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

FIFTH ROUND OF PUBLIC HEARINGS: SUPERANNUATION

SUBMISSIONS OF NATIONAL AUSTRALIA BANK AND NULIS[1]

A. INTRODUCTION

1. This submission is made on behalf of National Australia Bank Limited (**NAB**) and NULIS Nominees (Australia) Limited (**NULIS**). Where it is appropriate to draw a distinction between the position of the two entities, that has been done in the body of the document.

2. This submission addresses the available findings proposed by Counsel Assisting in relation to the NAB and NULIS case study in written closing submissions dated 24 August 2018 as amended on 28 August 2018 (**CS**). In responding to these submissions, NAB and NULIS have:

    a) considered the primary factual findings proposed by Counsel Assisting and identified those paragraphs which it considers contain material inaccuracies: see Part B (paragraphs 5 – 6) and the Schedule;

    b) identified and responded to what NAB and NULIS understand to be the available findings proposed by Counsel Assisting in relation to Plan Service Fees (**PSFs**) and Adviser Service Fees (**ASFs**) (Parts C and D, paragraphs 7 - 98), grandfathering of trailing commissions (Part E, paragraphs 99 - 107) and MySuper products (Part F, paragraphs 108 - 127); and

    c) addressed submissions made by Counsel Assisting in relation to the NAB Group's culture and governance practices: see Part G (paragraphs 128 - 155).

3. In summary, NAB and NULIS make the following submissions:

    a) NAB and NULIS welcome the Commission's focus on superannuation and acknowledge that the case study raises important matters that warrant attention;

    b) NAB and NULIS fully accept the seriousness of the matters which were the subject of breach reports tendered before the Commission concerning PSFs and ASFs. These events involved previously acknowledged and reported instances of misconduct, and conduct falling below community standards and expectations, and should not have occurred;

    c) it is important to recognise the context in which the PSFs and ASFs were applied, and the steps taken by NAB and NULIS to remediate errors once they were identified:

        i) as to the introduction of PSFs and ASFs, the intention was to make the fees payable by members more transparent and easier to understand. NAB was a market-leader in this respect. However, NAB and NULIS recognise that, despite the best of intentions, the application of the new fees had flaws;

        ii) as to remediation, each event has been investigated, reported to the relevant regulator and has been (or will be) remediated. While Ms Smith and Mr Carter acknowledged that remediation has taken too long, the desire of NAB and NULIS to

[1] Filed pursuant to the grant of leave given by the Commissioner under paragraph 1(d) of the order granting leave to appear dated 1 August 2018. NAB does not make any submissions on behalf of MLC Limited (**MLCL**), given that in the 2017 financial year NAB sold 80% of its shareholding in MLCL to Nippon Life.

remediate cannot be ignored.[2] This has included, where appropriate, an external assessment of the remediation conducted.

In every case, remediation has been designed with the aim of ensuring that members and customers have not been adversely impacted by the errors and that NAB will not profit at members' expense;[3]

d) NAB and NULIS have carefully considered the findings proposed by Counsel Assisting at CS [134] – [154]. While NAB and NULIS accept several of these findings, a number of others are not open on a fair reading of the evidence. A number of the proposed findings also depart from accepted legal principle and would, if made, represent a significant departure from the law as currently understood;

e) as to Counsel Assisting's submissions on NAB's culture and governance, NAB recognises that creating the right culture is a top priority for all of its leaders. NAB's culture is underpinned by a clear vision, values and behaviours focused on the customer and a robust governance framework. NAB has a balanced scorecard with "customer" and "risk" as key measures. NAB's employees have an obligation to comply with NAB's Code of Conduct. NAB strongly refutes any suggestion that it, or any of its officers and employees, have displayed disrespect or disregard for the law, the regulator or members. NAB also submits that the evidence does not establish many of the factual underpinnings on which Counsel Assisting's submissions as to culture are based. It is also relevant to note that, in relation to PSF breaches reported in 2015 and 2016, the Australian Securities and Investments Commission (**ASIC**) has publicly recognised the "cooperative approach" taken by NAB and NULIS;[4]

f) any assessment of a corporation's culture must be wide-ranging, and not limited to conclusions sought to be drawn from limited instances of alleged misconduct;

g) even if an assessment were to occur by reference to the limited matters considered in Round 5, the evidence demonstrates a commitment to surfacing issues, acknowledging where errors have been made, and fixing mistakes for customers, in accordance with NAB's core values. These steps are consistent with the fact that NAB's wealth business has been on a journey of continuous improvement over a number of years to uplift its standards and to bring about a cultural shift from an "adviser-centric" to a "customer-centric" culture.[5] In that regard, as recorded in the Quality Advice Framework Report dated November 2017 (which followed on from a review undertaken in 2014 at Mr Hagger's instigation), Deloitte indicated that culturally, NAB "exhibited a commendable culture of accountability and ownership for greater customer centricity and the overall success of the business".[6] NAB Wealth's Independent Customer Advocate has also similarly recognised progress in attitudes and beliefs regarding the treatment of customers, whilst noting that significant further work remains.[7] Further, a cultural assessment of NAB's wealth business needs to be undertaken having regard to an industry seeking to adjust to large-scale legislative changes, including the Future of Financial Advice (**FoFA**) and MySuper reforms.

4. In short, NAB acknowledges that it is not perfect and, regrettably, mistakes have been made. However, NAB and NULIS have investigated them, learnt from their mistakes, and sought to remediate affected customers. NAB and NULIS submit that their conduct in this respect is consistent with what the community expects from a bank once mistakes have been identified.

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[2] Smith XXN at T4346.5-7; Carter XXN at T4272.23-31.

[3] As required by NULIS's Error Remediation Policy, Exhibit 5.84, Witness Statement of Nicole Smith dated 1 August 2018 in response to Further Revised Rubric 5-40 (WIT.0001.0093.0001) (**Smith 1**) and Exhibit NSS-1 (**NSS-1**), Tab 28, NAB.005.832.0001 at 0004.

[4] Hagger XXN at T4791.19-20. See also ASIC media release, 17-022MR ASIC dated 2 February 2017.

[5] In that regard, see Hagger XXN at T1694.18-21 in which Mr Hagger described the culture of NAB's Wealth business as having progressed from an adviser-centric to a customer-centric culture, whilst acknowledging that "we have more work to do".

[6] AH-1, Tab 16, NAB.088.001.0125 at 0223.

[7] Exhibit 2.191, NAB.005.217.0087.

B. EVIDENCE (CS [6] – [133])

5. CS [6] – [133] seeks (among other things) to summarise the evidence in respect of several topics: PSFs, ASFs, Adviser Contribution Fees, the 2016 Successor Fund Transfer (**SFT**) and grandfathering of commissions, and MySuper.

6. NAB and NULIS have considered Counsel Assisting's summary of the evidence. The Schedule to these submissions identifies a number of material errors and inaccuracies in that summary. In addition, where NAB and NULIS consider that particular evidence should be considered in its wider context, that is noted at the appropriate point in these submissions.

C. PROPOSED FINDINGS OF MISCONDUCT CONCERNING PLAN SERVICE FEES AND ADVISER SERVICE FEES[8]

First proposed finding: Alleged contravention by MLCN and NULIS of 912A(1)(a) of the Corporations Act 2001 (Cth) (the Corporations Act) to do all things necessary to ensure the financial services covered by their respective licences are provided efficiently, honestly and fairly: CS [138]

Second proposed finding: Alleged contravention by MLCL of s 912A(1) of the Corporations Act: CS [139][9]

7. NULIS accepts that it is open on the evidence before the Commission to find that there had been a breach or likely breach by those entities of s 912A(1)(a) of the Corporations Act with respect to the events concerning PSFs deducted from member accounts with no linked adviser that were reported by MLC Nominees Pty Limited (**MLCN**) or NULIS.[10] NULIS accepts that the same finding is open with respect to the ASF events reported by MLCN or NULIS referred to in Ms Smith's statement in respect of which a breach notification has identified that a breach of s 912A(1)(a) may have occurred.[11]

8. ASIC Regulatory Guide 256 (to which Mr Hagger referred in cross-examination[12]) states at [RG256.14] that "complying with this obligation includes Australian Financial Services (**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". NULIS submits that it has complied with its obligations in remediating members impacted by the relevant events.

Third proposed finding: Alleged contravention by MLCN and NULIS of ss 29E(1)(a) and 52(2)(b) and (c) of the SIS Act: CS [140]

9. NULIS submits that it is not open to the Commission on the evidence to conclude that MLCN and NULIS contravened ss 29E(1)(a), 52(2)(b) or 52(2)(c) as contended at CS [140]. Counsel Assisting's submission is put on two bases, which are addressed in turn below.

Alleged failure to exercise reasonable care

10. Counsel Assisting submit that there was an alleged failure by MLCN or NULIS "to exercise care to ensure that fees were only deducted where the contracted service was provided and to seek to ensure that ongoing fees were terminated after the cessation of these services": at CS [140].

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[8] For completeness, NULIS notes that CS [150] refers to a breach report lodged by NULIS on 31 May 2018 with respect to ASFs deducted from the accounts of deceased members. However, Counsel Assisting have not submitted that any particular finding is available on the evidence with respect to this event.

[9] As to the second proposed finding, NAB no longer owns MLCL. Accordingly, no submissions are made on MLCL's behalf.

[10] See notifications regarding Event 061477 (NSS-1, Tab 12) (**TERP Notification**); Event 30095982 (NSS-1, Tab 17) (**SWIFT Notification**).

[11] See notifications regarding Event 471986 (NSS-1, Tabs 30, 31 and 35); Event 262512 (NSS-1, Tab 40), Event 40630382 (NSS-1, Tabs 48 and 49), Event 51921166 (NSS-1, Tabs 54 and 55).

[12] Hagger XXN at T1688.37-41.

11. This submission must be assessed against the terms of the legislative regime. Section 52(2)(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) requires a trustee to exercise "the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries on which it makes investments".

12. Section 52(2)(b) does not require a higher standard of duty upon a trustee than the general law position[13] and does not impose a standard of strict liability: a trustee "is not surety, nor is he an insurer": cf *In re Chapman* [1896] 2 Ch 663 at 775 per Lindley J. Similarly, in *Re VBN and APRA and A Party Joined (No 5)* (V2005/686) (2006) 92 ALD 259 at 355, Forgie DP stated:

> 'What of the covenants in ss 52(2)(b) and (c)? We will begin with s 52(2)(b). It centres on the Trustee's exercising "care, skill and diligence" in all matters affecting the entity and so, in this case, the Fund. Whether it does so is measured by reference to what an "ordinary prudent person" would have done in dealing with the property of another for whom the person felt morally bound to provide. The first matter to note is that **the provision does not impose a "***warranty of perfection***"**.' (emphasis added)

13. When assessed against this standard, the evidence before the Commission demonstrates that the trustee (MLCN or NULIS as applicable) complied with its statutory duty.

14. *First*, as explained by Ms Smith in cross-examination, controls exist both in the form of the underlying contractual arrangements which govern the arrangements between the parties (including obligations imposed on advisers, such as through product disclosure statements, to provide services) and at the point of the member and the adviser agreeing to the payment.[14]

15. *Secondly*, NULIS also engages an administrator to act as its service provider: the administrator was legally liable for breaches of its contractual obligations in its capacity as administrator, which are required to be reported under the Administration Agreement.[15]

16. *Thirdly*, in circumstances where specific controls with respect to the delivery of service were found to be deficient (for instance, where a "head office" code had erroneously been allocated to a member's account), measures were put in place to remedy those specific deficiencies.[16] More generally, measures were also taken over a sustained period of time to uplift the control environment and to introduce reforms, including the implementation of the independent customer advocate program.[17]

17. To the extent that CS [140] suggests that s 52(2)(b) imposes an absolute standard on a superannuation trustee in the position of NULIS to "ensure" that a service is provided in each case where there was an arrangement as between an adviser and a member for the provision of general or personal advice by directly monitoring advisers, the suggestion finds no support in the text of the Act or in prior authority. The specific manner in which a trustee could practicably comply with such an obligation is also unclear, particularly in the case of a superannuation trustee such as NULIS with approximately 1.2 million members[18] and in circumstances where the majority of financial advisers were outside NAB[19]. Finally, there is no evidence before the Commission that any superannuation trustee has adopted such an approach.

Alleged failure to act in members' best interests

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[13] See, eg, *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* [2006] 15 VR 87 at [102] – [107]; *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204 at [120].

[14] Smith XXN at T4469.14-23

[15] As referred to, for example, in NULIS's Error Remediation Policy, NSS-1, Tab 28, NAB.005.832.0001 at 0003; see also Administration Agreement, Exhibit 5.2, Statement of Paul Alexander Carter dated 30 July 2018 in response to Further Revised Rubric 5-40 (WIT.0001.0087.0001) (**Carter Statement**) and Exhibit PAC-1 (**PAC-1**), Tab 17, NAB.005.576.0074 at ._0045 - _0046.

[16] See, for example, Smith 1 at [85] – [88] regarding Event 471986.

[17] See, for example, Smith XXN at T4472.29-36; T4473.31-36.

