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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

9.45 AM, MONDAY, 16 APRIL 2018

Continued from 23.3.18

DAY 11

MS R. ORR QC appears with MR M. HODGE QC and MR M. COSTELLO Counsel Assisting with MR M. HOSKING
MR J. SHEAHAN QC appears with MS P. NESKOVCIN QC for Westpac
MR P. CRUTCHFIELD QC appears with MR R. HOLLO SC and MR G. REGAN for AMP Limited

THE COMMISSIONER: Ladies and gentlemen, as with the last round of hearings, those who have leave to appear have been notified of that fact. They, in turn, where they have counsel appearing, have told me who their counsel are. There's, therefore, no occasion for separate announcement of appearances. Again, there were some applications for leave to appear by individuals, which I did not allow. The solicitors for the Commission have written to each of those persons concerned to try to explain, as best we can, why it is that their application for leave to appear has not been granted.

I think I am right to say that each of those who sought leave to appear, but whose application was refused, was a consumer who had a particular matter that he or she wished to bring to the attention of the Commission. I say to them, as I say to others, and have said previously, that the submissions that we receive through the website are particularly important to us. We do look at them, we do try to digest them, and to become aware of the issues that individuals are seeking to raise with us. Now, Ms Orr.

MS ORR: Commissioner, this is the second round of public hearings for this Royal Commission, and this round of hearings will inquire into aspects of the financial advice industry. Financial advisers provide advice on areas of consumer finance, investing, superannuation, retirement planning, estate planning, risk management, insurance and taxation. The financial advice industry has been the subject of considerable scrutiny in recent years. There is good reason for this scrutiny. Work released by ASIC in 2010 suggests that between 20 and 40 per cent of the Australian adult population use or have used a financial planner.

In the 12 months to July 2016, approximately 2.3 million Australians aged 18 and over received advice from a financial planner. This round of hearings will explore some of the issues that directly impact on Australians in their dealings with the financial advice industry Including the charging of fees for financial advice that is not provided or not provided in full, which we will refer to as fees for no service, The provision of inappropriate financial advice, and instances of improper conduct by financial advisers, including misappropriation of customer funds.

We will also examine the disciplinary and regulatory regime for dealing with misconduct by financial advisers. The structure of this opening statement is as follows: we will begin by explaining some of the key features of the financial advice industry. Second, we will touch on some of the events in the financial advice industry in recent years, focusing on events involving Storm Financial and Commonwealth Financial Planning Limited. Third, we will explain some of the key features of the legal framework governing the provision of financial advice which has been the subject of considerable reform in recent years, and is in the process of undergoing further reform.

Throughout these hearings, we will invite consideration of whether the reforms that have been made to date have achieved their intended purpose. Fourth, we will

summarise what consumers have told the Commission about their experiences with financial advice through public submissions submitted via the Commission's online portal. Fifth, we will summarise some of the regulatory outcomes obtained in recent years in respect of misconduct in the financial advice industry. Sixth, we will explore what the two external dispute resolution bodies who deal with disputes relating to the provision of financial advice, the Financial Ombudsman Service and the Credit and Investments Ombudsman have told the Commission.

As we noted in the first round of public hearings, these bodies are being replaced later this year with a unified body but they have provided information to the Commission about a body of complaints from consumers going back almost 10 years. Seventh, we will explain the roles of the two key industry bodies, being the Financial Planners Association and the Association of Financial Advisers. Eighth, we will summarise what financial services entities have acknowledged to the Commission as their own and their related entities misconduct, and conduct that has fallen below community standards and expectations. Much of the information we will refer to was provided in responses to the letters that you, Commissioner, sent to a range of entities late last year and early this year.

Finally, we will briefly address the nature of the evidence that will be heard over the next two weeks, giving an overview of the case studies that the Commission will be considering. We will explain why each of the particular topics to be explored in these hearings is of significance to consumers and to financial services entities, and why these case studies have been chosen. We will highlight the key themes and questions that we see running through these case studies, upon which we will invite written submissions at the end of these hearings.

We turn first to the key features of the Australian financial advice industry. The financial advice industry is of significant value to the Australian economy. In 2015 to 2016, Australia's financial advice sector was estimated to be worth $4.6 billion in revenue. The number of participants in the financial advice industry is also significant and has grown substantially over the course of the past decade. In November 2009, there were just over 18,000 financial advisers in Australia working for 749 advisory groups operating over 8000 practices. As at 1 April this year, there were 25,386 financial advisers registered in Australia, an increase of around 41 per cent from the number recorded in late 2009.

