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TRANSCRIPT OF PROCEEDINGS

O/N H-919875

THE HONOURABLE K. HAYNE AC QC, Commissioner

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

MELBOURNE

9.32 AM, FRIDAY, 10 AUGUST 2018

Continued from 9.8.18

DAY 44

**MS R. ORR QC appears with MR M. HODGE QC, MR A. DINELLI and MS E. DIAS
as Counsel Assisting with MR T. FARHALL**

MR J. PETERS QC appears with MR B.K. HOLMES for IOOF

MR J. McKENNA QC appears for Energy Super

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, we can – continuing with Mr Oliver.

5 THE COMMISSIONER: Mr Oliver, would you come back into the witness box, please.

10 <MARK OLIVER, ON FORMER OATH [09.32 am]

<CROSS-EXAMINATION BY MR HODGE

15 THE COMMISSIONER: Yes.

MR HODGE: Thank you. Could we bring up IFL.9999.0003.0064. This is page 17 of Mr Oliver’s witness statement.

20 THE COMMISSIONER: Yes.

MR HODGE: Now, and if we bring up paragraph 40. Mr Oliver, you were asked some questions by the Commission about the position of IIML, which is the trustee, as to whether it should receive the benefit of payments made by responsible entities of managed investment schemes that were paid to the group where the payments were in respect of investments of the superannuation funds. You’re aware of that?---Yes.

30 And just if we make sure the structure of this is clear, you’ve talked already yesterday about how IIML, as the trustee of the superannuation fund, will invest some of its money in managed investment schemes that are operated by IIML again, but this time as responsible entity?---That’s correct.

35 And then IIML, as the responsible entity of those managed investment schemes, will in turn invest that money with external managed investment schemes?---Yes.

40 And there are agreements – many agreements that the IOOF group has in place with external managed investment schemes by which they agree to make payments back to the IOOF Group for investments made by IIML as responsible entity of the managed investment schemes?---If I could perhaps clarify there?

45 Yes?---So IIML as a responsible entity operates managed investment schemes which in the majority then invest with other fund managers on a wholesale basis. This particular question I interpret to relate to the broad investment menu that the platform operator offers members of the fund access to a range of direct other manager’s managed investment schemes.

Yes?---So there are two different ways of accessing, if you like, third party fund managers. One indirectly through a managed investment scheme operated by IIML.

5 Yes?---Known as the multi-mix funds, or more directly on a platform menu operated by the RE, by the RSE, into those fund manager options and that's what those relationships relate to, the latter.

10 Sorry, when you're saying "those relationships" and you're pointing at the paper, you mean the question - - -?---In relation - - -

- - - that you've been asked?--- - - - to managed investment schemes whereby IFL receives a payment.

15 Yes. And when you're saying "IFL" you're referring to the head group. Is that right?---The holding company, yes.

20 And perhaps to – maybe if we can try to orient this, can we bring up one of these agreements. Can we bring up IFL.0009.0001.0007. So this is what's described as a fund manager deed?---A platform services agreement, yes.

And it's an agreement between IOOF Holdings, the holding company?---That's correct.

25 And Aberdeen Asset Manager which is an external fund manager?---That's correct, yes.

And is this an agreement you're familiar with?---Not directly, no.

30 The – is it a type of an agreement that you're familiar with?---Yes, I'm aware of the construct.

35 Okay. And when you talk about the construct, perhaps if we go to page .0023. This sets out certain IOOF-related entities?---Yes.

And we see one of them is Australian Executor Trustees, or AET?---That's correct.

And another one is IOOF Investment Management which is IIML?---That's right.

40 And a third is Questor Financial Services?---Yes.

And Questor is no longer in operation?---That's correct.

45 And the way that this type of agreement works is that these related entities each operate platforms for IOOF?---Yes.

And superannuation members can invest their money through the platforms operated by IOOF?---Yes, some or all of those platforms operate a superannuation fund - - -

THE COMMISSIONER: Sorry, you will have to repeat that and speak up?---Some or all of those platforms operate or operated a superannuation fund, yes.

5 MR HODGE: And then from those platforms there are then investments into external managed investment schemes such as ones operated by Aberdeen?---Yes.

10 And under this agreement, Aberdeen agrees to make payments to IOOF, the holding company, in exchange for investments made through the subsidiary platform operators?---Yes, in return for the, if you like, the administration of contributions and distributions and all of the operations that are required to – for money to flow through to that fund manager’s managed investment scheme.

15 And for agreements like this that were entered into before 1 July 2013, they require a percentage of the funds under management to be paid back to the holding company?---It is my understanding that prior to 1 July ’13 it was a value-based payment, yes.

20 Sorry, again, could I ask you to do two things. The first is just to speak up a little bit?---Yes.

25 And the second is if you could just try to listen to my question and see whether you can answer my question. It’s a bit tricky sometimes when you insert some jargon into it for us to understand whether we’re agreeing with each other. So the way in which the payment from an external fund manager back to the holding company is determined under pre-1 July 2013 agreements is by a percentage of the funds invested from the IOOF platforms into the external fund manager?---I believe that’s correct at that time.

30 Well, those agreements continue to apply now, don’t they?---I believe they – based upon which any payment is made is on the basis of the number of members.

35 Sorry, you think that all of the agreements have been changed now to number of members?---It’s my understanding that the basis upon which these fund manager payments are made is on a per member basis.

And I wonder whether we’re at cross-purposes here. For new agreements entered into after 1 July 2013, those agreements are on a per member basis?---That would be correct, yes.

40 Because FOFA banned, except in certain circumstances, volume-based shelf fees?---That’s correct.

45 For agreements entered into before 1 July 2013 they still contain percentages?---I don’t know, to be honest.

Is this not part of what you are responsible for as part of products and platforms?---It is but I’m not familiar with those arrangements prior to that date.

The arrangements, though, continue to operate, don't they, Mr Oliver?---I believe they do, yes.

5 So the arrangements from pre-1 July 2013 continue to apply now?---That may be the case. I'm not entirely sure.

10 When you came to answer the questions that the Commission asked you about payments from responsible entities of MISs, did you make any inquiries to understand how this part of the business you were responsible for operated?---Yes, I did.

15 Did you make any inquiries to understand, as an example, why there were some fund managers who were paying very substantial amounts of money per quarter and some fund managers paying a much lower amount of money?---I didn't ask that particular question. My assumption was that it was based on the popularity of those particular funds.

20 So just so I understand, you think that all payments now made by external managed investment schemes are made on the basis of the number of members invested in the external fund, rather than on the basis of a percentage?---That has been my understanding, yes.

25 And for agreements entered into after 1 July 2013, the amount paid per member is \$10 per member?---That's correct.

How was that arrived at?---I – I don't recall, but I wasn't around at the time that amount was set, I understand.

30 Again, this forms part of the section that you're responsible for?---Yes.

Is that right?---That's correct, yes.

35 And you know that new fund managers who sign up to have a product listed on an IOOF platform have to pay \$10 per member?---Yes.

40 Do you know how that \$10 was arrived at?---I – I don't know the basis upon which that number was arrived at, but I know what it covers and it sounds a reasonable level based on the operations that are required to facilitate an investor into those funds.

I am sorry, could you say that again?---I don't know the precise basis upon which that number was arrived at, but I understand the processes that have to be undertaken – and my understanding is it is a recovery of that process cost.

45 And who is it that incurs that process cost?---It would be the service call in this particular instance so IOOF services which is the majority employer of staff that operate the administration of these flows.

Is it your evidence that the payments are made to the holding company but then paid back to Service Co?---It's paid back to the platform operator.

5 Your evidence then, as I understand it, would be money gets invested by IIML as the responsible entity into an external managed investment scheme, like one run by Aberdeen. That's the first step?---Yes.

10 And then Aberdeen makes a payment to IOOF Holdings in respect of that investment?---So the actual steps, as I understand it, are a member's money comes in through IIML as responsible entity, it's paid through to the custodian who then disburses moneys through to a range of managed investment schemes, term deposits, and a range of other investments. So it's the custodian that actually directs those payments.

15 There's a custodian - - -?---Yes.

- - - in between the IIML managed investment scheme and the external managed investment scheme?---And between the RE and the operation of the fund, the RSE.

20 And between IIML and - - -?---Yes.

- - - the actual fund that IIML is the responsible entity for?---Yes.

25 In any event, money has moved from the fund that IIML is operating out into an external managed investment scheme?---Yes.

30 And then the external managed investment scheme has made a payment to IOOF Holdings for receiving that money, or it being invested with that external managed investment scheme?---So the payment is in respect of the provision of access and the administration of that flow, and subsequent income distribution payments that come back from the fund manager and tax reporting and – and aggregation of tax and those activities.

35 And the total amounts of those payments each quarter are quite substantial?---Yes, I think that's shown in the annexure.

Well, let's bring that up. I tender that document, Commissioner.

40 THE COMMISSIONER: Fund manager deed IOOF Holdings and Aberdeen Asset Management Limited IFL.0009.0001.0007, exhibit 5.100.

45 **EXHIBIT #5.100 FUND MANAGER DEED IOOF HOLDINGS AND ABERDEEN ASSET MANAGEMENT LIMITED (IFL.0009.0001.0007)**

MR HODGE: If we can bring up annexure D to Mr Oliver's statement which is IFL.9999.0003.0083. So this is the first of four pages of payments made by various REs back to IOOF Holdings?---That's correct, yes.

5 And this – these are payments just for the quarter ended March 2018. Is that right?---That's correct, yes.

And so we see the first one, Aberdeen, is paying \$136,743.92. That relates just to the superannuation fund back to IOOF Holdings?---That's correct.

10

And that's as a proportion – or that's as part of a total payment made by Aberdeen back to IOOF Holdings of \$182,392.37?---Yes.

And, again, this is per quarter?---That's correct.

15

Now, you see then the next item – the next line item is AllianceBernstein?---AllianceBernstein, yes.

That payment is of a much smaller amount?---Yes.

20

Similarly you see Ascalon Capital Managers Limited?---Yes.

That's paying just \$1,250 per quarter?---Yes.

25 And \$1250 per quarter is the minimum payment that can be made to a fund manager back to IOOF Holdings. Is that right?---I believe there's a – yes, a – a per fund minimum charge, yes.

30 And can I suggest that some of these external fund managers are paying on the basis of \$10 per member and some of them are paying on the basis of a percentage of funds under management?---Based on my earlier comments, that's possible, yes.

Okay?---Could I – could I make a further comment?

35 Yes?---If I look at the disparity in those numbers, I would point to the fact that some of these fund managers will operate multiple managed investment schemes of varying degrees of popularity amongst members, which would go some way to explain the discrepancy between those numbers.

40 Yes. Well, if I take you back to the amendment made to the Aberdeen agreement on 25 June 2013. Can we bring up IFL.0009.0001.0001. So this is an amendment made to the Aberdeen agreement. You can see it's dated 25 June 2013?---Yes.

45 And if we go over the page to .0002. You can see it has been signed on 25 June, so five days before FOFA comes into effect?---Yes.

And if we go over the page to .0003, and we see this is a list of the funds presently being operated by Aberdeen. Do you agree – I’m sorry, operated at the time, that is, as at - - -?---Yes.

5 - - - 25 June, and the management fee that’s to be paid back to the holding company is a percentage of the funds that are invested?---Yes.

And do you have any reason to think that this agreement with the percentage has since been superseded?---I’m not aware of that being so.

10 I’m sorry, say that again?---I’m not aware of that being the case.

Okay. And do you say that these percentages genuinely reflect the cost to IOOF Service Co of providing whatever services it provides to Aberdeen?---They’re a level
15 which was agreed at the time. I can’t comment further than that.

But what happened was this, wasn’t it, from 1 July 2013, it was prohibited to make volume-based shelf space payments back to a fund manager or a platform operator like IOOF except insofar as it reflected the actual cost of or efficiencies. Is that your
20 understanding?---Yes, that sounds right.

And these are what would be referred to as grandfathered payments?---That sounds right, yes.

25 Do you know whether that’s the case, Mr Oliver?---Not definitively, no. It’s – it’s a level of detail that predated my joining the firm and familiarity with those arrangements.

What I’m trying to understand is, if we go back to your statement, when you gave evidence if we go back to IFL.9999.0003.0064 – sorry, Commissioner, I should tender that amendment document.

35 THE COMMISSIONER: Amendment to Aberdeen agreement, 25 June ’13, IFL.0009.0001.0001 is exhibit 5.101.

EXHIBIT #5.101 AMENDMENT TO ABERDEEN AGREEMENT DATED 25/06/2013 (IFL.0009.0001.0001)

40 MR HODGE: Thank you, Commissioner.

So you’ve given evidence here in respect to our questions, in paragraph 40 that:

45 *IIMILs position is that it should only receive the payments if it provides services to the responsible entities.*

?---Yes.

Now, when you've said that IIMLs position how did you determine that was IIMLs position?---Well, IIML as the superannuation entity doesn't deliver those services.
5 The services are delivered through the platform operators which have a service agreement with IIML.

When you said that that was IIMLs position, how did you determine what IIMLs position was?---By working with my colleagues to establish what IIMLs position
10 was, as responsible – as responsible superannuation entity.

So which colleagues did you work with to figure out what IIMLs position was?---Well, working across the business with my product colleagues, with my governance and legal colleagues to understand the backgrounds to the contractual
15 arrangements between the parties.

Was this something that to your knowledge was ever considered at the board level of IIML?---I – I'm not aware of that.

20 Do you understand that, ultimately, it is the board that determines the position of IIML about anything that the board might wish to determine the position about and delegates it to others to determine the position about things that are delegated to them?---Yes, I do.

25 Do you know whether the IIML board has delegated to somebody to determine what its position is about payments from external managed investment schemes?---To the extent that IIMLs board uses the services of our legal team, I interpret that as a suitable proxy for IIMLs position.

30 Is the reason you say that because this paragraph was something that was drafted by IOOFs legal team?---This was a paragraph which was drafted between us to ensure that it reflected the arrangement that exists.

I'm sorry, to ensure that it what?---That it reflected the arrangement that exists.
35

Can I suggest this to you: that as far as you are aware, IIML at a board level has never considered what its position is with respect to payments made by external managed investment schemes to the IOOF Group where those payments are derived based on investment of the superannuation funds?---I – I can confirm that I'm not
40 privy to the board's deliberations on these matters.

You don't know whether the board has considered this?---I don't know directly that that's something that has been discussed.

45 And when this paragraph was drafted to say what the position was of IIML, this wasn't based on going back and finding some record of this issue having been considered at an earlier point in time?---Not to my knowledge, no.

This was just something that you and the legal team came up with to describe what you decided was the position?---I've no reason to believe that that's an incorrect statement.

5 But do you have any reason to believe that it's a correct statement?---Well, I trust my colleagues and my governance department. They work closely with the board.

10 So it's somebody in the governance department that told you that this was the case?---Well, it's working between the governance area and my product team to ensure it's an accurate statement.

Who told you that this was the position of IIML?---This was working with my legal counsel and other colleagues to ensure that it was the – a true statement.

15 Did somebody say, "This is the position of IIML"?---Well, ultimately, yes.

Who was that?---That would be from our legal counsel.

20 And who is the legal counsel?---Mr Mark Mittelman working with our company secretary.

And then you see in paragraph 44 it said:

25 *IFL passes on the payment from each of the responsible entities of the MISs to the platform operator.*

?---Yes.

30 Now, the platform operator is IIML?---In some instances that's IIML as responsible entity, yes.

Are there other platform operators within the group?---Yes, as listed in the prior item, Australian Executor Trustees and previously Questor.

35 Questor doesn't exist any more?---That's correct.

So it's only Australian Executor Trustees and IIML?---That's correct.

40 Is it your understanding that IFL pays money or passes on to IIML, as the platform operator, the moneys that it receives from external managed investment schemes?---I believe so, yes.

And what is the basis for your belief?---Well, that's what I've been given to believe. I have no reason to disbelieve that.

45

Yes. Perhaps I should put it a different way. Who told you that this was the case?---To be honest, I – I don't recall specifically as we were bringing my responses together for this statement.

5 Sorry, you don't recall - - -?---I don't recall.

- - - who specifically told you this?---No.

10 Have you reviewed the financial statements for, for example, IIML or IOOF?---No, I have not.

15 Can I bring those up. This is for the financial year ending 30 June 2017, which is IFL.0006.0003.3737. Now, if we go to page .3765. You see there's note 30, a third of the way down the page, Related Party Transactions?---Yes.

And you see there's then a subheading which is Transactions With Related Parties?---Yes.

20 Do you agree, as is stated there, that IIML is a related party to IFL?---Yes.

IFL being the holding company?---Yes.

And you see Other Income?---Yes.

25 And you see:

Investment manager fees received from related entity.

30 ?---Yes.

Now, in 2017, that payment received from a related entity was only 154 and a half thousand dollars?---I see that, yes.

35 That couldn't possibly be the payment back to IIML of the investment management – I'm sorry, of the fees received from external managed investment schemes?---I'm sorry, I'm not familiar with these statements but - - -

You're not familiar with the financial statements of IIML?---No, I'm not.

40 Can I put it to you in a different way: do you agree that the payments received by IFL from external managed investment schemes in respect of moneys invested from IIML platforms vastly exceeds 154 and a half thousand dollars in a single year?---It certainly doesn't reflect what is in the annexure.

45 In the annexure - - -?---Yes.

- - - to your statement?---Yes.

It doesn't reflect your evidence?---Well, I don't know where it would be reflected. I'm not familiar with the statements.

5 And you see then Other Transactions?---Yes.

And those are all payments to related entities rather than payments from related entities?---I can't – I can't tell that from what I can see, but - - -

10 You can't tell that? It says:

Service and marketing fees paid to related entities.

?---To related – yes, yes.

15 Continuing:

Investment manager fees paid to related entity, retail management fees paid to related entity, services fees paid to related entity.

20 ?---Yes.

So do we agree those are payments made to related entities?---Yes.

25 I tender that document, Commissioner.

THE COMMISSIONER: IIML financial report 30 June 2017 IFL.0006.0003.3737 exhibit 5.102.

30 **EXHIBIT #5.102 IIML FINANCIAL REPORT DATED 30/06/2017 (IFL.0006.0003.3737)**

35 MR HODGE: So if we come back to paragraph 44 of your statement which is IFL.9999.0003.0064. Do you still wish to maintain that IFL passes on the payment from each of the responsible entities of the MISs to the platform operator?---I do, because I – I – I don't understand the connection between the statements and – that you've shown me and - - -

40 If the payments were received by IIML, you would expect them to be recorded in the financial statements?---Right.

Do you agree?---Yes.

45 If they're not recorded in the financial statements, that would suggest that the first sentence of paragraph 44 of your statement is untrue?---Were the financial statements not of IIML rather than IFL that you showed me?

That's right we looked at the financial statements of IIML?---Yes.

IIML is the platform operator, isn't it?---Yes. I believe so, yes.

5 So if IIML received a payment from IFL, it would be recorded in its financial statements?---Yes, I would expect so.

This paragraph, again, is just based on something that somebody told you?---Yes, and I believe to be the case.

10

And who told you?---As I've explained, my governance service colleagues.

Do you believe it to be the case for any reason other than somebody told you?---No.

15 I'm sorry?---No.

All right. Can we move to a different topic. Sorry, I should actually in fairness ask you this, Mr Oliver, seeing as you purported to give evidence about it. One of the things that we are trying to understand is how trustees go about dealing with these types of grandfathered volume-based shelf space fees where a percentage of the investments that are being made of the trust's money are being paid to other parts of a particular retail group. You understand the issue?---Yes.

20 If I ask you questions about that, is that going to be of any assistance to the Commissioner?---I'm - I'm not sure I understand the question, sorry.

You've purported to give evidence about this issue?---Yes.

30 Do you have any knowledge beyond what is set out in the five paragraphs that we have looked at on page 17 of your statement about this issue?---I have general knowledge around it, but - - -

All right. Can you see an issue, from the perspective of the trustee, which is that another part of the retail group is receiving a percentage of the funds of the trust invested with an external managed investment scheme?---I can see that, yes.

35

And can you see that for a trustee, a trustee acting in the best interests of members, would, one would expect, say that money should not go to some other part of the group except insofar as it reflects a payment for services. It should be returned to the members?---I agree that with - with your statement that it should go to the service provider of the service.

40

But only to the extent that the service provider is providing some service worth the value of the money?---Yes.

45

And so if the payment that is being made is a percentage of the funds invested, unlinked from the value of the services provided, then it is entirely possible that the

payment made by the external managed investment scheme will vastly exceed the value of any services provided?---I – I can't comment on that but I can see the line of questioning, yes.

5 And in those circumstances, you can see that the trustee would say, "This isn't money that should be retained by some other part of the retail group, it should be returned to the members because it is a percentage of their funds"?---If the proposition is that that amount exceeds the reasonable level of services provided, I would agree.

10 And is that something, to your knowledge, that has been considered within IOOF?---I – I can't speak for the conversations within the board.

15 You're aware that there's another agreement between IIML and IOOF Holdings, which is of this same type of agreement?---Other than that which we've just discussed?

A platform services agreement - - -?---Yes.

20 - - - between IIML and IOOF?---Yes.

Would it assist you if I brought it up. It's IFL.0009.0001.1118. So this is a platform services agreement between Holdings and IIML. Do you see that?---Yes.

25 Are you familiar with this agreement?---I'm aware of it.

Are you aware of why it was entered into?---Because the – because of the services delivered to the organisation.

30 I'm sorry, because of the services delivered to the organisation?---Yes.

Did you say?---Yes.

35 So if we go to page 14 of this document, .1131. So the related entities here are Australian Executor Trustees and IIML?---Yes.

40 And the services that are provided – if we go to page 21, which is .1138 – is fund administration and additional investment-related services provided by IFLs related entities?---Yes.

So the IFL related entities as we've seen are AET and IIML?---Yes.

45 So just so I understand, this is an agreement whereby IIML agrees with Holdings that IIML will pay Holdings for services that IIML provides to itself?---Yes, that appears to be the case.

And do you know how in practice that agreement works?---No, I don't.

Right. I tender that document, Commissioner.

THE COMMISSIONER: Platform services agreement IOOF Holdings and IIML, IFL.0009.0001.1118 exhibit 5.103.

5

EXHIBIT #5.103 PLATFORM SERVICES AGREEMENT IOOF HOLDINGS AND IIML DATED 28/03/2018 (IFL.0009.0001.1118)

10

THE COMMISSIONER: Mr Hodge, have we got a date for that agreement?

MR HODGE: Yes, Commissioner, it's – from memory it's 28 March 2018. 28 March 2018.

15

THE COMMISSIONER: Yes. Yes. The date should be part of the exhibit marking.

MR HODGE: Thank you, Commissioner.

20

Then could we bring back up Mr Oliver's statement and go to IFL.9999.0003.0071. So you see question 29 that the Commission asked you was:

25

Summarise any concerns raised by APRA since 1 January 2013 with the RSE licensee –

Which is IIML –

30

...or the group concerning the governance arrangements of the RSE licensee or the relationship between the RSE licensee and the Group. Explain how, if at all, the RSE licensee has addressed any such concerns.

?---Yes.

35

And you see in paragraph 67, your answer is:

During the APRA industry-wide review that commenced in late 2016 that focused on governance issues, APRA raised certain matters in respect of the governance arrangements of IIML or its relationship with the Group.

40

?---Yes.

And then you say:

45

Until this APRA review, no material concerns had been raised by APRA in respect of IIML since 1 January 2013.

?---Yes.

5 What was the basis upon which you made that statement?---Well, I – I had to rely on the input of others, given I had joined the firm in 2016. So counsel was sought from our company secretary who would be close to these matters.

All right. So you spoke to the company secretary. Who is that?---That's Mr Paul Vine.

10 And the company secretary told you that the first time APRA raised any issues in respect of IIML was as part of the industry-wide review that commenced in late 2016?---I believe that to be the case.

15 Can I show you APRA.0002.0003.1363. Can I ask you – before I ask you some questions about the detail of this document, are you familiar with how APRA supervises the operation of the IOOF Group or IIML?---Broadly, in terms of regular interactions, quarterly meetings, but beyond that I'm not privy to the specifics of how that monitoring takes place.

20 Okay. So you see, this is a letter to the director of IOOF Holdings – the directors of IOOF Holdings Limited dated 15 September 2015. You see that at the top?---Yes.

25 I take it this wasn't a document that you were shown in the course of preparing to give evidence?---That's correct.

And you see that the subject of the document is the holdings company, IIML and Questor?---Yes.

30 And that they are referred to collectively as "IOOF"?---Yes.

And if we go over to page 4 of the document, which is .1366, if we look under the heading of changes to APRAs supervision program, you see the second paragraph there:

35 *APRA noted that it had been interacting with IOOF on a wide range of prudential matters, many of which had been discussed during the meeting. In particular of concern to APRA had been the difficulty in obtaining accurate and current information in relation to the IILs –*

40 That's the holding company, I think, rather than IFL?---IFF Limited.

Continuing:

45 *IILs chief risk officer role, portability relief, the ORFR, culture, identification of responsible persons, the information flow and relationship between the board and management and the Fairfax Media matter.*

?---Yes.

And then the next paragraph:

5 *Given the size and complexity of IOOF the number and range of prudential matters raises concerns for APRA. As a result, the approach being taken is to move away from focusing on each individual issue and focusing on understanding management's interactions with the IIML, Questor and IOOF boards and the overall culture of IOOF.*

10

?---Yes.

Now, I've obviously only shown you a few parts of a letter that nobody in the group had made you aware of before now. Do you still maintain that the first time that
15 APRA raised matters in respect of governance arrangements was in about late 2016 as part of an industry-wide review?---I mean, if I reflect on that and the comments made, I – I understand there had been a regular ongoing dialogue around board structures, but, again, those were being progressed. I think there was no material specific matters, as I understand it.