[18] As stated at CS [4]; see also Exhibit 5.84, Witness Statement of Peggy O'Neal dated 19 July 2018 in response to Revised Rubric 5-22 (WIT.0001.0078.0001) (**O'Neal 1**) and Exhibit PYO-1 (**PYO-1**), O'Neal 1 at pages 64 - 66.

[19] Carter XXN, T4202.12-14.

18. Counsel Assisting further submit at CS [140] that there was a failure by MLCN and NULIS to act in the best interests of members "in assessing and negotiating the required approach in circumstances where NAB was seeking to minimise the amounts required to be paid and was adopting that position in its discussions with ASIC, including on behalf of NULIS". NULIS understands this to be a reference to the approach to remediation (a) with respect to the "NAB Wealth" events concerning ASFs and (b) to the breach reported by NULIS on 14 June 2018 with respect to PSFs deducted from the accounts of MasterKey Personal Super (**MKPS**) members, specifically by reference to the remediation methodology proposed in a letter to ASIC dated 29 March 2018.[20]

19. The *first* point to note is that Counsel Assisting's submission is based on a factual premise – namely, that NAB was seeking to minimise the amount to be paid – which has not been established and which is, in fact, contrary to the evidence and the decisions that NAB took after due investigation: see paragraph 26 below. The *second* point (to which these submissions immediately turn) is that the submission misconceives the scope of the relevant duties of MLCN and NULIS.

20. **Application of the best interests duty in this context**. The "best interests" duty in the SIS Act and at general law is not an obligation at large which imposes an overarching obligation to act in members' best interests generally: rather, it is a covenant to "perform the trustee's *duties* and exercise the trustee's *powers* in the best interest of the beneficiaries": s 52(2)(c) (emphasis added). As such, it operates to qualify the performance of a particular specified duty or the exercise of a specified power. This is illustrated by authority considering the application of the best interests duty at general law and under s 52(2)(c).[21] Again, the covenant in s 52(2)(c) does not enlarge the general law duty.[22] Further, the relevant interests are those prescribed by the trust instrument.[23]

21. Here, the proposed findings with respect to the conduct of MLCN and NULIS with respect to both ASFs and PSFs fail to identify any particular duty or exercise of power which is said not to have been performed or exercised in the best interests of members (whether by reference to the Trust Deed or otherwise). Specifically, the particular instances which involved the exercise of a power or duty to "assess" or "negotiate" the "required approach" are unparticularised.

22. The submissions put by Counsel Assisting also do not grapple with the content of the best interests duty in these circumstances. In that regard, the authorities considering the scope of the "best interests" duty emphasise that the duty is not absolute. For example, in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159, Rein J relevantly stated at [51] that he did not "accept that the trustee is made liable for any outcome which turns out to be unbeneficial to members, even if the original decision which led to that outcome was taken with the best interests of all members in mind … another way of describing this approach is to say that s 52(2) is concerned with process not outcome". His Honour went on to emphasise that the trustee was not "subjected to a regime of strict liability" (at [51]), notwithstanding the availability of a defence in s 323 (at [52]).

23. **The role of MLCN and NULIS in negotiations relating to NAB Wealth ASF events.** At the outset, it is important to contextualise the nature of MLCN's and NULIS's role in relation to remediation of these ASF events. In her witness statement, Ms Smith addressed particular events relating to ASFs which had been reported by the *trustee* (that is, MLCN or NULIS) which concerned specific control breakdowns.[24] These were separately investigated and remediated, and were distinct from the NAB Financial Planning negotiations reported by NAB and its advice

[20] Exhibit 5.74, ASIC.0036.0001.7316.
[21] For example, *Cowan v Scargill* [1985] 1 Ch 270 concerned a determination by trustees in relation to the exercise of a power of investment; *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd* [1999] 1 VR 144 concerned the exercise of a power of amendment to increase retrenchment benefits; and *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204 concerned the entry into a group insurance policy pursuant to a discretion contained in the trust deed.
[22] *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204 at [121].
[23] See, eg, *ASIC v Australian Property Custodian Holdings Limited (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)* (No 3) [2013] FCA 1342 at [460].
[24] As explained in Smith 1 at [67] and also at [75] – [115] and [127] – [128] concerning the identification, investigation and remediation of those events.

licensees referred to in this proposed finding, although Ms Smith referred at [69] to the existence of these events and stated that NAB's advice licensees were continuing to engage in discussions and negotiations with ASIC in relation to those issues.

24. There is no evidence before the Commission relating to the specific circumstances or nature of the NAB Financial Planning ASF breaches (and no witness on behalf of NULIS was requested to address this in a statement). There is also no specific evidence before the Commission in relation to the nature or impact of these events on members, including as to the number of members and quantum of fees in issue. In NULIS's submission, this limits the extent to which it is open to the Commission to make any specific findings in relation to these events.

25. As to remediation of these events generally, Ms Smith's evidence was that she "believed that the advice licensee was in discussion with the regulator, the regulator understood and was privy to whatever they thought the issues were with the advice licensee, and that an appropriate customer outcome would be achieved in terms of the advice licensee entering into a review program or a remediation program if they had not provided advice to customers".[25]

26. In any case, as noted above, the evidence before the Commission does not support a factual finding that NAB was "seeking to minimise the amount to be paid" with respect to the NAB Wealth ASF Events. This matter is further addressed at paragraphs 75 - 80 below by reference to the specific findings proposed by Counsel Assisting at CS [148].

27. **Approach to remediation with respect to PSFs deducted from the accounts of MKPS members.** Nor does the evidence before the Commission establish any basis to find that there was any failure to act in members' best interests with respect to MLCN's and NULIS's actions concerning remediation to MKPS members. For the reasons outlined above, it is problematic to assert that a breach of the "best interests" covenant could arise out of a communication to ASIC proposing a remediation methodology: what is the exercise of duty or power to which the covenant attaches in such circumstances?

28. Even if it were somehow possible for MLCN and NULIS to breach s 52(2)(c) in this way, it is not open to so find on the evidence before the Commission. In summary, the evidence shows that, from the time when ASIC raised a concern in relation to disclosure to MKPS members in October 2017, NULIS undertook an investigation and engaged in a series of discussions and negotiations with ASIC including in relation to remediation to members. The letter dated 29 March 2018 expressed a desire on the part of NULIS to resolve ASIC's concerns and therefore proposed a remediation methodology for ASIC's consideration. As set out in that letter, NULIS considered that the scheme proposed was "the most accurate and fairest method to remediate all MKPS members" and sought to "place MKPS members in the position they would have been in" had the relevant disclosures not occurred. The proposal was made in good faith in the spirit of proposing "a proactive member-centric approach to resolve ASIC's concerns".

29. Ultimately, ASIC did not accept this proposal and NULIS adjusted its remediation approach in response to ASIC's feedback, as set out in a letter dated 7 June 2018.[26] In reality, the above evidence reveals an unexceptional engagement between an entity and a regulator concerning remediation.[27]

Fourth proposed finding: Alleged contravention of ss 29E(1)(a) and 52(2)(d)(i) and (d)(iii) of the SIS Act: CS [141]

30. Counsel Assisting submit at CS [141] that MLCN and NULIS failed to comply with "the covenant to prioritise the interest of members who were wrongly charged PSFs over the interests of advisers, themselves or [MLCL] where the latter retained such fees, which was adverse to the financial interests of members". In that regard, s 52(2)(d)(i) of the SIS Act imposes a covenant "where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee

[25] Smith XXN at T4465.10-14.
[26] Exhibit 5.79, ASIC.0039.0001.1173.
[27] The evidence that supports the propositions in this paragraph are at Exhibit 5.68, ASIC.0036.0002.2531; Exhibit 5.70, ASIC.0015.0002.0296_E; Exhibit 5.72, ASIC.0036.0001.5091; Exhibit 5.74, ASIC.0036.0001.7316.

or an associate of the trustee" and s 52(2)(d)(iii) obliges a trustee to "ensure that the interests of the beneficiaries are not adversely affected by the conflict". Section 29E(1)(a) obliges a Registrable Superannuation Entity (**RSE**) licensee to comply with the RSE licensee law.

31. While NULIS acknowledges that this error should not have occurred in the first place, members from whose accounts PSFs were incorrectly deducted were remediated in full.[28]

32. As to the application of s 52(2)(d)(i), a threshold issue is whether any conflict even arises for the purposes of s 52(2)(d)(i) in these circumstances: the interests of members in being remediated is not *prima facie* in conflict with those of NULIS or MLCL. Further, the evidence does not establish that the interests of advisers, the trustee (MLCN and NULIS) or MLCL, were prioritised above those of members *in any way* which would constitute a contravention of s 52(2)(d)(i) of the SIS Act. Nor do Counsel Assisting particularise how this might be so.

33. Indeed, the evidence positively establishes that NULIS has, at all times, prioritised the interests of members.[29] Ms Smith's evidence in that regard was that "the board has been a very active board … the trustee would not, under any circumstances, be thinking that we would be acting in the interests of the advice licensee or the bank over the interests of members".[30]

34. This evidence is underpinned by the governance framework NULIS has put in place which supports NULIS's capacity to act independently of the NAB Group and prioritise the interests of members.[31] Any potential or actual conflicts of interests with members of the NAB Group are recognised and governed by NULIS's conflicts management framework.

35. Further, as Ms O'Neal stated in her witness statement dated 23 July 2018 at [20], NULIS is always seeking to improve member outcomes and to that end, approves an annual business plan setting out its strategy, investment and financial plan. Part of that strategy includes growing the Funds (which improves member returns) and simplifying the operation of the Funds through ongoing investment in core systems and customer processes (which improves member experience and potentially reduces costs). Ms O'Neal also pointed to specific examples in her witness statement at [23] – [31] of NULIS's advocacy on behalf of members within the NAB Group.

36. Counsel Assisting further submit at CS [141] that the alleged breach of s 52(2)(d)(i) and (iii) "extended to the trustee's failure to exercise its discretions independently of NAB in its negotiations with ASIC in respect of the remediation methodology which would be adopted". However, Counsel Assisting do not identify: (a) the particular discretions which MLCN and NULIS are said not to have exercised independently and the occasions on which it failed to do so; and (b) the basis on which any such exercise of discretion constituted a failure to prioritise members' interests.

37. More broadly, there is no evidence that MLCN or NULIS inappropriately failed to exercise any discretion independently of NAB with respect to the remediation of the PSF or ASF events. Indeed, as to the independence of MLCN and NULIS in negotiations with ASIC, Ms Smith's evidence was that "… in respect of meetings with the regulator, where the trustee believes it needs to put forward its own voice or an independent position … that is actually when I have attended or we've ensured that the [Chief Operating Officer] of the office of the trustee would be attending those meetings".[32] There is no evidence that contradicts this testimony from NULIS's former chair. NULIS also relies here upon the evidence set out at paragraph 33 above regarding NULIS's prioritisation of members' interests.

Fifth proposed finding: Alleged contravention of s 62 of the SIS Act: CS [142]

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[28] Hagger XXN at T4738.21; Smith 1 at [52].
[29] See generally O'Neal 1 at [44] – [48]; [108] – [111]; Exhibit 5.85, Witness Statement of Peggy O'Neal dated 23 July 2018 in response to Further Revised Rubric 5-40 (WIT.0001.0077.0001)(**O'Neal 2**) and Exhibit PYO-2 (**PYO-2**), O'Neal 2 at [19] – [38].
[30] See generally Smith XXN at T4470.10-20.
[31] As addressed in detail at O'Neal 1, at [40] – [43], [108] – [109]; see also PYO-1, Tab 12.
[32] Smith XXN at T4368.3-7.

38. NULIS submits that it is not open to the Commission to find that MLCN and NULIS breached s 62(1). There is no evidence before the Commission to support this finding. Nor, as a matter of procedural fairness, would it be appropriate to do so.

39. *First*, an immediate difficulty is that CS [142] does not articulate the particular conduct or evidence on which the alleged contravention is said to be founded.

40. *Secondly*, the proposed finding does not sufficiently engage with the terms of s 62 and the manner in which a contravention of the section is to be established. The section relevantly provides that "each trustee … must ensure that the fund is maintained solely …" for one or more of the core and ancillary purposes there specified. At CS [142], there is no identification of any purpose on the part of MLCN or NULIS which is said not to be one of the statutorily prescribed purposes in s 62(1).[33]

41. By way of contrast, cases in which a contravention of s 62 has been identified typically involve a finding as to the existence of an impermissible purpose.[34] These cases, together with the express statutory language of s 62(1), also suggest that the relevant focus is on the *purpose* for which a fund is maintained, rather than the *effect* of a particular transaction.

42. Overall, a consideration of whether or not a breach of s 62 has occurred involves a question of fact for consideration in all the circumstances of the case. As Steward J observed in *Aussiegolfa Pty Limited (Trustee) v Commissioner of Taxation* [2018] FCAFC 122 at [231], "purpose" in the context of s 62 "looks to the object of acts of maintenance of a fund on a yearly basis. If those acts have the sole object of achieving the core purposes and/or ancillary purposes, the provision is satisfied".