As at 1 June last year, there were 5822 financial services licensees that offered financial advice to consumers in Australia. The financial advice industry is highly concentrated. As at late 2017, the top five entities, the four major banks and AMP, collectively held a market share of about 48 per cent by industry revenue. About 30 per cent of the total number of financial advisers on ASICs Financial Advisers Register worked for one of the major banks. 44 per cent of advisers, both aligned and non-aligned, operated under a licence controlled by the largest 10 financial institutions. The majority of financial advisory firms were small, with about 78 per cent operating a firm with less than 10 financial advisers, and about 90 per cent with less than 50 advisers, and 95 per cent with less than 100 financial advisers.

The average number of financial advisers operating under a particular financial services licence was 34 individuals. New South Wales has the largest share of financial advice practices with over 30 per cent, followed by Victoria with over 20 per cent, Queensland with under 20 per cent, Western Australia with over 10 per cent, South Australia under 10 per cent, the Australian Capital Territory, Tasmania and the Northern Territory all with under 10 per cent. There are a number of key participants in the financial advice industry to whom we will be referring throughout these hearings. These participants include financial advisers, also known as financial planners, holders of Australian financial services licences, and dealer groups.

A financial adviser may be licensed directly by ASIC to provide advice or may be an employee of an organisation licensed by ASIC to provide advice, or may operate as an authorised representative of an organisation licensed by ASIC to provide advice. Some financial advisers operate in dealer groups which are also known as financial advisory networks. Where advisers operate in this structure, a group corporate entity holds the relevant licence permitting the financial advisers who are members of the dealer group to operate as its authorised representatives and provide financial advice to consumers on its behalf.

Such financial advisers provide advice to consumers under both the licence and the commercial brand of the dealer group. Financial advisers and dealer groups can be classified as either independent or non-aligned or as aligned with a financial institution, such as a bank or a wealth management services provider. There are various ways alignment can occur, including through vertical ownership structures, contractual relationships, commissions and other forms of remuneration. Financial advisers can only use the terms "independent" or "non-aligned" or similar words or expressions in relation to their business if they meet certain legislative requirements.

These include not receiving commissions, volume-based payments, other gifts or benefits from an issuer of a financial product, and operating without any conflicts of interest arising from their associations or relationships with a product issuer. Financial advice is provided in relation to a range of topics, pursuant to the relevant conditions of the relevant licence. The five main types of financial advice sought by consumers measured as a percentage of the Australian financial advice industry's revenue for the 2016 to 2017 year were superannuation and retirement advice, being advice that seeks to help individuals plan for their financial situation in retirement. This advice accounted for approximately one-third of industry revenue.

Loan and investment advice, being advice for determining the most suitable loan product and financial asset allocation for a consumer. This advice accounted for approximately a quarter of industry revenue. Self-managed superannuation fund advice. This advice primarily concerns the advice received to support investment and administration decisions made by the trustees or directors of a corporate trustee for a self-managed superannuation fund, and it accounted for approximately one-fifth of industry revenue. There are also other services, including estate planning, which accounted for approximately one-tenth of industry revenue and tax advice being personal financial product advice that also deals with the liabilities, obligations or

entitlements of a person under taxation laws. This advice accounted for almost one-tenth of industry revenue.

Of the approximately 25,000 financial advisers registered in Australia, 8704 have told ASIC that they have completed a degree at bachelor level or above, representing 35 per cent of all advisers. We turn to events in the financial advice industry in recent years. There have been several prominent scandals in Australia in relation to the provision of financial advice in recent years. Two of the most prominent of these scandals involved Storm Financial and Commonwealth Financial Planning. Storm Financial was a financial advice company based in Townsville in Queensland. Since around 1994, the Storm Financial investment model encouraged investors to borrow against the value of their home and to use the loan moneys to invest in indexed share funds.

Storm also encouraged investors to take further investment steps based on moves in the share market. The advice was one size fits all investment advice. In 2009, Storm collapsed with losses totalling over $3 billion. By the time of its collapse, approximately 3000 of its 14,000 clients had suffered significant losses as a result of implementing the financial advice provided. Many of the investors were retired or close to retirement with few assets and little income. Some of these investors lost their family homes or had to postpone their retirement for lengthy periods.

In 2010, ASIC brought proceedings against the founders of Storm, Emmanuel and Julie Cassimatis. ASIC alleged the Storm investment model was flawed for investor who were retired or approaching retirement with little or no income and few assets. The case centred on a sample of investors who had been advised to invest in accordance with the Storm model. In August 2016, the Federal Court found that the Cassimatises had exercised their powers in ways which caused or permitted inappropriate advice to be given. In permitting the Storm investment model of advice to be provided, the court found they had breached their duties of care and diligence under the Corporations Act.