20

I tender that document, Commissioner.

THE COMMISSIONER: Letter APRA to IOOF Holdings, 15 September '15, APRA.0002.0003.1363, exhibit 5.104.

25

EXHIBIT #5.104 LETTER APRA TO IOOF HOLDINGS DATED 15/09/2015 (APRA.0002.0003.1363)

30

MR HODGE: Can we bring up APRA.0002.0003.1361. This is a letter from APRA to IOOF dated 20 October 2015. Do you see that?---Yes.

35 Again, this isn't a document that you were shown in the course of preparing to give evidence?---That's correct.

And then if we go to page 2 of that document. You see there's a paragraph about a third of the way down the page which begins:

40 *With respect to our statement regarding our experience with IOOF in "obtaining accurate and current information" we acknowledge that we did not discuss this matter at our meeting. It is, however, APRA's experience that there have been numerous instances where there have been difficulties in obtaining accurate and current information.*

45

And then there's some examples given?---Yes.

Now, again, I appreciate I've only shown you part of the document. Do you still think the statements in paragraph 67 of your statement are accurate?---Broadly, yes. I mean, I understand there is ongoing and will be ongoing dialogue. I think it's a question as to the materiality of the concerns.

5

I tender that document, Commissioner.

THE COMMISSIONER: Letter APRA to IOOF Holdings, 20 October '15, APRA.0002.0003.1361, exhibit 5.105.

10

EXHIBIT #5.105 LETTER APRA TO IOOF HOLDINGS DATED 20/10/2015 (APRA.0002.0003.1361)

15

MR HODGE: And then can we bring up APRA.0002.0009.1213. You see this is a letter dated 21 December 2015 to the directors of IOOF Holdings?---Yes.

I take it, again, this isn't a letter that you were shown during the course of preparing to give evidence?---That's correct.

20

And you will recall, if we can put that document on one side of the page – on one side of the screen and bring up on the other side of the screen the relevant part of your statement, which is at IFL.9999.0003.0071. So you see you say specifically that:

25

During the APRA industry-wide review that commenced in late 2016 that focused on governance issues, APRA raised certain matters in respect of the governance arrangements - - -

30

?---Yes.

Continuing:

and until that review no material concerns had been raised.

35

?---Yes.

And if we go to, on the left-hand side of the screen, page 5 of the document, .1218, you see the heading Governance?---Yes.

40

And then you see the second paragraph:

APRA is concerned that the current governance structure has resulted in a lack of demonstrable focus by boards on individual APRA-regulated entities as some decisions appear to have favoured the interests of shareholders over the beneficiaries of superannuation funds under trusteeship.

45

?---Yes.

Now, again, I appreciate I've only shown you part of a document, but do you still maintain that paragraph 67 of your statement is true?---In – in light of that
5 information, clearly there were concerns that were, you know, different to that expressed.

I tender that document, Commissioner.

10 THE COMMISSIONER: Letter APRA to IOOF holdings, 21 December '15, APRA.0002.0009.1213, exhibit 5.106.

15 **EXHIBIT #5.106 LETTER APRA TO IOOF HOLDINGS DATED 21/12/2015 (APRA.0002.0009.1213)**

MR HODGE: Why were you put up as the witness to deal with these questions, Mr Oliver?---Well, in the main, most of the questions relate to the day-to-day areas of
20 my responsibility.

I see. Now, you know the Commission, after it received your statement, suggested that you were not the appropriate witness to address these questions?---I understand that was the case.
25

And suggested that Mr Kelaher, the managing director would be the appropriate person to address these questions?---I also understand that.

30 And nevertheless, IOOF insisted that you were the best person to answer these questions?---Yes.

Now, do you know why you were told with respect to paragraph 67 that concerns hadn't been raised by APRA until part of an industry-wide review in late 2016?---I can see no other reason than the degree of materiality. So the comment says "no
35 material concerns". I think that's really the question. I can see no reason why I wouldn't have been told something that was believed to be material.

One of the things that has happened is that APRA has been insisting upon IIML splitting its dual regulated RE/RSE model?---I understand that, and I understand it has subsequently been considered.
40

Yes. You say – if we bring up page 25 of your statement at .0072. You explain at paragraph 71 what you've been – I'm sorry, I was going to say what you've been told. You explain at 71 what APRA considers to be the minimum changes required
45 by IIML?---Yes.

I assume you haven't been dealing with APRA?---No, I have not.

This is, again, something that somebody has told you?---I have to rely on the input of others, yes.

5 And in this case, who are the others who have told you this?---This would have been from my governance area, again.

Sorry, the governance area is - - -?---And this comprises, you know, company secretary, legal, compliance and risk.

10 And you say in 72:

These APRA proposals will be considered by the IFL board at its meeting on 1 August 2018.

15 ?---Yes.

And the board met on 1 August 2018?---It did.

20 And do you know what resolution was reached?---I'm not privy to the board output

All right. Now, I want to ask you about one last topic, which is some changes that were made earlier in this year to pricing?---Yes.

25 And that – that squarely is within the ambit of what you know about?---Yes.

Because it was your team that was responsible for pricing changes?---Yes, for proposing the pricing changes, yes.

30 Okay. And can we bring up IFL.0006.0001.4196. So this is the papers for a meeting of the board of directors of IIML on 12 February 2018?---Yes.

35 And if we then go to page .4260. This is a paper that was sent to the board dealing with some changes to pricing?---Yes.

And if we go to page 2 of that document, which is .4261, we can see at the bottom it's a paper endorsed by you and approved by Mr Kelaher?---Yes.

40 And there are a few different aspects to this, but one of the aspects of the pricing was that there was going to be a re-pricing in relation to certain superannuation products?---Yes.

And there was also going to be a rebranding where the names of those superannuation products was changed?---Yes.

45 And you see about halfway down the page there's a sentence which is:

All existing member pricing will be grandfathered.

?---Yes.

5 Continuing:

There is an arbitrage risk that existing personal division members will move from grandfathered pricing to the new pricing. However, this is an existing risk and historically there has been very little arbitrage.

10

?---Yes.

And what that's referring to is the new pricing is, in most respects, lower than the old pricing?---Correct.

15

And so the risk is that the members might move to the new pricing and, therefore, pay a lower price?---There is a likelihood, yes.

20 Well, there's a risk, but what you said to the board was it's a low risk?---There was an expectation it was already happening, but yes.

What you had said to the board was the effect of this is there's a low risk?---Yes.

25 And if we go over the page to page 3, we can see, I think at the – in the table at the bottom half of the page, some of the changes to pricing?---Yes.

30 And so Choice and pension members who are currently – who have balances of up to \$250,000 and are presently paying a .85 per cent fee will, depending upon whether they move to core or the full platform model, pay either .35 per cent or .7 per cent?---Yes.

And the difference between the core and the full is that the core gives access to the 24 internal IOOF managed investment schemes?---That's correct, yes.

35 And the full gives access to both those internal IOOF managed investment schemes and also external managed investment schemes?---Yes.

40 All right. And then if we go over the page to page 5, which is .4264, you will see this is the appendix B considering the conflicts of interest that might arise?---Yes.

And in paragraph 1 we see:

45 *In this case, the fees proposed for personal members are being reduced which on its face demonstrates prioritisation of the interests of those members above the corporate interests.*

?---Yes.

The conflicts issue doesn't seem to address the issue of grandfathering the higher pricing for existing members?---No.

Did you say no?---No.

5

Could I tender that document, Commissioner.

THE COMMISSIONER: Board papers for meeting of directors of IIML, 12 February '18, IFL.0006.0001.4196 exhibit 5.107.

10

EXHIBIT #5.107 BOARD PAPERS FOR MEETING OF DIRECTORS OF IIML DATED 12/02/2018 (IFL.0006.0001.4196)

15

MR HODGE: Thank you. No, you didn't attend that board meeting?---No, I did not.

20

But you received a report back later about an issue that had been raised?---Yes, from memory, there was a request by the board to ensure that members were informed about the revised pricing going forward.

I think, if we bring up IFL.0032.0001.0469. So this is an email sent by Renato Mota to you and to Mark Mittelman?---Yes.

25

And this is the day after the board meeting?---Yes.

And the query that had been raised in respect of the re-pricing was:

30

...why the new price point did not apply to all existing clients at trustee's discretion rather than just new clients or those that request a change.

?---Yes.

35

And then it said:

In other words, is the trustee obliged to re-price (or would it even be prudent to re-price) all clients?

40

?---Yes.

So that was then an issue that you needed to go and look at?---Yes.

I tender that document, Commissioner.

45

THE COMMISSIONER: Email Mota to Oliver and others, 13 February 2018, IFL.0032.0001.0469 exhibit 5.108.

**EXHIBIT #5.108 EMAIL MOTA TO OLIVER AND OTHERS DATED
13/02/2018**

5 MR HODGE: And if we bring up IFL.0032.0001.1243. This is a chain of emails that begins with an email sent by you, if we go to page .1244. This is very shortly after you received Mr Mota's email, you send an email to some members of your team?---Yes.

10 And in relation to the re-pricing, we see:

Renato has posed the question to legal but for consideration why would we not re-price all members in IES and is the trustee obliged to do so or are they simply not so better off by so doing?

15

?---Yes.

And then if we go over the page to the first page, .1243, and we see the response you get from Mr Mason at the bottom of the page is, relevantly:

20

Re-pricing the back book in IES has an \$8 million per annum revenue impact.

?---Yes.

25 Continuing:

There are many grandfathered Commission arrangements in the pre-FOFA back book. We didn't re-price the back book at 1 January 2014.

30

?---Yes.

And then he sends you another email a little later on which says:

Had a quick look at our back book. There are approximately 40,000 IES members who have a grandfathered commission.

35

?---Yes.

Continuing:

40

But of the 29,000 IES members who would be better off under the new pricing, approximately 20,000 have a grandfathered commission.

?---Yes.

45

I tender that document, Commissioner.

THE COMMISSIONER: Emails between Oliver, Mason and others, 13 February '18, IFL.0032.0001.1243, exhibit 5.109.

5 **EXHIBIT #5.109 EMAILS BETWEEN OLIVER, MASON AND OTHERS
DATED 13/02/2018 (IFL.0032.0001.1243)**

10 MR HODGE: Now, I don't know whether you will have seen the next document or not. Can we bring up IFL.0032.0001.0044. This is an internal email from Mr Mota to Ms Broom and copied to Mr Mittelman?---Yes.

And it's sent a little over a month later on 22 March?---Yes.

15 And you will see in the second line it says:

See attached comments from director on repurpose and re-price papers. They are challenging on grounds of community expectations.

20 ?---Yes.

Is this an email you have seen before?---No, it's not.

25 Are you aware that there were some challenges raised by a director in respect of the March IIML papers?---Yes.

And what were the challenges?---In essence, it centred around the back book and re-pricing of the back book.

30 I will show you the attachment and you tell me if you've seen the attachment. It's IFL.0032.0001.0042. This is some notes that seem to have been prepared by at least one director on the board. Have you seen it before?---No, I haven't seen this, no.

35 You see the fourth bullet point down which is:

Interest of beneficiaries must be prioritised over interests of the trustee. Surely it is in their interest to have the lower pricing and in the trustee's interest to keep them on the higher pricing.

40 You see that?---Yes.

45 And you recognise, don't you, that conflict of interest. On the one hand, the interest of the beneficiaries, the members of the trust fund in having lower pricing, and on the other hand, the interests of the trustee in ultimately making more profit that it can return to the group?---I do recognise that conflict, yes.

And do you consider that that conflict was – I’m sorry, I tender that document, Commissioner.

5 THE COMMISSIONER: With its email, Mr Hodge, the email Mota to Broom and others 22 March ’18, IFL.0032.0001.0044, with its attachment, March IIML papers, IFL.0032.0001.0042, together exhibit 5.110.

10 **EXHIBIT #5.110 EMAIL MOTA TO BROOM AND OTHERS, WITH ATTACHMENT, MARCH IIML PAPERS DATED 22/03/2018 (IFL.0032.0001.0044 & IFL.0032.0001.0042)**

15 MR HODGE: Thank you, Commissioner.

Do you consider that the conflict was adequately managed in this case, Mr Oliver?---Yes, I do.

20 All right. Do you want to explain to the Commissioner how the conflict was managed?---Well, I think we have, firstly, a recognition that a conflict exists. There was a subsequent set of requirements given by the board to follow up those members who may be better off in the new pricing structure, and that’s a process which we continue to go through today.

25 I’m sorry, I will – could I ask you just to take that or explain that to us again. So the conflict was recognised?---Yes.

30 And then how was the conflict managed?---So the conflict is managed insofar as reassessing the fee, being comfortable with that, and then ensuring that those members who may benefit from moving to the new pricing are made aware of that.

I see. So, ultimately, the change to the pricing was approved by the board?---Yes.

35 And you were saying that the board also approved notifying members who might benefit – well, that would benefit from the new pricing about the new pricing?---That’s correct. I mean, all members were informed but there was a follow-up program to ensure that those members who would most likely benefit from further awareness of the impact of those changes would be followed up.

40 Well, I will show you the paper, which is – if we go to IFL.0006.0001.4636. So this then is the set of papers for the next meeting of the IIML board on 23 March 2018?---Yes.

45 And if we go to page .4650. This is a follow-up paper on the pricing strategy?---Yes.

And if we go to the second page. We see again the endorsement is by you and it’s approved by Mr Kelaher?---Yes.

And then if we go back to the first page where there's the Conflicts Consideration, we see it says:

5 *A thorough analysis was undertaken prior to the preparation of the February board paper to compare the current pricing available to all 58,562 existing Choice members.*

?---Yes.

10 Continuing:

Overall, 29,000 existing members currently have a higher fee structure and may potentially benefit under the new pricing, representing approximately 50 per cent of existing Choice members.

15

?---Yes.

And then it said:

20 *22,000 of these Choice members are currently advised.*

?---Yes.

And that, I think, means 22,000 of the 29,000?---That sounds right.

25

Or you're not sure?---I'm not sure, to be honest, but given they're in Choice one would expect they would be more likely to be advised.

Well, this is – this paragraph is only concerned with Choice members?---Yes.

30

So it's either all of the Choice members - - -?---Right. Yes.

- - - or the subset that have a higher fee structure. You're not sure which one it is?---To be honest, it's not clear to me which way.

35

And then if we go over the page, it said in the second paragraph:

40 *In this case, although the fees proposed for new Choice members are being reduced, 50 per cent of the existing Choice members will have a higher fee structure than the proposed fee structure and will not be automatically moved across to the new pricing. It is common across the industry for platforms to have clients at different price points.*

?---Yes.

45

And then it says:

To manage this conflict all Choice members will be notified of the new product offering as outlined below.

?---Yes.

5

Now, this paper doesn't seem to explain how many of those members with a linked adviser are paying grandfathered commissions?---No.

I tender that document, Commissioner.

10

THE COMMISSIONER: Board papers for meeting of IIML board, 23 March '18, IFL.0006.0001.4636, exhibit 5.111.

15 **EXHIBIT #5.111 BOARD PAPERS FOR MEETING OF IIML BOARD
DATED 12/03/2018 (IFL.0006.0001.4636)**

MR HODGE: Thank you. Now, I think the re-pricing doesn't actually get approved at that meeting?---This was March.

20

Yes?---Yes. I can't recall the precise timing, sorry.

There's a – I'm sorry, I think – I think I've misled you. I think it is approved at that meeting. I should – but then it's reported as part of the May meeting. Can we bring up the May meeting which is IFL.0006.0001.5149. So this is the pack for the May meeting but it contains the minutes for the March meeting which are at page .5156. And if we go to page .5157. We see these are the parts of the minutes dealing with this employer super re-pricing?---Yes.

25
30

And you see the third bullet point down:

There are potentially different perspectives on price. The proposed pricing benefits will be applied to current RSE members who can access them on request. Revised pricing cannot simply be applied across all RSE members as some would be worse off and it would not be financially viable for the business which requires economic sustainability as well as an ongoing approach to continuously improving services. Compared to competitors we are top quartile in return and bottom quartile on fees.

35
40

Do you see that?---Yes.

Now – and then it goes on to explain the changes to pricing will be communicated to financial advisers and members?---Yes.

45

Now, one of the things that IIML could have done was to apply the new pricing to those existing members who would be better off under the new pricing?---Yes.

But it didn't do that?---No.

And if we go over the page to .5158, we see the resolution which is to approve the new pricing, resolution 18-3-3.1?---Yes.

5

You didn't attend this board meeting?---No, I did not.

So we see what happens is that the rest of the board – which is the chairman, Mr Venardos, the managing director, Mr Kelaher, Ms Flynn, and Mr Selak – don't vote on this item because they're conflicted?---I see.

10

And the only two directors who vote on the item are the two independent directors who have been appointed, Ms Oldham and Mr Walsh?---Yes.

15 And they end up voting – or they vote in favour of the re-pricing?---Yes.

Ultimately, there's reconsideration of some of these issues, although not the re-pricing, after complaints are made by Bridges Financial Planners?---That was in respect of a different product. Not the employer super product.

20

Yes?---Yes.

There's a different issue not related - - -?---Yes.

25 - - - to this re-pricing of the employer product. Was that related to the Pursuit product?---That's correct, yes.

Now, one of the things that your team had considered in preparing this re-pricing was the likelihood that existing members would move over to the new pricing?---Yes.

30

And what was the conclusion that your team came to as to the likelihood that existing members would move over to the new pricing?---So are we talking about the employer super re-price?

35 Yes?---Well, I mean, we have to – if we look at the overall economics of the product, we need to make certain modelling assumptions to be able to have confidence to set a price point. So there was an expectation that, you know, certain member cohorts may not move and we factor that into how we would arrive at the price.

40 I tender that document, Commissioner.

THE COMMISSIONER: Board papers, meeting of IIML board, 30 May '18, IFL.0006.0001.5149, exhibit 5.112.

45

EXHIBIT #5.112 BOARD PAPERS, MEETING OF IIML BOARD DATED 30/05/2018 (IFL.0006.0001.5149)

MR HODGE: Thank you, Commissioner.

5 Now, I want to give you another opportunity to directly answer the question that I have asked. There was an assessment made of the likelihood that certain types of members would move over from the old pricing to the new pricing?---Yes.

10 And could you explain to the Commissioner what that assessment was?---There were certain probabilities of movement to price points. That helps inform the economic impact of changing price downward. And based on those judgments, that's what we set the price at.

Can we bring up IFL.0010.0001.0160. This is a memo prepared to the IOOF leadership group by Ms Broom and Mr Mason?---Yes.

15 And they're within your team?---They are, yes.

And you will see this is dated 31 January 2018?---Yes.

20 And who are the IOOF Leadership Team – Group?---That's the senior executives of the group, so the heads of each of the major functions.

Would that include – does that include you?---No, it doesn't. It includes the managing director, it includes my manager, and the other functional heads.

25 All right. So it would go to Mr Kelaher?---Yes.

And if we go over the page to page 4 of that document, .0163. Actually, if we just go to .0164. So we see 3.5, Risks?---Yes.

30 This is identifying the risks of the new pricing that's proposed?---Yes.

And then we look just below the – look about a quarter of the way down the page we see:

35 *Arbitrage risk IES moving to new pricing.*

?---Yes.

And the second dot point is:

40

29,263 would be better off.

?---Yes.

45 And that's a number ultimately reflected, as we've seen, in that board paper that was presented in March?---Yes.

And:

16,164 of these are advised with a grandfathered trail.

5 ?---Yes.

That information doesn't seem to have been provided to the directors, and in particular the independent directors in the March paper?---I notice that, yes.

10 Did you say you noticed that?---I noticed that, yes.

And then you see the paragraph down:

15 *It can be seen that the arbitrage risk within IES is different from other re-prices due to grandfathered commissions and unengaged membership with low account balances and a large number of members being only marginally better off.*

20 ?---Yes.

And then in the next paragraph:

25 *In reviewing arbitrage risk, we considered the unlikely movement of direct (unadvised) members and advised members with grandfathered trail.*

?---Yes.

30 And the preparation of this paper, were you part of it?---I don't recall but I – I would expect to have seen it, yes.

And the first proposition seems to be that for members who are unadvised, and, therefore, unengaged, they're unlikely to move to the new pricing?---Yes.

35 And that was the assessment that was made by IOOF?---Yes.

And for members who are advised, if their adviser is receiving a grandfathered trail, they're also unlikely to move to the new pricing?---I – I can assume that was an assumption that was made, yes.

40 Is that your view?---Well, I would hope that as we communicate these price point changes, that people would be alert and take those matters into their hands to move but we have to work on some assumption of past behaviour.

45 And the assumption of past behaviour is that advisers who are receiving a grandfathered trail are unlikely to move their members, notwithstanding that they will be better off to the new pricing where they won't receive a grandfathered

trail?---In our experience, that products with grandfathered trails tend to take longer to be moved, yes.

5 Sorry, can you say that again?---In our experience, those products tend to take longer to move to a new price point.

Notwithstanding that the member would be better off under the new price point?---Yes.

10 And, again, this information doesn't seem to have been communicated up to the directors in the paper, and in particular then to the independent directors?---I'm not sure whether it was discussed in the room, but it doesn't appear to be on their papers, that's correct.

15 And can you see – or do you agree that what would be in the best interests of this cohort of 29,263 members would be to just move them to the new pricing, rather than leaving it to what IOOF considered to be unlikely movement for unadvised members and members with an adviser who are receiving a grandfathered trail?---If – if the expectation was that all members would move to the new pricing, the new pricing
20 point would have been a different and more likely higher pricing point. We had to make some assumptions about the likely migration to that new price point, ensuring the sustainability of the fund going forward.

I'm just trying to make sure I've understood that. This paper, if we go back to page
25 .0161, this is an analysis in relation to the pricing. This is as at January of 2018?---Yes.

And then on page 2, this is setting out the proposed pricing that has already been
30 designed?---Yes.

And then on page 3 there's some general discussion about platform price positioning and the impacts on IES?---Yes.

35 And then on page 4 there's – I'm sorry, page 5, there's a discussion of the risks, which is what we've been looking at?---Yes.

And so that I understand, you're saying if the risk of members moving to the new pricing was thought to be higher than assessed in this paper, then IIML wouldn't have offered the new pricing?---It – yes. If – if everybody moved to the new pricing,
40 it would be reasonable to expect that the new pricing wasn't sustainable.

So the difficulty then was this, was it: you couldn't say to the directors of IIML, and in particular the independent directors, "It would be in the best interests of approximately 29,000 members to simply move them to the new pricing" rather than
45 risking the possibility that advisers wanting to maintain their trail commissions and unadvised members who are disinterested will not benefit from the new pricing, because if you explain that to them they might act in the best interests of the

5 members and that would reduce the profitability for IOOF and then it would never have wanted to introduce the new pricing in the first place?---I wouldn't expect to have it put in those terms but an aggregate – if the assumptions made about migration between price points whether everybody moved then the price changes would simply not be sustainable and therefore not in the interests of all members.

I tender that document, Commissioner.

10 THE COMMISSIONER: Memorandum 31 January '18, Broom and Mason to IOOF leadership group IFL.0010.0001.0160, exhibit 5.113.

15 **EXHIBIT #5.113 MEMORANDUM, BROOM AND MASON TO IOOF LEADERSHIP GROUP DATED 31/01/2018 (IFL.0010.0001.0160)**

MR HODGE: Commissioner, I don't have any more questions for Mr Oliver.

20 THE COMMISSIONER: Thank you. Mr Peters.

MR PETERS: No re-examination, Commissioner.

25 THE COMMISSIONER: Yes, thank you. Thank you very much, Mr Oliver. You may step down.

<THE WITNESS WITHDREW [10.57 am]

30 MR HODGE: Commissioner, the next witness is Mr Kelaher.

THE COMMISSIONER: Yes. Mr Kelaher, would you be good enough to come into the witness box, please.

35 **<CHRISTOPHER KELAHER, SWORN [10.58 am]**

40 **<EXAMINATION-IN-CHIEF BY MR PETERS**

THE COMMISSIONER: Mr Kelaher, do sit down. Yes, Mr Peters.

45 MR PETERS: Thank you.

THE COMMISSIONER: Mr Peters, just before you begin, Mr Kelaher has various folders there. Are they his statements or someone else's?

MR PETERS: They should be his statements, your Honour. I was going to tender them.

THE COMMISSIONER: Yes. Well, I'm just not sure that they are.

5

MR PETERS: Perhaps what's there can be removed, Commissioner, and we can give him his statements.

THE COMMISSIONER: Yes.

10

MR PETERS: Thank you for that.

THE COMMISSIONER: Yes, Mr Peters.

15

MR PETERS: Mr Kelaher, is your full name Christopher Kelaher?---Yes.

And is your current business address level 6, 161 Collins Street, Melbourne?---Yes, it is.

20

And are you the managing director of IOOF Holdings Limited?---I am.

And have you held that position since May 2009?---Yes.

And you appear today in answer to a summons dated 30 July 2018?---Yes.

25

I tender that, Commissioner.

THE COMMISSIONER: The summons to Mr Kelaher will be exhibit 5.114.

30

EXHIBIT #5.114 SUMMONS TO MR KELAHER DATED 30/07/2018

35

MR PETERS: Now, Mr Kelaher, have two witness statements been prepared for you?---Yes, they have.

Do you have the witness statement in respect of Rubric 5-19?---Yes, I do.

And is that dated 26 July 2018?---Yes, it is.

40

And do you have the annexures and exhibits to that statement in the bundle with you?---Yes.

And is the statement true and correct?---Yes, it is.

45

I tender that, Commissioner.

THE COMMISSIONER: The witness statement of Mr Kelaher relating to Rubric 5-19 dated 26 July '18, together with its annexures, is exhibit 5.115.