43. This analysis is illustrative of the detailed factual inquiry that would need to be undertaken in the circumstances of any given case, including as to the nature of any benefits received by members or related persons and the impact on, for example, the income and assets of the fund. To the extent it is suggested that the sole purpose test was not satisfied by reason of any payments authorised by MLCN or NULIS, all of the relevant circumstances would need to be considered in detail.

44. *Thirdly*, there is no evidence before the Commission that MLCN or NULIS in fact authorised deductions of payments for a purpose other than those specified in s 62.

45. On the assumption that the fifth proposed finding is directed at PSFs and ASFs, the evidence does not reveal any purpose in the implementation or administration of those fees that falls outside s 62(1). Further, it was not suggested to Ms Smith, or any other witness who gave evidence on behalf of NAB or NULIS, that MLCN or NULIS were maintaining the funds for a collateral purpose. To the extent that the reported breaches in relation to ASFs and PSFs recognised that fees had been erroneously paid from the fund in circumstances where they should not have been, this is not a matter that relevantly bears upon MLCN's or NULIS's *purpose*.

46. That the purpose of the fees was not collateral is further supported by their objective characteristics. Whatever be the proper characterisation of the fees as fees for access or fees for service, both PSFs and ASFs had a sufficient connection to the provision of benefits to members of the fund to fall within s 62.[35]

47. *Fourthly*, a consideration of whether s 62 has been contravened cannot fairly be undertaken without recognising the operation of the defences in s 323 of the SIS Act, which would need to be considered by reference to the precise formulation of the contravention alleged. This remains

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[33] In that regard, the relevant "purpose" which must be established for the purposes of s 62 is that of the trustee and not some other person: cf *Aussiegolfa Pty Limited (Trustee) v Commissioner of Taxation* [2018] FCAFC 122 per Steward J at [231].

[34] For instance, to pay another superannuation fund's tax debt (*Case 23/96* 96 ATC 278); to provide a family trust with capital to purchase a Swiss chalet that was used by a member and his family (*Case 43/95* (1995) 31 ATR 1067); or to pay an inflated price for assets from an employer-sponsor controlled by the trustees of the superannuation fund (*APRA v Derstepanian* [2005] FCA 1121).

[35] *APRA Superannuation Circular No.III.A.4* at [41] – [42] supports this position.

unarticulated.

Sixth proposed finding: Alleged contravention by MLCN and NULIS of s 912A(1)(h): CS [143]

48. NULIS submits that it is not open to the Commission to find that MLCN and NULIS contravened s 912A(1)(h) by not having adequate risk management systems in place.

49. *First*, s 912A(1)(h) of the Corporations Act is not applicable to RSE licensees by reason of s 912A(5)(a), which relevantly provides that that subsection "does not apply to a body regulated by [the Australian Prudential Regulation Authority (**APRA**)], unless the body is an RSE licensee that is also the responsible entity of a registered scheme". There is no evidence before the Commission that MLCN or NULIS was, in addition to being an RSE licensee, the responsible entity of a registered scheme.

50. *Secondly*, NULIS points to the following matters (which are not intended to be exhaustive) as evidence of the risk management systems in place and actions taken by MLCN and NULIS to improve them:

    a) significant improvements and uplifts in the control environment took place over a period of time at the instigation of MLCN and NULIS. This included independent reviews of the control environment requested by the applicable trustee "starting in 2015 through to 2017" which highlighted a need for uplift, as Ms Smith explained in cross-examination;[36]

    b) as explained in Ms Smith's statement dated 1 August 2018 at [48] – [50], in February 2017 additional licence conditions were imposed on NULIS's AFSL which required that NULIS engage an ASIC-approved independent expert to assess and report on the adequacy of its compliance and risk management practices for its superannuation business. In July 2017, KPMG delivered its First Phase Report, which noted, *inter alia*, that NULIS demonstrated a "strong commitment to continuous improvement of key systems, processes and controls" and that KPMG's testing did not reveal any "overall systemic concerns";[37] and

    c) in cross-examination, Ms Smith also referred to a series of measures taken to progressively uplift controls over time.[38] In that regard, both NAB and NULIS have appropriately acknowledged the need to take action to uplift controls and, as noted by KPMG, have committed to continuous improvement.[39]

Seventh proposed finding: Alleged engagement in conduct that was misleading and deceptive or likely to mislead and deceive contrary to s 12DA of the ASIC Act and s 1041H of the Corporations Act: CS [144]

51. Whether conduct is misleading and deceptive, or is likely to mislead and deceive, is a question of fact that must be determined by reference to the relevant context, including relevant surrounding facts and circumstances.[40] The Commission did not direct its attention to, and does not have before it, all of the relevant material and context that would need to be considered before a concluded view could be reached on whether misleading or deceptive conduct had been engaged in. Nor were the witnesses who gave evidence on behalf of NULIS directed to all of the relevant material in cross-examination concerning the disclosures made to members.[41]

52. However, NULIS accepts that:

    a) there may have been a breach of ss 1041H of the Corporations Act and 12DA of the ASIC

[36] See generally Smith XXN, T4381.30 – 4382.4.
[37] NSS-1, Tab 23, NAB.005.018.0396 at 0402.
[38] Smith XXN at T4465.34 – 4466.19.
[39] NSS-1, Tab 23, NAB.005.018.0396 at 0402.
[40] See, eg, *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 per McHugh J.
[41] For example, Ms Smith stated that in order to respond to a question in relation to the disclosures to members she would need to be taken to the relevant PDS and other contractual documents, but that did not occur: Smith XXN at T4323.2 – 4324.16.

Act with respect to disclosure to members because the member communications provided to members could potentially have misled unadvised members to believe that PSFs would not apply to their account given that they did not have a named financial adviser linked to their account;[42]

b) there may have been a breach of ss 1041H and 12DA in relation to MKPS members because, although it had been disclosed to MKPS members with linked accounts that they had the ability to negotiate the PSF with their adviser, it may not have been apparent to these members that they could opt out of the fee.[43]

53. NULIS acknowledges that communications to members could have been clearer. However, the evidence shows that NULIS is committed to fully remediating members who have had PSF amounts incorrectly deducted from their accounts.[44]

Eighth proposed finding: Alleged unconscionable conduct contrary to s 12CA of the ASIC Act with respect to the charging of PSFs by MLCN and NULIS and the attempt to retain (or avoid reimbursement) of those fees: CS [145]

54. There is no evidence before the Commission that supports a finding that MLCN and NULIS breached s 12CA of the ASIC Act in the manner alleged or at all. Nor does s 12CA, as judicially considered, permit such a finding in the present context.

55. As the Federal Court has recently recognised:[45]

> "Section 12CA incorporates the unwritten law of unconscionability. The unwritten law relevantly includes the equitable principles of unconscionable conduct. Those principles operate to set aside a transaction where "one [person] by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created" (*Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 at 462 per Mason J)."

56. As a result, one of the elements required to establish a contravention is that the relevant members who have been charged PSFs are "operating under a special disability or disadvantage" vis-à-vis MLCN and NULIS.[46] The need to satisfy that element is a "necessity". The special disability or disadvantage must be one which "seriously affects the ability" of the member to "make a judgment" as to their own best interests. While the categories of special disability or disadvantage are not closed, the mere fact that parties will have different levels of information and different levels of bargaining power does not give rise to the necessary disability or disadvantage.

57. A further essential element is that the alleged contravenor takes advantage of the other person's special disadvantage or disability.[47] In order for that element to be satisfied, it must be shown that the alleged contravenor had some awareness of the special disadvantage or disability. Moreover, it must be sufficiently evident to support a finding that the alleged contravenor unconscientiously engaged in conduct that was exploitative or unfair.[48]

58. In the present case, Counsel Assisting have not addressed any of the essential elements identified above:

a) no attempt has been made to establish that fund members were, either generally or specifically, under a "special disadvantage" in the *Amadio* sense so far as NULIS was

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[42] As referred to at NSS-1, Tab 17, NAB.005.069.0155 at 0157 and 0158.
[43] As referred to at NSS-1, Tab 26, NAB.005.672.0028 at 0004.
[44] See Smith 1 at [44] – [47] (members with no linked adviser); Exhibit 5.44, Witness Statement of Nicole Smith dated 3 August 2018 in response to Rubric 5-77 (WIT.0001.0094.0001)(**Smith 2**) and Exhibit NSS-2 (**NSS-2**), at [19] – [21] (other MKPS members).
[45] See *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751 (***Westpac***) at [2213].
[46] See in respect of the propositions made in this paragraph, *Westpac* at [2214], [2218], [2219], [2225].
[47] See *Westpac* at [2214], [2225].
[48] See *Westpac* at [2225].

concerned, having regard to the high threshold required to establish this. Nor is there any evidence before the Commission which would support the satisfaction of this element;

b) nor has any attempt been made to establish that MLCN and NULIS were aware of the alleged special disability or disadvantage, and that they acted against conscience by taking advantage of it. There is no evidence to suggest any such awareness and no proposition to that effect was put to Ms Smith;

c) nor is there any evidence that demonstrates that MLCN or NULIS were even aware that PSFs were being deducted from the accounts of unadvised members following their approval. Again, no suggestion to this effect was made to Ms Smith. In the absence of knowledge by MLCN or NULIS of this threshold fact, it cannot fairly be said that MLCN or NULIS unconscientiously took advantage of a special disadvantage or disability (even if such a disadvantage or disability could be found).

59. Each of these matters precludes the Commission from finding that MLCN or NULIS contravened s 12CA of the ASIC Act.

60. There is a further fundamental difficulty with the proposed finding: namely, the suggestion that MLCN and NULIS attempted either to "retain or avoid reimbursement of PSFs" that were incorrectly deducted.

61. There is no evidence that the trustee (MLCN or NULIS) attempted to retain any PSF that was charged to any member. The finding is not open in the absence of such evidence. Further, the evidence with respect to the investigation and remediation of the The Employee Retirement Plan (**TERP**) and Superannuation with Fee Transparency (**SWIFT**)/Encompass PSF events shows that, rather than seeking to avoid reimbursement, the approach adopted was to comprehensively investigate and remediate the issue and ensure that all relevant information was put before the NULIS Board, which then approved a full remediation package. In summary:[49]

a) an extensive investigation was conducted to identify the nature and character of the PSF. Mr Carter's evidence, supported by contemporaneous documents, was that "what we were doing is making sure there was a full understanding of the issue and contemplating all the questions that I might get asked about the issue".[50] Whilst Mr Carter acknowledged that "in retrospect I wish that … we had moved more quickly through the investigation, with the benefit of hindsight", he refuted the proposition that management was "really just trying to find services that could justify keeping the money", re-iterating that "we were trying to understand what actually was the nature of the issue" and to make sure that "all factors were considered to come to a conclusion";[51]

b) after detailed analysis, including obtaining independent legal advice, it was determined that there were two different ways to characterise the PSF, described as the "investment policy alternative" and the "trust expense alternative". Each characterisation involved different potential approaches to remediation;

c) it was considered by the administrator that both alternatives were reasonably arguable, as reflected in a letter dated 24 October 2016 to the NULIS Board (**Management Letter**).[52] Whilst the letter recommended that the "compensation with interest" approach was preferred, it acknowledged that "[the National Wealth Management Services Limited (**NWMSL**)] understands, ultimately the decision on the most appropriate PSF remediation path rests with NULIS as the trustee";

d) on 24 October 2016, the NWMSL Board resolved, *inter alia*, to note and endorse that each of the alternatives (and both compensation approaches) were "reasonably arguable and therefore appropriate" and to recommend to NULIS to "approve the compensation methodology consisting of a full refund (plus interest) of all PSFs to non-linked members

[49] As summarised in Exhibit 5.159, ASIC.0039.0001.6376 at 6381.
[50] Carter XXN at T4271.46- T4272.1.
[51] Carter XXN at T4272.23-31.
[52] Exhibit 5.38, NAB.155.027.3782 at 3783.

as being more generous to members and the preferred approach, notwithstanding that the opt-in compensation approach was also appropriate and reasonable";[53]

e) on 26 October 2016, the NULIS Board resolved to approve the characterisation of the PSF as a "trust expense" and the proposed remediation approach outlined in that paper;[54]

f) by July 2017, members were remediated in full (including interest). [55]

62. The fact that different options were being investigated, and differing legal advices were considered, in order to achieve a full understanding of the issue does not support a finding that the approach of MLCN or NULIS was "seeking to retain (or avoid reimbursement of) those fees". Rather, it is indicative of a careful and prudent process of investigation and review.

63. Further, in relation to NULIS's position, Ms Smith's evidence was she was aware that different legal advice had been received and was of the view that the organisation needed to "go through due process and consider the matter and bring that outcome to the board, and that the trustee had a voice and an independent voice as part of that process".[56] Her evidence was that she was "pushing the [management team and the administrator] to come to a conclusion and for us to resolve the matter".[57] While Ms Smith candidly acknowledged that, with the benefit of hindsight, the process took "too long",[58] on 26 October 2016, NULIS's power as trustee was exercised to approve the remediation package that was the most generous for members.[59]

Ninth proposed finding: Alleged contravention of ss 912A(1)(c) of the Corporations Act by failing to comply with ss 912A(1)(a), 1(ca), 1(h) and 912D(1B): CS [146]

64. This proposed finding has not been particularised by reference to any specific conduct; nor is it explained how any particular conduct the subject of the finding is said to satisfy the elements of each of the provisions referred to.