The court found that by failing to give reasonable consideration to the circumstances of the relevant investors, Storm provided inappropriate advice which exposed the relevant investors to devastating consequences. In March 2018, the Federal Court imposed a penalty of $70,000 from a maximum penalty of $200,000 on each of the Cassimatises and ordered they each be disqualified from managing corporations for seven years. The court found that the Cassimatises had focused on managing Storm's profitability and paid too little attention to the interests of vulnerable investors.

In the interim, ASIC had entered into settlement agreements with various institutions with the effect of providing compensation in relation to losses suffered on investments made through Storm. In 2012, ASIC had entered into a settlement agreement with CBA to make available up to $136 million as compensation to many CBA customers who borrowed from the bank to invest through Storm and suffered

financial losses. This was in addition to payments of approximately 132 million that CBA had already provided to Storm investors under its resolution scheme.

In 2013, ASIC had intervened in a class action brought against Macquarie Bank in respect of Storm as it had concerns about the fairness of settlement arrangements. The Full Federal Court agreed that the distribution of the settlement sum was not fair and reasonable to all group members and a revised settlement arrangement was arrived at whereby Macquarie Bank agreed to pay 82.5 million by way of compensation and costs. And in 2014, ASIC had entered into a settlement agreement with the Bank of Queensland to pay approximately $17 million as compensation for losses suffered on investments made through Storm.

The second prominent scandal that we will refer to involved Commonwealth Financial Planning Limited. Allegations of misconduct within Commonwealth Financial Planning were unearthed by a whistleblower, Mr Jeff Morris, who made a disclosure to ASIC in 2010. Mr Morris reported that certain CBA financial advisers were advising clients to invest in high risk but profit-generating products that were not appropriate for them. And in some cases, switching products without the clients' permission. Mr Morris also reported that in some cases this involved forging clients' signatures on documents.

When the global financial crisis occurred, thousands of clients of Commonwealth Financial Planning, many of whom were nearing retirement or already retired, lost millions of dollars as a result of this misconduct. More than $22 million in compensation was paid to clients who had received inappropriate financial advice from two Commonwealth Financial Planning advisers, Mr Don Nguyen and Mr Anthony Awkar. However, it later became apparent that the misconduct extended beyond these two advisers and CBA subsequently implemented a second compensation program. In October 2011, ASIC accepted an enforceable undertaking from Commonwealth Financial Planning which included the review of the advice given to clients by an additional 16 advisers, and any compensation to clients arising from that review.

Three additional Commonwealth Financial Planning advisers and six advisers from another CBA advice arm, Financial Wisdom Limited, were subsequently identified as also having provided inappropriate advice, and their clients were also included in CBAs compensation program. CBA voluntarily commenced the Open Advice Review Program in July 2014. The program was open to customers of Commonwealth Financial Planning and Financial Wisdom between 1 September 2003 and 1 July 2012. As at 31 December last year, the Open Advice Review Program had conducted 8658 assessments, 2503 of which were assessed as requiring compensation. A total of $37.6 million in compensation has been offered, including negotiated settlements and refunds to address incorrect fees and implementation errors.

We turn to the legal and regulatory framework for the financial advice industry. The provision of financial advice to Australian consumers is governed by a complex and

interlocking set of legal rules and remedies derived from legislation and the general law. The relevant legislation is the Corporations Act and the ASIC Act, and the extensive regulations and legislative instruments made pursuant to them. This legislation coexists with and interacts with the general law including contract, tort and fiduciary principles. The contemporary legal framework was progressively set in place following recommendations from the 1997 Financial System Inquiry chaired by Mr Stan Wallace.

In 1998 ASIC was formed and took responsibility for consumer protection in the financial sector under part 2, division 2 of the ASIC Act. In 2001, the Financial Services Reform Act was passed. Among other things, this Act established the current licensing regime for holders of Australian financial services licences. It imposed prescriptive conduct and disclosure obligations on financial advice providers dealing with retail clients and put in place requirements for provision of product disclosure statements for financial product sales. The regime originally created by this Act has since been extensively refined and reformed with the result that it is now highly detailed, complex and specific. It has been described by some as obscure and convoluted.

The legislation defines "financial products" and "financial services". A particular type of financial service is providing financial product advice. A person provides financial product advice when they give a client a recommendation or statement of opinion or a report of either of those things that is intended to influence a person in making a decision in relation to a particular financial product or class of financial product. The legislation defines two types of financial product advice: personal advice, which is advice given to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs, and general advice, which comprises all other financial product advice.

