⁴⁸ See Exhibit 2.187, NAB.005.346.0003 (specific concerns for Tim Steele given to Mr Hagger on 3 November 2017) and Exhibit 2.188, NAB.005.346.0004 (file note of discussion with Greg Miller on 30 October 2017).

⁴⁹ See Hagger XXN T1696.20-1699.6 and in particular at T1699.5-6.

matter and to Mr Steele ... was to say ... this is what I want to see. I want to see issues surfaced, customers protected, and consequences".⁵⁰ Mr Hagger also stated in cross-examination that Mr Steele's stocks had risen in the organisation due to his leadership of the beneficiary nominations matter, including through his role in customer remediation and in working through the impacts and consequences for those involved in the practice.⁵¹ Mr Steele joined NAB in April 2016 and was supportive of both his personal and broader leadership team consequence outcomes.⁵²

35. Fourthly, a financial consequence was also imposed on Mr Hagger as a result of the conduct, in the form of a reduction of 0.05 to the applicable short-term incentive multiplier relating to his bonus.⁵³ This outcome was discussed and approved by the NAB Board on 4 October 2017.⁵⁴ The minutes record that the deduction was made balancing "continuing Wealth risk management issues against strong performance on other dimensions, including industry leadership on a number of matters".

C. MEASURES TAKEN BY NAB TO PREVENT, DETECT AND REMEDY DISHONEST CONDUCT

36. In the period from 1 January 2013 to present, NAB has maintained and implemented (and continues to implement) a range of measures to prevent, detect and remedy dishonest conduct by financial advisers. These measures are outlined in the Hagger Statement at [31] to [80] and Annexure B to that statement. By way of a brief summary, they include the following:
- a) improved recruitment and screening mechanisms, including the adoption of the Australian Banking Association Reference Checking Protocol, in relation to both on-boarding and off-boarding advisers;⁵⁵
 - b) measures which impose obligations on employees to disclose actual or suspected wrongdoing (which include dishonest conduct), including under NAB's Code of Conduct and NAB's Whistleblower Policy, which was enhanced in 2017 by engaging KPMG to operate an independent, externally monitored hotline and reporting service for disclosing persons;⁵⁶
 - c) improved monitoring, supervision and training of advisers, including through regular revision and enhancement of audit and compliance policies and procedures;⁵⁷

⁵⁰ Hagger XXN T1698.19-26.

⁵¹ Hagger XXN T1698.3-8; 1698.29-32.

⁵² Hagger XXN T1698.5-6; 1698.36-40.

⁵³ Hagger XXN T1702.11-1702.22.

⁵⁴ See board minutes at Exhibit 2.190, NAB.092.001.1000.

⁵⁵ Hagger Statement at [34] – [38]; ABA reference checking form in Hagger Statement, tab 17, NAB.005.142.0158.

⁵⁶ Hagger Statement at [39] – [45]; NAB's Code of Conduct at tab 5, NAB.083.001.5786; NAB's Whistleblower Protection Policy in Hagger Statement, tab 11, NAB.001.001.0049.

⁵⁷ Hagger Statement at [46] – [64]; Advice, Compliance and Policy Guide in Hagger Statement, tab 10, NAB.061.003.6897.

- d) progressive uplifts to NAB's control environment, events management and event remediation, including through a dedicated "Controls Transformation Program",⁵⁸
- e) as referred to above, implementation in 2015 of a voluntary process to notify ASIC of adviser departures in circumstances where there is a serious compliance concern, which has continued to evolve throughout the period;⁵⁹
- f) appointing Deloitte in 2014 to review and report on NAB's self-assessment of its performance across a number of areas within NAB's financial advice business and re-engaging Deloitte in 2017 to provide further assistance to NAB, culminating in 2017 in the completion by NAB (with Deloitte's input) of the Quality Advice Report;⁶⁰
- g) initiatives undertaken throughout the period to increase ethics training and awareness, including through NAB's Code of Conduct training, leaders' forums and professional development programs and regular employee roadshows which included case studies and presentations throughout Australia;⁶¹ and
- h) measures to remediate dishonest conduct (when it occurs), including through NAB's Customer Response Initiative program and business as usual remediation.⁶²

⁵⁸ Hagger Statement at [65] – [66].