65. Insofar as this proposed finding refers to the potential contraventions of s 912A(1)(a) referred to at paragraphs 7- 8 above, NULIS accepts that this finding is open. Otherwise, to the extent that it is contended that any contravention of s 912A(1)(c) arises out of any of the other proposed findings set out in Counsel Assisting's closing submissions, NULIS submits that it is not open to the Commission to make the finding proposed for the same reasons as submitted with respect to those other findings.

Tenth proposed finding: Alleged contravention of s 912D(1B) of the Corporations Act: CS [147]

66. At CS [147], Counsel Assisting submit that it is open to find that NULIS and MLCL contravened their statutory obligation to report, as soon as practicable and in any event within 10 business days, a breach or likely breach of their obligations under s 912A of the Corporations Act. Specifically, it is contended that this arises by reason of the fact that NULIS and MLCL were "aware of the charging of fees for no services to clients … since at least 2013, when complaints were received, alternatively, since at least July 2015 when an internal legal advice raised the issue", but that "ASIC was not notified until 24 December 2015".

67. For the following reasons, NULIS submits this finding is not open on the evidence.[60]

68. The specific breach to which CS [147] appears to refer is the TERP Notification, which was reported by MLCL and MLCN (not NULIS) on 24 December 2015. Whilst this issue was raised as an event in September 2015 and subsequently investigated (as explained by Ms Smith in her statement dated 1 August 2018 at [26] – [35]), the relevant determination that a significant and

[53] Exhibit 5.41, NAB.057.002.5664 at 5666.
[54] Exhibit 5.39, NAB.005.562.4422_E.
[55] Smith 1 at [62] – [64].
[56] Smith XXN at T4333.46-T4334.24.
[57] Smith XXN at T4354.15-25.
[58] Smith XXN at T4346.5-7.
[59] Smith XXN at T4374.11-12.
[60] NAB and NULIS do not make any submission on behalf of MLCL.

reportable breach had occurred was made by a Breach Review Committee on 23 December 2015 (consistently with NULIS's internal event management policy). As outlined by Ms Smith at [33] – [34], the breach was reported the next day, well within the 10 business day requirement.

69. Both as a matter of statutory construction and on the basis of ASIC's approach to compliance with s 912D, an obligation to report does not arise as soon as a particular issue is identified within an organisation. Rather, the obligation to report only crystallises when there is actual knowledge by a responsible decision-maker: (a) of a breach or likely breach; and (b) that that breach or likely breach was significant. ASIC Regulatory Guide 78 states at [78.28] that "we will administer this requirement as meaning that you become aware of a breach (or likely breach) when a person responsible for compliance becomes aware of the breach". In this case, in accordance with NULIS's internal processes, the relevant body with designated responsibility for compliance is the Breach Review Committee.[61]

70. For completeness, NULIS also submits that in any prosecution for an offence for failure to comply with s 912D(1B) it would be necessary to establish, on the criminal standard of proof, an *intention* to fail to report in any proceedings for an offence for failure to comply with s 912D(1B).[62]

71. As addressed at paragraph 142 - 144 below, NAB and NULIS accept that breach reporting was an area which needed improvement (which has now occurred). However, there is no evidence at all before the Commission of any intentional failure to report breaches to ASIC. Nor was any such suggestion put to any NAB or NULIS witness.

D. PROPOSED FINDINGS OF CONDUCT FALLING BELOW COMMUNITY STANDARDS AND EXPECTATIONS IN RELATION TO PLAN SERVICE FEES AND ADVISER SERVICE FEES

Eleventh proposed finding: the charging of Plan Service Fees and Adviser Service Fees where no service was provided by an adviser to the member may have amounted to conduct that fell below community standards and expectations: CS [148]

72. In relation to members in MKBS and MKPS who did not have an adviser linked to their account NAB and NULIS accept that the PSF should not have been deducted and that the conduct falls below community standards and expectations. Members impacted by this conduct have been fully remediated.

73. In relation to the ASF, NAB and NULIS accept that where there has been a failure to comply with contractual terms agreed by the customer it is conduct that does not meet community standards and expectations. Where NAB has identified members impacted by a failure to provide service, they have been remediated (fees refunded together with the earning or interest). NAB continues to review and remediate customers in this position.

74. NAB and NULIS further acknowledge that disclosure provided to MKPS members with linked advisers about their ability to reduce the fee to zero should have been clearer and that this conduct does not meet community standards and expectations. Consistent with the media release dated 26 July 2018, impacted members will be fully remediated.[63]

Twelfth proposed finding: By advocating various methodologies in their negotiations with ASIC, including opt-in remediation or "fair value" approach, with the intention or effect of minimising the quantum of remediation to be paid to members, NAB and NULIS acted in a way that was ethically unsound and ultimately delayed remediation to members who, in some instances, had paid fees in 2009: CS [148]

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[61] See, eg, Smith 1 at [25]; Exhibit 2.178, Statement of Andrew Hagger dated 5 April 2018 in response to Rubric 2-9, (WIT.0001.0022.0001)(**Hagger 1**) and Exhibit AH-1 (**AH-1**), Hagger 1 at [101]; AH-1, Tab 13, NAB.072.001.2957; Smith XXN at T4311.11-26; T4508.26-46; T4509.1-15.

[62] Section 5.6(1) of the *Criminal Code 1995* relevantly provides that, where the law creating the offence does not specify a fault element for a physical element that consists only of conduct, the fault element is intention. In this case, the relevant physical element which comprises the offence is conduct, being the failure to report.

[63] NSS-1, Tab 27, NAB.005.817.0001.

75. The twelfth proposed finding articulated by Counsel Assisting at CS [148] appears to relate to the negotiations carried out by NAB with ASIC relating to "Adviser Service Fee" events within the NAB Wealth business and with respect to the remediation approach proposed by NULIS by letter dated 29 March 2018 addressed at paragraph 28 above.

76. NAB and NULIS accept that these matters took too long to discover, investigate and remediate from when the fees were first deducted from members' accounts. However, NAB and NULIS dispute that the evidence before the Commission is capable of establishing that there was any "intention or effect" of minimising the quantum of remediation to be paid to members or that their conduct was in any way unethical.

77. With respect to ASFs, important aspects of the background context include that:

    a) NAB was a first industry mover away from a commission-based adviser remuneration structure and towards a "fee for service" model, well ahead of the introduction of the FoFA reforms in 2013. At the time of implementation of this new model, NAB received positive feedback as to the adoption of this model;[64]

    b) the intention in introducing ASFs was to make the fees payable by members more transparent and easier to understand. However, NAB and NULIS accept that the implementation of the fees was not executed as well as it should have been. This is so despite NAB's position that a high proportion of NAB's customer's did in fact receive the contracted service. Where members did not receive the promised service, NAB has consistently accepted that members need to be remediated;

    c) key issues in negotiations with ASIC have included determining the services that NAB had contracted to provide and the level and mode of proof to be adopted in testing the provision of the services, or, as Mr Hagger put it "the way to establish whether services have been provided or not". [65] Mr Hagger's evidence was that "we were developing a remediation program which we felt was pragmatic and able to get to the heart of what had actually gone on between an adviser and a client";[66]

    d) negotiations between ASIC and NAB have evolved over time. In cross-examination, Mr Hagger referred to a discussion with Mr Kell on or around 7 June 2017 which he reported to the NAB Board as "a first reaction to our proposal" (being the methodology proposed to ASIC on 2 June 2017). Mr Hagger stated that "our understanding at this point – it changed later … but our understanding at this point was that ASIC was broadly happy with the direction we were headed, but unhappy about the specific item that you just raised" (being a reference to the methodology to be adopted in circumstances where no digital data or physical records were available).[67] Whilst Mr Kell and Mr Mullaly were called to give evidence at the hearing on behalf of ASIC, it was not put to either witness that Mr Hagger's account of events was incorrect, nor were those witnesses asked to comment on any alleged "unethical conduct" in NAB's approach in the course of the negotiations;

    e) by way of further illustration, Mr Hagger noted that in the period leading up to October 2017 when Ms Cook took over leading the discussions with ASIC, "in the previous six months when I had been leading, there were times that it seemed that ASIC was, with some exceptions, but broadly comfortable with our approach. And then it became clear in August that they were not comfortable. And then things were quiet through September, and then ASIC wrote quite a legal letter back to us … at that moment we felt it best, given that it had become a legal matter, that Ms Cook lead the discussions".[68]

78. It does not follow from the progression of these discussions over time, including the fact that different positions were adopted both by NAB and ASIC (which accepted and adopted various aspects of NAB's proposed methodology), that NAB's behaviour was in any way "ethically

[64] As set out in, for example, the letter dated 13 April 2018 at Exhibit 5.76, ASIC.0039.0001.1727 at 1730.
[65] Hagger XXN at T4794.26 – 28.
[66] Hagger XXN at T4798.1-3.
[67] Hagger XXN at T4800.22-27.
[68] Hagger XXN at T4792.46 – 4793.5.

unsound". With respect to the "fair exchange of value" proposition, Mr Hagger's evidence was that whilst he did not know the specifics of what had been put forward, the guiding principle was to assess "from a customer's perspective, has there been a fair exchange of value" and that, if there had not, then "something needs to be done about that".[69] Again, these matters reflect a progression of views over time and an appropriate discussion with ASIC as to the degree and mode of proof that would be required in order to demonstrate an actual provision of promised services. Any suggestion that NAB's proposal of these methodologies involved unethical conduct on its part is categorically rejected.

79. In summary, at all times in the course of progressing its review of ASFs, NAB has approached the discussions and negotiations with ASIC in good faith and in the spirit of reaching a consensus which was both customer-centric, and acceptable to the regulator. NAB was willing to adapt its proposals and engage with ASIC's feedback. NAB's behaviour also demonstrated a commitment to provide ASIC and NAB's customers with assurance in respect of ASF events going forward by appointing an independent expert (PwC) to test and assure the controls design and operational effectiveness of NAB's approach.[70]

80. Similarly, for the same reasons as set out above at paragraphs 28 - 29 above with respect to remediation to MKPS members, any allegation of unethical conduct by NAB or NULIS with respect to the remediation approach proposed in the letter dated 29 March 2018 is rejected. Whilst the approach adopted evolved over time, the methodology proposed by NULIS was put forward in the spirit of proposing a customer-centric approach to resolve ASIC's concerns.

Thirteenth proposed finding: In its representations to ASIC throughout negotiations in respect of the Plan Service Fees, NAB acted in a way that departed from community standards and expectations: CA [149]

81. At CS [149], Counsel Assisting submit that "in its representations to ASIC throughout negotiations in respect of the [PSFs], NAB acted in a way that departed from community standards and expectations".

82. NAB refutes the allegation that it departed from community standards and expectations in its dealings with the regulator, and in particular that it was not "full and frank" in its dealings with ASIC.

83. **Continued reporting and updating to ASIC**. The evidence shows that, from the time that the first PSF Event was reported in December 2015, regular updates were provided to ASIC through a variety of informal and formal channels as to the progress of the investigation and remediation. These took the form of, *inter alia*: the breach reports themselves; responses to notices; monthly and quarterly reports; presentations; correspondence and informal communications, both oral and written.[71] Not all of these communications are before the Commission.

84. Relevantly, part of these updates involved discussions which occurred at an executive management and Commissioner level between Mr Hagger[72] and Mr Tanzer (ASIC Commissioner) and Mr Kell (ASIC Deputy Chair). For example, in cross-examination, Mr Hagger referred to a number of conversations he had with Mr Tanzer between June and 30 November 2016. Mr Hagger's uncontroverted evidence was that, in one of those conversations, he had informed Mr Tanzer that "you have the number of members, and the approximate dollars involved in terms of the fees is similar, perhaps slightly bigger, per member than the TERP issue".[73] In that regard, in the SWIFT Notification, estimates of the number of member accounts impacted (totalling 112,110) had been provided.[74]

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[69] Hagger XXN at T4794.14-19.
[70] As set out in, for example, the letter dated 13 April 2018 at Exhibit 5.76, ASIC.0039.0001.1727 at 1731.
[71] See eg, the TERP Notification and SWIFT Notification referred to above; response to notice dated 25 February 2016 (Exhibit 5.150, NAB.047.006.2838); Exhibit 5.151 and attachment NAB.047.006.5395; NAB presentation on 3 November 2016 (Exhibit 5.159, ASIC.0039.0001.6376).
[72] From April 2013 to July 2016, Mr Hagger was Group Executive, NAB Wealth, in which role he had responsibility for NAB's superannuation business: Hagger XN at T4731.11-15. Following that, from August 2016, his role was Chief Customer Officer, Consumer Banking and Wealth, NAB: Hagger XN at T4730.42-47.
[73] Hagger XXN at T4757.34-40.
[74] NSS-1, Tab 17, NAB.005.069.0155 at 0157.