In general, a person may only provide personal advice or general advice if they hold an Australian financial services licence or are a representative of a person who holds such a licence. The regulatory framework for financial advice contemplates that there will usually be two or three separate entities involved in the provision of personal advice to a retail client. Depending on the business structure, they will be either the financial services licensee, which is usually a body corporate, and an individual, who is an officer or employee of the licensee acting as its representative in providing advice, or an individual who is an authorised representative of the licensee, or a corporate authorised representative and an individual who is an authorised representative of the licensee.

An entity that holds an Australian financial services licence will be subject to a number of general obligations under the Corporations Act, including the requirements in section 912A of that Act. Among other things, a financial services licensee must:

> *...do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly, have in place adequate*

arrangements for the management of conflicts of interest that may arise in relation to the provision of financial services as part of the financial services business of the licensee or its representatives, and take reasonable steps to ensure that its representatives comply with the financial services laws.

Financial advisers are also subject to a number of specific obligations under the Corporations Act and the ASIC Act. Several of these obligations came into effect on 1 July 2013 with the introduction of the Future of Financial Advice Reforms. The FOFA reforms, as they have come to be known, arose in response to the 2009 Inquiry into Financial Products and Services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services, which considered, amongst other things, the Storm Financial scandal. We will outline some of the key obligations under the FOFA reforms.

First, since 1 July 2013 when providing personal advice to a retail client, a financial adviser had an obligation to act in the best interests of the client in relation to the advice, and an obligation only to provide advice if it would be reasonable to conclude that the advice is appropriate to the client. Second, where a financial adviser provides personal advice, and sometimes also for general advice, the client must be provided with a financial services guide before the financial advice is provided. A statement of advice must generally also be given setting out prescribed information, including the basis on which the advice was given and any interests, whether monetary or not, and whether direct or indirect, that might be reasonably capable of influencing the advising entity or any of its associates in the provision of the advice.

Third, since 1 July 2013, financial advisers have been prohibited from receiving particular benefits known as conflicted remuneration. A benefit will be conflicted remuneration if it could reasonably be expected to influence the choice of financial product recommended by the financial adviser, or to influence the financial advice given by the adviser. An example might be a commission earned where the adviser recommends a particular product. However, there are a number of exceptions to the conflicted remuneration prohibition. One significant exception relates to life insurance commissions. Financial advisers can continue to receive commissions in relation to life insurance products, although changes to this arrangement have commenced on 1 January this year.

Another significant exception is referred to as grandfathering. A financial adviser can generally continue to receive conflicted remuneration if it is paid under an agreement that was entered into before 1 July 2013. Fourth, since 1 July 2013, financial advisers have been subject to additional disclosure obligations in circumstances where they charge ongoing fees to clients. An adviser who charges ongoing fees must provide an annual fee disclosure statement and must give clients the option to opt in to the ongoing fee arrangement every two years.

Fifth, financial advisers are also subject to statutory prohibitions on unconscionable conduct and misleading or deceptive conduct. Further, the ASIC Act contains two

implied warranties that are also relevant to the provision of financial advice. The first warranty is implied into every contract for the supply of financial services to a consumer. It is a warranty that the services will be rendered with due care and skill. The second warranty applies when a consumer makes known to the supplier of a financial service any particular purpose for which the service is required, or the result that the customer wants to achieve.

The implied warranty in these circumstances is that the services then supplied will be reasonably fit for that purpose, or are of such a nature and quality as to achieve that result. A number of law reforms are currently underway. Reforms to lift the professional, education and ethical standards of financial advisers were announced in February last year. The reforms include compulsory education requirements, supervision for new advisers, a code of ethics for the industry, an industry exam, and ongoing professional development obligations.

A Commonwealth standard setting body, FASEA, will be established to develop these requirements and govern the professional standing of the financial advice sector. The new requirements will commence on 1 January next year. From this date, new advisers will be required to hold a relevant degree before they are eligible to commence the supervision year and to sit the exam. Existing advisers will have two years to pass the exam and five years to reach a standard equivalent to a degree. The code of ethics will not commence until 1 January 2020. Reforms to increase the accountability of financial product issuers and distributors were announced in December 2016 with a draft Bill released in December 2017.