5 **EXHIBIT #5.115 WITNESS STATEMENT AND ANNEXURES OF MR KELAHER RELATING TO RUBRIC 5-19 DATED 26/07/2018**

MR PETERS: In respect of Rubric 5-58, do you have a statement dated 26 July 2018 there?---Yes, I do.

Together with the annexures and exhibits?---Yes. Yes, I do.

And is that statement true and correct?---Yes, it is.

I tender that, Commissioner.

THE COMMISSIONER: Witness statement of Mr Kelaher concerning Rubric 5-58, dated 26 July '18, together with its annexures, exhibit 5.116.

EXHIBIT #5.116 WITNESS STATEMENT AND ANNEXURES OF MR KELAHER CONCERNING RUBRIC 5-58 DATED 26/07/2018

MR PETERS: Thank you, Mr Kelaher.

THE COMMISSIONER: Thank you, Mr Peters. Yes, Mr Hodge.

<CROSS-EXAMINATION BY MR HODGE [11.01 am]

MR HODGE: Thank you, Commissioner.

Mr Kelaher, you've been the managing director of IOOF since May of 2009?---Yes, I believe so.

And you also – or you were the managing director of Questor since 25 October 2006?---Yes, that's correct.

And you were previously the managing director of Australian Wealth Management Limited?---Yes, that's correct.

Between 2006 and May 2009?---Yes, I – I think so, without going into detail. Yes, I believe so.

- And Australian Wealth Management then merged into IOOF?---Yes. Yes. It was a three-way merger.
- 5 And then you became the managing director for the entire group entity?---Yes, that's correct.
- And you also sit on the board of IIML?---Yes, I do.
- 10 And IIML is both an RSE licensee and also a responsible entity for various managed investment schemes?---Yes, it is.
- And similarly, in respect of Questor, does Questor – has it been wound up now or does it still exist?---It's non-operational. I couldn't tell you whether it's been wound up or not but it's non-operational.
- 15 Questor also had the same type of structure, that is, it was both an RSE licensee and an RE of managed investment schemes?---Yes. On or around sort of 2009 and '10, this was the standard structure for these sorts of enterprises.
- 20 And the Questor structure no longer exists because as you've said it's not operational any more?---No. No. It – well, I think that when the companies were brought together, then – then you had two identical structures and, therefore, the long-term benefit would be to integrate them.
- 25 The managed investment schemes being operated by Questor effectively moved over to IIML?---Yes, fundamentally, yes. There was a successor fund transfer.
- Well, that's – I think that's not for the managed investment schemes, that's for the – is that for the - - -?---That's for the RSE, yes.
- 30 That's right?---Yes.
- For the actual superannuation funds?---Yes.
- 35 And APRA for some years has been expressing agitation about the governance structures and arrangements at IOOF?---We have a dialogue with APRA. It's active, it's robust.
- Since at least late 2015 APRA has been expressing particular concerns?---As I said, we – we have a dialogue with them, they raise concerns, we – we respond. We have a robust dialogue.
- 40 And APRA - - -
- 45 THE COMMISSIONER: Mr Kelaher, do I take the answer to be yes?---Yes, Commissioner.

MR HODGE: And APRA has been insisting that – or has said that its minimum requirements are now that the dual structure, that is, that IIML is both the registered – registered entity for the – responsible entity for the managed investment schemes and also the RSE licensee be dissolved?---Yes, that's the – that's the – their aspiration, yes.

And that was something that was considered at a board meeting last week by IFL?---Yes, it was.

10 And I think we sent a notice seeking production of any minutes or draft minutes of that meeting and were told there weren't any last week, but then we sent – you're not aware of that?---No, I'm not.

15 And then we sent another notice seeking production of any notes that had been made of that meeting, and we got something like – we got some handwritten notes?---Yes. I'm aware of that.

I take it the board meetings of IOOF aren't recorded in a – that is, is there an audio recording?---No, no, sorry, yes.

20 So there - - -?---There's minutes are taken.

And who takes the minutes?---The company secretary.

25 Okay. So could you just tell us, if we bring up IFL.0048.0001.0001?---Yes.

We're just trying to figure out what are the handwritten minutes taken by the company secretary. It doesn't seem like this first page are the handwritten minutes?---No, no, that – well, I'm not a handwriting expert. I suspect that we normally have a closed session which excludes the company secretary, and, therefore, these may be the personal notations of the chairman.

Okay?---But I'm – I can't tell you any further than that.

35 Do you take notes - - -?---No.

- - - at board meetings?---Well, you know, I – nothing that would be of any interest.

40 And then can we – can we go to - - -?---I scribble, if that's – I mean, I scribble - - -

THE COMMISSIONER: Well, the notice to produce was issued, Mr Kelaher. Has it been answered?---Yes, it has.

45 MR HODGE: Any notes that you've taken have been provided to us, is that right?---I took no notes.

You took no notes at that meeting?---Yes.

All right. And then if we go to page .0003?---Yes.

Would this be the handwritten minutes?---I – I couldn't tell you. It – it possibly could be. It looks like the handwriting of our company secretary but I couldn't - - -

5 You couldn't say?---That's not my field of expertise, no. But it – but it looks likely.

Do you eventually see some minutes when somebody types them up and sends - - -?---Yes, I do.

10 - - - them around to you?---Yes.

Do you regard it as common practice in this day and age for the minutes of a publicly listed company to be taken by a company secretary hand-writing them?---It's – it has

15 been our practice. I can't pass an opinion about what others do but that's our practice, and the – the drafts are circulated to members, firstly, to the chairman and then to other members of the board and question is it an accurate reflection of events.

Then if we bring up IFL.0049.0001.0003. These seem to be - - -?---It's upside-

20 down.

I can see that. These are some other notes, although that seems to be about your KPIs?---Yes.

25 So these are or are not your notes?---They're not my notes.

Okay. They're somebody else's notes?---Yes.

All right. And then the next note that we got was will IFL.0049.0001.0004. I'm

30 assuming those aren't your notes?---No, they're not.

You don't know whose notes they are?---No, I don't.

Then IFL.0049.0001.0005. Again, just to confirm, those aren't your notes?---No,

35 they're not my notes.

And you don't know whose notes they are?---No.

What was actually resolved at the meeting in terms of addressing APRA's minimum

40 requirements?---From – from my recollection, the – the resolve was that we would change the board structure of the RSE in the first place – in the first instance, and we would appoint an independent chairman, I would step down from that board, we would add a further – an independent chairman. Our chairman would continue but

45 not as chairman. We would add another independent director that would possibly come from the ANZ transaction that's foreshadowed. So it would be entirely independent from – from its current structure. Furthermore, we resolved that we would investigate separating the RSE and the RE and – and there are some – some

tax complications that could be encountered on that, and – and thought was given that – to the fact that we would wait till we completed the ANZ transaction and – and then potentially pick up an RE structure that was separate to the RSE structure which would be then in full compliance with APRA's concerns.

5

With the requirements that APRA has imposed?---Yes. Yes.

And was that a recognition by the board that APRA's concerns were valid?---Yes. That – yes.

10

And that there were governance issues with respect to IOOF that needed to be addressed?---No. No, I don't agree with that.

And in relation to the splitting of the RSE and the RE, was there a recognition at the board level or at the board meeting that there were problems with that DRE structure?---No, I – I think there was just a desire – it – it's a matter of indifference. These structures had – had evolved over time and were sort of de rigueur 10 years ago. Maybe they weren't appropriate any further. And – so I guess in the current environment, it was seen as that that was the preferred structure. We really don't have any – any particular barrow to push in that.

15

20

There are two different ideas here and I just want to understand where the IOOF board has landed on these ideas. One idea is that IOOF recognises that there are legitimate governance concerns about the structures that it has had in place for some years, and having recognised those concerns it is going to move to change the structures, and the other idea is it doesn't think that there are any concern – there are any legitimate concerns, but in, to use your words, the current environment where there's criticism of retail funds and financial advice providers, and APRA is expressing a lot of concerns, it's just easier to make these changes?---I – I would adopt the latter.

25

30

Yes. You don't share the view of APRA that there are legitimate concerns about these structures. It's just ultimately, as a matter of practicality it's easier to make the changes rather than having to keep dealing with the complaints?---Yes.

35

And you've given a witness statement in relation to some events concerning the Questor Cash Management Trust?---Yes.

And when you reflect on those events, does that cause you to think that there might be some issues with the structure of one company being both the RSE of – the RSE licensee and also the responsible entity for a managed investment scheme?---No, I don't.

40

Do you see any issues at all with the way in which Questor dealt with the CMT issue?---I think if the overarching aspiration is to – is to make sure that any member affected by the over distribution in the Questor case is addressed, then – then no.

45

That is, ultimately, the members were put back into the position they should have been?---Yes, that's the ultimate test and that was the overarching belief throughout the transaction that was caused by a third party custodian.

5 But they were put back into the position they should have been in because, can I suggest, APRA intervened and raised a number of issues with Questor and IOOF as to how it was handling the issue?---No, unrelated to APRA completely.

10 Okay. Well, let's go through that event. Back in 2009, Questor was the RSE licensee for a superannuation fund?---Yes, TPS.

And it was the responsible entity for – I think I will say a managed investment scheme which was IDPS-like?---Yes, correct.

15 IDPS-like, is that the name of the managed investment scheme?---No, it's the description. The descriptor.

It's the type of - - -?---I understand what you mean, yes.

20 And IDPS is an investor directed portfolio service?---Yes.

And in addition, Questor was also the responsible entity for another managed investment scheme which was the Cash Management Fund?---Correct.

25 And that's, I think, sometimes referred to as the CMT meaning Cash Management Trust?---Yes.

And the situation was that Questor, as RSE licensee of the superannuation fund, the Portfolio Service Retirement Fund - - -?---Yes.

30 - - - had invested money into the CMT of which it was the responsible entity?---Yes.

And Questor, as responsible entity of the IDPS-like, had also invested money into the CMT of which it was the responsible entity?---Yes, correct.

35 And there was an issue in 2009, although not detected in 2009, which was that a – I think was it a – a term deposit became due and was treated rather than as an asset, as income?---I – I'm not specifically sure about – about the actual – the cause of the problem. On – we – we obviously inherited, when we merged with AWM, the
40 Questor business structure. And part of their custodian arrangements were with NAS. And our pre-existing custodian outside of that transaction was BNP. And in order to sort of unify, we transferred the NAS to BNP and in the course of that it was detected that the – that there was an over-distribution had taken place.

45 Well, I just want to – so that the Commissioner can get the picture of what had occurred – you referred to an over-distribution. That was because something that

should have been recorded as an asset got recorded as income?---I think so.
Something like that. I – I know it more as a – it was effectively an over-distribution.

5 All right. You're not sure of exactly why it was that the over-distribution
occurred?---No. No.

But in any event, an over-distribution occurred?---Yes. Yes.

10 And that occurred in 2009?---Yes.

And that occurred because neither the custodian, nor Questor, had identified that, I
would suggest, this was an asset rather than income?---The custodian didn't
recognise. Not Questor.

15 Questor also didn't recognise it, did it?---Well, that wasn't its function.

What do you mean it wasn't its function?---It – well, the custodian has the function
of keeping a custody and a register of the assets.

20 Yes?---So if – if it didn't keep an accurate register, I mean, Questor – Questor
appoints it.

25 I see. As far as you're concerned, that's not Questor's fault?---Strictly speaking, no,
it's a – if you appoint a custodian and they fail to – to accurately complete their task,
but – but – you know.

When you – just so I can understand, when you say “strictly speaking”, you accept
that there's an argument that Questor also failed in respect of the over-
distribution?---No, but - - -

30 You don't accept that?---No.

You don't think it's arguable that there was a problem for Questor?---No, I – you
appoint a custodian and you expect them to act accurately.

35 You don't think that it could be argued that Questor, as the responsible entity, may
have been able to provide a greater level of oversight?---I think with the benefit of
hindsight maybe you might have done things differently, but – but arguably – you
contract a custodian to act, your expectation is they will act accurately and report
40 accurately.

Can - - -?---And that's not what occurred here.

45 I would just like to have a look at your statement, which is IFL.9999.0004.0001.
Sorry, I said .0001, I think it should be .0019. This is your statement in response to
Rubric 5-58?---Yes.

And this is concerned with this Questor issue?---Yes.

And if we go to page .0028. Just if we look at paragraph 52(a) of your statement?---Yes.

5

I just want to see if I'm understanding whether there's any difference between what you're saying here and your earlier thoughts about it. Where you say:

10 *Whilst it could be argued that Questor as responsible entity may have been able to provide a greater level of oversight in relation to NCSs calculations and distributions –*

Is that something that you think is arguable?---Well, I think I've offered that with the benefit of hindsight you can reflect on these, but at the time no.

15

All right. And what happened then was that there was this over-distribution in 2009?---Yes.

20 Does the CMT or did the CMT make annual or quarterly distributions?---I – I couldn't recall.

Okay. And then in 2011 the over-distribution was detected?---Yes, yes, on the transition to BNP from NAS.

25 Yes, it moved from one custodian to the other custodian?---Yes.

And the new custodian identified that there was this asset that had been treated as income?---Yes, yes, we had over-distributed to unitholders.

30 Well, what the – I'm not sure that's right, is it? The custodian didn't identify the over-distribution, the custodian identified that there was an asset that was missing?---Sorry, yes.

35 That's right?---Yes.

And then that then caused Questor to try to figure out what had happened to that asset?---Mmm.

40 Is that right?---Yes.

Again, just because it's being recorded you will need to say yes - - -?---Sorry, yes.

45 And when Questor investigated, it realised that this asset had been mistakenly recorded as income and that it had distributed it to the then unitholders?---Yes. Yes. That's right.

And what Questor then did, in 2011, was to reduce the distributions to be made over the next three years?---Yes.

5 And who did it tell that it was doing that?---Who did it tell? I'm not sure. Meaning – I'm not sure what you mean by that.

Did it say to the unitholders - - -?---No, no, it didn't, sorry.

All right?---It just commenced a – a program to dilute the distributions.

10 Yes. And just so we are clear on what that means - - -?---Yes.

- - - rather than Questor, as responsible entity of the CMT making the distributions back to the superannuation fund and the IDPS-like that it ought to have been making, it instead decided to dilute the distributions to recover the over-distribution it had made?---Yes. Yes, to restore the position.

15 So it didn't need to tell Questor, as RSE licensee, or Questor as responsible entity of the IDPS-like that it was doing this, because it's all Questor?---No, well, I'm not sure it formed that view.

20 But it didn't tell the members of the superannuation fund who had their assets invested in the cash management trust?---It didn't tell the members, no.

25 And it didn't tell the investors who had their money invested through the IDPS-like?---No, no.

That it had diluted the distribution?---No.

30 And then at some point in time an issue was raised about this?---Yes.

And at that point, Questor gave notice of a breach to ASIC?---Yes.

And that, I think, was about 2012?---Yes, I – I believe so.

35 And did it give notice to APRA?---No.

Sorry, it gave no notice to APRA as to what had happened?---No, the RE operates under – under the ASIC jurisdiction.

40 I see. So, therefore - - -?---As RE of the CMT, sorry, it acts under ASIC.

Yes, it has so many hats we've got to be clear about which hat it is wearing at one time. So thank you for that. So in 2012 it gives notice to ASIC, and I think you've exhibited that to your statement. You may not, but in any event, I have it. Can we bring up IFL.0029.0001.1180.

45

THE COMMISSIONER: It is exhibited to the statement.

MR HODGE: Thank you, Commissioner. Yes, it's tab 15.

5 So this is the notification of breach given to ASIC?---Yes.

And we see what's identified is the breach occurred in May of 2009?---Yes.

10 Which presumably was when the over-distribution was made?---I believe so.

And then the licensee, which is Questor as responsible entity for the CMT, became aware of the breach or likely became aware of the breach in February of 2010?---Yes.

15 And then if we go over the page to page .1184, we see the notice to ASIC is signed on 3 October 2012?---Yes.

And that's signed by Thomas Robertson?---Yes.

20 He's the head of Compliance. Is that right?---Yes.

And would the board of Questor have resolved to give this notice to ASIC?---No, no, I would think normal practice would be that – that it would come from the compliance head.

25 But how is the decision made as to whether it's a significant breach to be notified?---I'm not sure I recall, but – but - - -

30 What is the process now?---Well, it's normally a conversation that – that percolates up from the head of compliance to the general counsel and he forms a view that – that it's a matter that needs to be reported.

Does IOOF have a breach review committee?---Yes, I believe it does.

35 Do you sit on it?---No, I don't.

Do you know who constitutes it?---General counsel, at least. We try and distinguish ourselves from the risk and compliance committee deliberately.

40 I am sorry you try and what?---We have a structure on the main board of holdings where we have a risk and compliance committee that I don't sit on.

I see?---So that matters of this sort of nature I have no – no involvement with.

45 Do you find out, though, about significant breaches?---Yes.

How do you find out?---Well, general counsel advise me.

Is there some formal reporting to you about it?---Not that I could point to. But it – it occurs but I can't – I couldn't talk to a formal - - -

5 Is it a matter of indifference to you?---No, not – no, it's not.

Is it important to you that it be reported to you what significant breaches have occurred - - -?---Yes.

- - - within your organisation?---Yes, it is. Yes, it is.

10 So doing the best you can for us tell us what the structure is by which those breaches get reported to you?---The breach would be reported to me by general counsel. That's the structure.

15 Is there a regular reporting?---Yes, there is.

How often is the reporting done?---Well, no – no less frequently than monthly.

Does he send you a document?---No. No.

20 He just calls you up?---He reports to me, yes.

He comes and meets with you?---Yes.

25 And says these are the significant breaches - - -?---Yes.

- - - we've notified in the last month?---Yes.

Okay. So in relation to this breach - - -?---Mmm.

30 - - - is that how you found out about it?---I couldn't recall going back that far. I – I couldn't recall.

Okay. And then if we go back a page to page 3 of 5. We see there's a description of the breach?---Yes.

35 And this reflects your understanding that there was this over-distribution, that it was detected when custody was passed from NAB to BNP?---Yes.

40 And then there was a doubt raised about the existence of an asset?---Yes, that's correct.

And it says:

45 *The over-distribution was authorised by internal fund accounting staff at the time of the error.*

Again, just because it's being recorded you will need to say yes or no. You see that?---Yes, I do.

5 And the internal account – internal fund accounting staff must be staff of Questor?---Yes, that's correct.

Okay. So they have authorised the over-distribution?---Yes, based on false information, I – I suspect.

10 And when you say you suspect, have you devoted much time to going back and actually figuring out why this happened?---Look, it's back at 2009, and I guess it's within our fund accounting team, I guess my concern was that – that the – the mistake not be repeated, but – but no, no, it's not – it's not something I've dealt with.

15 Wouldn't one way of ensuring that the mistake not be repeated be to find out why the mistake happened in the first place?---Yes.

In fact, that would seem to be the only way, wouldn't it?---Yes. Well, sorry, yes, yes, that's one way. I don't accept that it's the only way.

20 How do you ensure that a mistake not be repeated without finding out why it happened in the first place?---Well – well, I guess, I'm alluding further to the fact that if the mistake was carried out by someone else.

25 I see. As far as you're concerned, this was a mistake on behalf of NAB?---Yes.

And just to, because we have so many acronyms so that I can make clear what's – when you're referring to NAB, you're referring to there was a particular company which was the subsidiary of the NAB group that offered custodial services?---Yes, NAS.

30

And NAS had been or was already offering custodial services to Questor at the time of the merger in 2006?---That's correct.

35 And Questor came from the entity that you had been at from before 2006. Is that right?---No. No. Questor was a part of AWM.

I see. You didn't come from AWM?---No. No.

40 I see. I'm sorry?---We – there's one company that precedes AWM.

And then - - ?---So we inherited the structure.

45 And then if we go to page 5 of 5, .1184. This is describing what the rectification by the licensee is?---Yes.

And we see what's described is:

Complete investigation and method to write-off over-distribution in the fund.

?---Yes.

5 And then:

Review alternative methods to write back over-distribution.

?---Yes.

10

And then:

Preliminary analysis on new members entering fund since write-off commenced.

15

?---Yes.

And then:

20

Determine extent and nature of any compensation required.

?---Yes.

25

Now, as I think we've already agreed, by this stage, by October 2012, the – what's referred to as the write-off of the distribution, that has already been ongoing since 2011?---Yes.

By reducing the - - -?---Yes.

30

- - - distribution that's paid from the CMT?---Yes.

And this says that there's some:

35

Preliminary analysis being done on new members entering the fund since that –

I might call it the reduction of distribution commenced?---Yes.

40

And what needs to be determined is the extent and nature of any compensation required?---Yes, that's right.

And the issue that that is getting at is that the problem with what Questor was doing by reducing the distribution was that new members who were joining the CMT were being detrimentally affected?---Yes.

45

And they were not receiving what they were contractually entitled to receive?---Yes.

And similarly, existing members who made additional contributions to the CMT were also being detrimentally affected?---Yes.

And they were not receiving what they were contractually entitled to receive?---Yes.

5

And one of the issues here, can I suggest, was that Questor as RSE licensee allowed this to occur?---No. No.

10 You don't think that there was any issue with Questor as RSE licensee sitting by and allowing itself, as responsible entity of the CMT, to reduce the distributions for three years?---No. I don't see – I don't see that argument.

15 Really? You can't see any reason why a trustee acting in the interests of its members wouldn't say to the responsible entity of a managed investment scheme, "You can't breach your contract with our members and artificially reduce the distribution"?---I think that's your construction.

20 What part of that is my construction?---Well, the words you're using, you're – you're, I guess, looking simply at Questor as the RSE, not Questor the IDPS. I mean, the resolution that we were seeking was basically once the mistake was identified, the – the full resource was aimed at restoring members, both in the RSE and the IDPS. That was the – that was the overarching construct, and to do that – I mean, we – we looked at Ernst & Young to assist us, we took some legal advice. Yes, I mean, our overarching aspiration was to make sure that the affected members
25 were made whole with compensation for the time value of money. That was the – that was the aspiration.

Now, do you say that was the aspiration in 2012?---Yes, that we started a process following that to – to – to make sure that people were made whole.

30

Do you say, I think to use your expression, the full resource was deployed in 2012 to make the investors and members of the superannuation fund whole?---Yes. It's quite a complex task, because – because as you point out, they are moving members in and out of the CMT. And the IDPS and the RSE. So once the unitholders are affected,
35 it's – it's quite a challenge to – to work out a remediation plan, and outside assistance was sought through Ernst & Young.

I tender that document, Commissioner.

40 THE COMMISSIONER: What do I – the – it's the breach report.

MR HODGE: Actually, we don't need to tender that, Commissioner, it has already been - - -

45 THE COMMISSIONER: Yes.

MR HODGE: - - - exhibited to Mr Kelaher's statement.

Now, when do you say that you retained Ernst & Young?---I'm – I can't recall off the top of my head but it's in the papers.

Do you think it was in 2012?---I couldn't recall.

5

Well, when you said the full resource was deployed, and I understood you to be saying in 2012, did that include Ernst & Young?---Not at that stage possibly but I would have to look at when we engaged the letter – you know an engagement letter – but when I talk about the full resource, the full resource of our fund accounting team.

10

The full resource of your fund accounting team was devoted to trying to figure out what compensation needed to be paid?---Was to figure out how we could – how we could remedy the – the position on behalf of members.

15 Can we bring up IFL.0027.0001.1918. So this is the Legal Compliance and Risk Report to the board directors of Questor for the – I think it's the March 2013 meeting of the directors?---Yes.

20 And you see subparagraph (b) on the first page cash management fund over-distribution?---Yes.

And it says:

25 *As reported in the last board paper, we reported to ASIC on 5 October 2012 a significant breach.*

?---Yes.

30 And I think at least at that stage Questor met – the Questor board met every two months? Does that sound right?---Yes. Possibly, yes. Certainly at least two-monthly.

Certainly what, sorry?---Two-monthly, sorry.

35 And so presumably, then, it was reported to the board in early 2013 about this breach notice that had been given on 5 October 2012?---Yes.

40 And would you have known before the reporting to the Questor board about the breach notice?---I believe so, but – but it's going back a fair way. I'm – we're talking about recollections now, and - - -

And then you see ASIC had some queries that were raised?---Yes.

45 And then attached to this paper is the response of Questor. Can we go to IFL.0027.0001.1924. So this is the letter back from Questor on 17 January 2013?---Yes.

And if we go over to page 2, you see it says:

Questor has determined –

5 Subparagraph (ii):

Questor has determined the most appropriate action is to write back the over-distribution over a three-year period, however we are currently assessing the merits of reducing this period.

10

?---Yes.

15 So who would have been responsible for making that determination?---That probably would be a view that would come through our fund accounting team, our head of fund accounting.

You don't know who in particular was responsible?---The gentleman at the time was Mr Rosito.

20 So it is likely that it was Mr Rosito who made the decision or you're just not sure?---Well, I'm not 100 per cent sure but I believe he would have been part of the decision-making, yes.

25 Would they have consulted you on the decision?---Yes.

Did you agree - - -?---But the science of the remediation would have come from them.

30 No, you see – and this is what we need to be very careful about, is distinguishing what we mean by remediation. This is not remediation to the members. This is reducing the distribution being made by the CMT because it has distributed more of its assets than it ought to have. Do you agree?---Yes.

35 This is about Questor as responsible entity of the CMT restoring itself?---Yes.

So I just want to be clear about that determination. That's a determination that you think would have lay with who?---With our fund accounting team.

40 Okay. And I think we've agreed already that reducing the distribution is a breach of contract?---I haven't agreed with that. I – I don't think I'm qualified to make that assessment, but - - -

45 Did you ever consider whether there was a legal entitlement to reduce the distribution?---I couldn't recall it now, that – the determination was then.

I'm sorry, say that again?---I can't recall now what my mind was then in relation to that matter.