85. **Call between Mr Hagger and Mr Tanzer**. In the context of communications with ASIC in relation to Report 499, on 22 October 2016, Mr Hagger emailed Mr Thorburn and Mr Cahill and stated that he intended to call Mr Tanzer or Mr Kell on Monday 24 October 2016 "to advise the latest on where we are up to on the PSFs. All in the ongoing interests of openness and transparency".[75] Mr Hagger's email also noted that "we doubt they will wish to shoe-horn the matter into their report given deadlines, their multi-phased approach and the very substantial rewrite which would be required to their report overall".

86. There is no evidence, including from ASIC, that Mr Hagger's observations in this respect were incorrect. Mr Hagger's statement also correctly recognised that the report being written by ASIC was being presented at a point in time, with further phased updates to be provided at a later date which could include the revised PSF compensation figures once approved by the NWMSL and NULIS Boards.[76]

87. As foreshadowed, Mr Hagger called Mr Tanzer on the morning of 24 October 2016. Mr Hagger gave evidence of that conversation at the hearing, which was supported by a contemporaneous file note in the form of an email.[77] In that conversation, as recorded in Mr Hagger's email:

    a) Mr Hagger stated, "in the interests of openness and transparency", that "we wanted to let him know we are nearing completion of our position on PSFs with board meetings occurring this week for NWMSL and NULIS" and that "if the report was coming out later, in say a week or two, this could potentially be included, though I don't want to front-run those Board discussions", noting that "the Trustee may for example ask for further work or clarifications that would extend timeframes";

    b) Mr Hagger issued an invitation to Mr Tanzer that "if he wanted to know anything further about any of this, to let me know";

    c) Mr Hagger indicated that "there were factuals and counterfactuals in our situation of PSFs and it is a very close call in my view as to outcomes and legal issues, as I have consistently indicated";

    d) Mr Tanzer acknowledged that the "report is indeed a snapshot at a point in time" and it was appropriate that NAB's response "has been consistent with that", and that "he will come back to [Mr Hagger] if he requests any further information on the PSFs prior to the release of the report".

88. There is no reason to doubt Mr Hagger's account of that conversation. It was not put to Mr Hagger that any part of his account was untrue. Mr Tanzer was not called to give evidence. Further, there is no evidence, nor was it put to Mr Hagger, that Mr Tanzer or an ASIC employee engaging with NAB at the working level requested Mr Hagger to provide updated compensation figures notwithstanding Mr Hagger's offer to provide any further information sought, nor that Mr Tanzer asked Mr Hagger to supply any further information with respect to the timing of the Board discussions. It was entirely open to Mr Tanzer to do so, as Mr Hagger emphasised. Further, Mr Tanzer had already been provided with information (see paragraph 84 above) that indicated the scale of the additional compensation that was under consideration.

89. No ASIC witness offered, or was asked to provide, any criticisms about the conduct of Mr Hagger or of NAB more generally with respect to the first fee for no service report.

90. NAB strongly refutes the submission by Counsel Assisting at CS [149] that Mr Hagger's evidence "reveals both a disrespect for the role of the regulator and a disregard for the gravity of the events in question". There is no evidence before the Commission that would justify this finding. To the contrary, as submitted below, the evidence demonstrates the seriousness with which this issue was treated.

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[75] Exhibit 5.153, NAB.044.010.7685.
[76] See draft Report 499 at Exhibit 5.32, NAB.158.006.5030 at page .5053 (Table 4 setting out "estimated further compensation as reported to ASIC as at 31 August 2018) and at page .5056 referring to the fact that ASIC would report further at a later date.
[77] Exhibit 5.37, NAB.047.001.1728.

91. Mr Hagger's communications with ASIC demonstrate both a willingness to engage in proactive and transparent communications with the regulator, and a recognition that the importance of the events justified direct communications at the most senior levels. As recorded in Mr Hagger's contemporaneous emails of 22 and 24 October, the whole point of choosing to voluntarily engage with ASIC at a Commissioner-level was due to Mr Hagger's desire for ongoing openness and transparency. Mr Hagger had no reason to consider that his internal emails from 2016 would ever be produced to the Commission. His repeated references to his desire to be open and transparent should therefore be given full weight.

92. The seriousness with which Mr Hagger treated the PSF matter is reinforced by the fact that he had continued to remain engaged in issues relating to the PSF remediation following his transition to the role of Chief Customer Officer, Consumer Banking and Wealth. This is also illustrated by Mr Hagger's behaviour through the PSF matter as a whole, including in communications which he authored such as the Management Letter which demonstrated a customer-centric approach.

93. To the extent it is suggested that the behaviour of NAB's senior management, including Mr Hagger, was primarily motivated by a "reactive media strategy", this is rejected. In response to the proposition that "the premise of being reactive in the media is that NAB will be seen as just one in the pack rather than called out as an outlier in the report", Mr Hagger responded that "I see Mr Goonan is saying that, but … that doesn't drive the decision of what to do with ASIC".[78] Mr Goonan was Executive General Manager, Corporate Affairs and did not report to Mr Hagger.[79]

94. **Ongoing process of Board approval.** It is also important to emphasise that, up until the point where the NULIS Board resolved to approve the characterisation of the PSF as a "trust expense" on 26 October 2016, the process of investigation in relation to the PSF Events was ongoing and the possible quantum of compensation was in a state of flux. This is reflected in contemporaneous internal documents: for example, on 19 October 2016, Mr Hagger provided an update to NAB's Group Risk Return Management Committee on the PSFs "incorrectly charged for SWIFT, Encompass and TERP (totalling $34.3m)" and noted, among other things, that "the quantum of compensation (ranging from $15m to $40m) was being discussed with the Trustee and counsel".[80] Moreover, notwithstanding the meeting of the NWMSL Board on 24 October 2016, as was plain in the Management Letter, the ultimate decision rested with the Board of NULIS, as trustee.

95. **Disclosure of compensation figure within 7 days of NULIS approval**. Within a week of the remediation approach being approved by the NULIS Board on 26 October 2016, ASIC was notified (again voluntarily) of the compensation figure of $34.6m in a presentation on 3 November 2016.[81]

96. In submissions at CS [74], Counsel Assisting referred to an internal email dated 3 November 2016 from Mr Andrew Mitchell of ASIC (who was not called to give evidence) to other ASIC personnel.[82] In that email, Mr Mitchell referred to the update provided to ASIC on 3 November and stated, inter alia, that "the revised figure is concerning because the company has known about the events for approximately 11 months and has only just presented the figures in a meeting today …".

97. To the extent that it is contended that this document supports the proposed findings, this should be rejected. Whilst it is correct that the existence of the breach with respect to TERP had been known for some time, the SWIFT/Encompass issue was outlined in correspondence with ASIC in the months immediately prior to September 2016 and then a breach was reported in September 2016 (approximately two months prior to the 3 November 2016 email referred to in paragraph 96 above). Further, as noted above, the dimensions of the SWIFT/Encompass event had been

[78] Hagger XXN at T4764.17-19.
[79] Hagger XXN at T4766.22-23.
[80] Exhibit 5.29, NAB.042.003.1456_E at 1523_E.
[81] Exhibit 5.159, ASIC.0039.0001.6376 at 6382. Mr Hagger did not attend this presentation: Hagger XXN at T4775.44-4776.1.
[82] Exhibit 5.319, ASIC.0061.0001.0001.

indicated both in the breach notification, which referred to customer numbers, as well as in conversations between Mr Hagger and Mr Tanzer (to which Mr Mitchell was not a party).

98. Further, the approach to compensation (which informed the quantum) was not determined until the NULIS Board resolved to approve it on 26 October 2016. Moreover, the statement in Mr Mitchell's email that NAB had communicated to Mr Tanzer that it was stuck "in a situation of complex and differing legal opinions on the compensation methodology for the PSF" is entirely consistent with the evidence given by each of Ms Smith, Mr Carter and Mr Hagger and the contemporaneous documents referred to in Mr Hagger's email of 24 October 2016 discussed above.

E. PROPOSED FINDINGS OF MISCONDUCT IN RELATION TO GRANDFATHERING OF TRAILING COMMISSIONS

Fourteenth proposed finding: By resolving to retain grandfathered commissions in respect of members that were to be transferred to the MLC Super Fund as part of the successor fund transfer which occurred in July 2016, NULIS may have contravened the covenants set out in section 52(2)(c) of the SIS Act which required it to exercise its powers and to perform its duties in the best interests of members: CS [151]

Fifteenth proposed finding: NULIS may have contravened the covenants set out in section 52(2)(d)(i) and (d)(iii) of the SIS Act by failing to prioritise the interests of members over the interests of advisers who continued to receive trailing commissions at the expense of those members, as well as the financial interests of the NAB Group: CS [152]

99. It is convenient to deal with these proposed findings together. NULIS submits that the material before the Commission does not support the proposed findings.

100. Both CS [117]-[124] and [151] and the cross-examination of the NAB and NULIS witnesses[83] focussed upon a resolution by the directors of NULIS, on 10 June 2016, to maintain grandfathered commission arrangements pertaining to the products which formed part of The Universal Super Scheme (**TUSS**) following the SFT.[84] The nature of the SFT is described at paragraph (t) of the Schedule. Prior to the SFT, commissions were paid by MLCL as issuer of the TUSS investment life policy.[85]

101. The resolution made on 10 June 2016 cannot be divorced from its context. As Ms Smith stated in cross-examination, that context was an SFT involving a package of changes to the structure of the relevant funds and which NULIS considered, overall, to be in the best interests of members.[86] This was an entirely orthodox approach.[87] The SFT was conducted with a view to ensuring that equivalent rights were maintained and members remained in the same position before and after the SFT.[88] A decision had been made well in advance of the SFT not to make any changes to the features of products (including fees), but rather to achieve equivalency from 30 June 2016 to 1 July 2016. The decision made regarding commissions in the context of the SFT did not involve NULIS entering into consideration of the broader question as to whether the grandfathering of commissions should continue.[89] The resolution did not detract from concurrent proposals for the trade-up of legacy products from commission-based to non-commission products.[90]

102. The evidence establishes that NULIS made the resolution for the purpose of facilitating the SFT. Ms Smith's evidence in cross-examination was that if commissions were not grandfathered, there

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[83] Carter XXN at T4210.26 – T4224; Smith XXN at T4382.18 – T4398.27.
[84] Exhibit 5.7, NAB.005.562.2915 at .2934_E.
[85] Exhibit 5.7, NAB.005.562.2915 at .2935_E.
[86] Smith XXN at T4389.13-31.
[87] Relevantly, in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87, Byrne relevantly held at [118] that there was no breach of the best interests covenant in circumstances involving the distribution of part of a surplus to non-beneficiaries where, *inter alia*, the payment was part of a package which, on the evidence, would produce a substantial benefit to members.
[88] Carter XXN at T4215.33-35; Smith XXN at T4394.1-4; Exhibit 5.7, NAB.005.562.2915 at .2935_E.
[89] Smith XXN at T4398.22-27.
[90] Smith XXN at T4394.4-6 and T4396.24-35; Exhibit 5.7, NAB.005.562.2915 at .2937_E.

was a risk that the SFT would not go through in the timeframe available for its completion, or that it would be delayed.[91] The board paper in relation to the proposed resolution also noted that the cessation of commission payments would require a costly and time-consuming program of work that would cause delays to the SFT, and identified further impacts as including a possible significant reduction in funds under management due to member attrition and consequently increased fees and costs to remaining members.[92] Notably, in cross-examination, Ms Rowell of APRA made a similar point, identifying "the ongoing viability and sustainability of the RSE itself" as a consideration relevant to whether the continuing payment of commissions was in members' best interests.[93]

103. The board paper in support of the proposed resolution also identified possible liability for breach of contract, which would necessitate separate legal advice.[94] In that regard, it was put to Mr Carter and Ms Smith that, at the time of the decision on 10 June 2016, NULIS did not have any legal obligation to pay commissions, such that some other entity would be terminating the remuneration arrangements; and to Mr Carter that any issue concerning breach of contract could accordingly be disregarded.[95] Mr Carter accepted that that was so "for NULIS". That evidence is relied upon at CS [124], however the concession was plainly qualified. Ms Smith rejected the proposition that commissions could, without more, be reduced to zero, stating that consideration would need to be given to the contractual arrangements relating to the payment of commissions, among other matters.[96]

104. In NULIS's submission, it is plain that the directors of NULIS could not have determined on 10 June 2016 to cease the payment of commissions without regard to the existing contractual obligations. As at 10 June 2016, the SFT had not occurred. It cannot be inferred that, in the event of refusal by NULIS to assume the obligations of the entities previously responsible for the payment of commissions, including MLCL,[97] and the exposure of those entities to potential legal liability, the SFT would have proceeded. The proposal presented to the directors of NULIS did not contemplate such a resolution. Rather, the alternatives presented to the directors of NULIS were: (i) if commissions were to be terminated without compensation – to delay the SFT, obtain legal advice and undertake the program of work necessary to remove commission arrangements attached to member accounts; or (ii) if commissions were to be switched off and replaced with ASFs commensurate with existing adviser remuneration entitlements – to delay the SFT by as much as 12 months, obtain legal advice and undertake the work necessary to build new system functionality to support ASFs.[98]

105. In light of the context outlined above, NULIS submits that there is no contradiction between the resolution made on 10 June 2016 and Ms Smith's acceptance of the proposition that it is in the best interests of members to be in products that do not pay commission rather than products that do pay commission.[99] NULIS also notes Ms Smith's evidence was given in response to questions that asked her to artificially consider the commission in isolation, and to ignore both the fact that the SFT involved a package of changes and the legal obligations of the transferor trustee. The same observations can be made about the questions and answers put to Mr Carter on this topic.