This Bill adopts two key proposals from the Murray Financial Services Inquiry, the introduction of design and distribution obligations on issuers and distributors, and a product intervention power for ASIC. It is intended to ensure that financial products are targeted and sold to the right consumers, and where products are inappropriately targeted or sold, ASIC will be empowered to intervene in the distribution of the product to prevent harm to customers. Legislative changes in relation to ASIC are also in progress. The ASIC Industry Funding Model which recovers costs of ASICs regulatory activities from industry commenced in July last year with further reforms to come.

The ASIC Enforcement Review was established in October 2016. During 2017, it consulted on, among other things, industry codes in the financial sector, and ASIC banning powers. All of the law we have referred to is complemented by a suite of secondary material, including guides produced by ASIC, industry codes of conduct, and the practices adopted by external dispute resolution bodies. We will refer to relevant ASIC regulatory guides throughout these hearings. The legislative framework for the financial advice industry is the subject of detailed consideration in Background Paper 7 which was prepared by Professor Pamela Hanrahan and is available on the Commission's website. The Commission welcomes comments on that the paper which may be provided to the office of the solicitor assisting the Commission.

We turn to the information we have received from members of the public in relation to financial advice. We make some observations about the public submissions. The types of conduct that have been referred to in these submissions include conduct that is relevant to the issues we will be canvassing throughout these hearings. The public submissions have referred to instances of Australians being charged fees for no service by financial advisers, including continuation of fees for ceased services, fees for premium services that were not received, and fees for advice that has not taken the clients' needs into account. One example involved a customer being charged premium fees for a managed investment account when deposits were held in a zero growth cash account over a period of 10 years.

A former financial adviser reported several instances of former clients continuing to pay annual review and other service fees despite there being no adviser assigned to their account following the adviser's departure from the company. A significant proportion of the submissions received relate to inappropriate advice received from financial advisers. Many submissions refer to financial advisers providing advice encouraging Australians to engage in lending they are not capable of servicing over the long term. Other themes from the public submissions include inappropriate advice in relation to investing savings and funds borrowed against private property where the customer has requested conservative or low-risk investments.

Members of the public have told us that they have been led to invest in high-risk investment schemes that were inappropriate for their individual circumstances, which has caused substantial losses over short periods of time. In one example, a couple approaching retirement who had sought financial advice to set up an allocated pension fund were convinced to set up a diversified portfolio and lost approximately $170,000 over the next 17 months. Members of the public have lodged submissions about advice received where they could not reasonably be expected to understand or manage the ongoing risk associated with the investment. These include submissions from vulnerable people such as elderly people and people with a disability.

Members of the public have also lodged submissions about advice pressuring them to consolidate or roll over their existing superannuation into an in-house superannuation product. In one example, a couple who paid approximately $1000 to a bank for the provision of a financial advice plan, told the bank that they did not want to transfer their superannuation into another fund as they were enjoying a good return rate and low fees. The adviser's plan, nonetheless, recommended the couple move their superannuation into a higher fee account and recommended financial products exclusive to that bank.

Members of the public have also raised concerns in their submissions about actual or perceived conflicts of interest between their financial adviser and a financial services entity. Members of the public have raised concerns about a lack of transparency in relation to the financial adviser's role and their remuneration arrangements with a particular financial entity. Members of the public are concerned that financial advisers are often only recommending particular in-house or commissioned products.

A number of submissions refer to financial advisers engaging in improper conduct in order to drive greater investment, in particular, in-house products.

This conduct includes falsifying documentation to support higher levels of lending or more aggressive investment strategies. One submission concerned a retired couple who sought increased returns over general pension funds available through their bank. Their adviser falsified their needs analysis and put them in high-risk investments that dropped significantly in value over a short period. When the couple sought to protect their remaining assets from further loss, the adviser could not be contacted to resolve the issue for almost a year.

We turn to the work of ASIC in connection with the provision of financial advice. ASIC is the key regulator providing oversight and enforcement in relation to the financial advice industry. Commissioner, you will hear from Mr Peter Kell, Deputy Chair of ASIC, immediately following this opening statement, about ASICs work in this area. ASIC has told the Commission that since 1 January 2008, it is aware of $383.117 million of compensation being paid to clients who have suffered financial loss as a result of the provision of financial advice, or as a result of a failure to provide ongoing services as part of an arrangement to receive financial advice.

ASIC has told the Commission that as at 28 February this year, approximately 305,946 customers have been paid or agreed to be paid a total of $216.421 million by five entities in compensation as a result of fees paid for no service. Of this total amount, 117.8 million has been paid by CBA, 49.314 million has been paid by ANZ, 41.313 million has been paid by NAB, 4.715 million has been paid by AMP, and 3.276 million has been paid by Westpac. Each of these entities estimate that they will pay further compensation yet with the total compensation that will be paid to customers across these five entities being estimated at approximately $218.939 million.