⁵⁹ Hagger Statement at [67].

⁶⁰ Hagger Statement at [68] – [70]; Quality Advice Report in Hagger Statement, tab 16, NAB.088.001.0215.

⁶¹ Hagger Statement at [71] – [75].

⁶² Hagger Statement at [76] – [80].

D. NAB'S RESPONSE TO THE AVAILABLE FINDINGS PROPOSED BY SENIOR COUNSEL ASSISTING

Proposed findings in relation to Mr Meyn

Proposed finding 1 – Mr Meyn might have breached the statutory obligation under s 1041H of the Corporations Act not to engage in conduct in relation to a financial product or financial service that is misleading and deceptive or likely to mislead and deceive

37. NAB considers that it is beyond question that Mr Meyn's conduct in initialling the forms as if he were the client, and in procuring the incorrect witnessing of his client's nomination forms, amounted to misconduct. The conduct was dishonest and constituted a breach of NAB's policies and procedures, including of NAB's Code of Conduct. This is the basis on which Mr Meyn's employment was suspended and, ultimately, terminated. NAB also acknowledges that the provision of the nomination forms to the trustee purporting to contain signatures which have been duly witnessed may also have had the potential to mislead.
38. Notwithstanding these matters, the basis on which a specific contravention by Mr Meyn of s 1041H may be established is less clear. Section 1041H(1) imposes a prohibition on a person engaging in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive. The proposed finding does not particularise the manner in which it is alleged each of the requisite elements of this subsection are satisfied. By way of illustration, threshold issues arise as to: (a) whether Mr Meyn engaged in the conduct on his own account or whether he acted as the agent of NAB; (b) whether the conduct in question was relevantly "in relation to" a financial product or financial service within the meaning of s 1041H(1) (noting, for example, that any relevant financial product or service was not provided to or at the request of, the trustee). Another factor the Commission may wish to take into account is that no evidence was adduced from the trustee or any other person to the effect that they had been misled.
39. In any event, as noted above, to the extent that any person was misled at the time the forms of Mr Meyn's clients were submitted, this was soon cured as NAB arranged for the forms to be properly witnessed and re-submitted to the trustee. No person suffered any loss arising out of the conduct.
40. For these reasons, NAB submits that, whilst Mr Meyn might have breached s 1041H, there is insufficient material before the Commission to support a finding that he did so. Moreover, NAB does not purport to make any submissions on Mr Meyn's behalf, and notes that Mr Meyn has not been given an opportunity to be heard.

Proposed finding 2 – Mr Meyn might have breached the statutory obligation under section 12DA of the ASIC Act not to engage in conduct in relation to financial services that is misleading or deceptive or likely to mislead or deceive

41. NAB repeats paragraphs 37 to 40 above, which apply equally to the alleged contravention of s 12DA of the ASIC Act.

Proposed findings in relation to NAB

Proposed finding 3 – NAB may have breached its statutory obligation under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly

42. While NAB gave a Breach Notification following the determination of the Wealth BRC on 31 May 2017,⁶³ it does not necessarily follow that NAB breached its obligation under s 912A(1)(a) to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. That question turns on the objective facts, and NAB's view that a breach notification should be given is not determinative. In this regard, NAB also observes that ASIC Regulatory Guide 78, which relates to s 912D breach reporting, encourages licensees to report in circumstances of uncertainty: see eg at RG [78.12]. NAB's position is that on the basis of the material presently before the Commission, a breach of s 912A(1)(a) is not established.
43. NAB accepts that, prior to the identification of the relevant conduct, it did not provide specific training to advisers in relation to the witnessing of beneficiary nomination forms. However, in circumstances where the form was clear on its face as to the correct witnessing requirements, the absence of specific training on this issue does not, in NAB's submission, thereby give rise to a failure to do "all things necessary" as required by s 912A(1)(a).
44. NAB does not resile from the position set out in the Breach Notification that the event "raised concerns" about the adequacy of its supervision and monitoring process in relation to the completion of nomination forms.⁶⁴ However, an important qualification to this proposition was set out in the Breach Notification to the effect that there are inherent difficulties in detecting irregularities in the completion of the forms in the course of a compliance check.
45. That is because, as explained in the Statement of Mr Hagger at [145], to be able to identify the problem, the person doing the compliance check must be alerted to the possibility, and be able to establish, that the other witness was not present when the clients signed the form. This is not something that can be established on the face of the executed form unless, for example (as in