Have you ever investigated whether anybody determined whether it was legal to reduce the distribution?---I would think that we would discuss it – once again, this is nearly 10 years ago. I would think that we would have discussed it with our fund accounting team, with our CFO, with our general counsel, and, therefore, there
5 would be an assumption that the action we were taking was appropriate. But I can't recall specifically.

Can we just be clear about this, what we're talking about here is a report at the beginning of 2013. That's five and a half years ago and the issue keeps going after that. Do you agree?---Yes.
10

It's not nearly 10 years ago?---No, the – the over-distribution was.

The over-distribution occurred in 2009?---Yes.
15

But we're talking about what happened commencing from 2011, which is reducing the distribution in order to restore the trust assets?---Yes.

That commenced in 2011. You then came to consider it at a board level in early 2013?---Mmm.
20

It had already started by then?---Yes.

It had been going for at least 18 months by then, or about 18 months - - -?---Yes.
25 - - - by then?---Yes.

Did anyone ever say to you that you can recall, "We are entitled to reduce the distribution"?---No. No, I can't recall.
30

Is that something that concerns you?---The over-distribution full stop concerns me, but, you know, it was – as a quantum value, our auditors regarded it as immaterial, but, you know, the – the proposition that – that it occurred concerns me, yes.

You see then subparagraph (iii) is:
35

Questor has determined that on a see-through basis compensation will be required be paid to any new investors entering the Portfolio Service Retirement Fund and the Portfolio Service Personal Income Plan who received a diluted distribution resulting from the scheme's write-off. The nature of the compensation to affected members will be made as a good value claim and it will be funded by Questor.
40

Do you see that?---Yes. Yes.
45

Now, that didn't happen, did it?---No.

That is, it wasn't funded by Questor?---No.

And when you – when it says here:

5 *The nature of the compensation to affected members will be made as a good value claim.*

Did you understand that there were investigations underway at the time as to what compensation needed to be paid?---I presume so, but I – I can't specifically recall.

10 Was it a matter of concern to ensure as soon as possible that the members who were being detrimentally affected were compensated?---Yes.

And did you receive reporting then as to what was going on with the progress of determining what compensation needed to be paid by Questor?---Yes.

15 And how did you receive that reporting?---Well, either oral or written reports to the board.

20 And when do you recall it being reported to you that the investors to be compensated had been identified and compensation had commenced?---Sorry, did you say when?

When do you recall – yes?---Look, I don't recall specifically the date.

25 Now, do you recall an incident with a whistleblower at the end of 2013?---Yes.

And do you recall – we will bring up IFL.0027.0001.2325.

30 THE COMMISSIONER: While that's coming up, should the legal and compliance ---

MR HODGE: Yes, Commissioner. Thank you.

35 THE COMMISSIONER: Legal compliance and risk report for March 23 meeting, Questor board IFL.0027.0001.1918, exhibit 5.117.

40 **EXHIBIT #5.117 LEGAL COMPLIANCE AND RISK REPORT FOR MARCH 23 MEETING, QUESTOR BOARD (IFL.0027.0001.1918)**

45 MR HODGE: And do you recall what was raised by a whistleblower about the Questor over-distribution?---No, not specifically but I recall that there was a – a reference to a matter about an over-distribution. But that – that's as much detail as I recall.

Do you recall that the whistleblower was raising an issue about the reduction in distributions that was occurring?---Yes.

5 And that nobody knew about the reduction in distributions?---No, I don't recall that – that aspect of it but – but certainly there was a reduction in distributions.

If we – so this is the papers for the board meeting to occur of Questor on 28 October 2013?---Yes.

10 And then one of those papers is another legal compliance and risk report?---Mmm.

Can we bring up IFL.0027.0001.2354. So that should be a few pages on. You see item B:

15 *ASIC cash management fund over-distribution.*

?---Yes.

And then you see at the end of the second paragraph it says:

20

In our letter to ASIC –

That's the January 2013 letter:

25 *...we advised of a compensation methodology to be monitored and implemented at the conclusion of the proposed write-back period of three years.*

?---Yes.

30 And then the next paragraph says:

A recent whistleblower notification has been investigated by risk and a report is being finalised in time for an update in the board meeting.

35 ?---Yes.

Continuing:

40 *It is apparent that at least the following action will be required: (a) a further assessment of the impact on members and proposed compensation. The review will be brought forward instead of waiting for the three year period to lapse to ensure the right level of exposure is identified which takes into account the entry and exit of members and the amount of compensation.*

45 ?---Yes.

5 So can I suggest to you it hadn't been the intention of Questor and it wasn't the case that Questor, from the end of 2012 or through 2013 was attempting to identify and prepare to remediate affected customers?---No, I disagree. I think we were – we were attempting to identify the cause and find out a way to remedy the position for – for members, both in the RSE and also in the IDPS which we subsequently did. We restored them in whole and for the time value of their money.

10 What this paper is explicitly recording is that it was intended to wait until the end of the three-year period of under-distributing before doing the assessment of the impact on members and proposed compensation. Do you agree?---No.

You don't agree that the words:

15 *...a further assessment of the impact on members and proposed compensation.
This review will be brought forward instead of waiting for the three year period to lapse –*

20 Mean what they say?---Well, I – I recall – and – and it's obviously a few years back – I think that the – the three-year period was going to be condensed to two years. Part of the – the challenge here was the – the party responsible for the over-distribution had been denying all responsibility.

25 Now, just think – take a moment and think whether you really want to say that the reason that there was a problem in 2013 was that the party responsible for the over-distribution, by which you mean the former custodian, was denying responsibility. Do you really want to say that that's what was happening in 2013?---Sorry, in relation to what?

30 Are you saying to the Commissioner that in 2013 Questor had made a claim against the custodian and the custodian was denying responsibility?---Yes.

All right. Did you write that claim?---Did I write that claim?

35 Yes?---No, I did not.

Did you meet with anybody about that?---Not that I recall but – but obviously it would have been a legal claim that we were making and dialogue that we had entered into with NAS to recover.

40 Now, do you agree with me that what these words mean on its face, on their face, is that before the whistleblower notification it had been intended to wait until the end of the three-year period before doing the further assessment of the impact on members and proposed compensation?---On the face of it, you could interpret that, yes.

45 When you say “you could interpret it”, is there some other meaning you can give to those words that you want to give?---Well – well, no, but it – it's – it's talking about a prospective – a further assessment, and it talks about may, you know.

It might assist you if the blow-up is not only of subparagraphs (a) to (d) but also of the chapeau to those subparagraphs, the two lines above them?---Yes, okay. Yes, I see the - - -

5 You see the words - - -?---Can you ask your question again?

Yes. What is being reported to the board is to the effect that because of the whistleblower notification, there will now need to be steps taken to bring forward instead of waiting for three years, the further assessment of the impact on members and proposed compensation?---Yes, that – that’s a – that’s a possible construction, yes.

Is there some other possible construction of these words that you want to give to the Commissioner?---No.

15 All right. That’s what the words mean?---Yes.

That’s what was reported to the board?---Yes.

20 That’s what you understood at the time?---Yes.

Did it concern you that it was only because of a whistleblower notification that IOOF was now going to take steps to bring forward undertaking this assessment of compensation and the effect on members?---I don’t accept that it was the whistleblower that triggered the action.

Commissioner, I tender that document.

30 THE COMMISSIONER: Just the report or the whole board pack?

MR HODGE: It may have been done as an extract. I hope it has been done as an extract but I will – I think for safety I will just tender the report. I will tender the report, Commissioner.

35 THE COMMISSIONER: Legal compliance and risk report for Questor board, 28 October ’17 - - -

MR HODGE: 2013, Commissioner.

40 THE COMMISSIONER: 28 October 2013.

MR HODGE: Yes.

45 THE COMMISSIONER: IFL.0027.0001.2354, exhibit 5.118.

**EXHIBIT #5.118 LEGAL COMPLIANCE AND RISK REPORT FOR
QUESTOR BOARD DATED 28/10/2013 (IFL.0027.0001.2354)**

5 MR HODGE: Thank you, Commissioner. Is that a convenient time to take a short morning tea break?

THE COMMISSIONER: How long do you need, Mr Hodge?

10 MR HODGE: I thought if we just took a break of five minutes.

THE COMMISSIONER: If I come back at shortly before five past midday.

MR HODGE: Thank you, Commissioner.

15

THE COMMISSIONER: Yes. I will come back at five past midday.

ADJOURNED

[11.56 am]

20

RESUMED

[12.05 pm]

25 THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Thank you.

30 Now, just so we're clear on the nature of the whistleblower report, can we bring up IFL.0006.0003.0606. And so we see this is a – or the pack for the risk and compliance committee in September of 2013. Do you see that?---Yes. Sorry, yes.

You don't – as I understood it, you were saying you don't sit on the risk and compliance committee?---No, I don't.

35

Okay. And if we go to the attachment to that, which is a report which is IFL.0006.0003.0826. And – so this is the report dated 26 September 2013, and then we go to .0831. Sorry, to 0831. You will see it's saying:

40 *We have received two notifications from PwC on the whistleblower hotline.*

So was PwC operating a whistleblower hotline for IOOF?---Yes, it was.

You see the second one is:

45

The second whistleblower disclosure report was in respect to an anonymous disclosure received via the IOOF whistleblower PO Box. The allegation is that

management is reducing the rate of return in respect of the cash fund of the Questor product in order to recover an earlier over-distribution, to the detriment of retail investor who were not members of the fund at the time of the over-distribution.

5

?---Yes.

So can I suggest it's that whistleblower complaint which is the one that's then referred to the board of Questor in October of 2013?---Yes, presumably.

10

I tender that document, Commissioner.

15

THE COMMISSIONER: Papers for risk and compliance committee meeting, 26 September '13, IFL.0006.0003.0606, exhibit 5.119.

20

EXHIBIT #5.119 PAPERS FOR RISK AND COMPLIANCE COMMITTEE MEETING, 26 SEPTEMBER '13 (IFL.0006.0003.0606)

MR HODGE: And can we then bring up IFL.0044.0006.0240. So this is a report from Mr Riordan who is the general counsel to Mr Urwin who is the head of risk dated 20 October 2013. See that?---Yes.

25

And it's concerning the whistleblower report?---Yes.

Had you or have you seen this document before?---No. It doesn't look familiar. I mean, I guess from our perspective at all times we tried to stay away from whistleblower – from my office from a whistleblower. So effectively, it's not – it's not normal that I might see something like this but I might have a conversation with our general counsel.

30

Now, are you sure about that?---Well, it's a long time ago, so no, I'm not 100 per cent sure.

35

When you say it's normal for you to be kept away from it, wouldn't it be the case that the general counsel would let you know either by email or by speaking to you about particular whistleblower complaints?---Normally whistleblower complaints would – would have their own course according to our whistleblower policy. They may emanate and generate up through our risk and compliance committee.

40

Do you recall being made aware of this whistleblower complaint by Mr Riordan before the Questor board meeting?---I couldn't speak accurately to the timing but, you know, I'm – I'm aware of it, I think.

45

I see. Can we go then to page .0242. You will see this is the rectification plan?---Yes.

And you see the first item is:

Complete investigation and method to write-off over-distribution amount in the CMT.

5

?---Yes.

And the status as at 17 October 2013 – it's a bit grainy but it says :

10

No documented investigation report available by IOOF Finance.

?---Yes.

Continuing:

15

Based on discussion with key members there appears to have been no independent verification/recalculation performed to verify the \$6.1 million, root cause analysis of the error, or any subsequent review of the procedure documentation, approval from management.

20

?---Yes.

Were you aware of these matters? I will take them in turn. First, that there had been no independent verification or recalculation performed to verify the \$6.1 million?---No, no, I guess my – I had a working assumption that it was – the 6.1 was the 6.1.

25

That there had been no root cause analysis of the error or any subsequent review of the procedure documentation?---My recollection was – was the root cause error was – was from NAS but I can't be any more specific than that.

30

That there was no approval from management?---I'm not sure I can speak to that. I'm not familiar with it.

35

You're not familiar with what?---I'm not familiar with the – that's the first time I've seen approval from management.

No, no, were you aware that there was no approval from management for reducing the distribution for three years?---No, no, I'm not aware that that – of that statement and that proposition.

40

Does it concern you to learn now, almost five years later, that this reduction in the distribution from the CMT occurred without approval from management?---If that were the case, most certainly.

45

Back in 2013, did it – did it concern you to know whether it was the case or not that this reduction in distribution had occurred with the approval of management?---Yes, it would concern me.

5 Back in 2013, did it concern you?---Well - - -

Did you make any inquiries to find out whether it had been approved by management?---At that time, we were aware that there was a problem and we were trying to resolve it. I can't be any more specific than that.

10

I tender that document, Commissioner.

THE COMMISSIONER: Memorandum from head of risk to general counsel, 20 October '13, IFL.0044.0006.0240, exhibit 5.120.

15

EXHIBIT #5.120 MEMORANDUM FROM HEAD OF RISK TO GENERAL COUNSEL DATED 20/10/2013 (IFL.0044.0006.0240)

20

MR HODGE: What I want to suggest to you is that it was this whistleblower report that then triggered Questor taking active steps to attempt to deal with and figure out whether it would – and I'm sorry, figure out how it would remediate the detrimentally affected members. Do you agree with that?---No, I don't.

25

You said before that the problem – or a problem was that the former custodian owned by NAB was being very difficult about paying compensation?---Yes, owning up for its error, yes.

30

And you said that was a difficulty that was already in existence as at 2013?---I – I can't be specific as to the date, but I'm telling you generally.

Well, remember we were looking at this whistleblower report?---Mmm.

35

And I was – I'm sorry, we were looking at the October 2013 board report. And I was pointing out to you that, on its face, what those words meant were that as a result of the whistleblower report it would now be necessary to actually bring forward assessing the extent of member impact and the amount of compensation. You recall that?---Yes. Yes.

40

And you recall that when I suggested to you that it was because of the whistleblower report - - -?---Yes.

45

- - - that there was a trigger for Questor taking steps, you said, "No, one of the difficulties was that the custodian was being very difficult about agreeing to pay compensation."?---Yes.

Do you recall that?---Yes, I do.

And you will recall I said to you, “Are you certain that this was occurring in 2013? Do you really want to say that?” And you said, “Yes.” Do you recall that?---Yes.

5

Can I show you a document, which is IFL.0027.0001.2565. This is the papers for a meeting of the directors of Questor on 24 March 2014?---Yes.

10 And if we go to the legal compliance and risk report which is IFL.0027.0001.2603. You see subparagraph (b) for regulatory issues, ASIC?---Yes.

You see – so this is an update on what has been occurring. Do you agree? Mr Kelaher?---Yes, I’m sorry I’m reading.

15 Do you agree this is the update?---Yes. Do you want me to read it or - - -

No, no, read it?---Yes, sorry, it refers to a NAB conversation in February ’14.

20 Yes. So let’s just work through it. This is reporting back to the board on what internal activity has occurred in relation to the Cash Management Trust over-distribution?---Yes.

Do you agree?---Yes.

25 And the first thing it reports is that:

As previously reported, internal activity is continuing and includes reducing the write-off time period, presently September 2014, to bring this issue to a close.

30

?---Yes.

And that was something that you referred to earlier which was that at some point in time, it was decided to try to recoup the over-distribution more quickly?---Yes.

35

To reduce the period from three years to two years?---Yes, that’s right.

And then it says:

40 *Further, the ORFR –*

Now, could you tell the Commissioner what the ORFR is?---Operating reserve policy for super fund.

45 The ORFR – well, just to be clear it’s the actual reserve, isn’t it?---Yes.

It’s the operating risk reserve?---Yes.

Continuing:

5 *The ORFR is established for incidents like this (the effect on TPS RF receiving diluted distributions) and we will consider its application once development is completed (between March and June 2014).*

?---Yes.

10 Do you know what “development” is being referred to there?---Sorry?

Do you know what “development” is being referred to there, you see, it says:

Once development is completed between - - -

15 ?---I think that might be a reference – I can’t be sure but I think the reference there is to the – there was a new protocol to establish ORFRs as a legislative piece, from memory.

20 Yes. There was a requirement from APRA in order to have a certain level of risk reserve?---Yes. Yes.

And this is suggesting that once that reserve has been established to the requisite level, which will be some time between March and June 2014 - - -?---Yes.

25 - - - then there will be consideration given to using that to compensate members?---Yes.

And the ORFR is only part of the superannuation trust?---Yes.

30 Do you agree?---Yes.

It’s not something that affects the IDPS-like members?---No, it doesn’t.

35 And what’s being suggested is that consideration will be given to using the ORFR in order to compensate the members of the superannuation trust?---Yes.

And do you agree that the ORFR is an asset of the trust?---I’m not sure I’m qualified to answer that, but prima facie, yes.

40 Surely – and you know what’s coming – you must have turned your mind to the question of whose money is the ORFR?---Yes. Yes, I would have turned my mind to it.

45 Because if the ORFR is an asset of the company of Questor, then Questor is using its money to compensate the members - - -?---Yes.

- - - but if the ORFR is an asset of the trust, then Questor is causing the members to compensate themselves?---Yes, but that's not what occurred.

You didn't use the ORFR?---No.

5

Now, we will come to what you did in a moment. And then you see:

10 *A meeting with the NAB to commence discussions on recouping some of the cost which can be paid into the ORFR occurred in February 2014 and we have been invited to submit a compensation claim. There is no admission of liability at this time.*

?---Yes.

15 Can I suggest to you that the first time that Questor got in contact with the former custodian was in February of 2014?---Yes, I accept that. I might have been in error earlier.

20 You might have said something that wasn't true. Is that what you mean?---No, no, I might have made a mistake referring to 2013, that's all.

25 Do you have any explanation you wish to offer to the Commissioner as to why Questor waited until February 2014 to get in contact with the custodian if it considered that it was the custodian's fault that there had been this over-distribution?---I don't think we waited till 2014, but – but, you know, I wasn't involved in the – in the dialogue with NAS.

I tender that - - -

30 THE COMMISSIONER: Mr Kelaher, what am I to make of the sentence:

A meeting with the NAB to commence discussions on recouping some of the cost occurred in February '14.

35 What am I to make of it?---Sorry, Commissioner, I would accept that interpretation, obviously.

Well, be good enough, please, to listen to the question that is asked. Yes, Mr Hodge.

40 MR HODGE: Do you want to offer any explanation to the Commissioner as to why Questor waited until February 2014 to make contact with the former custodian if it considered that it was the former custodian's fault that the over-distribution had been made?---No, no, I can't, obviously. I mean, I think we were investigating the – the extent of the over-distribution. I can – I – I'm presuming.

45

Well, you know when we look at these documents that that's not true, don't you? You know that, in fact, you weren't investigating it. And then a whistleblower report

was made in October of 2013. Do you agree?---No, I – I’m saying to you that I don’t think that – that our remediation was – was sparked by the whistleblower. But no more, no less.

5 I tender that document, Commissioner.

THE COMMISSIONER: Questor legal compliance and risk report for meeting of 24 March ’14, IFL.0027.0001.2565, exhibit 5.121.

10

EXHIBIT #5.121 QUESTOR LEGAL COMPLIANCE AND RISK REPORT FOR MEETING OF 24 MARCH ’14 (IFL.0027.0001.2565)

15 MR HODGE: And then can we bring up IFL.0027.0001.2936. You will see these are the papers for a board meeting of Questor on 27 October 2014?---Yes.

And then if we go to .2436, which is the Legal Compliance and Risk Report. Now, you see, again, item 1(b) ASIC:

20

Cash management fund over-distribution.

And you will see the second sentence says:

25 *Questor has since issued a demand to NAB claiming compensation in relation to the over-distribution of scheme assets that occurred in May 2009.*

?---Yes.

30 And you’ve exhibited that demand. If we put the board paper on one side and bring up on the other side of the screen the document which is tab 6 to Mr Kelaher’s statement, it’s IFL.0006.0003.4038. You see this is the demand dated 13 May 2014?---Yes.

35 And you will see the second paragraph says:

Our investigation into the incident was both a lengthy and thorough process and we are now in a position to report our findings to the National Australia Bank as we had undertaken to do.

40

?---Yes.

And then if we go over the page to page .4039. You will see this is where the assertion is made that it is Questor’s fault. And we see that at the bottom of the page where it says:

45

Questor had an expectation NCS would perform a reconciliation as part of its ongoing custodial services and advise Questor if there was any anomaly.

?---Yes.

5

And you see what's said in the immediately preceding paragraph is:

We do acknowledge that irrespective of NCS –

10 Which is the custodian:

...performing a reconciliation before the distribution was made, it may have been prudent for Questor to also reconcile the shadow portfolio back to the records or to the underlying credit union offering the term deposit.

15

?---Yes.

I take it, though, you don't accept that it would have been prudent for Questor to do so?---Look, when you're looking back with hindsight, yes.

20

You don't accept that Questor had any duty to the – ultimately the members of the superannuation trust to do so?---Questor always has a duty to the members but, you know, I think we're sort of getting into a technical area where I really don't have expertise in terms of the – the operations of a custodian specifically.

25

And then if we go over the page to .4041. You will see it said:

Although Questor does not absolve itself of its part in the incident having occurred, we consider that NCS as custodian breached its duties under the agreement by failing to exercise the requisite standard of care owed to Questor as a client and also by not having in place effective internal controls that should have detected the incident.

30

?---Yes.

35

And it's then explained that the final amount of compensation will be confirmed by 30 June 2014, which is when the next quarterly cash account distribution will be made?---Yes.

40

So this is the demand, and what's being contemplated, if we then go back to the report, is in the second last sentence:

Once compensation is calculated, we will communicate to the approximately 9000 affected members.

45

?---Yes.

Do you see that? And so what was intended was that the first time that it would be communicated to the members that there had been an under-distribution was after the under-distribution had finished?---Yes.

5 And the other point made here, you will see, is that:

On 4 August 2014, NAB requested further information to calculate its share of compensation.

10 ?---Yes.

I tender that document, Commissioner.

15 THE COMMISSIONER: Legal compliance and risk report for meeting of 27 October '14, IFL.0027.0001.2936, exhibit 5.122.

EXHIBIT #5.122 LEGAL COMPLIANCE AND RISK REPORT FOR MEETING OF 27 OCTOBER '14 (IFL.0027.0001.2936)

20

MR HODGE: And do you recall when it was that Ernst & Young were engaged to conduct a data verification?---I don't have that date sitting in front of me but it's probably in my statement.

25

I will just bring up for you the report. So if we go to IFL.0006.0003.4008, which is tab 5 to Mr Kelaher's statement. This is the remediation assessment report that was delivered to IOOF in December of 2014?---Yes.

30 And if we go to page 2, .4009, you see the engagement letter was 22 August 2014?---Yes.

So can I suggest it wasn't until August 2014 that Questor engaged Ernst & Young to carry out an assessment of the remediation?---Yes.

35

And then at some point there was an agreement reached with the custodian, that the custodian would pay for half of the amount of the compensation that needed to be paid. Is that right?---Yes, that's right.

40 And that payment was then used in the first instance to refund the members of the IDPS-like scheme?---Yes, that's correct.

And that was in the interests of the members of the IDPS-like scheme. You agree?---Yes.

45

It wasn't in the interests of the members of the superannuation fund?---A different construction applied to the RSE members in TPS because the potential to – we

identified a problem that was if we made a compensation payment to them, then we could breach their contribution cap limits, and so we discovered we would need to get a tax ruling in order to waive breaching the cap contribution. So whilst we identified a solution, we couldn't – so it was resolved to deal with the IDPS straightaway and seek a tax ruling from the ATO as to the compensation to the RSE TPS members.

Now, I wonder whether you're getting confused. Was the tax ruling about paying compensation to the members or was the tax ruling about the consequence of using the ORFR to compensate the members?---I'm – I'm unaware of that.

You don't know what the tax ruling was about?---From memory, my understanding of the tax ruling was that if we – if we paid – paid a compensation amount into members' accounts then we could be breaching the cap rule. That was my understanding.

I'm not sure I really understand, though, why that explains why you needed to use the money received from the custodian to first pay the IDPS-like members?---My recollection is that we were confronted with the dilemma that if we paid into the members' accounts we would be in breach of the contribution caps limits. That's my understanding.

Do you - - -?---For the super fund.

Do you say that you thought you had to delay – or you could – I'm sorry, I should withdraw that. Do you say you thought at one point that it might be impossible for you to compensate the members of the superannuation fund?---No. No. I'm saying that my understanding was that if we were to pay the compensation to individual members' accounts in the superannuation fund, we might breach the – the contribution cap limits. That was my understanding and, therefore, we required a tax ruling.

Now, let me show you a document, which is tab 9 to your statement. It's IFL.0006.0003.4061. So this is a memorandum to go to the board on 28 October 2015?---Yes.

You see that?---Yes.

And it's the board of Questor?---Yes.

And it explains in the background at the beginning that:

In October 2012 Questor had reported a significant breach.

Do you see that?---Yes.

And then if we go over the page to .4063. You see this is an appendix explaining what's recommended for approval?---Yes.

5 And the first point is the payment of compensation to TRF – so that's the super fund members?---Yes.

Impacted by the breach to the value of \$2.775 million, plus an accrued interest component?---Yes.

10 And then it says:

The compensation described above to be sourced from –

And the first point is:

15

The remaining proceeds of the settlement between the custodian and Questor.

?---Yes.

20 And the second one is:

The shortfall to be returned from the fund's general reserve, being \$1.616 million.

25 ?---Yes.

And it says:

30 *Note, Questor in its capacity as responsible entity of the TPS IDPS-like product has fully compensated unitholders to the value of \$392,000 utilising the NCS settlement. Accordingly this paper only deals with the TRF.*

?---Yes.