Across these entities, more than 310,000 customers have been affected, with a number of the entities still considering the total number of affected customers. ASIC has also told the Commission that since 1 January 2008 in respect of authorised representatives, employees of licensed entities, or other individuals providing financial services, it has obtained 60 enforceable undertakings and 39 negotiated outcomes; cancelled 116 financial services licences, and suspended 27 more; imposed additional licence conditions on 18 licensees; obtained banning orders against 387 individuals; issued 14 infringement notices for misconduct imposing penalties totalling $149,000; commenced 12 civil penalty proceedings which have led to the imposition of penalties totalling $23.64 million; and commenced 50 criminal proceedings.

A number of these regulatory outcomes relate to the provision of inappropriate advice, including 31 enforceable undertakings and nine negotiated outcomes, seven licence cancellations and two suspensions; 75 banning orders; eight civil penalty proceedings leading to the imposition of penalties totalling $23.1 million; and two criminal proceedings. We turn, Commissioner, to the submissions provided by the

two principal external complaints resolution bodies currently operating in the financial advice area. These are the Financial Ombudsman Service and the Credit and Investments Ombudsman. Financial services entities can elect to be members either of FOS or the CIO.

Each of the entities the subject of the case studies to be explored in these hearings are members of FOS, the Financial Ombudsman Service. The Financial Ombudsman Service told the Commission that as at 30 June last year, around one-quarter or 27 per cent of its 13,422 members were financial advisers. This group made up the largest proportion of FOS membership. FOS told the Commission that in 2016 to '17, it dealt with 1681 disputes in relation to investments and advice. These involved complaints about financial advisory services, managed investment funds, stock broking, trading in derivatives, options and crypto currency and managed investments schemes such as time share, horse racing syndicates and agricultural schemes.

Of the 626 disputes about advice accepted by FOS in 2016-17 around half were in relation to a financial adviser. The most common complaints to FOS in relation to financial advisers concerned inappropriate advice and failures to follow customer instructions. FOS gave the Commission some examples of the sorts of disputes they have dealt with, which included instances where risk profiling practices and procedures had not appropriately addressed the client's attitude to risk or capacity for loss and instances where a financial adviser has not understood the product it was recommending, and as a result has not adequately explained the features and risks associated with the product.

The Credit and Investments Ombudsman told the Commission that of the complaints it received about financial advisers the largest proportion was about inappropriate advice, around 39 per cent. Followed by excessive or incorrectly charged fees, 28 per cent of complaints, conflict of interest, around 15 per cent of complaints, and failure to follow a customer's instructions, around 11 per cent of complaints. The Credit and Investments Ombudsman provided the Commission with some examples of systemic issues or serious misconduct which including advising consumers to borrow against the equity in their homes in order to invest in managed investment funds without any reasonable basis, advising consumers to establish a self-managed superannuation fund where such advice was not appropriate for the customer's personal financial circumstances.

Advising customers to purchase investments which were not appropriate for their personal circumstances, and advising customers to invest in property development schemes in which the authorised representatives had an undisclosed interest. The Association of Financial Advisers or the AFA is a professional association with approximately 4300 members, the majority of whom are practising financial advisers who are authorised representatives of licensees. The AFA told the Commission that membership of professional associations has increased significantly in the last 10 years. The AFA told the Commission it has its own recognised professional designation, its own code of conduct, a formal complaints process, and disciplinary

procedures. The Commission will hear evidence from the AFA about its disciplinary processes for responding to misconduct by financial advisers later in these hearings.

The Financial Planning Association of Australia or the FPA is another professional association which represents the professional interests of financial planners. There are over 13,000 members or affiliates of the FPA. The FPA has established an independent body – the Conduct Review Commission – for the purpose of investigating complaints and managing disciplinary proceedings to ensure that members are held accountable to the FPA code of professional practice and code of ethics. The FPA has provided the Commission with statements of reasons for determinations issued by the Conduct Review Commission since 1 January 2008. The majority of these relate to inappropriate advice given by financial advisers, including failing to adequately explain risk to clients and failing to take personal circumstances into account. The Commission will also hear evidence from the FPA about its disciplinary processes for responding to misconduct by financial advisers later in these hearings.

We turn to the information provided to the Commission by financial services entities about whether their own conduct has constituted misconduct or conduct falling below community standards and expectations. This information has been provided in response to the letters from you, Commissioner, sent late last year and early this year asking entities to identify any misconduct it had engaged in, or conduct falling below community standards or expectations since 1 January 2008. We will summarise aspects of the responses from these entities, the entities that are the subject of the case studies in these hearings. In doing so, we will, again, refer to events of actual misconduct or conduct falling below community standards and expectations that have been acknowledged.