⁶³ As referred to at paragraphs 24 and 25 above.

⁶⁴ Hagger Statement, tab 45, NAB.005.021.0488 at .0490.

the case of Mr Meyn's conduct), the person reviewing the form happens to know that the other witness is an employee working from a different office and was unlikely to be present at the place where the form was signed. NAB considers that this is the principal reason why the beneficiary nominations conduct went undetected for a period of time, rather than any failure of monitoring and supervision on the part of NAB (notwithstanding that, out of an abundance of caution, NAB has now introduced the targeted changes described below).

46. Further, NAB submits that whether a breach of s 912A(1)(a) has occurred must be considered having regard to the whole of the relevant circumstances. In that regard, ASIC Regulatory Guide 256 (to which Mr Hagger referred in cross-examination⁶⁵) states, for example, at [RG256.14] that "complying with this obligation includes AFS licensees taking responsibility for the consequences of their actions if things go wrong when financial services are provided and clients suffer loss or detriment" and that "this includes remediating clients who have suffered loss or detriment as a result of misconduct or other compliance failure by the licensee or its current or former representatives". In the present context, one relevant circumstance is that, as soon as NAB became aware of the issue (and prior to the making of the Breach Notification), it took comprehensive steps to: (a) investigate the conduct; (b) educate and inform its employees of the correct witnessing procedure; (c) remediate affected clients; and (d) apply appropriate consequence management. NAB also took targeted steps subsequent to the notification to enhance its monitoring and supervision procedures with regard to beneficiary nomination forms, including the following:
- a) in July 2017, NAB amended its Licensee Standards to specifically refer to the correct way to witness documents, including the binding nominations;⁶⁶
 - b) in 2017, NAB enhanced its controls by updating its RWE checkpoints (which guide RWEs through their review of advisers' files) to include a new specific question relating to the witnessing of binding nominations.⁶⁷
47. It is also salient to consider the range of measures undertaken by NAB to prevent, detect and remediate dishonest conduct in the relevant period outlined at paragraph 36, including regular presentations and training encompassing issues of ethics and culture.
48. For these reasons, NAB submits that the material before the Commission does not establish a breach of its statutory obligation under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly in respect of the incorrect witnessing of beneficiary nomination forms.

Proposed finding 4 - NAB may have breached its statutory obligation under section

⁶⁵ Hagger XXN at T1688.37-41.

⁶⁶ Hagger Statement at [152]; Hagger Statement, tab 47, NAB.005.140.0121.

⁶⁷ Hagger Statement, tab 48, NAB.005.161.0001.

912A(1)(ca) to take reasonable steps to ensure that its representatives complied with the financial services laws