35 So by this time, the settlement moneys have already been used to fully repay the members of the IDPS-like?---Yes.

40 And, again, so that I can understand, do you say that had been done only because there was some doubt about the tax consequences of compensating the members of the superannuation fund?---Yes, that was my understanding.

45 Because on its face, what appears – or the – when the proposal is considered in full, what appears to be happening is this: that for the members of the IDPS-like product where there is no trust funds of theirs available to compensate them, you have just used the settlement moneys to compensate them. And then for the members of the superannuation fund, you have used whatever settlement moneys were left over, plus

the general reserve of the superannuation fund to compensate them. Do you agree?---Yes.

5 And in that way, it would avoid Questor, the entity, in its personal capacity, having to pay any compensation to the members?---Yes.

That's the effect of the proposal?---Yes, it is.

10 And was that the reason that the remediation of the members was framed in this way?---No, the remediation – the remediation to the IDPS-like was done because there was no tax impact and my advice was on the investigation of – of the tax group that there was a tax issue if we compensated the TPS RSE members, and, therefore, we would seek an ATO ruling which we did. And – and they were subsequently compensated from the general reserve.

15 What was the general ruling about from the ATO?---Well, look, I'm – I – I don't have a specific recollection. My understanding was that it would be a waiver for the purposes of contribution caps for superannuation.

20 Can we go to page .4065. So this is explaining sources of compensation?---Yes.

And you will see:

25 *The compensation amount settled between Questor and NCS and passed on to TRF is considered acceptable on commercial and legal terms.*

?---Yes.

And then you see 4.2:

30 *The proposal was to use the ORFR - - -*

?---Yes.

35 Continuing:

...to compensate them.

?---Yes.

40 But the internal legal advice was that because the relevant operational risk didn't advise at the super fund level the trustee couldn't use the ORFR to fund the compensation?---Yes, I agree.

45 And so then the next thing that was considered was insurance?---Yes.

And it was decided that the complexities of making a claim under the PI policy were quite great and, in addition, premiums in the future might rise?---Yes.

5 And that must be a professional indemnity claim against a policy taken out by Questor?---Yes.

That is, a reflection of the fact that Questor may have negligently or in some other way giving rise to liability have caused this problem to occur?---No.

10 How else could you make a claim against a professional indemnity policy for Questor - - -?---Sorry.

- - - unless it was because of a potential liability of Questor?---I'm sorry, yes, there was no negligence, so there was no possibility of making that claim.

15 Well, that's not what the report says. It says the claim has complexities and there's a:

Potential effect on future premiums.

20 ?---Yes, that's – I'm giving you my answer.

I see. Your view was there's no claim against Questor?---Yes. Well, if it's not – if Questor isn't of itself negligent, then it's going to be hard pressed to make a claim, is my proposition.

25 I understand. And your view is Questor wasn't negligent?---No.

And then we see 4.4, general reserves?---Yes.

30 Continuing:

Management recommends that a portion of TPSs general reserve be used to top up the diluted distribution and, therefore, compensate TRF members.

35 ?---Yes.

And if we go over the page:

40 *It is appropriate for Questor to utilise the general reserve in the circumstances described above as Questor has explored all other viable sources of compensation and the proposal accords with the TRF governing rules and reserves policy.*

45 ?---Yes.

Now, there's an obvious source of compensation that's not explored there, isn't there?---Well, I guess the company could pay, yes.

5 And do you know why no consideration was given to the company paying?---Well, there was a reserve there which covers events such as these. So it was deemed appropriate to use the general reserve.

I - - -

10 THE COMMISSIONER: Is it an available point of view for me, Mr Kelaher, that the company was the first and obvious source to pay compensation, or do you say that's not an available point of view?---No, it's an available point of view, Commissioner.

15 MR HODGE: I tender that document, Commissioner. I'm sorry, that has already been exhibited.

THE COMMISSIONER: It's already in.

20 MR HODGE: Thank you, Commissioner. I apologise. Can we then bring up the actual minutes of the relevant meeting, which is IFL.0029.0001.2611. So these are the minutes of the Questor board meeting where the directors are to consider how they're to pay compensation. You see that?---Yes, I do.

25 And you see 2.1:

Each director declared they did not have a conflict of interest in relation to any matters set down to be discussed at the meeting.

30 ?---Yes.

Do you think that statement – I'm sorry, do you think that it's true that none of the directors had a conflict of interest in relation to the question of compensating the members of the fund?---I – I guess there are conflicts of interest in relation to every –
35 every transaction matter, so I think it's making a general expression.

I'm sorry, my question was do you think it's true that the directors did not have a conflict of interest in relation to the matter of compensating the members of the superannuation fund?---It's open to interpretation that there could have been a
40 conflict.

This is an issue that has been raised with IOOF by APRA, its failure to record conflicts of interest?---The items that we – we talk with APRA in relation to conflicts of interest are – are mentioned insofar as we are insufficiently explicit in identifying
45 them.

Does that mean the answer to my question is “yes”, that the failure to record conflicts of interest is a matter that has been raised with IOOF by APRA?---Sorry, yes, it is. That’s – yes.

5 And this is an example of IOOF failing to record conflicts of interest?---I’m not sure it’s as simple as that. My answer is that – that – that the conversations that we’ve had with APRA in relation to managing conflicts of interest is that we are not explicit enough. And I think that’s their words. So that’s what I’m saying.

10 Well, if you say there is no conflict of interest when there is a conflict of interest, do you regard that as being not sufficiently explicit about conflicts of interest, or is that an entirely different category of problem?---With the – with the benefit of hindsight, I would agree with you.

15 If we go to page .2615, this is where the decision of the board is resolved?---Yes.

And it says:

The board queried how ex-members would be remediated.

20 And the managing director –

That’s you?---Yes.

25 Continuing:

... advised there is a project being undertaken to identification the location of all ex-members which have been impacted.

30 ?---Yes.

Do you know what happened with that project?---Well, prima facie it was concluded and the members were remediated.

35 And how were they remediated?---They were written a letter and - - -

What source of funds was used - - -?---Sorry, the general reserve was used. This was for TRF.

40 I see. The general reserve - - -?---Yes.

- - - of the super fund?---Yes.

Was used in order to compensate ex-members?---Yes.

45 I see. And there doesn’t seem to be recorded any consideration of the idea of using company funds to repay the members. Do you agree?---Yes, I agree.

And so what is resolved is that the compensation will come from the settlement that has been received from NCS and otherwise the general reserve - - -?---Yes.

- of the trust fund?---Yes.

5

And you agree the general reserve belongs to the members?---It's not an asset of the members, no.

It's an asset of the trust, isn't it?---Yes. Yes, it is.

10

And aren't all the assets – don't all the assets of the trust belong to the members?---That's not the way it has been put to me, but I'm – I'm not a trust expert. The general reserve is not an asset of the members, is the distinction that's put to me.

15

Who do you think it belongs to?---The fund.

You understand that Questor is a trustee - - -?---Yes.

20

- - - that holds assets on trust for the members?---Yes.

The assets of the fund are held on trust by Questor - - -?---Yes.

- - - for the members?---Yes.

25

They belong to the members. You agree?---Yes.

The reserve is one part of the assets of the fund?---It's – I don't think I'm qualified to answer the question. It has been put to me by our – our legal advice is that the general reserve is not an asset of the members.

30

THE COMMISSIONER: Well, qualified or not, Mr Kelaher, I would be very grateful if you would answer the question with your opinion. I will make of the opinion what I do, but what's your answer?---My answer is that the general reserve is not an asset of the members, Commissioner.

35

MR HODGE: Now, you wrote to the members to tell them that there would be a compensation amount credited to them?---Yes.

40

And you've exhibited some of those letters?---Yes, we have.

And when you say "we have", you have. It's your statement, yes?---Yes, yes, I have.

All right. Can we look at one of the letters you've exhibited which is tab 11, IFL.0029.0001.1162.

45

THE COMMISSIONER: While that's coming up should the minutes of the Questor board meeting 28 October '15, IFL.0029.0001.2611 - - -

MR HODGE: It's already an exhibit, Commissioner.

5

THE COMMISSIONER: Already exhibited? Very well.

MR HODGE: Thank you.

10 So this is the – or a sample of the letter sent to a member?---Yes.

And this is – I think in this case, it's a member of IDPS-like?---Yes.

15 I think you can tell that from the use of TPS. Is that The Portfolio Service?---No the TPS is an acronym for the superannuation scheme.

In any event, your exhibit description says it's a letter to a TPS IDPS-like member?---Yes, okay.

20 And you will see it says:

Following a periodic review of our CMA, we identified an historical distribution error that resulted in income being credited to your CMA at a lower rate than it should have been.

25

?---Yes.

That's not true, is it?---Well, I guess it's silent as to the time the review is undertaken, I guess, because at some point the – there had to be a review.

30

I'm sorry, I think I understand your point. There are many ways in which this sentence is untrue. Perhaps if we work through them. The first is that:

The identification of this issue followed a periodic review of our CMA.

35

And your point is, I think, okay, it wasn't that we found it after a periodic review, but you're saying, "We do many periodic reviews", so - - -?---It's capable of reference to that. I guess at the end of the day, our arch ambition was to compensate and – and that we did.

40

In terms of your arch ambition, is it also an ambition to be truthful with your members?---Yes.

All right?---Yes.

45

So then you see it says:

We identified an historical distribution error that resulted in income being credited to your CMA at a lower rate than it should have been.

?---Yes.

5

That's not true, is it?---Well, I – I'm not sure. I think we're – if we were making lower distributions, that would be income credited at a lower rate.

10

You made a deliberate decision to reduce the distribution. Do you agree?---Yes.

It wasn't an error. Do you agree?---Yes. It wasn't an error. I guess the reference to "error" is – is error that caused the need to do it. So - - -

15

I see. You think the historical distribution error that's being referred to there is the original error of over-distributing?---I grant you, that – yes, it's – it's not precise.

By "not precise", would you be prepared to accept that it is misleading?---Yes, it's capable of being misleading.

20

And then if we look at tab 12 to your statement, which is IFL.0029.0001.1164. So this should be, based on the exhibits – the description of the exhibits in your statement – the letter that was sent to members of the fund?---Yes.

25

And you see the same - - -?---Yes.

- - - type of statement?---Yes.

Continuing:

30

We identified a historical distribution error in an underlying investment of the CMA that resulted in income distributions being credited to your CMA at a lower rate than it should have been.

35

?---Yes.

And again, do you agree with me this statement is misleading?---Yes, it's potentially capable of misleading.

40

Is that a matter of concern to you as the managing director of IOOF?---Yes, on – on subsequent inspection, yes. But I'm not sure what turns on it.

And then if we go to tab 18 - - -

45

THE COMMISSIONER: Sorry, what do you mean by your last answer, Mr Kelaher, "I'm not sure what turns on it"?---Well, I, Commissioner - - -

Are you saying it's a matter of indifference, a matter of no importance? Is that what I am to take away from that comment?---No, no, Commissioner. It's – it's a reference to our – our primary goal of restoring the member's account, and with interest, and that was the ambition. So the letters, when we read them with hindsight, could be more accurate, but that's what I would say.

Yes.

MR HODGE: Can we go to tab 18 of Mr Kelaher's statement that's IFL.0006.0003.4087. This is a letter from APRA to the directors of Questor?---Yes.

And you will see it refers to some earlier correspondence that had been occurring in the middle of 2016?---Yes.

APRA was dissatisfied with Questor's approach to its duties as a trustee?---Yes.

And if we go to page 2 of the document, .4088, we see about halfway down the page:

In APRA's view, an RSE licensee acting in members' interests would not have allowed for remediation which sought to disadvantage unaffected members. APRA expects that an RSE licensee acting in members' interests would hold the party who caused any error or loss accountable and ensure that members were not unfairly affected by any actions to remediate such errors or losses.

?---Yes.

And then if we go over the page to page .4089, we see that APRA set out its expectations under the heading Conclusion as to what Questor would do acting in the best interests of the super fund members?---Yes.

And the first thing that it said it would expect to be done would be to:

Immediately replenish the super fund's general reserves utilising funds from Questor as responsible entity.

?---Yes.

And what it was effectively requiring Questor to do was to use its own funds now to pay for the compensation that had been paid to members. Do you agree?---Yes.

And you responded to that letter?---Yes.

And if we bring up IFL.0006.0003.4093. This is a letter from 19 April 2017, that is, last year?---Yes.

And if we go to the last page, which is .4097, you see you are the signatory to this letter?---Yes. Yes.

And so at least by this time, you must have been fully immersed in dealing with this issue?---I'm not sure about fully immersed. I was dealing with this issue, yes.

5 You were dealing with APRA on a number of fronts?---Yes. I mean, we deal with APRA daily, you know, they're our regulator.

If we go to page .4093, which is the first page, we see the position that you sought to adopt – we see this in the paragraph beginning halfway down the page which is:

10 *That APRA might take.*

?---Yes.

And you say:

15

Giving priority to the interests of the members of the super fund does not mean that Questor can or should ignore the interests of the beneficiaries of the Cash Management Trust. It has fiduciary obligations in respect of both funds.

20 And then you assert:

Questor as RSE licensee has had an unblemished regulatory history over many years, correctly balancing these competing interests.

25 ?---Yes.

Is it still your view that the exercise that Questor has to undertake in a situation like this is to balance the interests of members of the fund against the interests of members of managed investment schemes of which it is responsible entity?---Yes.

30 Yes, I think it's – it's – it's a – it's a difficult task and it's a task of balancing, yes.

The problem is, can I suggest, that the trustee has a statutory obligation to always prefer the interests of the beneficiaries of the super fund?---In – in – for – insofar as TRF is concerned, the super fund?

35

Yes?---Yes.

So there's no balancing that can go on - - -?---Well, it was - - -

40 - - - you have to prefer the interests of the beneficiaries of the super fund?---The – the – the proposition states how does one balance one's fiduciary obligations against that statutory obligation. I guess I'm probably not qualified to land but it was interpretive.

45 What was interpretive?---Well, balancing a statutory obligation with a fiduciary obligation.

If we go to page .4094, which is page 2 of the letter. You see, about three-quarters of the way down the page, you say:

5 *We can confirm that the following options were offered by the responsible entity to the rectification committee for consideration on behalf of the RSE licensee. Option 1: the responsible entity could clawback the over-distribution in the next distribution after the error was identified and confirmed in 2012, or option 2, the responsible entity could clawback the over-distribution over a period of time.*

10 ?---Yes.

And then it said:

15 *Option 2 was ultimately selected by the RSE licensee.*

?---Yes.

20 Is there any part of that – of those statements that I’ve just read out that you would say are true?---Yes.

25 Do you say that in 2011 the – Questor came to the rectification committee on behalf of Questor as the trustee and offered two options as to how it would claw back an over-distribution?---I can’t see the text under the highlight but I’m not sure we said that in – in 2011.

No, that didn’t happen, did it?---No, but I’m not saying that – I’m not saying that we put that as a date option. I can’t see - - -

30 THE COMMISSIONER: Take out the pop-out and pop out the whole of the section beneath The RSEs Options.?---I’m standing by those words.

35 MR HODGE: When do you say that the rectification committee considered on behalf of Questor as trustee of the super fund those two options?---Well, I don’t think it’s explicit but obviously shortly – as soon as it became aware.

I don’t understand. Remember we’ve already agreed the reduction in the distributions to try to make up the over-distribution - - -?---Yes.

40 - - - began in September of 2011?---Yes.

And remember we’ve seen the whistleblower report?---Yes.

45 And the investigation into the whistleblower report. And there doesn’t seem to have been any documentation of the decision to reduce the distribution?---Mmm.

Remember that?---Yes.

And you haven't seen any documentation of the decision to reduce the distribution?---No, I haven't.

5 And you haven't seen a decision of a rectification committee where the rectification committee agrees to reduce the distribution over three years rather than immediately?---No, no, I haven't.

10 So when you said these things to APRA, what was the basis of them?---I think there's – these are time reference generally after those dates. So I guess what I'm saying to you is that – that it's not referring to specific dates there.

You are saying to APRA that there were two choices given to the RSE licensee, that the RSE licensee selected the second of those choices?---Mmm.

15 And that that was the choice that was implemented?---Yes.

That didn't happen, did it?---No, it did.

It did happen?---Yes, well – well, to my knowledge that's what we did.

20 No, no, no, no, no, Mr Kelaher - - -?---We started clawing back the over-distribution.

That's right. In September 2011, Questor, as responsible entity, reduced the distribution?---Yes.

25 It was a decision made by some accounts team within Questor?---Well, the – the company was – was subsequently aware.

The company was subsequently aware?---Yes.

30 You mean the board was ultimately told about it?---Yes.

The board was ultimately told about it either at the end of 2012 or the beginning of 2013? We've looked at the documents already?---Probably 2012, yes.

35 Remember the significant breach notice is given in October of 2012?---Yes.

And then after that, that's reported to the board?---Yes.

40 Do you say these paragraphs, these words that you have written and signed do not mean that a decision was made by Questor as trustee of the super fund to reduce the distribution over three years?---Questor as trustee of the super fund didn't make that decision, no.

45 So when you say:

Option 2 was ultimately selected by the RSE licensee –

which can only be Questor as trustee of the super fund because that is the capacity in which it is RSE licensee, how is that statement true?---Well, I guess we're merging the -- merging the roles of the RE and the RSE maybe.

5 Now, I don't understand how you can possibly make that statement, given that the other part of what you have written is:

The following options were offered by the responsible entity --

10 Which is also Questor --

to the rectification committee for consideration on behalf of the RSE licensee which is Questor as trustee of the fund.

15 ?---Yes.

You don't blur the roles, you distinguish between them?---Yes.

20 Do you want to offer any other explanation as to how what you have written is true?---I -- I say that the import of what we were doing was -- was, as I -- as I pointed out, the import was to try and get the member back to whole, and - - -

25 Is the answer to my question no, you cannot offer any explanation as to how what you have written - - -?---No, I can't offer.

All right. And then you say, if we go over to page 3 of your letter, 4095 at the bottom, you say:

30 *Because full compensation could not be obtained from the custodian, there would be a need to use the general reserve of either or both of the CMT and TPS super fund for members of the TPS super fund and beneficiaries of the CMT to be fully compensated.*

35 Do you see that?---Are you going to highlight that or - - -

It's at the very bottom of the page - - -?---Under - - -

The last paragraph?---Under 2, the compensation plan?

40 Yes. It says:

In reaching its decision, it took into account the need - - -

45 ?---Yes.

Do you see that?---Yes.

Then it said:

5 *Because full compensation could not be obtained from the custodian there would be a need to use the general reserve of either or both of the CMT and TPS super fund for members of the TPS super fund and beneficiaries of the CMT to be fully compensated.*

?---Yes.

10 Do you say that's something that Questor considered at some point in time?---Yes.

It considered using a general reserve of CMT to compensate members?---Not the general reserve of the CMT.

15 But when it says:

The general reserve of either or both of the CMT and TPS super fund –

?---Yes.

20

You're now making the point, that's not true, there was never consideration given to using a general reserve of the CMT?---Well, consideration was given to using either/or. Sorry I'm short-circuiting. I'm saying that we used the general reserve of the super fund.

25

Does the CMT have a general reserve?---Not that I'm aware of but I couldn't recall.

30 In the course – are you able to explain how you could consider using the general reserve of the CMT if there is no general reserve of the CMT?---Well, I probably couldn't but I can't recall if there is a general reserve for the CMT or not.

Commissioner, could I ask one more question and then - - -

35 THE COMMISSIONER: Yes.

35

MR HODGE: - - - we will finish for lunch. Could you go to page 5 of your letter?---Yes.

40 So you see in the last paragraph you say:

40

Finally and most relevantly is the fact that at no time has Questor received any demands for compensation or complaint about its remediation and compensation plans from any member of the TPS super fund.

45 ?---Yes.

Continuing:

In terms of the so-called “pub-test” which in these circumstances is a proxy for members’ best interests, it is the board’s view that the test has been passed.

?---Yes.

5

Sorry, Commissioner, I said I had one question, I actually have two.

THE COMMISSIONER: You astonish me, Mr Hodge.

10 MR HODGE: That’s what I aim to do all the time, Commissioner, as I think I have proven this week.

In relation to the first sentence, you see that you say that at no time has Questor received any demands or complaints.

15

?---Yes.

Can I suggest it would be impossible for members to make a demand or a complaint because they didn’t know what Questor was doing?---Yes.

20

And then you see you say:

In terms of the so-called “pub-test”, which in these circumstances is a proxy for members’ best interests –

25

?---Mmm.

What is the pub test for members’ best interests?---Institutions like ours are constantly being confronted with community expectations. So, therefore, we try and imbue the operations of the group with the – with the expectations of the community, and at all times here, at the end of the day, the aspiration was to return the member to – to his whole position and compensate him for the period outstanding, and – and that’s – that’s something that we did, and that’s what people would resonate with. That’s what they would want and that’s what they would expect. And that’s – that’s the aspiration. That’s the import of the letter.

30

35

Do you think the community might expect that Questor and IOOF would use its own funds to compensate members, rather than using the members’ funds in the form of an asset of the trust to purportedly compensate members?---That’s open to – to consideration, but as – as a business that we operate, this is a relatively modest amount involved here. At the end of the day, we are frequently making contributions from the company. I mean, we – we see that as our responsibility.

40

Is that a convenient time.

45

THE COMMISSIONER: 2.15.

MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: If you would be good enough to be back here in time to commence at 2.15, Mr Kelaher.

5

ADJOURNED

[1.11 pm]

10 **RESUMED**

[2.15 pm]

THE COMMISSIONER: Yes, Mr Hodge.

15 MR HODGE: Thank you, Commissioner.

Now, Mr Kelaher, your pub test letter was reviewed by the board of directors of IOOF Holdings?---I believe so.

20 If we bring up IFL.0028.0001.1890. I'm sorry, I think this is – these are the – there's a board report for the April meeting but the minutes of the meeting are at IFL.0028.0001.0656. This is a minutes of the meeting of the board of directors of IOOF on 26 April 2017?---Yes.

25 I take it this would have begun life as the handwritten notes of the company secretary?---I presume so.

And then if we go to the fourth page of that document. We see the third bullet point down:

30

Questor CMT: the board noted our letter on this matter and that we should continue to press our position.

?---Yes.

35

And we understand the letter that's referred to there must be the letter that you sent on 19 April 2017. Does that sound right?---Yes, but maybe I need to see that letter.

40 That was the one we were looking at before, the pub test?---If that's the one immediately before lunch, yes.

The pub test letter?---Yes, yes.

45 So the board knew about it and they were happy with that?---They knew about it. I can't form a view about what they said.

Well, they said you should continue to press the position?---Yes.

And you're on the board?---Yes.

So you knew what the board thinks?---Well, the board knew the letter and – and they were comfortable with the letter.

5

And then there was some further correspondence from APRA about this?---Yes.

APRA, I think, wrote to you in August of 2017 – sorry, I tender those minutes, Commissioner.

10

THE COMMISSIONER: Minutes of the meeting of IOOF Holdings Limited board, 26 April '17, IFL.0028.0001.0656, exhibit 5.123.

15 **EXHIBIT #5.123 MINUTES OF THE MEETING OF IOOF HOLDINGS LIMITED BOARD, 26 APRIL '17 (IFL.0028.0001.0656)**

MR HODGE: And then if we bring up IFL.0006.0003.3953. And you probably recall this letter?---Yes, I'm just – if I might read it for the moment. Yes.

20

And we can go through it but do you recall APRA tried to explain to you, that is, to IOOF, that you didn't understand how section 52(2)(d) and 52A(2)(d) of the SIS Act worked?---Yes.

25

And they said you don't get to engage in this balancing exercise?---Yes.

You have to just always preference the interests of the super fund members?---Yes.

30 And did you agree with that, after you received this letter?---I'm not sure it was within our domain to agree with it or otherwise.

Well, you had previously expressed the view that you were engaged in some balancing exercise. And you were being told there's no balancing exercise, you must always preference the interests of the members of the super fund?---Well, yes, I guess we – at the end of the day we accepted that APRA's position is final.

35

I see. I tender that document, Commissioner.

40 THE COMMISSIONER: Letter APRA to IOOF, 15 August '17, IFL.0006.0003.3953, exhibit 5.124.

45 **EXHIBIT #5.124 LETTER APRA TO IOOF DATED 15/08/2017 (IFL.0006.0003.3953)**

MR HODGE: And so did you agree to replenish the reserve with company funds?---No, no, we did not.

5 All right. So when you say you agreed that APRA's position was final, I'm not sure I understand what that means?---Well, I – we accept at the end of the day that APRA provides the licence – I guess our view was – and, you know, this was a view discussed and developed with our lawyers, that – that – that there was a – an interpretive piece about which prevails and going back to this concept of balancing.

10 And when you've repeatedly given evidence throughout today - - -?---Yes.

- - - that in the end the most important thing was to fully compensate the members - - -?---Yes.

15 - - - and by that I understand you to mean to make the members whole?---Yes.

You haven't done that, have you?---Yes, we have.

20 You've used the members' money, which is the reserve, to pay the members?---No, we've used the general reserve to compensate the members.

And the general reserve belongs to the members?---No, that's not my understanding.

25 And what you could have done was to instead use your money, the company's money, to actually properly make the members whole?---That – that's an alternative, yes.

And to restore the reserve?---That's an alternative.

30 But you haven't done that?---No, we haven't.

35 And can I suggest to you you haven't done that because you continue to be, as Questor originally, in breach of your duties to the members to act in the best interests of the members?---No, I believe we acted in the interests – the best interests of the members.

Now, this issue of using the reserve has arisen on some other occasions as well?---You will need to be more specific.

40 All right. There was an issue in relation to Pursuit where you used the reserve to compensate members. There was a Pursuit distribution reinvestment error. Do you recall that?---No, no, I don't, but - - -

45 I will bring that up?---Yes.

Can we bring up IFL.777.0001 – I'm sorry IFL.0007.0001.3942. So this is the board papers for a meeting of IIML?---Yes.