It should, again, be noted that many of these acknowledged events of misconduct or conduct falling below standards and expectations, affected large numbers of customers. In some cases, thousands of customers, and the event may well have extended over the course of a number of years. We will deal with the responses from the entities relevant to these case studies in alphabetical order. We start with AMP and its related entities which have provided three submissions to the Commission. AMP told the Commission that its advice business authorises the provision of financial advice services by approximately 2800 financial advisers across Australia who run approximately 1500 financial advice practices through AMPs various advice licensees.

Over half of these financial advisers are licensed with AMP Financial Planning, approximately 1000 are licensed with Charter Financial Planning, or Hillross Financial Services. AMP acknowledged in its submissions that it has engaged in conduct that it characterised as possible misconduct or conduct falling below community standards and expectations in relation to the provision of financial advice. We give some examples of its acknowledgements. First, AMP made a series of acknowledgements of conduct that it described as involving possible

contraventions of the Corporations Act and the ASIC Act in relation to fees for no service.

AMP acknowledged 196 events across 14 AMP advice licensees of advisers failing to provide customers with services for which they had paid during the period from 1 July 2008 to 30 June 2015. This resulted in $193,519 being paid to customers in compensation. AMP also acknowledged the following six events which involved an AMP licensee continuing to charge a customer fees for service that were not provided by the licensee or the adviser during the period from 1 July 2008 to 30 June 2015. First, clients were charged ongoing service fees without receiving services after the client's adviser sold the rights to the service and the right to be paid by the clients to an AMP licensee under a contractual arrangement sometimes referred to as the buyer of last resort.

Upon acquisition by the licensee, the clients were placed into a central pool. For so long as the clients remained in the central pool, the clients did not receive services, but AMP licensees continued to charge fees to approximately 14,000 clients in this pool. In some cases, this was because of a systems error, but in others, it was because AMP applied an internal business rule that clients could continue to be charged fees for 90 days. Approximately $3.69 million has been repaid to customers. Second, clients were charged ongoing service fees but did not receive service in circumstances where the client's adviser had departed AMP and AMP decided to ring-fence the clients of the former adviser.

As at 13 February 2018, approximately 10,685 customers had been identified as affected by this conduct and AMP estimated that approximately 1.08 million will be repaid to customers as a result of this conduct. Third, customers were charged ongoing service fees after an adviser's authorisation had been terminated. As at 13 February this year, approximately 3108 customers had been identified as affected by this conduct, and approximately $1.2 million will be repaid to these customers. Fourth, AMP acknowledged that it had inadequate processes to ensure delivery of ongoing service fees where customer registers were acquired by one AMP practice from another AMP practice.

As at 13 February this year, approximately 1167 customers were identified as having been affected by this conduct, and approximately $1.022 million has been repaid to these customers. Fifth, AMP acknowledged that it had incorrectly charged ongoing service fees where an AMP advice licensee had acquired the rights associated with a client register but provided no services for the fees that were being charged. As at 13 February this year, approximately 27 customers have been identified as affected by this conduct, and $47,000 has been repaid to those customers.

Sixth, AMP acknowledged possible misconduct in relation to its reporting to ASIC of its charging of fees for no service. AMPs conduct in relation to charging fees for no service will be examined further in one of the case studies in these hearings. Second, in respect of inappropriate advice and improper conduct by financial advisers, AMP acknowledged that since 2009 it has identified 81 advisers with

potential serious compliance concerns. This is a phrase defined by ASIC as including circumstances where a person has engaged in conduct that is dishonest, illegal, deceptive, or fraudulent, or gross incompetence or gross negligence.

AMP also acknowledged that in this period it had identified 440 advisers with potential other compliance concerns, a phrase defined by ASIC as including circumstances where a person has engaged in conduct that would be a breach of internal business rules or standards, which results in an adverse finding from audits conducted by or for the licensee, or which results in actual or potential financial loss to clients as a result of the advice received. AMP acknowledged that inappropriate advice by 14 advisers between 1 January 2009 and 30 June 2015 had resulted in compensation being paid to 1079 customers. The amount of the compensation was not provided. AMP also acknowledged misconduct which occurred during the period from March 2010 to September 2014, that it described as insurance rewriting conduct. This was said to involve instances where an authorised representative recommended to a customer that they cancel their existing AMP life insurance policy and replace it with a new AMP life insurance policy which enabled the authorised representative to collect the maximum rate of upfront commission payable.