49. For substantially similar reasons as set out above with respect to the third proposed finding, NAB submits that the material before the Commission does not establish a breach by NAB of its statutory obligation under section 912A(1)(ca), particularly in circumstances where the “reasonable steps” NAB should have taken, and did not take, have not been articulated.
50. Section 912A(1)(ca) is not expressed in absolute terms, but imposes a standard of “reasonableness”. As with s 912A(1)(a), a determination as to whether a breach of s 912A(1)(ca) occurred would require an examination of all of the applicable facts, matters and circumstances. In the relevant period, NAB took a range of steps to ensure that its representatives complied with the financial services laws, including those outlined at paragraph 36 above. NAB relies upon these matters as evidence that it did, in fact, take reasonable steps to ensure its representatives complied with financial services laws.
51. A key matter in an assessment of what were “reasonable steps” in the present case is the fact that the particular forms in question provided clear and specific instructions on the correct witnessing procedure, as outlined at paragraph 43 above. Also relevant are the inherent difficulties in detecting a failure to comply with those clear and specific instructions, as explained at paragraphs 44 to 45 above. Further, Mr Meyn acknowledged in his letter in response to the allegations of misconduct that had been put to him that he knew his conduct to be wrong at the time he engaged in it.⁶⁸

Proposed finding 5 - the conduct was attributable to a broader culture of the financial advice business within NAB of a lack of understanding of and respect for ethical and legal obligations and which appears to have prioritised the convenience of financial advisers and clients above legal and ethical obligations

52. NAB submits that there is insufficient evidence to support the making of this proposed finding at the level of generality with which it is expressed.
53. An appropriate starting point in considering this proposed finding is that there is no evidence that Mr Meyn, or any other adviser, received any financial gain by the conduct, whether in the form of an increased incentive payment or otherwise.⁶⁹ On the contrary, as explained above, advisers who engaged in the conduct were sanctioned with a reduced incentive payment. As such, there is no evidence that the beneficiary nominations conduct was attributable to any sales-driven culture within NAB’s financial advice business, including through remuneration, incentive or commission arrangements.

⁶⁸ Hagger Statement at [131]; Hagger Statement, tab 32, NAB.080.016.5587.

⁶⁹ See, eg, Hagger Statement, tab 42, NAB.005.137.0535 (in which Mr Steele noted that “there is no indication that anyone received any personal gain in not following the correct process”).

54. As Mr Hagger acknowledged in cross-examination, NAB accepts that the beneficiary nominations conduct may have been attributable to a “failure of discipline” and a “failure of culture” which had arisen specifically with respect to beneficiary nomination forms.⁷⁰ Expanding on this, Mr Hagger observed that:⁷¹

...from all my interactions with this particular issue, I believe that the client service officers and the advisers concerned thought they were taking a short-cut in the interests of the client, and yet it's very stark on the form that you either witness the form when you're present or you don't. So I think a social norm had crept in and become entrenched. We know that now. We didn't know that in November 2016. But this is the sort of thing I want to see. We could have closed the books on this case study in December by terminating the adviser. We did get the forms re-signed. We could have stopped there, but we investigated further. We began to realise it was more common and then we acted upon that, because we want to do the right thing by clients ... this is very important.

55. The emergence of this “social norm” is exemplified by Mr Meyn’s explanation that he considered his conduct relating to the incorrect witnessing to be a time-saving measure for him and his clients.⁷²
56. NAB submits that the above matters do not provide a sufficient evidentiary basis on which a finding could be made of a “broader” culture within NAB’s financial advice business of a “lack of understanding of and respect for ethical and legal obligations” nor of a culture which “appears to have prioritised the convenience of financial advisers and customers above ethical and legal obligations”.⁷³
57. On the contrary, the specific steps taken by NAB in response to the beneficiary nominations conduct outlined in detail in these submissions are evidence of a culture which emphasises the importance of such obligations. Also weighing against this broader finding is Mr Hagger’s evidence of the steps taken by NAB in the period from 2013 onwards to promote a culture of compliance, honesty and ethical behaviour,⁷⁴ including through its policies and procedures, mandatory Code of Conduct training,⁷⁵ and initiatives undertaken throughout the period to increase ethics training and awareness.⁷⁶ In this regard, it is also notable that, as recorded in the Quality Advice Framework Report dated November 2017, Deloitte indicated that culturally NAB “was sincerely interested in surfacing the key matters affecting the business and exhibited a commendable culture of accountability and ownership for greater customer centricity and the

⁷⁰ Hagger XXN T1677.11-22.