And IIML, I take it, when it meets, it meets in all of its capacities. It doesn't have a separate meeting where it's the trustee and a separate meeting where it's the RE of one managed investment scheme?---It – it has two – it has two roles. One is RSE and the other is RE. It turns its mind separately to either item.

5

If we go to IFL.0007.0001.4053. So this is a memorandum concerning an issue about the Pursuit – I'm sorry, you might be able to see this more easily if we go to the appendix. If we go to 4055. So this is something called the Pursuit Distribution Reinvestment Error?---Yes.

10

And there's some references here to the trustee of the superannuation fund?---Yes.

And also to the operator?---Yes.

15

They are all the same entity?---Trustee and the operator, yes.

IIML is both the trustee of the superannuation fund and also the operator of Pursuit Investment Services?---Yes.

20

And you will see what the board was asked to approve in relation to a particular issue, which is explained in the Background. You can see heading 2, Background?---Yes.

And the second bullet point is:

25

In August 2014 it was identified that distribution transactions entered (and backdated to the previous month) in the Orion administration system remained invested in the cash account rather than being reinvested in the relevant managed investment in accordance with the client's existing instructions.

30

?---Yes.

That seems to be an error of the operator. Do you agree?---Yes. Yes.

35

And what the board was asked to approve was that the IDPS clients – so that is the people who were invested in the investor directed portfolio service?---Yes.

Would be paid compensation funded by the operator?---Yes.

40

And that's funded by IIML itself?---Yes.

There's no reserve available that belongs to those members to pay them?---No.

45

And what the members of the superannuation fund would be paid with was money funded from the Operational Risk Financial Reserve?---Yes.

And that reserve is an asset of the superannuation trust?---Yes.

And I'm not sure if we're now going to disagree about this but an asset of the superannuation trust belongs to the members?---That's not my understanding.

5 And so rather than using company funds to pay the members of the superannuation fund who had suffered loss as a result of IIMLs error, IIML was going to use the ORFR from the trust. Yes?---Yes.

10 And it did so?---I believe so, but you would need to keep scrolling through the pages. I'm not - - -

15 This is the appendix seeking the approval?---Mmm. You need to scroll over the page.

20 Well, we need to look at the minutes, which we can bring up in a moment. You don't recall what the outcome of it was?---There are – there are lots of meetings, lots of transactions, so you would need to familiarise me.

25 I'm sorry, it doesn't surprise you at all that the recommendation in this case would be to use the ORFR to compensate the trust fund members?---That's the function of it.

30 To compensate the members of the superannuation fund for an error made by IIML in its capacity as error – as operator?---Well, I think IIML, in its capacity, I guess that's an interpretation.

35 Does it seem surprising to you that IIML, as operator, would have to directly compensate the members who were invested in the IDPS but IIML wouldn't also have to directly compensate the members of the superannuation fund?---Well, I think it goes back to your proposition that there is no RFR for an IDPS scheme than there is for the superannuation scheme.

40 Your point is if it was possible to find some other source of money to pay back the IDPS members, we also wouldn't use company funds to do that?---If there is – if there is an ORFR set up for this purpose then it would be utilised.

45 I tender that document, Commissioner.

THE COMMISSIONER: Just the memorandum, is it - - -

MR HODGE: Could we - - -

40 THE COMMISSIONER: Or the board pack?

MR HODGE: - - - tender the – the board pack, Commissioner, and then I will - - -

45 THE COMMISSIONER: Board papers IIML for meeting of 27 May '15, IFL.0007.0001.3942, exhibit 5.125.

**EXHIBIT #5.125 BOARD PAPERS IIML FOR MEETING OF 27 MAY '15
(IFL.0007.0001.3942)**

5 MR HODGE: And then just to make good on the proposition as to what ultimately occurred can we bring up IFL.0007.0001.3101. So this is part of the board pack from the meeting of August 2015. But if we go to .3103. We have the minutes of the meeting on 27 May 2015. You see that there, Mr Kelaher?---Yes.

10 And then if we go to page 8 of that document, which is .3108 you see item 4.2 Pursuit Redistribution Breach?---Yes.

And you see what's summarised there:

15 *The board noted the paper, the board noted the summary of the breach and its impact.*

?---Yes.

20 Continuing:

*The proposed remediation strategy and source of compensation and additional controls that have been put in place to prevent similar errors in the future.
Resolved to approve the remediation strategy and source of compensation.*

25

?---Yes, that's correct.

Now, do you think there's a conflict of interest involved in this decision?---No, I don't. I – we have a – a reserve – the super fund, the IDPS doesn't, and so - - -

30

If we go to page .3103. We see conflict of interest:

Each director declared they did not have a conflict of interest in relation to any matters set down to be discussed at the meeting.

35

And certainly from your perspective, that's unsurprising?---No.

You don't see any conflict involved here? Again, because it's being recorded you will need to answer rather than just shaking your head?---Sorry. Sorry, no.

40

You don't see any conflict of interest?---No.

If we go to page .3109. Do minutes of board meetings, as a matter of practice, get signed in IIML?---Yes, normally they do.

45

I see?---My understanding.

I tender that document, Commissioner.

THE COMMISSIONER: Minutes of the board of IIML 27 May '15,
IFL.0007.0001.3101, exhibit 5.126.

5

**EXHIBIT #5.126 MINUTES OF THE BOARD OF IIML 27 MAY '15
(IFL.0007.0001.3101)**

10

MR HODGE: And there was also a similar issue that another issue of the same type that arose with respect to Questor. We will bring up that document. Can we bring up IFL.0027.0002.0725. Sorry, no, .0705. So this is the board pack for a meeting of Questor?---Yes.

15

In May of 2015?---Yes.

So about the same time as the Pursuit Redistribution Error?---Yes.

20

If we go to page .0750. We see this is an appendix explaining a remediation proposal in relation to another error called the TPS Regular Investments Sweep Breach?---Yes.

25

If you look the third dot point down, you will see the explanation of what occurred, which is that – I am sorry, the third dot point down under Background:

30

From 30 September 2011 the transfer was completed for those clients who were to transfer to a comparable multi-mix trust. However, Questor failed to reinstate the regular investment sweep instructions previously in place for these clients while they were invested in the United Funds.

?---Yes.

35

And you understand – this brings back a recollection for you – the consequence of not reinstating the sweep was that there was loss to the clients?---Yes.

And the remediation proposal was that the operator – and in this case that's Questor - - -?---Mmm.

40

- - - would pay compensation to the IDPS members?---Yes.

But the members of the superannuation fund would be reimbursed using the ORFR?---Yes.

45

And I would suggest to you, again, that means reimbursed using their own money, but you disagree with that?---No, there's a reserve there for this purpose.

And I tender that document.

THE COMMISSIONER: Board papers Questor 27 May '15, IFL.0027.0002.0750, exhibit 5.127.

5

**EXHIBIT #5.127 BOARD PAPERS QUESTOR 27 MAY '15
(IFL.0027.0002.0750)**

10

MR HODGE: Just to show that that was also approved can we bring up IFL.0027.0002.0001. And you will see this is the board pack for the meeting on 26 August 2015, but if we go to page 2 we will see the minutes of the meeting on 27 May 2015. Do you see that there?---Yes.

15

And then if we go to page 4, which is .0004, see at the bottom of the page that the resolution of the board was to support the remediation strategy?---Yes.

20 Again, lest there be any doubt about this, if we go to page 5, the minutes aren't signed. You can see that?---Yes.

If we go to page 2, no conflicts of interest are declared?---No.

I tender that document, Commissioner.

25

THE COMMISSIONER: Minutes of Questor, 27 May '15, IFL.0027.0002.0002, exhibit 5.128.

30 **EXHIBIT #5.128 MINUTES OF QUESTOR, 27 MAY '15 (IFL.0027.0002.0002)**

35 MR HODGE: Now, I want to show you another document which is IFL.0006.0003.4075. This is a memorandum that was prepared by IOOF and we understand ultimately sent to APRA. Have you seen it before?---Yes.

And if we go to page 4 of that document ending in .4078. You see paragraph 3.1.3, RE:

40 As set out in the background papers to the CMT issue, Questor as RE did not maintain a sufficient level of oversight or a comprehensive governance framework.

Do you see that?---Yes, I do.

45 Do you accept that that was the case, that Questor did not maintain a sufficient level of oversight or a comprehensive governance framework?---I'm not qualified to – to

answer the first part of your – your question in terms of the technical piece of it, but perhaps if you might repeat that question again?

We can take it in parts?---Yes.

5

Do you accept that Questor, as responsible entity, did not maintain a sufficient level of oversight?---I can't speak to that. I mean, I – it's not – I'm not sure how many people should be examining or not examining a transaction.

10 You've never thought about that?---I don't actually understand the – the – whether it's electronic, whether it's digitised or – yes, so I've turned my mind to it but - - -

You don't understand what the extent of the oversight was, is that your point?---Yes, whether it's physical, whether it's maker checker, there are various mechanisms to review.

15

So it's not possible for you to form a view as to whether there was inadequate oversight?---I can form a view but – but how much help that is to you I'm not sure. But it's not my – what I'm saying to you is it's not my expertise, so - - -

20

Did you ever at any stage form a view as to the adequacy of oversight?---I don't think I concluded a view. I guess I inspected the – you know, I tried to understand what had transpired in relation to the – to the custodian breach but, you know, as I said, it's not my expertise.

25

All right. You considered it at some stage but you didn't form a view. Is that a fair summary of it?---Yes, I don't think I was qualified to form a view. You know, with benefit of hindsight, for example, you could say, well, more people should have been maker checkers looking, but I – you know.

30

I tender that document, Commissioner.

THE COMMISSIONER: Memorandum concerning conflicts and decision-making map – have we a date for it, Mr Hodge?

35

MR HODGE: Commissioner, I will have a date for it but I don't have it immediately to hand. It was an attachment to an email sent to APRA. I now have a date for it. It was 18 August 2016.

40 THE COMMISSIONER: August 2016, IFL.0006.0003.4075, exhibit 5.129.

**EXHIBIT #5.129 MEMORANDUM CONCERNING CONFLICTS AND
DECISION-MAKING MAP DATED 18/08/2016 (IFL.0006.0003.4075)**

45

MR HODGE: Could we go back to a document we've already looked at which is IFL.0006.0003.4061. You recall this is the board paper that we looked at earlier in relation to the Questor CMT over-distribution error?---Yes.

5 And if we go to page .4063. You see paragraph 2.2 Control Environment:

Questor's investigation into the breach found that there was a control gap relating to the monitoring and review of investment performance and daily yields.

10

?---Yes.

Continuing:

15 *Questor's investigation also highlighted the following.*

?---Yes.

20 And there's three points there. And if we go over the page, there's then a fourth point at the top which is:

Poor understanding of source documents and reports supplied by external parties and investigation of reconciling, outstanding and excluded items.

25 ?---Yes.

And these, can I suggest, are poor understandings on the part of Questor?---Yes.

And then you see in the next part:

30

In response, Questor has improved –

35 And then there's various internal controls that have apparently been improved by Questor?---Yes, yes. I think that the import is that these are observations post the event. So - - -

Well, when you're thinking about who should be liable for the loss, isn't that what you always do, make observations post the event as to who is responsible?---Yes, that's correct.

40

And having identified these various failings on the part of Questor, did you consider whether Questor ought to personally compensate the members of the superannuation fund?---Yes.

45 When?---Well, on or about the – well, I can't give you a specific date, but to the question did we consider, yes, we did, but - - -

Did you minute it?---No. No. But what we say is that – that the fundamental error here was from the custodian. Now, we’ve examined retrospectively and formed views subsequent but, you know, I think that’s with the lens of hindsight.

5 There was also an error, as has been identified, on the part of Questor. Do you agree?---Look, yes, there’s possibly a shortcoming there, but it’s – with the lens of hindsight, as I say.

10 And so that I understand the full import of your evidence, can we bring up your statement and go to paragraph 52 of that statement. So this is IFL.9999.0004.0028. Here you say in paragraph 52:

15 *Questor in its capacity as RSE licensee of the fund considered the possibility of seeking to recover losses from Questor as responsible entity of the CMT and from IOOF Service Co.*

Do you see that?---Yes, I do.

20 So that we understand your evidence, your evidence is that at some stage you and the other directors of Questor, on behalf of Questor as the trustee, considered, what, suing yourselves, that is suing Questor, but as responsible entity of the CMT?---No, no, we didn’t.

25 So when you say in paragraph 52:

We considered this possibility of seeking to recover losses –

30 what were you contemplating?---We were contemplating that – that the – the entity that had caused the loss should – should be responsible for it.

You say:

Questor in its capacity as RSE licensee –

35 Meaning trustee - - ?---Yes.

Of the super fund:

40 *Considered the possibility of seeking to recover losses from –*

And this means from itself, doesn’t it?---Mmm.

Is that right?---Yes, effectively, yes.

45 Do you have a distinct recollection now of at some stage having a consideration or discussion at board level as to whether Questor should recover from itself compensation for the members?---I can’t recall whether there was a discussion at

board level but it goes to the question of did Questor believe that the – that it had caused the problem, and – and I say it did not.

5 When did it even consider that question; did it cause the problem?---I can't specifically point to a time to my recollection, but it – it – it says that it's comfortable that it did not cause the problem.

Sorry, who said that?---Questor.

10 When has Questor said that?---Well, that's what I'm saying, I can't recall the specific date. I'm saying the conclusion is that Questor does not believe that Questor caused the problem.

15 You've seen the paper of the board?---Yes.

Where it's identified that there were failures on the part of Questor?---I – I've seen a discussion of that, and it's with the lens of hindsight. As I said, when you look back at what goes on and you try and attribute reasons behind something that might have occurred. The fundamental root cause here was NAS, was the – the custodian. They
20 caused the problem. Now, we – we're saying could we have done more? You can always do more. You can always improve. And the subsequent commentary goes to the – the question of what more could we do. And that's what you – you learn when – when an error is made, you – you learn.

25 NAB thought it was only partly at fault?---Yes.

It thought that the other party with fault was Questor?---Yes.

30 That was why it only agreed to pay for half of the – of the compensation?---I can't speak for – for NAB. I think you would have to speak to them.

In any event, you knew that NAB thought that Questor was partly at fault?---I
35 thought that – that NAB thought we were a small – a small counterparty and that why – why should we – why should we compensate.

I want to put these things to you squarely, Mr Kelaher: at no time has Questor ever properly displayed any understanding of its best interests duty to its members in relation to the Questor CMT issue?---No, I don't agree with you.

40 At no time has Questor ever displayed any proper understanding of its obligation to prioritise the interests of the members, always and over the interests of Questor or any related entity to Questor?---No, I don't agree.

45 Even now, you do not see any problem with the events that have occurred in relation to this?---I – I see a problem insofar as there was a – an over-distribution, and at the end of the day that over-distribution was compensated for members in full.

Now, it wasn't compensated in full. You used the members' money to purportedly compensate them. You know that, don't you?---No, they're your words.

5 Have you ever looked at the financial statements for Questor?---Yes.

Have you looked at the financial statements for the superannuation fund?---Not – not recently.

10 Have you ever looked to see whether the reserve is an asset of the fund?---Not specifically.

If the reserve is an asset of the fund, do you accept that it belongs to members?---No, it's an asset of the fund, no, I don't.

15 Commissioner, I don't have any further questions of Mr Kelaher.

THE COMMISSIONER: Mr Peters.

20 MR PETERS: No re-examination, Commissioner.

THE COMMISSIONER: Thank you. Thank you, Mr Kelaher. You may step down. You're excused from attendance.

25 <THE WITNESS WITHDREW [2.47 pm]

MR HODGE: Commissioner, could we just adjourn for two minutes so that we can do a rotation of the parties and counsel.

30 THE COMMISSIONER: If I come back at, what, 10 to 3. Is that going to be time enough? Shortly after 10 to 3?

35 MR HODGE: Yes. Yes. Thank you, Commissioner.

THE COMMISSIONER: Very well.

40 **ADJOURNED** [2.48 pm]

RESUMED [2.51 pm]

45 THE COMMISSIONER: Yes, Mr Dinelli.

MR DINELLI: Thank you, Commissioner. The next case study concerns Energy Super. I might invite my learned friend to call the witness, Mr Scott Wilson.

THE COMMISSIONER: Yes.

5

MR McKENNA: The witness is outside, Commissioner.

THE COMMISSIONER: Yes. Somebody is - - -

10 MR WHITE: Before Mr Wilson comes I announce my appearance for Mr Simpson in this matter.

THE COMMISSIONER: Thank you. I ask you to come into the witness box.

15

<SCOTT MAXWELL WILSON, AFFIRMED [2.52 pm]

<EXAMINATION-IN-CHIEF BY MR McKENNA

20

THE COMMISSIONER: Thank you very much. Do sit down. Yes.

MR McKENNA: Thank you, Commissioner.

25

Witness, is your full name Scott Maxwell Wilson?---Yes, it is.

Your work address is level 10, 123 Eagle Street, Brisbane?---Yes, that's correct.

30 And you're presently the chair of the board of Electricity Supply Industry Superannuation Queensland Limited, the trustee of the Energy Super Fund?---Yes.

And you've been a director of this company since 2011?---Correct.

35 In front of you on your left, do you have a summons addressed to you by the Commission?---I do.

Dated 31 July 2018?---Yes.

40 I tender that summons, Commissioner.

THE COMMISSIONER: The summons to Mr Wilson is exhibit 5.130.

45 **EXHIBIT #5.130 SUMMONS TO MR WILSON DATED 31/07/2018**

MR McKENNA: Thank you. Mr Wilson, do you have next to you – I think on your left – a document headed statement of Scott Maxwell Wilson, Rubric 5-04?---I do.

Which is signed by you?---Correct.

5

And which includes various exhibits referred to in that statement?---Correct.

And to the best of your knowledge, are your statements in that document true and correct?---They are.

10

I tender that statement, Commissioner.

THE COMMISSIONER: The statement of Mr Wilson concerning Rubric 5-04, exhibit 5.131.

15

EXHIBIT #5.131 STATEMENT OF MR WILSON CONCERNING RUBRIC 5-04

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MR McKENNA: Thank you. Mr Wilson, is the third document in front of you a document headed statement of Scott Maxwell Wilson Rubric 5-63 which is signed by you?---Correct.

25

And which includes various exhibits referred to in that statement?---Yes.

To the best of your knowledge, are your statements in that document true and correct?---They are.

30

I tender that statement, Commissioner.

THE COMMISSIONER: Exhibit 5.132 is the statement of Mr Wilson concerning Rubric 5-63.

35

EXHIBIT #5.132 STATEMENT OF MR WILSON CONCERNING RUBRIC 5-63

40

MR McKENNA: Thank you.

THE COMMISSIONER: Thank you. Yes, Mr Dinelli.

45

<CROSS-EXAMINATION BY MR DINELLI

[2.55 pm]

MR DINELLI: Thank you, Commissioner.

Mr Wilson, my name is Albert Dinelli. I am one of the Counsel Assisting the Commission?---Good afternoon.

5

You indicated that you're the chair of the trustee. Is that correct?---Correct.

And that entity is the trustee, that is electricity Supply Superannuation Queensland Limited is the trustee of Energy Super?---Yes.

10

And you've been the chair, have you not, since January of this year?---This year, that's correct.

But, in fact, as you said in answer to my learned friend, you've been a director since 2011?---I have.

15

And you were the Deputy Chair between December 2014 and December 2017?---Correct.

And just for completeness in terms of your current roles on the board of the trustee, I understand you're presently a member of the governance remuneration and nomination committee?---I am.

20

And also the insurance and claims committee?---I am.

25

So from your experience on the board over the past seven years, you're able to assist the Commission by explaining the nature of the duties of a trustee?---I can.

And how those duties have been complied with by Energy Super?---Yes.

30

And when a request was made of Energy Super for a person to give evidence, you were put forward as that person?---Yes.

Can you perhaps assist the Commissioner by explaining something about the history of the Energy Super Superannuation Fund?---Okay. So the Energy Super Superannuation Fund has a long history. It's – it's – there's two wings to the – to the fund, if I can explain it that way. We merged – we went through a successful merger in 2011. One of those wings is based in the electricity generation, distribution and supply sectors, and that has been going for very many years. I actually was a member of that fund when I first started work in 1982, for a very short time. The other arm of our Energy Super fund comes out of a – the electrical contracting sector, and there was a – a precursor fund to our fund now called SPEC, Superannuation Plan for Electrical Contractors which is another area where electricians work. So they either work in distribution, generation, supply, or they could also work in the electrical contracting, construction and project work. So there was – those two funds saw that there was a lot of mutual benefit to bring themselves together, and that

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40

45

happened 2010/11. And I joined the fund just after that merger. I – sorry, I joined the trustee just after that merger.

5 I see. And – and you were a member appointment to the fund – to the trustee board, were you?---Yes.

10 And what does that mean, to be a member appointment?---Well, it – we have trustees who are appointed either through an employer sponsor or employer appointed, or a member appointed, and they're appointed through either the Electrical Trades Union or the Australian Services Union or the QSU, the Queensland Services Union as a representative of the members of the fund.

15 Am I right that there's two that are nominated by the ETU. Is that correct?---By the? Two that are nominated by the ETU?---Yes, two by the ETU.

20 Yes. Is the ETU – just to assist is the ETU an overarching name for various different unions or - - -?---No, the Electrical Trades Union Queensland Northern Territory branch is the nominating body. So that's a standalone state-registered union.

I see.

25 THE COMMISSIONER: State branch of the federal body?---State branch, yes, correct.

But the relevant body is the state branch?---Yes, the relevant body – appointing body is the state branch.

30 Yes?---Yes. It's not a national appointment.

35 MR DINELLI: I understand that. In fact we will come to some other bodies shortly. Can you explain to me if or how the Communications, Electrical and Plumbing Union fits in?---That's the short name. The long name goes on for quite some time, Communication, Electrical, Plumbing, Postal, etcetera, etcetera. That is a federal registered union which has a communications branch, an electrical branch and a plumbing branch. And in the postal, there's postal and telecommunications services. So the CEPU is a national body which is a national union made up of those three separate branches. During the 1980s there was a move to amalgamate a lot of smaller unions into bigger – bigger unions which we're still seeing today and the CEPU is a result of that. So there's a national registration called the CEPU which we are the electrical division.

40 I understand. Thank you for that clarification. So the constitution, as I understand it, provides that two of the directors are nominated by the ETU?---Correct.

45 And one by, if I can call it the QSU?---Yes.

Which is the Australian Municipal, Administrative, Clerical and Services Union of Queensland?---Yes, there's a bit of detail around that. The – when the two funds joined in 2010/11, to bring those two together there was obviously QSU representatives on the supply generation and distribution side, but not on the electrical contracting project work industry side of the precursor fund SPEC. So the ETU and the QSU have a rotating nomination process where there's two from the QSU, two from the ETU and then when the terms rotate, when they rotate, rotate out – I might need a document to explain it, but when the terms rotate out it goes three back to one. So at this present point in time, there is one QSU, three - - -

10 And three ETU?---Yes.

That's right?---When my term expires in 2020 it will go back to two ETU, two QSU.

15 So can I understand then that at any one time there's four appointed by the unions in the way that you've described?---Correct.

And four by the employers?---Correct.

20 And there is one independent director. Is that correct?---There is one independent director.

And you yourself, I think you've said, were appointed in 2011 as a member representative?---Correct.

25 So there's various links between the trustee board itself and these various unions. Am I right that some but not all of the directors – the union-appointed directors pay their directors fees to the union that they represent?---We pay directors' fees to the director. And then what they do is an arrangement between them and their sponsoring body. So, for example, a director may choose, depending on the rules of their union or the sponsoring body, they may choose to pass those fees on to the sponsoring body as a, I suppose, a way of covering for the hours they spend doing the trustee work – the lost opportunity hours. For example, I – I keep my directors' fees. Mine don't go back to the Electrical Trades Union.

35 In fact, this is set out in your statement at tab SW-20, EYS.0011.0001.1023.

You will recall that in your evidence you referred to directors and executive officers' remuneration. Do you recall?---Yes.

40 And it's quite small. Perhaps if the top section for the year ended 30 June 2017 can be blown up. And you will see that there's various footnotes there for Mr David Smith, Mr Peter Simpson, and Ms Neisha Traill?---Yes.

45 They refer to in the case of number 1 the remuneration is paid to the Australian Services Union?---Correct.

And number 2 the remuneration paid to the Communications, Electrical, Plumbing Union Electrical Division?---Correct.

5 So is that a matter for each of the directors how they - - -?---Yes.

- - - assign the money they receive for being a director?---Between the director and the sponsoring organisation.

10 I see.

And in your evidence you've also indicated that Energy Super has agreements with various unions. Is that correct?---Correct.

15 And they deal with – or at least those to which you refer to as the union partners include the Electrical Trades Union Queensland and Northern Territory?---Yes.

20 The Communications, Electrical, Electric, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia. That's the one you said had quite a long name?---That's the long name, yes.

I agree with you. The second is the CEPU, Tasmanian division?---Yes.

25 And then the Services Union, which is the union we referred to before, the Australian Municipal, Administrative, Clerical and Services Union Queensland?---That's it.

They're known as the union partners, are they, of Energy Super?---Yes.

30 And perhaps if I can ask that – show a sample of one of those. A sponsorship agreement with ETU Queensland and Northern Territory. That's exhibit 1 to your second statement which is EYS.0006.0001.1109?---Yes.

If it's easier for you, Mr Wilson, you see that - - -?---Okay.

35 - - - it's also on the screen there and I will take you to the relevant page. This is the agreement with the ETU Queensland and Northern Territory of last financial year. Is that correct?---Yes.