106. Further, the resolution did not represent an endorsement by the directors of NULIS of the indefinite continuation of commission arrangements. This is apparent from the board paper in support of the proposed resolution itself, which noted the existence of a separate program for the trade-up of legacy products, in the context of which the appropriateness of continuing commission payments would be considered.[100] That program has been implemented since the SFT: the Access and Portfoliofocus Essentials product series within the MLC Superannuation Fund, and ex-Aviva products within the MLC Super Fund, have been traded up from commission

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[91] Smith XXN at T4390.23-36.
[92] Exhibit 5.7, NAB.005.562.2915 at .2938-9_E.
[93] Rowell XXN at T5194.43 – T5195.25.
[94] Exhibit 5.7, NAB.005.562.2915 at .2939_E.
[95] Carter XXN at T4217.9 – 35; Smith XXN at T4391.35-42.
[96] Smith XXN at T4397.37-T4398.2.
[97] Exhibit 5.7, NAB.005.562.2915 at .2935_E.
[98] Exhibit 5.7, NAB.005.562.2915 at .2938_E .2939_E.
[99] Smith XXN at T4390.4-5 and T4397.6-8; cf. CS [122] and [151].
[100] Exhibit 5.7, NAB.005.562.2915 at .2937_E.

products to non-commission products.[101] Remaining legacy products are scheduled to be traded up within the next 18 months, subject to board approval.[102]

107. NULIS submits that the program which NULIS has implemented (and continues to implement) of trading up members to non-commission products demonstrates a preference for *removing* commissions rather than retaining them to the extent permitted by the FoFA legislation. In doing so, NULIS has prioritised the best interests of members, whilst recognising that trade-ups must be carried out in an orderly manner, which takes account of the operational complexities of moving members from one product to another and the importance of preserving equivalency of rights.[103]

F. PROPOSED FINDINGS OF POTENTIAL MISCONDUCT IN RELATION TO MYSUPER PRODUCTS

Sixteenth proposed finding: MLCN and NULIS may have contravened the covenants set out in section 52(2)(c) of the SIS Act which required it to exercise its powers and to perform its duties in the best interests of members, by delaying the transition of members to their respective fund's MySuper offering which resulted in members continuing to pay grandfathered commissions, Plan Service Fees and contribution fees, including where no adviser was providing any service to the relevant members: CS [153]

108. NULIS refers to the content of the "best interests" duty in s 52(2)(c) as described at paragraphs 20 - 22 of these submissions. Like the proposed finding addressed in these paragraphs, the sixteenth proposed finding fails to identify the particular duty or power which is said not to have been performed or exercised in the best interests of members (whether by reference to the Trust Deed or otherwise), or to particularise the particular instances of such conduct. In any event, the material before the Commission does not support the making of the proposed finding.

109. The facts set out at CS [125]-[126] are not disputed. However, that summary does not present a complete overview of the transition of Accrued Default Amounts (**ADAs**) to a MySuper product (**MySuper Transition**). In NULIS's submission, the evidence as a whole does not establish that either MLCN or NULIS "delayed" the MySuper Transition at all, let alone that either trustee did so in a manner which may have contravened the covenants set out in section 52(2)(c) of the SIS Act. Rather, the evidence indicates that the rate of the MySuper Transition was affected by its complexity and various impediments which were required to be overcome.

110. Planning commenced for the MySuper Transition in late 2012.[104] MLCN and PFS Nominees Pty Limited (**PFSN**) prepared initial MySuper Transition Plans by 1 June 2013.[105] MLCN and PFSN resolved that transitioning ADAs to those products immediately would create significant risks and would have a significant impact on members.[106] The key impediments identified concerned investment issues, the loss or change of member benefits and access to services, execution risks and successor fund transfer issues.[107]

111. In particular, relevant issues included:[108] (a) the necessity of changing the underlying investment strategy and asset allocation of numerous options with differing growth/defensive asset allocations to the long-term asset allocation for MySuper of 70% growth / 30% defensive; (b) the possibility that, when ADAs were transferred from existing investments to MySuper, some investment funds would become too small to be viable and would need to be closed; (c) the transactional costs and potentially substantial taxation impacts of the sale and purchase of underlying investments;[109] (d) the importance of giving members time to make informed

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[101] O'Neal 2 at [13]-[16].
[102] Smith XXN at T4385.12-33.
[103] Smith XXN at T4385.8-46 – T4386.12.
[104] Carter Statement at [48].
[105] PAC-1, Tab 19, NAB.005.734.0001 at .0014.
[106] PAC-1, Tab19, NAB.005.734.0001 at .0006.
[107] Carter Statement at [56]; PAC-1, Tab 19, NAB.005.734.0001 at .0006.
[108] PAC-1, Tab 19, NAB.005.734.0001 at .0007 and .0008; Exhibit 5.54, NAB.005.561.4232 at .4256 and .4259.
[109] In December 2013, management estimated that some $2.7 billion of capital gains may be realised if all ADAs were migrated immediately, whilst transactional costs may be as high as $20 million: Exhibit 5.54, NAB.005.561.4232 at .4256.

investment choices; and (e) the execution risk associated with implementing the ADA transition. In NULIS's submission, those considerations were properly taken into account as bearing upon members' best interests. The identification of those considerations is consistent with APRA's recognition, in guidance concerning SPS 410, of the existence of complexities in, and risks associated with, transitioning ADAs.[110]

112. The transition of ADAs was undertaken in stages as the impediments were resolved for each group of members, and where the transition did not result in a detriment to other members of the MLC Super Fund.[111] In June and July 2015, the majority of ADAs were transferred to transition investment options, the purpose of which was to change the underlying investment strategy and asset allocation for the previous default investment options to the long term asset allocation for MySuper.[112] The transition of all ADAs was completed by 31 March 2017, in advance of the deadline imposed by SPS 410 (being 1 July 2017). More than $12 billion of assets were transferred in that process, affecting approximately 412,000 members.[113] The system changes required for MySuper as a whole were significant, impacting over 18 systems at a cost of over $17 million, involving more than 70 staff and affecting 800,000 members.[114]

113. As noted at CS [126], Ms Smith accepted in cross-examination that the speed with which the MySuper Transition occurred affected how long members remained in higher fee-paying ADAs before moving into the MySuper product. However, Ms Smith's evidence was that that matter was considered as part of determining the right balance between safely delivering the MySuper Transition in the required timeframe and the benefit to members of paying lower fees in the MySuper option.[115] Ms Smith gave evidence concerning the complexities of the transition which was consistent with the description of the impediments to transitioning ADAs in the MySuper Transition Plan referred to above.[116]

114. In NULIS's submission, there is no evidence to suggest that the consideration given by NULIS to the striking of the appropriate balance between the identified considerations was inadequate. The oversight by NULIS of the MySuper Transition was thorough. The MySuper Transition Plan was periodically reviewed by the relevant trustee in accordance with APRA guidelines. A formal review was conducted annually, with ongoing monitoring and review of ADAs taking place on a quarterly basis. The transition of ADAs was also implemented in accordance with NULIS's Assurance Framework, which includes three lines of assurance testing.[117]

115. Finally, the relationship suggested at CS [130] and [133] between the "delayed transition" of ADAs and underperformance of the MySuper option should not be accepted. As noted at CS [130], the NULIS board considers each year whether members in the MySuper product are disadvantaged relative to members in other MySuper products as a result of scale. The determination of NULIS on 26 October 2016, referred to at CS [130], was supported by a board paper which specifically considered whether there was a relationship between the competitive underperformance of the MySuper option and lack of scale, and concluded that no such relationship existed.[118] That conclusion is inconsistent with the underperformance having resulted from a "delayed transition" of the assets in the ADAs. There is no other evidence to support the suggested causal relationship.

Seventeenth proposed finding: MLCN and NULIS may have contravened section 29VN(a) of the SIS Act by failing to promote the financial interests of beneficiaries of their respective funds who held the MySuper product in the period 2013-2017, in particular the returns to those beneficiaries (after the deduction of fees, costs and taxes): CS [154]

116. NULIS submits that the evidence does not support the making of the proposed finding. On the

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[110] Prudential Practice Guide: SPG 410 – MySuper Transition (**SPG 410**), https://www.apra.gov.au/sites/default/files/spg-410-february-2013.pdf, at [17]-[18].
[111] Carter Statement, Tab19, NAB.005.734.0001 at .0005.
[112] Carter Statement, Tab19, NAB.005.734.0001 at .0007.
[113] Carter Statement at [51].
[114] Exhibit 5.54, NAB.005.561.4232 at .4259.
[115] Smith XXN at T4400.39 – T4401.21.
[116] Smith XXN at 4399.25-32, T4400.28-37 and T4402.14-22.
[117] Carter Statement at [54]; PAC-1, Tab19, NAB.005.734.0001 at .0005 and .0013.
[118] Exhibit 5.55, NAB.005.562.4470_E at .4474_E.

contrary, the material before the Commission establishes that NULIS has monitored the performance of the MySuper option since its inception and has, in light of that monitoring, made appropriate changes to the product design, including increasing the cost of manufacture in order to take exposure to different asset classes.[119]

117. Section 29VN(a) of the SIS Act requires a trustee to "promote the financial interests of the beneficiaries of the fund who hold the MySuper product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes)". The Explanatory Memorandum to the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* states that s 29VN "requires a trustee to make informed judgments regarding the MySuper product, for example in relation to the composition of assets in the investment strategy, so that it secures the best financial outcome for these beneficiaries."[120] However, it is not a requirement that trustees generate a certain level of returns, nor do low returns, on their own, necessarily involve a breach of the obligation. The obligation to promote the financial interests of beneficiaries necessarily includes consideration of the level of investment risk appropriate for the relevant members.[121]

118. The relevant conduct is identified at CS [154] as being an alleged failure appropriately to allocate the investment management fee to ensure the prudent and diligent management of funds attributed to MySuper products. Cross-examination with respect to this issue was focused upon the allocation of the investment management fee between the costs of investment management and profit to the NAB Group, and in particular, the allocation of funds to enable greater investment in unlisted assets. That focus is reflected in CS [128]-[129]. Those submissions should not be accepted, for three essential reasons.

119. *First*, NULIS submits that, as is apparent from the reference to the "structure" of the MySuper option in CS [128], the criticisms made of the allocation of the investment fee fundamentally go to the investment strategy adopted in relation to MySuper – and caution must be exercised in considering, with the benefit of hindsight, the appropriateness of that investment strategy. The core proposition put to Ms Smith in cross-examination was that there was not sufficient money allocated to investment management of the funds within the MySuper product to enable proper investment in unlisted assets. Ms Smith did not agree with that proposition, observing that the design of the MySuper option was based on default options within Plum products, the past performance of which was competitive.[122] Whilst the MySuper option has underperformed relative to peers, the comparison of returns to those of peers does not take account of product differences, including varying levels of exposure to growth and unlisted assets, lifecycle strategies and active compared to passive investment management.[123] Ms Smith's evidence was that MySuper's 70/30 split of growth to defensive assets compares with a 80/20 or 85/15 growth/defensive asset split in MySuper funds run by some other trustees.[124]

120. As Ms Helen Rowell, Deputy Chairman of APRA, observed in her witness statement and in cross-examination, the performance of trustees in delivering outcomes for members must be assessed on a risk-adjusted basis, in the context of the objectives set by the RSE licensee, including relative to return targets.[125] The MySuper option has outperformed its objective of CPI +3% over all time periods – in some periods, by a significant margin.[126] Performance monitoring undertaken in August 2017 indicated that the performance of the option since inception was in line with expectations, but under peers, for the product design and objectives that were understood at the inception of the option and the investment environment that had occurred.[127] The "product design" would include the allocation to unlisted assets.[128]

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[119] Smith XXN at T4407.8-12.
[120] *Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) (**EM**) at [1.16].
[121] EM at [1.17] and [1.19].
[122] Smith XXN at T4408.22-26.
[123] Exhibit 5.56, NAB.005.562.6778_E at .6784_E.
[124] Smith XXN at T4412.26-45.
[125] Statement of Helen Rowell dated 14 August 2018 tendered as Exhibit 5.298 (WIT.0001.0116.0001) (**Rowell Statement**) at [175]; Rowell XXN at T5176.26-33.
[126] Exhibit 5.58, NAB.005.563.6689_E at .6700_E.
[127] Exhibit 5.58, NAB.005.563.6689_E at .6695_E.
[128] Smith XXN at T4416.6-23.