⁷¹ Hagger XXN T1676.44 – 1677.7

⁷² Hagger Statement at [143]; Hagger Statement, tab 32, NAB.080.016.5587.

⁷³ Cf Senior Counsel Assisting’s closing address at T1979.15-28.

⁷⁴ See generally Hagger Statement at [39] – [45] and [71] – [75].

⁷⁵ Hagger Statement at [39].

⁷⁶ See, in particular, Hagger Statement at [73] and [75].

overall success of the business".⁷⁷

58. In her closing address, Senior Counsel Assisting relied upon the consequence management steps imposed by NAB on the leaders of the business in support of this proposed finding. However, in NAB's submission, these steps in fact demonstrate the strength of its leadership and culture and bespeak an acknowledgement of the importance of leaders taking accountability for issues which arise in the financial advice business. This is equally reflected in the fact that NAB put forward one of its most senior executives to give evidence on this topic.
59. In cross-examination, Mr Hagger was taken to a report dated 27 November 2015 prepared by an external consultant, Dr Lagan, regarding a review of potential conflicts of interest in relation to ThreeSixty Research (a part of NAB which undertakes product research).⁷⁸ ThreeSixty is a part of NAB which undertakes product research (and does not include financial advisers with external client relationships).⁷⁹ Significant weight was placed on this report in closing address.⁸⁰ NAB submits that the extent to which specific findings may be made from the passages to which Mr Hagger's attention was drawn in relation to the beneficiary nomination conduct is limited. The report did not examine that particular conduct (which was not known at the time) and the findings in the report appear to be based on interviews with a subset of 21 employees across NAB, JB Were, MLC and Three Sixty⁸¹ (out of an employee base of around 7,000 in NAB's Consumer Banking and Wealth management division alone),⁸² none of whom appear to have been from within NAB FP. The Commission did not either call for, or hear, any evidence from the author of the report in relation to its findings or context. Mr Hagger correctly resisted the proposition that this research had any specific relevance to Mr Meyn's situation, or that the beneficiary nominations conduct was caused by NAB's failure to ensure its employees understood their ethical obligations.⁸³
60. For the purposes of the proposed finding, it is true that the Wealth Chief Risk Officer (who commissioned the report) did not send the report to Mr Hagger at the time it was prepared,⁸⁴ but nothing relevantly turns on that fact.
61. In view of the above matters, whilst NAB would accept a finding that the beneficiary nomination conduct was attributable to a particular practice that had emerged, and become entrenched, with respect to the beneficiary nomination forms (a practice which, indeed, had become widespread within the financial advice industry more generally⁸⁵), there is insufficient evidence to support a finding framed in the broader terms proposed by Senior Counsel Assisting.

⁷⁷ Hagger Statement, tab 16, NAB.088.001.0215 at .0223.

⁷⁸ Exhibit 2.184, NAB.005.217.0360.

⁷⁹ Hagger XXN at T1678.33-1680.39.

⁸⁰ Senior Counsel Assisting's closing address at T1979.30-35.

⁸¹ Hagger XXN T1679.34-38; Exhibit 2.184, NAB.005.217.0360 at 0362.

⁸² Hagger Statement at [2].

⁸³ Hagger XXN T1679.30-32, T1680.6-10.

⁸⁴ Hagger XXN T1679.39-45.

⁸⁵ See, eg, Statement of Peter Kell, Exhibit 2.1, ASIC.0902.0001.3284 at [103]; Exhibit 2.1.15, ASIC.0902.0001.0947 (ASIC media release dated 19 January 2018).

Opportunity to be heard with respect to any additional adverse findings

62. If the Commission intends to make any adverse findings against NAB or any of its employees in connection with this case study, other than those identified by Senior Counsel Assisting in her closing submissions, NAB seeks notice of the same and an opportunity to be heard in relation to them.

4 MAY 2018**N J YOUNG QC****D F C THOMAS****E BATHURST****M E ELLICOTT**