And there hasn't been one yet signed for this year?---No.

40 And if you go - - -?---I believe it's being discussed and negotiated perhaps.

I think your evidence is it's still - - -?---Yes.

45 - - - in the process of negotiation. And if you go to page – sorry, if you go to the page 1111, which, Mr Wilson, it's now on the screen?---Yes. Okay.

Do I understand it correctly that \$63,800 is paid to the Electrical Trades Union pursuant to this agreement?---Correct.

And what's that for?---You want to know what the - - -

5

Yes, please?---Okay. The – the amount of money that is paid pursuant to this agreement is a – part of our marketing spend, part of our marketing and interacting with members process. So for that amount mentioned we – and you can see there's a list of the activities that take place just below that – that – that first dot point. So there's provision of Energy Super marketing material, there's visits to major project sites to interact with members, there's attendance at conferences. We attend biannual delegates conferences, we attend industry conferences, we get in front of members at a – at an enormous rate.

10

15

Sorry, when you say “we” what do you mean?---I'm talking about our business development people of the fund.

I see?---I probably used that term incorrectly. Energy Super gets in front of a lot of members through this arrangement.

20

Who actually attends these events to which you're referring?---We have business development employees who go out and visit members on site. It's a common activity for them to interact with members on site to talk to them about the benefits of, for example, combining multiple accounts if they have multiple accounts open, to looking at their insurance cover, is it appropriate for the time, having a look at any of their contribution strategies, maybe talking to them about have they thought about, you know, retirement plans. There might be an opportunity to direct them to some of the other services that we have. So it's a – it's a direct marketing. It's an interactive approach to getting in front of members.

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30

I understand that. And it must be me. I just don't understand, though, who is it that does that, though? Is it the – an ETU person that does that or is it an Energy Super person that does that?---An Energy Super person will do it in conjunction with an ETU person. You can't get on to a major project – you can't just rock up to a Gladstone, you know, site or a – a some sort of project out in the, you know, out in the wilderness and say, “I'm just here to talk about superannuation.” You need to have that connection into the industry to be able to attend to get in front of people.

35

40

And that's the purpose for which Energy Super pays that money to the ETU. Is that right?---It is one of the purposes, yes.

I understand?---To provide ease of access to get in front.

45

And it's your view that that's in the best interest of members to - - -?---Certainly. Certainly.

As I understand it you have similar sponsorship agreements with the other three unions that I mentioned - - -?---Yes.

- - - a moment ago?---Yes.

5

And they're along slightly different terms but - - -?---It – it depends on the location, it depends on the type of – for example, we were looking to try and expand, maybe grow some membership in Tasmania, so we approached the Tasmanian market with a slightly different aspect. It's a different environment down there. What works in Queensland might not work exactly the same way in Tasmania, for example.

10

That's the agreement you entered into only a couple of months ago?---Yes.

With the CEPU down in Tasmania. Is that right?---Right. So through this arrangement we also get in front of members at conferences and delegates meetings and members meetings. We also attend conferences for, you know, any number of occasions. We get in front of – we have a – we go to statistics on the success of these activities and one statistic I think is remarkable is that in any – in a given year we have about 18 per cent of our membership interacts with us, either face-to-face, or takes some sort of action as a result of being involved in a thing like this. The national average is about 1.5 per cent. So it's – it's a big pay-off for a small investment.

20

And can you explain to me why that interaction and the retention of members or the attraction of new members is in the interests of the members generally?---Well, obviously, if we don't retain our membership, if we don't attract new membership, it's going to place pressure on the existing membership. So by attracting new membership and retention of existing membership, we grow our funds under management.

25

30

And that's a very important aspect of your role as trustee?---Of course it is. Yes. Yes, very much so. With the growth in funds under management it's very important because we get the scale efficiencies.

35

We spoke about the directors before. It's your view, is it, that the mix of directors is appropriate to discharge the duties of the trustee?---Correct.

40

And leaving aside Ms Maher for a moment who's an independent director, do I understand that once appointed a union nomination – so the union nominates someone who then becomes a director. Is that right?---Correct.

THE COMMISSIONER: Can the fund or the trustee reject the nomination?---They certainly can.

45

Who gets the final say if push comes to shove, if somebody is proposing X be appointed and the existing board say no X, for whatever reason, is not an appropriate

person, who has the final word?---The directors of the trustee. We can – we can refuse someone under a – you know, a number of reasons.

5 MR DINELLI: You – perhaps we can explore that. And you can tell me why that's the case. Can I take you to the constitution, which is at EYS.0001.0001.0005. This is the current constitution, is it, Mr Wilson?---Yes.

10 Can I take you first to page 0015. And to 14.5A(e). Now, I understand this is consistent – and I will have that blown up so it's easier for you – I understand this is consistent with your evidence before, that is, from 1 April 2014:

ETU may select two member directors; QSU may select one member director.

15 ?---Correct.

And then:

ETU and QSU may alternately select one member director on two year rotations with the initial rotation selected by the ETU.

20 ?---Correct.

25 Now, just to assist the Commissioner on what you've been asked, if you go back to 14.4B, which is on the previous page, in fact is on 0013, you will see at the bottom there the provisions of article 14.4B apply subject to other provisions, which we don't need to deal with for the moment, from the changeover date.

30 You can assume, as I'm sure you know, that the changeover date is 22 March 2011. And that would accord with your evidence before that was the date upon which the unions merged, was it not – sorry, the funds merged?---Correct.

Sorry, you will have to say yes. You will just have to answer?---Could you repeat that question.

35 The date that I had previously – that I referred to as the changeover date or this document refers as the changeover date is 22 March 2011?---Yes, that's right.

40 And that accords with the time that the merger that you referred to before occurred?---Yes.

So then if you go over the page, it says:

45 *Persons selected from time to time as a member director or employer director take office where selected to replace a director whose term of office is to expire, on the expiry of that term of office or otherwise five business days after the date of receipt by the secretary.*

?---Mmm.

Now, that – the constitution itself doesn't provide that the board can reject a nomination, does it?---No, it does. On previous pages.

5

If you look at - - -

THE COMMISSIONER: Sorry, what was the answer, Mr Wilson. You said – I just didn't hear it?---Sorry. I said on a previous page it indicates where a director can be refused.

10

Yes?---Is that - - -

Yes. It's a problem with hearing you, that's all?---Okay, sorry.

15

My fault, not yours?---Okay.

Go on.

MR DINELLI: And can you take me to that?---If you – can I have a hard copy?

20

Yes, you will find it at SW-1. That's the very first document in – so you might have it in your statement 5-04?---Okay, 5-04. Sorry, I'm looking at the wrong one. Okay. If you go to page 11 of that - - -

25

Yes?--- - - - document.

So it's just underneath where we were before, (g):

Any person may be selected.

30

Is that - - -?---That's the one, yes.

Subject to the - - -?---

35

Subject to the superannuation law and the eligibility criteria determined by the directors.

Okay. So then if you go – I assume that's a reference, is it not, to the board renewal policy. And – and the fit and proper policy. Is that right?---It's also expanded at (h):

40

The incumbent directors may determine rules and procedures for appointment and removal of member alternate directors.

That applies to alternate directors?---Sorry, alternate directors.

45

Then if I can take you to SW-2, the Board Renewal Policy?---Yes.

And that is EYS.0005.0001.0051?---Correct.

And you note there – well, this is a document that’s prepared in accordance with an APRA prudential standard. You’re familiar with those?---Yes.

5

And this is prepared to meet the requirements of prudential standard SPS 510?---Correct.

10 And at point 5 on 0052, you note, amongst this document refers to – or has some background. 5.1:

The trustee undertakes a regular review of the skills, knowledge and experience on the board and directors are required to undertake a minimum number of hours each year to meet their professional development.

15

Do you see that?---Correct. Yes, I see that.

And the board composition and renewal process is reviewed on an annual basis. Number 2?---Yes.

20

And also you note there:

The trustee takes the view that having regard to the complexities of the financial services and superannuation industry, the development of expertise and knowledge of the industry and of the fund and the ESI group takes time.

25

You see that?---Yes.

Now, at paragraph 10 there’s other provisions which deal with nomination eligibility. And there’s a reference to fit and proper policy which I will take you to in a moment. But 10.1 provides:

30

The trustee maintains a skills matrix showing the relevant experience and diversity the board currently has and identifying gaps it is looking to fill in order to effectively fulfil its strategic plan.

35

Do you see that?---Yes.

And does the trustee do that?---Yes.

40

And 10.2 provides that:

The trustee will engage with the sponsoring bodies –

45 Now, I assume that’s a reference to the unions and to the employer bodies?---Yes.

Continuing:

So that they remain aware of the fund's business and strategic plans and the skills and capabilities required in a nominated director to effectively oversee the implementation of that strategy.

5 Do you see that?---Yes.

And then it provides the various things that a trustee engages with the sponsoring body about. They are:

10 *Commitment to the industry super ethos, fit the identified skill needs of the board, meet the fund's identified skills.*

Etcetera?---Yes, I see that.

15 Now, the last dot point there provides that there must be compliance – I'm sorry, that – including fulfilling the fund's Fit and Proper Policy. Do you see that?---Yes, I do.

And the Fit and Proper Policy, which, as I said, I will take you to next is EYS.0005.0001.0029?---Yes.

20

Provides for the appointment of directors at page 0033?---Yes.

And I think I asked you previously but I think 8.1 summarises the position:

25 *The directors are appointed by reference to the trustee's constitution and the board's renewal policy, director nomination, appointment and removal.*

Do you see that?---Yes, I do.

30 And 8.4 provides that there will be a governance remuneration and nomination committee. That's the committee you're on, isn't it?---Yes.

And at 8.6 it says:

35 *The trustee uses a standard fit and proper questionnaire to assess a nominee which will address the following matters.*

?---Yes.

40 Continuing:

General personal information, current and past directorships, major shareholdings, education and qualifications, professional associations, professional experience, character matters and the provision of consent to do various checks.

45

Do you see that?---Yes

So am I right that the trustee uses a fit and proper questionnaire to assess a nominee for the purposes of complying with this policy?---It's one of the things that we use.

5 And, in fact, I think you will find at paragraph – sorry, at exhibit SW-70, the one that was used for you?---Mmm.

Sorry, SW-71 which is EYS.0011.0001.0789. And is that the fit and proper questionnaire to which you referred?---It certainly looks like it, yes.

10 And that sets out, amongst other things, on page 0793, your qualifications?---Yes.

And at 0794 your professional associations?---Yes.

15 And that's – and also in your evidence you referred to the one for Ms Christine Maher - - -

THE COMMISSIONER: Rather than stay on the detail of this, can I come out to a rather larger picture to two questions that are related – and how you deal with them I leave to you – but if I put them together, you will see there are two aspects of it.
20 How hard is it to administer it and how effective is it to administer not so much the fit and proper, as the skills matrix, but skills matrix plus fit and proper are two elements that go to application at board member selection time?---Yes.

25 Now, two questions: how hard, in your experience, is it to administer that? And related to that may be how effective do you think it is in what you get out at the other end, as it were, of the process?---Okay. So am I answering your questions, Commissioner, or - - -

30 MR DINELLI: You always answer the Commissioner's question?---Okay. Sorry, Commissioner.

THE COMMISSIONER: He can say that. If he doesn't, I do?---Okay. Okay. So it's a process that we undertake to, I suppose, meet a minimum requirement to – to become a director. What we've – sorry, to become a director of the trustee. What
35 we see here is a – a format of collecting some information. There's also the, no, I'm on the wrong path.

On the fit and proper stuff - - -?---Yes, okay.

40 - - - I can readily understand. You want to know whether people are in bankruptcy, have got criminal histories and other such things. That's easy. I can understand that. It's essential information. I'm not saying it's unimportant information. It's really the skill set?---Okay, the skill set.

45 And the skill matrix - - -?---Okay.

- - - that how hard is that to administer and really related to that is how effective is it
- - -?---Okay.

5 - - - do you think in generating a result?---I think I can answer it like this: the skills
matrix is a tool that we use to look at our whole board and the collective skills on the
board. So we approach this with a collective approach, so the board itself makes the
decisions. If we have a director who is removing or retiring off the board or rotating
off – recently we had an employer director, Peter Scott, was moving on. So we
engaged with the sponsoring organisation, told them the skill set that we wanted, or
10 we were seeking because on our skills matrix that was one place we were going to be
a bit under. So we engaged early, we talked, Peter assisted in finding a replacement,
and that replacement was Mr Armand Mahne who has come on to the board as the
most recent director. That process takes place with whether it’s an employer-
nominated director or a union-nominated director. We engage – we talk to them
15 about who we’re after. Now, the skills of a director in our fund, obviously you need
to have, you know, skills on – or quickly gain those skills but there’s also the things
that you need to have an association with the industry, what we’re about. Know
what it’s like to engage with members. Know what it’s like to be in front of
members. I’m so accountable to members, I see them every day. You need someone
20 with that passion for the members of the fund. And I don’t know how you capture
that in a skills matrix. You know, it’s – it’s a – it’s a gut feeling.

And is the result effective?---I believe so. I think it’s very effective. And it’s
effective because we are a well-managed fund. We’re performing well. We’re
25 retaining our membership. Our fund is growing year on year. There may be other
more effective ways of doing it but at this point in time we find that it is a very
effective way of maintaining our level of skills and knowledge. It also works hand in
hand with a – a skill development plan, every director enters into a development plan
with our education officer, and we work over that for the next period of time, over
30 the – over the 12 months. And they will identify other skills that they might like to
enhance or pick up. So I think it’s a very effective tool. And it works well.

And do you think it yields good governance, adequate governance, proper
governance of the fund?---I do. I do.

35 No holes there that you would point to?---Currently, we have probably a bit of a lack
of expertise in investments, due to the – we lost a long-term director. However, what
we’re doing to alleviate that is we’re looking for a specialist person with investment
knowledge to fill in at the committee level which we find the most efficient way to
40 do that. You can bring people in to also up-skill the directors as well. You can bring
them in at the committee level and then when that job is completed, we should all be
skilled up to that acceptable level.

I have diverted you, Mr Dinelli.

45 MR DINELLI: You referred to - - -

THE COMMISSIONER: Ever so slightly.

MR DINELLI: You referred to Mr Armand Mahne in your evidence who has just been appointed. His fit and proper declaration is at EYS.001.0002.0002. That's
5 EYS.0011.0002.0002. Now, that's a fit and proper declaration made by him?---Yes.

In your evidence you exhibit the fit and proper questionnaire for each of you and Ms Maher but for Mr Mahne there doesn't appear to be one. Is there a reason for that?---I couldn't give you a valid reason for that. No.

10 That document itself is one of the steps, is it not, in the process of – of the committee?---Correct.

And point 1 requires him or her to say:

15 *I meet the fit and proper standard for the purposes of the –*

Relevantly –

20 *the Act and regulations?---Correct.*

The second dot point is:

25 *My educational and technical qualifications, knowledge and skills relevant to the duties and responsibility of the RSE licensee.*

?---Yes.

30 Is it your evidence that in relation to Mr Mahne there was a separate analysis of that as well?---I wouldn't say separate analysis. There was an engagement process. Because director Peter Scott had moved off the board or indicated he would like to move from the board due to workload issues, and we engaged with Peter and through – through his help and through engaging with the employer sponsor we found Mr Mahne who was a suitable replacement.

35 And can you explain what work was done by the committee in relation to that, the committee of which you're a member?---Well, we directed the CEO to engage with the employer association – sorry, with the employer and to talk to them. We engaged with director Peter Scott and asked him to – and this was an informal – Peter told me
40 – Peter called me and told me, "Mate, I'm having trouble meeting my obligations to both the – the trustee and to my employer. I'm just going to advise you that I'm seeking to stand down." So my reaction to that was, "Well, thanks for being so honest but can you help us with finding someone suitable to replace you." And he did. He put forward some – some ideas and there was a – a consultation process.
45 We asked our CEO to participate in that and see what – what came of it.

And – and was that individual’s skills and qualifications assessed by the board?---They were possibly looked at by the governance around a nom committee prior. I would have to check the time line but they would have been accepted by the board, yes.

5

And - - -?---Recommended to the board and then accepted by the board if they found
- - -

And in the course of that – in the course of the board considering it, were – what matters, to your recollection, were considered as relevant?---Well, firstly, the director that he was replacing. So that was of some relevance, did they have a similar skill set. And that was something we were seeking. So that was one point. We also were after someone who had a belief in what we do as an industry super fund as an equal representation model. We have a very cooperative board. We – we get along very well. We have very effective processes. So you need someone with that right fit to step into the – into that – into the board that way. And lastly, I suppose, the – you know, the willingness, the readiness to undertake the role. There’s also a requirement – I’m pretty sure Mr Mahne undertook the AIST course prior to joining the board. I’m pretty sure that was the timing.

20

And you’ve said in relation to that process that a recommendation is put to the – put to the board. Now, it was your evidence previously that the board can reject a nomination. Is that right?---On my understanding of the constitution.

Well, the constitution itself indicated that, you will recall, at clause 14.5A(g), which is at page EYS.0001.0001.0015, and you will see at (g):

Any person may be selected as a member director subject to the superannuation law.

30

?---Yes.

And:

Any eligibility criteria determined by the directors.

35

?---Yes.

Now, the eligibility criteria determined by the directors, am I right to say that that’s what is in the board renewal policy and in the fit and proper policy?---So are you saying – sorry, okay, I think I know what you’re saying. “Any eligibility criteria determined by the directors”, are you asking me does that refer to the fit and proper
- - -

40

Yes?--- - - - and the – yes. I believe so.

45

So previously we were at the fit and proper policy, SW-7, which is EYS.0005.0001.0029?---Yes.

At 0033. And at 8.10 at the bottom says:

5

If the requirements have not been met, the committee –

That I assume is the committee that you refer to:

10

...may decide to recommend –

dot point 1:

15 *The chair discuss with the sponsoring body or (2) potential training to address any deficiencies for the nominee to undertake within a required time.*

Do you see that?---Yes, I do.

20 That doesn't refer to there being a power for the person to be rejected, does it?---I think – I think it's intended to work with the sponsoring body to find someone suitable.

25 Let's just say hypothetical – perhaps I can ask, how many times has the person who has been put forward in the time that you've been on the board, how many times has the nominated person been rejected by the board?---Not once.

I'm sorry?---Not once.

30 And if, to use the Commissioner's language, push came to shove and the union wanted someone appointed, where – or an employer, for that matter, wanted a particular person appointed, where is the power to reject that for the board?---I think you will probably be – you would probably be engaging with the sponsoring organisation, to avoid the situation where push comes to shove. Push comes to shove is never something that we've encountered. We've always had a good relationship
35 with our sponsoring bodies. If someone – if someone was as determined to have someone on – placed as a director who was patently ineligible in our view, that would be a pretty bad situation to be in. We have never been in that situation, because we have a well - - -

40 THE COMMISSIONER: 14.7A subparagraph (d) perhaps may have some engagement. I'm not sure. And 14.7A on page 13?---14.7A.

14.7A subparagraph (d):

45 *Must not appoint as a director unless amongst other things the board has resolved or the person has satisfied the requirements of the fit and proper policy.*

?---Mmm.

You have got to positively say you meet the policy.

5 MR DINELLI: And can I ask you some further questions about that question of
governance and the sort of people who should be on the board, or the view of the
trustee as to who should be on the board. And you deal with this in your second
witness statement, which is at paragraph 92, if I could ask that that be called up. And
I think you might have gone to the second – the first statement. It's the second
10 statement in response to Rubric 5-63. You were asked of the views and
consideration by the licensee in relation to equal representation on the board. Do you
recall being asked about that?---Yes.

15 And you referred to a letter from APRA in relation to the proposed Superannuation
Legislation Amendment Trustee Governance Bill 2015?---Correct.

You were on a committee about that, weren't you?---I believe so, yes.

20 And do you recall what that proposed legislation – that, of course, didn't become law
but do you remember what that legislation was about in 2015?---Yes, I do. It was
about legislating a requirement that one-third of a board be independent, of any of
the other bodies, one-third employer nominated, one-third member nominated.

25 And the committee of which you were a part was asked to form a view on behalf of
the – the trustee about that bill?---Mmm.

Perhaps I can take you to your work on that. At EYS.0001.0002.4782. This is a note
or a submission to the directors from that committee. Do you recall this
document?---I do.

30 And did you have a part in putting it together, Mr Wilson?---It says there it's from
the chief executive officer.

35 But it records the view of the committee?---Correct, yes.

And you were part of that?---Correct.

I can take you to - - -?---No, no, that's fine.

40 And the committee there said – sorry, it's recorded there:

*the committee is of the view that the bill contains provisions designed to ensure
that superannuation funds have the flexibility to select independent directors
who have the relevant skill set to aid fund performance.*

45 ?---Yes. Correct.

And:

Which brings governance of regulated superannuation funds in line with international best practice standards.

5

Do you see that?---I do.

And:

10

The committee notes that superannuation is a significant asset for Australian households and that a very high standard of governance is required to ensure that Australians' superannuation is protected into the future.

?---Yes.

15

And:

This bill will allow superannuation fund boards to draw from a broader pool of independent directors, increasing diversity.

20

?---Yes.

And that was something that you - - -?---That was our view of what the bill was intended by those drafting it. That was their rationale behind that bill.

25

And was that something that – do I read that, though, as supporting – as supporting the proposition that superannuation is a significant asset and that a very high standard of governance is required?---I certainly agree that superannuation is a significant asset and a very high standard of governance is required.

30

THE COMMISSIONER: Can we just show the whole page, please, without the pop-out for the moment. What's the committee that's being referred to there? Is it the committee of – some committee of the trustee or is it - - -?---It might be the committee of - - -

35

Of the Parliament?---It could be.

40

MR DINELLI: So that is a reference to that committee rather than the committee of which you were a part or you don't recall?---It could very well be. It could very well be. Yes. I apologise for that. Perhaps if I looked at the minutes, it might help.

We might come back to that. If I - - -?---Yes, I think – I think you're right. Yes, it does refer to the committee in the – the Senate Economics Legislation Committee. So it would be their view.

45

What was the view that you had at the time, Mr Wilson?---Our – our fund never formed a formal view. We looked at the – the bill, we looked at what the committee

reviewing it had said. You know, there's pros and cons with every change that you make to a – a superannuation fund. I mean, if you have a well-functioning fund with equal representation, is there risks attached to changing that? I would say there are. There's – there might be some advantages. You might get some diversity of thought but there could be some disadvantages that would come out of that. So in theory, it's
5 – it's sort of something that's interesting, but in our fund we – we think we're okay, and it's not something that we're prepared to do at this particular point in time. If it became law, we would obviously comply, but, I mean, the highest – the highest house in the land decided that it wasn't appropriate, so there we are.

10 Now, can I ask you about the funds that you do have under management. Am I right to say that there's approximately \$7 billion of funds that are under management?---Yes, there is.

15 And how many members – how many members does Energy Super have?---We have approximately 48,000 members.

And can you tell me about – or can you tell the Commissioner, please, what has happened to the membership or the size of the membership over the last few
20 years?---Our membership stayed fairly stable. Fluctuated – minor – minor fluctuations in membership. Stayed remarkably stable, I would say.

If I can take you to paragraph 38 of your statement.

25 THE COMMISSIONER: First or second?

MR DINELLI: The first statement, I'm sorry - - -

THE COMMISSIONER: Yes.

30 MR DINELLI: - - - which is in response to Rubric 5-04. The – perhaps just leave – stopping there just for a moment?---Yes.

In the bottom table there you have the total funds under management?---Yes.

35 Which have gone – 30 June 2017 were about four and a half billion and I think your evidence was it's approximately seven billion, that's obviously because 30 June 2017 was a year ago?---Yes, that's right. Correct.

40 If you go to the next page, the total number of member accounts?---Yes.

In June 2013 it was 48,407. It's now – at least it might be approximately 48,000 now but it was 47,736, 30 June 2017?---Yes.

45 And can I ask you then to go down a little bit on that page to the operating expenses of the fund at paragraph 41 over the same period of time?---Yes.

And it's right, though, that even though the membership has slightly dropped or stayed relatively stable - - -?---Mmm.

5 - - - the operating expenses have gone up quite considerably since 2013?---Well, they've gone up from 2013, 18 million, up to 24 million at 30 June '17.

By about a third?---Perhaps.

10 And then on the next – sorry, bear with me. So given the membership has remained, to use your language, relatively stable, the increase in operating expenses have been reflected in a higher administration fee. Is that right?---Because – yes, it – that's correct, yes.

And I think you set that out at paragraph 127 – sorry, Mr Wilson?---Yes.

15 At paragraph – at that paragraph you see a table?---Yes.

I am just getting that up. That's on page 25 of the statement, paragraph 127. And the total administration fees have gone from \$157 to – in that period to \$217?---Yes.

20 Is that a matter of concern to you?---No, because it's relative to the growth of the fund.

And the question of fees or the question of fees it - - -?---Sorry, it's an asset-based fee. As the assets increase obviously the amount is going to increase. So it's not a big concern.

25 One of the things that you've considered over time, am I right, is the possibility of a – of a merger?---Well, having a merged fund, yes, it has been one of the aspects we look at over our annual review of our strategy. We've thought about – we look at our competitors and we've thought about mergers, yes.

30 Well, in fact, your current strategic plan provides for that. If you go – or the business plan, I should say?---Yes.

35 If you go to SW-4, EYS.0011.0001.0389. I think in your evidence you say – and this document gives effect to part of it, but the goals in Energy Super's strategic plan are to be the leading fund in the energy sector. Is that right?---Yes.

40 And another is to have strong member satisfaction and retention?---Correct.

And if you go to .0416, this business plan sets out that Energy Super has become a very well-respected industry super fund in the marketplace at the top?---Yes.