121. It should not be concluded that the investment strategy of the MySuper option was inappropriate due to its lower allocation to unlisted assets relative to peers. The setting of investment objectives is highly complex and those objectives can frequently be in competition with one another. The three objectives of maximising opportunities to participate in the upside of markets, protecting against downside risk and outperforming similar funds can rarely be achieved at once, and the prioritisation of those objectives is fundamental to the design of an investment strategy. Some strategies, such as investing in illiquid assets and active management, are also associated with higher costs.[129]

122. As it transpired (and as noted at CS [128]), unlisted assets performed strongly in the relevant period, with returns benefiting from significant upward revaluations due to sustained lower interest rates and historically low bond yields.[130] However, whilst an alternative asset allocation may have achieved higher returns in the market conditions which eventuated, NULIS submits that the evidence does not show that the investment strategy was not prudent and appropriate.

123. *Secondly*, NULIS submits that the evidence before the Commission demonstrates that, as market conditions evolved, NAB responded appropriately to the underperformance of the MySuper option, including by increasing the investment budget to permit greater investment in unlisted assets.

124. Reports to the NULIS board, to which Ms Smith was taken in cross-examination, identified reasons for the underperformance of the MySuper product as being its lower allocation to growth assets and unlisted assets, and peer-relative underperformance of the underlying Australian shares and fixed interest portfolios.[131] Importantly, none of those documents to which Ms Smith was taken pre-dated June 2016. In the first quarter of 2016, Corporate Institutional Wealth and NAB Asset Management (both of which are part of the NAB Wealth business)[132] agreed to expand the investment budget for MySuper to enable the strategy to partially address investment capability gaps.[133] As noted at CS [131], the increase in the investment budget was funded from NULIS's profit margin. By 26 October 2016, strategy enhancements had been implemented or recently proposed to improve performance returns to members. Those strategies included increasing the cost of the manufacture budget by 5bps to enable increased exposure to unlisted infrastructure and private equity, and an increased allocation to extended credit and low correlation strategies of approximately $620 million.[134] By 26 October 2017, those strategy enhancements had been implemented.[135] Ms Smith gave evidence that the increase in exposure to unlisted infrastructure continues as NULIS gains access to appropriate investments to include in the portfolio.[136]

125. It was put to Ms Smith in cross-examination that if the manufacture budget had been increased three years earlier, NULIS could have started investing in unlisted assets then. Ms Smith accepted that that was so.[137] However, an increase in the budget had not been suggested three years earlier.[138] The increase of five basis points to the cost of manufacture budget was part of addressing underperformance which had been identified.[139] NULIS submits that that evidence did not establish any failure on its part with respect to the allocation of the investment management fee. On the contrary, that evidence indicates that, upon underperformance being identified and attributed to the fund's lower allocation to unlisted assets, the matter was appropriately addressed.

126. *Thirdly,* NULIS submits that the evidence does not establish that investment in unlisted assets was precluded by the approach to the allocation of the investment management fee. Ms Smith's evidence was that the constraint on NULIS in allocating a greater fee budget was not simply the

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[129] Exhibit 5.58, NAB.005.563.6689 at .6696.
[130] Exhibit 5.56, NAB.005.562.6778_E at .6784_E; Exhibit 5.57, NAB.005.605.0123 at .0138.
[131] Exhibit 5.56, NAB.005.562.6778_E at .6784_E ; Exhibit 5.57, NAB.005.605.0123 at .0138.
[132] Smith XXN at T4420.34-47.
[133] Exhibit 5.59, NAB.005.563.5083_E at .5093_E.
[134] Exhibit 5.55, NAB.005.562.4470_E at .4474_E.
[135] Exhibit 5.56, NAB.005.562.6778_E at .6782_E.
[136] Smith XXN at T4411.7-25.
[137] Smith XXN at T4411.36.
[138] Smith XXN at T4411.34-42.
[139] Smith XXN at T4408.26-30.

need to remit profit to the group. Rather, the constraint was in finding a balance between how much would be spent in the portfolio for the return that would be achieved – balancing the tension between performance and cost to the member.[140] Although the increase to the manufacture budget which was implemented decreased the profit to the NAB Group,[141] decreasing the profit to the group was not the only means of increasing the investment management budget. The alternative was to increase the price of the product to the member.[142]

127. Ms Smith's evidence in this regard was consistent with the independent benchmarking report prepared by ChantWest, which noted that recommended changes to the construction of the MySuper portfolio, including to increase exposure to unlisted assets, would most likely increase investment fees.[143] Importantly, despite the relatively low ranking of the MySuper products with respect to total standard fees,[144] the average investment fee charged by industry funds was reported by ChantWest to be 12 basis points higher than the investment fee in MLC MySuper.[145] NULIS submits that that evidence indicates that the dichotomy set up at CS [128]-[129] and [132]-[133] between NAB Group profits, on the one hand, and investment in unlisted assets, on the other, did not in fact exist.

G. PROPOSED FINDINGS REGARDING NAB'S CULTURE AND GOVERNANCE PRACTICES

128. Counsel Assisting set out a number of submissions with respect to NAB's culture and governance practices at CS [803] – [816]. As these findings specifically address the culture of the NAB Group, the submissions made below are made on NAB's behalf.

129. In summary, NAB refutes any allegation that it or its officers or employees have displayed disrespect or disregard for members of relevant superannuation funds, for the regulator or the law (as submitted at CS [808]).

130. The matters relied upon at [808.1] – [808.11] contain a number of specific allegations with respect to, *inter alia*, ASFs, PSFs and breach reporting which Counsel Assisting submit support the finding at CS [808]. Many of these matters are not established on the evidence before the Commission or are otherwise problematic, and do not support the overarching submission made. More generally, NAB also relies upon the evidence identified at paragraphs 148 - 155 below as emblematic of an overall values-driven culture of continuous improvement.

131. Further, contrary to the submission advanced by Counsel Assisting at CS [807] that "Mr Carter, Ms Smith and Mr Hagger from NAB demonstrated a lack of insight into the problems with the conduct of NAB Wealth and the trustee and an unwillingness to acknowledge problems with the behaviour of the entities for which they were responsible", each of these witnesses displayed a sober, considered and appropriate response to the seriousness of the matters alleged and made appropriate concessions that acknowledged errors which had occurred: see further at paragraphs 142 - 145 below.

NAB Wealth conduct relating to ASFs (CS [808.1], [808.2], [810])

132. At CS [808.1] and CS [808.2], Counsel Assisting refer to an alleged "continued failure on the part of NAB to agree to assess whether services had been provided in exchange for fees for service for four of its five advice licensees" and "its refusal over more than two years to carry out a proper review of whether its other licensees had provided the contracted services in exchange for fees paid by clients". This appears to be a reference to the NAB Wealth ASF Events the subject of the correspondence with the regulator, which is addressed at paragraphs 77 - 79 above.

133. In summary, NAB does not agree that its behaviour constituted a failure to agree to assess

[140] Smith XXN at T4419.33-42.
[141] Smith XXN at T4411.44-45.
[142] Smith XXN at T4420.4-6.
[143] Exhibit 5.57, NAB.005.605.0123 at .0147.
[144] Smith XXN at T4407.25-37; CS [127]. However, the ranking of *average* fees (taking account of large employer discounts for corporate products) placed MLC Super Fund MySuper 1st in the retail actively managed funds cohort and 40th across the top 95 surveyed MySuper products: Exhibit 5.55, NAB.005.562.4470_E at .4477_E.
[145] Exhibit 5.57, NAB.005.605.0123 at .0131.

whether services had been provided or a refusal to carry out a review (nor has this been contended by ASIC). Rather, as explained at paragraph 77(c) above, the subject of its discussions and negotiations with ASIC concerned the degree and mode of proof required in assessing whether the promises made to individual members had been complied with.

134. Similarly, Counsel Assisting state at CS [810] that Mr Hagger "had the opportunity during his evidence before the Commission to demonstrate insight into why it is problematic that NAB resisted for an extended period agreeing to ASIC's proposal that it test whether licensees had provided the services that it had contracted to be provided in exchange for the fees charged to customers". For the reasons addressed at paragraphs 77 - 79 above, the proposition inherent in this statement is factually incorrect. NAB has advanced multiple proposals to ASIC over this period relating to testing the delivery of service provision. Further, under Mr Hagger's leadership, in the period commencing from 2015, NAB Wealth carried out an ongoing investigation and review of ongoing service fees and has always accepted that NAB ought to test whether the promised services had been provided.

Conduct relating to PSFs (CS [808.3], [808.4], [808.5], [808.8], [808.9])

135. For the reasons addressed in detail at paragraphs 61 - 63 above, NAB does not accept that there was any attempt "to find a basis over several months in 2016 not to make full remediation to members who had paid PSFs but had no linked adviser", as submitted at CS [808.3]. Rather, an investigation was conducted, consistently with sound governance policy, that sought to fully understand the nature of the events which had occurred and the proper characterisation of the PSF. Ultimately, whilst each of the alternatives investigated as a basis for remediation was considered to be arguable, NWMSL recommended, and NULIS approved, full remediation to all members.

136. Similarly, on the basis of the matters submitted at paragraphs 81 - 98 above, contrary to CS [808.4], NAB does not accept that there was a failure to be open and transparent with ASIC in October 2016, or at all, about its estimates for remediation of the PSFs.

137. At CS [808.5], Counsel Assisting refer to NAB's conduct "in preparing, and having signed by Ms Smith, communications to ASIC that asserted incorrectly the nature of the service contracted to be provided in exchange for PSFs". NAB does not accept that the letter was incorrect but, in any event, notes that no submission is made by Counsel Assisting that any error in the letter was intentionally made.[146] It should also be borne in mind that, as reflected in the letter under the heading "*NULIS desires to resolve ASIC's concerns*", the overall purpose of this communication was to inform ASIC of the position adopted by NULIS with respect to a proposed remediation approach. It was not to seek to rely on any distinction between the PSF as a fee for access to services or a fee for services.

138. Counsel Assisting also refer, at CS [808.8], to an alleged "failure to carry out any assessment of whether contracted services were provided in exchange for PSFs charged to [MasterKey Business Super (**MKBS**)] members (as distinct from MKPS members)" and point to "its failure to refund PSFs to MKBS members despite the evidence demonstrating that the same kind of misleading statements were made to MKBS members as to MKPS members". That proposition is advanced by Counsel Assisting notwithstanding that:

    a) such material as is before the Commission indicates that the position of MKBS members is significantly different to those of MKPS members by reason of the nature of the contractual arrangements in place. In response to a question regarding the distinction between MKBS and MKPS members, Ms Smith referred to the following: "when a [PSF] is set up in MKBS, it's determined between the employer and the adviser. And the employer is also determining the services that will be provided by the adviser for the plan, and monitoring the provision of those services" and that further "essentially the MKPS member has the fee – applied to their account in a default manner. And there's a series of things that are different about the MKPS member at the point that the fee is being charged to

[146] Nor is it suggested by Counsel Assisting that Ms Smith's acceptance in cross-examination of an error on her part is evidence of any intentional misstatement by her: see Smith XXN at T4324.32-42.

them than when someone is in the MKBS and part of an employer plan";[147]

b) there is no evidence before the Commission that ASIC has raised any issue about the disclosures to MKBS members (indeed, ASIC's letter dated October 2017 only raised for the first time this issue with respect to MKPS members); nor was any request made to NULIS to address this in any witness statement.[148]

139. These matters are an example of the relevant context that would need to be taken into account in any assessment of whether disclosure to MKBS members was misleading. No positive submission is made by Counsel Assisting to the effect that it is available to find on the evidence that disclosures to MKBS members were misleading.

140. In the circumstances, no adverse inferences may reliably be drawn about NAB's culture arising out of this issue.

Alleged failure to comply with s912D(1B) of the Corporations Act (CS [808.10])

141. Counsel Assisting also rely at CS [808.10] to a "failure to comply at least 84 times with section 912D(1B) [of the] Corporations Act between 2014 and 2017".

142. In relation to MLCN and NULIS, Ms Smith's evidence was that PwC carried out an independent review in 2015 on the Breach Review Committee process and "from that date we've shown improvement in our timing". Ms Smith stated that: "I think there has only been very few amount of breach review committee notices that have gone past the 10 day requirement by about – I believe up to one to two days".[149] Summarising the actions taken, Ms Smith acknowledged that "I did believe we had a problem – 2015" and stated that "we undertook an external review, took steps and actions in place to ensure we were meeting legislative requirements … and that we – we were largely complying with that requirement".[150]

143. As to the NAB Wealth licensees, by letter dated 15 May 2018, NAB responded to concerns raised by ASIC in relation to breach reporting and relevantly noted that "NAB has made concerted efforts to uplift its event management and breach reporting processes. The improving trend over time has been communicated transparently with ASIC over the last four years".[151] NAB also referred in that letter to the conclusion of PwC that NAB's Wealth Licensees' Event Management and breach reporting processes were operating as per documented requirements in the majority of instances. Nevertheless, NAB acknowledged that "it is not acceptable for any significant breaches to be reported to ASIC in excess of … 10 business days and continues to be committed to adhering to that timeframe" and that "as part of ongoing improvement initiatives, NAB is also looking at ways to enhance its breach reporting and event management process following insights gained through ASIC's breach reporting project".