45 And then there is an indication:

...the board of management need to ensure continued focus on meeting the needs of members

?---Yes.

5

And stakeholders and you set out a number of points. Number 1 is Energy Super as current risks. Do you see that? At number 1, about halfway down the page. I'm sorry, can we blow up number 1 at about point 3 of the page?---Yes. Yes.

10 And one of the issues is that, amongst others, (a):

Single industry ties mean we are inextricably attached to the success of that industry in Queensland.

15 ?---Yes, I see that.

And:

Membership has been flat for four to five years.

20

?---Yes.

And (c):

25 *All Australians have accounts, so no flow of new membership as seen in the past.*

?---Yes.

30 (d):

Net cash flow positive but reducing

And (e) says:

35

Increasing cost and fee pressures.

?---Correct.

40 And (f) provides:

Currently in a position of power for merger discussions reducing as funds amalgamate around us.

45 ?---Correct.

What would be one of the benefits of a merger?---Well, one of the benefits of a merger would be to increase the membership, perhaps. It might be that you're looking for a change in demographic. Our average member is probably around 45
5 thousand. Where if we merged with a fund that had a very low demographic, that would look at our cash flow issue that we're sort of facing. We may also look at a merger in an industry that we would see as having some sort of connection with ours, where we would have commonality of membership. It might be one thing we would look at. We might look at a merger to reduce costs associated with administration.
10 We might look at a merger because the larger amount of funds under management could help us to drive down investment fees. There's any number of reasons. It's part of your strategic analysis, I suppose. You look at a potential merger partner and then work out the risks and the benefits and see how you go.

15 And determined, no doubt you would say, by reference to your general obligations as a trustee?---Yes, that would be one of the things - - -

And obviously that is to act in the best interests of your beneficiaries, ultimately?---Yes.

20 And to prefer the interests of the members over any other interests?---Yes.

And you have had some discussions – I put it broadly as discussions. You describe in your statement – you identify some other funds that you've spoken to or had
25 contact with over the last five years or so - - -?---Yes.

- - - six years in relation to mergers?---Yes.

And you mentioned one of the points was scale, that is, getting more funds under
30 management - - -?---Yes.

- - - leads to - - -?---Benefits of scale, yes.

- - - benefits in terms of lesser fees and also the ability to perhaps invest differently
35 because one has a larger base of - - -?---Correct.

- - - fees. And it's your evidence, as I understand it, that sitting here now Energy Super is continuously open to merger opportunities?---Well, we're not closed to
40 them.

Continuously open to them, I think was the language you used?---Yes, yes.

When we went to – when I took you a moment ago to some of those benefits or as set
45 out in the business plan for 2018/2019, I understand, obviously, that's what's in place at the moment but have those sort of considerations been in the mind of Energy Super for some time?---Yes, that's correct.

And, indeed, as you've said, you've had some funds with other – sorry, you've had discussions with other funds in the energy sector?---We have.

5 Am I right that there was a – I think it was precipitated by Energy Super gathered a group of what were described as energy fund alliances together in February 2016?---Yes.

That was a meeting of Energy Super itself and NESS Super?---Yes.

10 EISS Super New South Wales?---Yes.

And South Australia in Equip Super?---Yes.

15 What was the purpose of that meeting?---We – we thought it would be strategic to gather like industry funds to have a discussion about our own experience, where we were headed, what we saw as risks in the industry. I mean, our – the energy industry is going through a pretty dramatic change, as you would be aware. There's generators are changing the way that they operate. We've got introduction of new technology. So it's a really dynamic sort of area. So we thought that would be a
20 good starting point, to talk about those sort of threats to the industry, but also compare each other's current circumstances, understand a little bit about each other, explore if there was any possibilities to work together, we might be able to work together in insurance, for example. There could be any – any number of things.

25 Does that group still meet? Do you still meet with - - -?---No, it was a one-off, yes. We thought it might – might turn into something a bit more permanent but we - - -

It didn't?---It didn't, no.

30 In fact, one of the other entities there was the Energy Industry Superannuation Scheme pool. The New South Wales one. Is that right?---Yes.

35 Is that the entity that you had had some discussions with, or at least written to in May 2012 about the possibilities of having a discussion or exploratory discussions about a merger?---Who was the fund again, sorry?

The – I think it's referred to as EISS, the Energy Industry Superannuation Scheme?---New South Wales or - - -

40 That's right?---Yes, New South Wales.

And they – they said that no – that they weren't interested?---Yes.

45 At the time?---Yes, that's right.

Have you had any further discussions with them?---I believe we might have contacted Treasury, because I think they were – they were still under some State legislation.

5 That's right?---So I think we may have contacted to see what Treasury was doing, but, no it hasn't – it hasn't gone anywhere.

And you've had, again in 2012, discussions with Local Government Super?---Yes. I believe so.

10

And I think it's your evidence that, if I'm right, there were three other merger discussions that did not develop much beyond some initial work and that was with Auscoal?---We did. We had some preliminary discussions with Auscoal, yes.

15 And the Allied Unions Super Fund?---AUSTQ. Allied Union Superannuation Trust Queensland. That was a tender process, basically, and we weren't successful.

20 And Maritime Super I think was the other one you referred to?---Maritime, we had some initial discussions and we were discussing with them quite okay but that was suspended.

I think the most advanced merger proposal over the last few years would be the one with Equip Super; is that right?---That's the one that travelled the longest, yes.

25 When did those discussions commence?---Well, Equip Super were a participant in the alliance strategy day. A little while after that, in March of that year, one of our directors, David Smith, was at CMFS which is a conference of major superannuation funds and was approached by some of the directors of Equip, and said that – and this is anecdotal I suppose, but spoke to Dave about the possibility of starting some
30 discussions around possibilities of a merger.

35 That was one of the things that was on the table or was the purpose of the energy alliances meeting a month prior, wasn't it?---It was one of the things that might have been – yes, it wasn't the primary purpose but it was certainly something that could have come out of that, yes.

40 And what happened after that initial – I think it was this verbal discussion?---I believe David wrote to the board of Equip, and then there was some initial conversations about maybe director – sorry, chair and CEO, and there was a telephone conversation between our chair, Mark Williamson, and their chair, just to test the waters, I suppose.

Mark Williamson was your predecessor?---Yes, he was the chair, yes.

45 And the chairman of Equip Super was Andrew Fairley?---Andrew Fairley, yes.

A document was produced, I think, soon after which went to a board meeting which I will come to in a moment at SW-60. That is EYS.0013.0001.0090?---Yes.

And do you recall this document?---Yes, I do.

5

It was presented to a board meeting on 31 May of 2016. Perhaps I can go to page 0092. And the authors of this paper who were people, as I understand it, members of executive at both Energy Super and Equip Super. Is that right?---Correct.

10 That identified a number of benefits from a merger between the two funds?---Possible. Yes, possible benefits.

Correct. I think it - - -?---The following benefits have been identified by the merger, yes.

15

And in fact some of the matters you've already raised?---Yes.

The significant financial benefits from increased scale?---Correct.

20 In fact was the first of them. And then second I guess along similar lines:

Increased scale in investments will result in lower investment fees which will benefit accumulation members and DB employers.

25 What are DB employers?---Defined benefit.

And:

30 *... increased mass of the funds will enable the investment in product and service development to be spread over a broader base.*

?---Yes.

35 So a number of matters were there identified. And we will come back as these appear in some of the later – some of the later documentation as well. But those were positives that if – if the merger could be – could be consummated there would have been those various benefits?---Yes.

40 And that was presented to the board, as I indicated already. Perhaps I will just take you to that board paper at SW-47, which is EYS.0013.0001.0261?---Mmm.

And you will see there that you were, of course, at this meeting on 31 May as the Deputy Chair?---I was.

45 And if one goes to 0266, you will see there the update on the Equip Super merger proposal, and it says:

The chair and director Smith spoke to the paper.

That's the paper we've just looked at?---Yes.

5 And there was a robust discussion regarding proposed board numbers and make up and the minimum requirements it needs to proceed before further discussions are held with Equip super and a number of things were set out in terms of responding to a proposal?---Yes.

10 50 per cent contribution from the Energy Super Board, discussions around a proposed merger, not a takeover, board and committee meetings are to be rotated between Brisbane and Melbourne, the CEO is to be filled by Energy Super, recommend the sub-committee and the respective board to be convened to agree board composition?---Yes.

15 And Mr Williamson then wrote a letter – or the chairman, he then wrote a letter after that meeting setting out those matters to his – to his – to the board, I should say, of Equip super?---Correct.

20 And you will see that at EYS.0008.0001.1325. And the second paragraph there:

The Energy Super board were very encouraged by this report.

That's a reference to the joint work that had been done:

25 *And believe the two funds should continue to discuss and develop the merger opportunity.*

?---Yes.

30 And there you set out, amongst other things, a proposal that:

35 *...there be 10 on the board with 50 per cent coming from each fund with Energy Super's contribution being two member representatives nominated from the sponsoring unions, two employer representatives and one independent.*

?---Yes.

40 And I think it was your evidence previously that a lot of these discussions occurred between Mr Williamson and Mr Fairley. Is that right?---Yes. Prior to this point in time there had been some initial conversations between Mr Williamson and Andrew Fairley. There was also some conversations between David Smith and – because he was based in Melbourne – and Equip is a Victorian fund so David was conversing with some directors of Equip Super, to sound out the – I suppose, the state of play to
45 see what the opportunities were like, sort of a bit of background work, I suppose.

And Mr Fairley's response is the next document, EYS.0014.0001.3075. And he there indicates that the Equip board had subsequently met and is very supportive of continuing to develop this merger. And on the next page, 3076, he indicates – or he says:

5

As I indicated do you during our meeting with your trustees and your CEO in Brisbane in May, Equip is aspirant to appoint the most highly skilled board of any financial services institution in this country. In order to do that it undertook a detailed skills matrix process with Heidrick & Struggles in 2014 and implemented some of those findings during 2015.

10

?---Yes.

And skipping over the next paragraph he said:

15

As a result of this our board has achieved a strong balance between member/employer representation and skills. It is important to the Equip board there be a commitment from Energy to adopt the approach of a skills-based board. This would logically mean that in circumstances where a skills matrix has been established by the merged fund in the event that persons nominated by the unions or employers did not have the necessary skills as measured by an independent third party consultant with necessary skills then the board would retain a right to not accept the nomination and to request another nomination of individuals that did have the appropriate skills.

20

25

Do you see that?---Yes, I do.

And that seems pretty reasonable, doesn't it, as a statement?---Well, it seems – it's certainly a statement. What is not – what is not provided is any detail around what that means.

30

And - - -?---And it's certainly reasonable to have a skills-based board. We don't disagree we have a skills-based board.

35

Do you have as part – as part of that an independent third party consultant assessing the skills?---Yes, we have our board reviewed every year.

That's right. But as part of the – as part of the persons nominated by the unions or employers are they measured by an independent third party consultant to see if they have the necessary skills?---No, we – as I said earlier, we approach our skills from the collective of the board, and our board is analysed every year as to how our collective skill set is operating.

40

And I think, in fairness, I think Mr Fairley then goes on to say:

45

A process would need to be developed based on objective criteria.

?---That's right. So we weren't opposed. We just wanted to see what the criteria was. Interestingly we had better performance over those years so it's arguable that if that's a measure of skill, we were interested to see what their skills were.

5 And, in fact, after receiving that at EYS.0008.0001.1333, perhaps before I get to that, am I right that then after that the subcommittee was set up called a Project Power Committee. Is that right?---Yes.

And you were a member of that, I think?---I was.

10

And Mr Williamson's response to Mr Fairley which is on the screen now says:

...acknowledged the merger had the potential to be in all of the members' best interests and we are keen to progress discussions.

15

?---Yes.

And after that, if I recall correctly, there was actually an MOU signed between – between the parties?---Some time after that.

20

I think it was on 26 - - ?---Yes, something.

- - - of July, so shortly after that?---Yes, not long after.

25 Commissioner, I just note the time.

THE COMMISSIONER: Well, can we, given that everybody has come down from Brisbane, how much longer do we need, Mr Dinelli?

30 MR DINELLI: About 15 minutes, and I have just asked - - -

THE COMMISSIONER: I will go until half past four. I won't go past half past four but I don't see why people should have to come traipsing back down unless they have to. Let's get on with it.

35

MR DINELLI: Commissioner, I shall do just that. If I can go to EYS.0008.0003.0427. What's this document?---This was a – an analysis that we had KPMG undertake to give us some, I suppose, some data around what up until this point hadn't really been quantified. We wanted to understand from an external party with – an analysis of the two funds to see what could be gained.

40

And if one goes to .0431, one of the findings – I mean, the document speaks for itself?---Mmm.

45 But one of the findings is that:

The high level cost benefit demonstrated opportunity to conservatively provide members and employers annual cost benefits of up to \$20.5 million.

?---Yes.

5

And that would lead to 15 basis points savings for members?---Yes. Yes, 10 to 15 basis points was certainly mentioned.

And amongst other things that were identified there were:

10

The new fund size will necessitate hardening governance compliance and risk arrangements and then it would achieve additional scale by engaging with medium and small funds with the proposition that it reflects the new fund is big enough to make a difference but agile enough to work innovatively.

15

Is that something that was said in that report?---Yes.

Now, that was then considered by the Project Power – that was then considered by the Project Power Committee on 19 September 2016?---Yes. Yes.

20

Commissioner, can I just tender that document, if I may.

THE COMMISSIONER: Exhibit 5.133, KPMG project power high level assessment, 6 September '16, EYS.0008.0003.0427, exhibit 5.133.

25

EXHIBIT #5.133 KPMG PROJECT POWER HIGH LEVEL ASSESSMENT, 6 SEPTEMBER '16 (EYS.0008.0003.0427)

30

MR DINELLI: Before I go to that committee meeting, though, there was a – an email then ETU.0001.0001.0360. If you would go down to the bottom of that email, there's a reference to KPMG having completed the high level analysis?---Yes.

35

Sorry, I should say this is an email that you wrote to Mr Simpson?---Yes.

Or Simmo but that's Mr Simpson. And he was one of your fellow directors?---Yes.

And it said:

40

KPMG have completed the high level analysis of the potential merger and the options. I'm still digesting it but it seems the benefits touted take some time to flow.

45

?---Correct.

Is and then the reference to a meeting. And it says:

Mark and I are trying to pull it up but John and Dave seems to be pushing to get Equip to pull the pin, if at all.

5 What does that mean?---Okay, there's a bit of a back story, I suppose. What it means
is that there's mixed messages coming out of the negotiation around a possible
merger. We have Mark having conversations with Andrew Fairley. The initial
conversation as reported back to us by email by Mark was that "I had a conversation
with Andrew Fairley. He said that a potential killer or deal breaker would be any
10 union-nominated positions on a merged board." That was the opening exchange
between chairs in what was supposed to be a merger opportunity. So I just wanted to
put that on the record, that there's a – an exchange between chairs that indicates that
they would have trouble with any union-appointed directors on a merged fund. It
goes further to say that "We've worked for years to get rid of them and we're not
going to reopen the practice." So I just have to put my – that in – in the timeframe.

15 So - - -?---So regardless of that we had Dave Smith in Melbourne talking to directors
from Equip who were saying, "Don't worry about Fairley, that's just him. We at the
board level, we want to progress this. We want to progress with this merger. Don't
worry about Fairley." So we're getting mixed messages out of Equip. We have
20 maintained – we had maintained our position in that letter from Mark Williamson
that we would be seeking a board of 50 per cent Energy Super, 50 per cent Equip.
So by the time we get to this point in time the Project Power Committee has asked
management to get KPMG to report. It comes back. The report comes back with the
savings that are identified, so 20 million between – out of \$14 billion fund. 20
25 million is a big number but when you compare the two funds and the – it's not that
big of a deal. Mark and I are trying to pull it up. The reason Mark and I are trying to
pull it up is because my feelings were, from the very start, that this won't get over.
This will not proceed because you've got the chair of the other fund saying we will
not accept union-nominated directors on the fund. Mark and I are trying to pull it up
30 because I didn't want to expend any more money. I didn't want to expend any more
of members' money chasing a merger opportunity that I thought had been soured
from the very start. Now, on the other side, John and Dave seemed to be pushing to
get Equip to pull the pin, if at all. John and Dave were two other directors on the –
on the Energy board. John was an employer director, Dave was a union director –
35 nominated director. Both had been through the previous merger that we had
completed successfully. Both were saying to Mark and I, who hadn't been through a
merger, "This may not be exactly what it seems. It might be just Fairley trying to
achieve something." Dave was also meeting with the directors. So we're getting
mixed intel.

40 Is it – perhaps if I can cut to this: ultimately, when you had a board meeting after
this, is the position that the ETU or it's recorded in the minutes the ETU have
requested the ETU and QSU be named in the proposed constitution to secure past –
tenure past the first term of appointment. Is that right?---Correct.

45 And there was then a further board meeting on 19 November 2016. And am I right
to say in considering the merger, one of the things that you noted is that the members

would receive a 15 basis point reduction in fees?---Potentially. That – we were required to do much more deeper analysis. The KPMG report was at a very high level. To ascertain the fully equivalency of a merger would require expenditure that would be significantly more.

5

In discharging your duties to the members, however, you would have had regard to the benefits and the financial benefits they would have obtained by way of a merger?---Had regard to it, yes.

10 Now, it's around this time that – it's around this time that Mr Simpson writes to you and the CEO and the chairman, which is EYS.0004.0001.0 – sorry, before I do that, can I tender that document, I'm sorry, the email.

15 THE COMMISSIONER: Emails to and from Wilson September '16, ETU.0001.0001.0360, exhibit 5.134.

**EXHIBIT #5.134 EMAILS TO AND FROM WILSON SEPTEMBER '16
(ETU.0001.0001.0360)**

20

MR DINELLI: EYS.0004.0001.0501. And Mr Simpson here, there has been some discussion about a draft constitution. And his concern is – end of the first paragraph:

25 *I hold major concerns in respect of their proposal to appoint member directors rather than maintaining a direct election model.*

Do you see that?---Yes.

30 He said:

I have also heard the Victorian employers are real keen on having union types on their board. Again, this merger is not stacking up from our end.

35 ?---Yes, there was a bit of sarcasm evident there.

In fact – and perhaps I can tender that.

40 THE COMMISSIONER: Email from Simpson, November '16, EYS.0004.0001.0501, exhibit 5.135.

**EXHIBIT #5.135 EMAIL FROM SIMPSON, NOVEMBER '16
(EYS.0004.0001.0501)**

45

MR DINELLI: If I can then go to ETU.0001.0001.0520. And just go to the bottom of that, if I may, which is 523 – 0523. That’s the email. He – this is then forwarded by Mr Simpson, if one goes to 0521, please. Forwarded to – who is Mr Bailey?---Yes. Yes.

5

Who is he?---He’s a – he’s a politician.

And on the next page, Mr Simpson says:

10 *I’m unsure if you’re across Energy Super’s current discussions with Equip Super in Victoria about a possible merger. In any event, it has been going on now for some months.*

Sorry, I will just ask for that - - -?---Yes.

15

Continuing:

20 *The GOCs that are represented on the board will have a big say in whether or not any merger proceeds. See my comments below. We may need to talk to you about the government’s position on this prior to Xmas.*

?---Yes, I see that.

Who is the GOCs referred to?---Government-owned corporations.

25

And are they the employer representatives?---They’re some of the employer - - -

Some of the – that’s right?---Some of our major employers.

30 Are were you aware of this email the he sent to the Minister?---He cc’d it – I think he forwarded to me.

He did. You will see at the top of 0521 that it was forwarded to you?---Yes.

35 I tender that, your Honour.

THE COMMISSIONER: Emails from Simpson, November ’16, ETU.0001.0001.0520 exhibit 5.136.

40

**EXHIBIT #5.136 EMAILS FROM SIMPSON, NOVEMBER ’16
(ETU.0001.0001.0520)**

45 MR DINELLI: ETU.0001.0001.0502. If we go to 0503. You will see at the bottom there there’s an email to you from Mr Simpson. And it says:

The board selection criteria is a big one for us obviously, as are the appointment of independent directors.

?---Yes.

5

Continuing:

I will be frank, again, we do not support this merger and the more work that comes out of this process the more entrenched that view becomes. I don't know where to go from here but I'm fast getting to the stage where we want to kill it once and for all.

10

?---Yes.

15 Now, that email was forwarded to – by Mr Simpson on the previous page, so 0502, to a Stewart Traill. Who is Stewart Traill?---Stewart Traill is an organiser for the Electrical Trades Union.

20

And there is a reference to:

I will talk to Bailey down the track about the government knocking this off but it would good to start talking to Ros, etcetera.

25

Do you see that?---Yes.

Continuing:

It is all off the record. Stuff hasn't been announced publicly. My aim is not to have it happen.

30

Do you see that?---Yes.

Commissioner, can I tender that document.

35 THE COMMISSIONER: Email from Simpson, November '16
ETU.0001.0001.0502, exhibit 5.137.

40 **EXHIBIT #5.137 EMAIL FROM SIMPSON, NOVEMBER '16
(ETU.0001.0001.0502)**

MR DINELLI: Now, on 20 December at the board meeting, ultimately the directors resolve to accept the recommendation that there be a merger?---Yes.

45

Subject to Equip Super amending the constitution to meet Energy Super's needs. Do you recall that?---Yes.

Had you decided at that point that a merger was in the best interests of members?---I had in my mind that the merger would not proceed because of the entrenched opposition of the Equip chair to having any union-nominated members on the board. So I didn't think it would proceed.

5

Had you formed the view that it was in the best interests of the members for the merger to proceed?---For it to be in the best interests of the members the merger had to go through two steps. It had to go through the full successor fund transfer. If we didn't have representation on the board, we wouldn't be assured that it would go through to that full - - -

10

Who is "we"?---If Energy Super didn't have representation on a merged board we could never be sure that it would progress through to the full SFT as outlined in the KPMG report.

15

Was it ever said – was it ever put, though, by Equip Super that there be no Energy Super directors on the board?---No, they were resistant to any union-nominated directors on the board. They said that several times through conversations between Andrew Fairley and Mark Williamson.

20

The position that was put by Energy Super – I'm sorry, the position that was put by Equip Super was that there be no automatic rights for QSU and ETU to nominate board positions?---Correct.

25

And that Energy Super would have to comply with them – meaning Equip Super's board skills policy to all board appointments?---Yes, that was – that was - - -

And they were – they were non-negotiable for Energy Super?---I believe we – we had hit a point where there was non-negotiables for us and there was non-negotiables for them. They outlined their non-negotiables back in March, as it turned out to be.

30

Do you accept, though, there might be circumstances where something is in the best interests of members but might not be in the best interests of the unions?---Well, everything that unions do around superannuation, because superannuation is a right, it's a workplace right. It's workers' wages that are foregone for retirement. What the unions do around superannuation? We won it. We won it in the 80s through awards. So superannuation is very, very important to unions. It just so happens when we talk about superannuation funds that the interests of unions and the interests of members of the funds are so aligned as to be indistinguishable. It's what we do. We look after members' money through the accumulation and into retirement. If we can't be guaranteed that an anti-union employer-based fund – an anti-union employer-based fund is going to allow to have union representation on their board going forward, what's going to happen to our members in Far North Queensland, what's going to happen to our members in Cairns and Townsville. Who is going to service them?

35

40

45

Mr Williamson wrote a letter – and this will be the last document I take you to – wrote a letter on 21 December after Equip Super had said, “Well, we won’t make those changes so the merger will not proceed.” And at SW-52, EYS.0008.0001.0718, you will see that he wrote to the directors and said at
5 paragraph – the third paragraph – I’m sorry, that’s just coming up – EYS.0008.0001.0718. The third paragraph is:

10 *The board unanimously agreed the merger is still in the best interest of our members and have confirmed their commitment to continue with the merger through the process agreed upon.*

Was that the position that you took at that time?---The board agreed, yes.

15 But - - -?---I was of the view - - -

That it was in the best interest of the members.

20 THE COMMISSIONER: Let him finish?---My personal view was that it wouldn’t go ahead. But the board agreed that the merger would be in the best interests of the members, yes.

25 MR DINELLI: But because the union representation and the compliance with the board skills policy couldn’t be secured, the merger didn’t proceed?---Yes, because Equip Super decided they would not merge with us under those circumstances. The employers who hold the shares of that fund held on trust by Andrew Fairley would not agree to change the constitution. So the Equip Super trustee, the holding company, all of the shares in the holding company are owned by the employers. During this phase, just prior to this phase, Andrew Fairley was consulting with those stakeholders. There was a consultation process going on. They refused to alter the
30 constitution. Came back and said, “No, it’s not going to happen.” So we decided that we would still write to them and say, “We still think it’s in the best interest of the members. Maybe you could have another chat to the employers.” We also offered to have some of our employer – employers talk to their major employers. Because our fund doesn’t operate like that. We have a very co-operative fund. Our
35 member sponsor organisations, our unions and our employers get along when it comes to members’ best interests around superannuation. So moving to a fund where you have this completely different set-up where the employers hold all the shares in the company and won’t alter their constitution to allow the shares to be held by the directors on behalf of members, that rings alarm bells.

40 Nothing further.

THE COMMISSIONER: Yes, Mr Dinelli. Mr White, is there anything you wish to raise?

45 MR WHITE: No.

THE COMMISSIONER: Mr McKenna.

MR McKENNA: Nothing from me. Thank you, Commissioner.

5 THE COMMISSIONER: Thank you very much for attending, Mr Wilson. And we can send you on your way back to Brisbane?---Thank you very much.

Or Queensland, at least?---It is Brisbane, by the way.

10

<THE WITNESS WITHDREW

[4.34 pm]

15

THE COMMISSIONER: 9.30 on Monday.

MATTER ADJOURNED at 4.34 pm UNTIL MONDAY, 13 AUGUST 2018

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