144. Similarly, Mr Hagger also appropriately conceded that, when he commenced at NAB Wealth in 2013, breach reporting was a matter that needed to be fixed, and stated that this was an area in which NAB "invested a lot of money in improving processes under ASIC's watch" and that "our breach reporting data in recent times … has been good, but not perfect, but a substantial improvement … and ASIC has noted that".[152]

145. NAB submits that all of this evidence is wholly inconsistent with an absence of regard for regulatory commitments.

Alleged ongoing failure of NULIS as trustee to intervene and insist that the NAB Group act in the interests of the members (CS [808.11])

146. At CS [808.11], Counsel Assisting point to "the ongoing failure of NULIS as trustee to intervene

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[147] Smith XXN at T4324.32-42.
[148] Exhibit 5.68, ASIC.0036.0002.2531 at 2541 to 2542.
[149] Smith XXN at T4311.30-34. See also Smith 2 at [31] – [32].
[150] Smith XXN at T4508.13-20.
[151] NSS-2, Tab 8, NAB.005.827.0006 at 0007.
[152] Hagger XXN at 4802.36-43. See also Smith 2 at [31] – [32].

and insist that the NAB Group act in the interests of the members of the superannuation funds for which NULIS is the trustee". This proposition appears to repeat the substance of the fourth proposed finding set out at CS [141], and should be rejected for the same reasons as submitted at paragraphs 30 - 37.

Adviser contribution fees and employer service fees (CS [808.6] and [808.7])

147. Counsel Assisting rely upon an alleged failure by NAB to assess whether it should refund employer service fees and adviser contribution fees (CS [808.6] and CS [808.7]). No witness was asked to address issues relating to employer service fees and adviser contribution fees in any rubric issued by the Commission, and the evidence before the Commission in relation to these fees was, at best, inadequate and inconclusive. In the circumstances, it is submitted no reliable inference can be drawn about NAB's culture on the basis of these matters.

Overarching matters relevant to NAB's culture

148. NAB further submits that any assessment of a corporation's culture must be made in light of all of the circumstances, rather than by reference to specific events. In particular, NAB points to the following matters as emblematic of an overall values-driven culture of continuous improvement. These matters weigh against any inference that NAB has disrespect for the law, for the regulator or for customers.

149. *First*, NAB and NULIS are committed to remediating customers impacted by misconduct by adopting a principles based approach referable to overarching values, which include that no member will be worse off arising out of the error.

150. *Secondly*, NAB and NULIS have put in place a governance management framework in order to ensure sound governance of the superannuation fund, which includes, inter alia, a Roles and Responsibilities Charter emphasising the paramount nature of NULIS's obligation as a fiduciary and the conflicts management framework.[153]

151. *Thirdly*, NAB and NULIS have put in place a significant program of work to ensure that the same errors are not repeated, including investment in progressive uplift and improvement of controls through a dedicated "Controls Transformation Program"[154] and engagement of external experts to review and assure those controls (such as, for instance, the KPMG review of NULIS's controls referred to at paragraph 50 above and the PwC review of NAB's ASF controls referred to at paragraph 79 above). ASIC stated publicly in February 2017 that ASIC acknowledged the "cooperative approach taken by NAB and NULIS" with respect to the licence conditions imposed on NULIS arising out of the PSF events and the engagement of KPMG.[155]

152. *Fourthly*, overarching obligations and requirements are imposed on all NAB employees to comply with NAB's policies and procedures, some of which (including NAB's Code of Conduct) are incorporated into NAB's conditions of employment.[156] Under NAB's Code of Conduct, all NAB Group employees have an obligation to disclose actual or suspected wrongdoing and report suspected fraud or corrupt activity, with employees required to undertake annual training on the Code of Conduct.[157] Other policies and procedures include NAB's Licensee Standards,[158] which define the scope of permitted activities for financial advisers within the NAB Group.[159]

153. *Fifthly*, throughout the period from 2013 to present, NAB has implemented and continues to implement a range of initiatives that administer and promote a customer-centric culture within the organisation.[160] This includes measures to prevent, detect and remedy misconduct, which are

[153] As addressed in detail at O'Neal 1, at [40] – [43], [108] – [109].
[154] Hagger 1 [65] – [66].
[155] Hagger XXN at T4791.19-20. See also ASIC media release, 17-022MR ASIC dated 2 February 2017.
[156] Hagger 1 at [21].
[157] AH-1, Tab 5 (NAB.083.001.5786).
[158] AH-1, Tab 9 and Tab 15 (NAB.056.003.2173 and NAB.056.001.1511).
[159] Hagger 1 at [21].
[160] These measures are outlined in the Hagger 1 at [31] - [80]; Statement of Andrew Hagger dated 13 April 2018 in response to Rubric 2-21(WIT.0001.0026.0001) (**Hagger 2**) and Exhibit AH-2 (**AH-2**), Hagger 2 at [42] – [106].

subject to ongoing refinement as part of NAB's align, act and adjust approach.[161] A summary of the key measures that demonstrate continuous improvement within NAB from 2013 to date are contained in the tables at Annexure B to Andrew Hagger's witness statements in relation to financial advice.[162] Some examples of such measures include:

a) improved monitoring, supervision and training, including through regular revision and enhancement of audit and compliance policies and procedures;[163]

b) increased ethics training and awareness, through leaders' forums and professional development programs, and regular employee roadshows;[164]

c) implementation in 2015 of a voluntary process to notify ASIC of financial adviser departures in circumstances where there is a serious compliance concern;[165] and

d) the introduction of a market-leading Independent Customer Advocate roles.[166]

154. *Sixthly*, NAB's commitment to promoting a culture of compliance, honesty and ethical behaviour is supported through a number of policies and procedures, including the Whistleblower Policy and whistleblower program.[167] Such initiatives allow employees to report suspected or actual wrongdoing with the understanding that there are protections available to them. Further, initiatives such as the Customer Response Initiative and appointment of an Independent Customer Advocates reinforce NAB's commitment to act in the best interests of customers, including through remediation programs.

155. *Finally*, as recorded in the Quality Advice Framework Report dated November 2017 (which followed on from a review undertaken in 2014 at Mr Hagger's instigation), Deloitte indicated that culturally, NAB "exhibited a commendable culture of accountability and ownership for greater customer centricity and the overall success of the business".[168] NAB Wealth's Independent Customer Advocate has similarly recognised progress in attitudes and beliefs regarding the treatment of customers, whilst noting that significant further work remains.[169] Overall, as articulated by Mr Hagger in his evidence in Round 2 of the Commission's hearings, NAB also recognises that its policies, processes and controls must keep pace with changing community standards and expectations.[170]

Opportunity to be heard with respect to any additional adverse findings

156. 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 Counsel Assisting in closing submissions, NAB seeks notice of the same and an opportunity to be heard in relation to them.

N J YOUNG QC D F C THOMAS M E ELLICOTT M R L FORGACS M T SHERMAN

31 AUGUST 2018

[161] Hagger 1 at [31].
[162] Hagger 1 at Annexure B; Hagger 2 at Annexure B.
[163] Hagger 1 at [46] – [64]; AH-1, Tab 10, NAB.061.003.6897.
[164] Hagger 1 at [71] – [75]
[165] Hagger 1 at [67].
[166] Hagger 1 at [74].
[167] AH-1, Tab 11, NAB.001.001.0049.
[168] AH-1, Tab 16, NAB.088.001.0125 at 0223.
[169] Exhibit 2.191, NAB.005.217.0087.
[170] Hagger 1 at [84].

SCHEDULE

FACTUAL FINDINGS PROPOSED BY COUNSEL ASSISTING

As referred to at paragraph 6 above, NAB refers to the following corrections in relation to the summary of the facts set out at CS [6] – [133].

a) CS [9]: the paper referred to states that 48% (not 40%) of members have an account balance of less than $5,000;

b) CS [24]: the fact sheet does not inform the reader that the process for turning off commissions would be the same for MKBS and MKPS members from May 2015. The fact sheet informs the reader that the process for turning off commissions would be "*largely*" the same for MKBS and MKPS members from May 2015, save for *"[a]ny differences"* which were set out in the document referred to;

c) CS [44]: ASIC's 16 September 2016 letter also contemplates that license conditions be imposed instead of an enforceable undertaking;

d) CS [52], [53]: Mr Hagger's evidence was that Ms Debenham was asking for agreement and instruction about communicating the PSF events to the marketplace (not ASIC);[171]

e) CS [58]: Mr Hagger's evidence was that, while he retained responsibility for the PSF events, this did not prevent working-level discussions between regulatory affairs and ASIC taking place;[172]

f) CS [63]: the minutes of the 24 October 2016 NWMSL board meeting suggest that Mr Hagger left the meeting during the discussion of agenda item 17 (not 16);

g) CS [64]: the meaning of Counsel Assisting's inclusion of the word "proposed" in square brackets in this paragraph is unclear. NAB notes that the comments had already been provided to ASIC at this stage: the date of the email referred to is 24 October 2016; NAB's comments on the draft ASIC report were provided to ASIC on 21 October 2016;

h) CS [65]: Mr Hagger's evidence was that this file note did not capture everything said on the call, and that he could not recall whether or not he gave Mr Tanzer the estimate or range of future compensation on the 24 October 2016 call;[173]

i) CS [69.1]: Mr Hagger's evidence was that, while the resolution had been passed, the NWMSL Board meeting was still live;[174]

j) CS [69.6]: it is inappropriate to draw a general inference from the single occurrence cited that NAB's "usual approach" is to provide ASIC with the financial and customer impact of events before board discussions relating to remediation takes place. Further, Mr Hagger's evidence was that he did not want to front run the board discussions; he did not say (as Counsel Assisting assert) that he did not want to provide an estimated remediation figure for this reason;

k) CS [69.7], [74], [75(a)], [76]: Mr Hagger was not asked about the 3 November 2016 email in cross-examination. Mr Hagger's evidence was that Mr Tanzer and ASIC could have requested updated figures from NAB/NULIS, including at the working group level;[175]

[171] Hagger XXN at T4734.36-29; T4781.38-43.
[172] Hagger XXN at T4781.1.
[173] Hagger XXN at T4761.1-15.
[174] Hagger XXN at T4786.45-47.
[175] Hagger XXN at T4785.46; T4764.43 – T4765.23.

l) CS [69.6], [75(b)]: the 3 November 2016 presentation is the first documentary evidence presented to the Commission that NAB had informed ASIC of the total estimated remediation figure. Mr Hagger's evidence was that he could not recall whether or not he gave Mr Tanzer the estimate or range of future compensation on the 24 October 2016 call;[176]

m) CS [71]: First, Mr Hagger's evidence was that the table in the draft report which included the draft figures (which NAB positively affirmed) referred to the TERP event only, and did not include SWiFT and Encompass.[177] Secondly, Mr Hagger's evidence was that Mr Tanzer and ASIC could have requested the figures for the Encompass/SWiFT events;[178]

n) CS [76]: it is not a matter of objective fact that Mr Hagger's communications with ASIC were not "open and transparent": rather, this is in the nature of a submission (which should be rejected for the reasons given at paragraphs 81 - 98 above);

o) CS [78]: for clarity, the 22 December 2016 email related to the ASF issue, not PSF (as the inclusion of this paragraph directly after the comments in CS [77] suggests);

p) CS [80]: the extract from the transcript of Mr Hagger's cross-examination relates to a remediation proposal put forward on 2 June 2017, which was distinct from the proposal referred to in CS [78];

q) CS [84]: the section of the transcript referred to shows that Mr Hagger's evidence was that it became clear that ASIC was not comfortable with NAB's approach;

r) CS [89]: ASIC had acknowledged that the ASF issue was different to the PSF issue: Mr Hagger's file note of the 24 October 2016 call records that Mr Tanzer "*took the point that ASFs are different in nature to PSFs*";[179]

s) CS [103]: Ms Smith's evidence was that NAB's change in position on the PSFs at this stage resulted from the findings of an on-going review of NULIS's control environment by the Breach Review Committee and subsequent discussions between the delegates of the NULIS Board and management (including the CEO of MLC Super and the Chief Risk Officer);[180] and

t) CS [117]: Counsel Assisting state: "In 2016, NAB performed a successor fund transfer (**SFT**), which consolidated multiple trust entities and super funds into one superannuation fund, the MLC Super Fund, with one trustee, NULIS." A more accurate statement is that: "On 1 July 2016, the superannuation interests of the members of the TUSS and the Plum Funds were transferred by way of successor fund transfer (**SFT**) into the MLC Super Fund."[181]

[176] Hagger XXN at T4761.1-15.
[177] Hagger XXN at T4789.35 – T4790.6.
[178] Hagger XXN at T4785.46; T4764.43 – T4765.23.
[179] Exhibit 5.37, NAB.047.001.1728.
[180] Smith XXN, T4491, T4510-4511.
[181] O'Neal 1 at [23].