That commission was higher than the commission that would have been payable had the policies been transferred using an internal transfer function. AMP acknowledged that one former adviser had engaged in this conduct approximately 57 times in respect of 49 clients, leading to compensation for seven customers of $61,777. This conduct is the subject of ongoing investigations by ASIC. In the course of those investigations, five other advisers have been identified as having engaged in the same conduct with two of those advisers now banned by ASIC.

AMP provided a supplementary submission in which it acknowledged further identified possible misconduct, including 126 additional advisers who had engaged in possible misconduct, such as charging fees for no service, or providing inappropriate advice. Of these advisers, AMP identified only one as currently being involved with its remediation program. AMP also spoke of 28 further advisers who had engaged in conduct that breached a statute, regulation, standard or code. The provision of inappropriate financial advice by three advisers associated with AMP, each of whom AMP has acknowledged engaged in conduct that it reported to ASIC as giving rise to serious compliance concerns, will be the subject of a case study in these hearings.

We turn next to ANZ and its related entities which have provided two submissions to the Commission. Yesterday, ANZ notified the Commission of a number of errors in parts of these submissions that were relevant to this hearing block which concerned, among other things, the number of authorised representatives of its aligned dealer group companies who had failed to provide periodic review services over a specific period. We will return to this correction. ANZ told the Commission that its wealth division provides financial advice to approximately 285,000 Australians through a network of approximately 872 authorised representatives, and employed financial advisers.

ANZs advice business is conducted by ANZ Banking Group Limited under the trading name ANZ Financial Planning, and by three subsidiaries, being Financial Services

Partners, RI Advice Group, and millenium3. ANZ acknowledged that it has engaged in misconduct and conduct falling below community standards and expectations relating to the provision of financial advice. We give some examples of ANZs acknowledgements. First, ANZ acknowledged misconduct in relation to fees for no service. ANZ acknowledged that between 2006 and 2013, more than 10,000 Prime Access customers paid fees for documented annual reviews that were never provided by ANZ financial planners.

ANZ acknowledged that it had compensated these 10,135 affected customers a total amount of $46.769 million in respect of this misconduct. ANZ also acknowledged that it had identified failures by four of its authorised representatives to provide documented annual reviews to 691 customers between May 2013 and April 2016. In the corrected submissions provided to the Commission yesterday, ANZ acknowledged that these failures involved eight rather than four of its authorised representatives, periodic reviews rather than annual reviews, and 813 rather than 691 customers. ANZ also told the Commission yesterday that there were also other authorised representatives of their aligned dealer groups in respect of whom annual audits or compliance reviews indicated isolated incidents of non-delivery of ongoing advice services as contractually required.

ANZ also acknowledged that from 2003 to 2015, certain entities associated with ANZ deducted fees from the accounts of about 2900 members of managed investment schemes and superannuation funds. The fees were supposed to be for ongoing services provided to each member by a financial adviser, but none of the members had an allocated financial adviser, and as a result none of the members received any services. The total fees deducted from the accounts of these members were $931,647. ANZ also acknowledged that between June 2007 and August 2016 service fees were deducted from customers' accounts in amounts or at rates in excess of those quoted in their service agreements.

This affected approximately 4035 customers to a total cost of $4.5 million. During this time period, ANZ also continued to deduct ongoing service fees from the accounts of certain customers who had cancelled their services. The total number of customers affected by this event has not yet been determined. At this stage of its investigation, ANZ believes that this event affected at least 198 customers with a cost to those customers of at least $564,000. In the weeks prior to these hearings, on 29 March this year, ANZ entered into an enforceable undertaking with ASIC in respect of the fees for no service misconduct relating to its Prime Access customers.

The enforceable undertaking requires ANZ, among other things, to pay a community benefit totalling – I'm sorry, a community benefit payment totalling $3 million to provide an audited attestation from ANZ senior management to provide reasonable assurance that the bank has, since 2014, provided documented annual reviews to

customers who were entitled to such reviews, and also to provide further audited attestations from senior management as to the improvements that the bank has made to its compliance systems and processes, and that the design and implementation of those systems and processes will seek to ensure documented annual reviews are provided in accordance with the ANZ Prime Access package.

In addition to its acknowledgements of misconduct in relation to fees for no service, ANZ also made acknowledgements in respect of inappropriate advice and improper conduct by financial advisers. ANZ acknowledged that in response to a notice issued by ASIC in 2015, it had identified 39 advisers who were employed or authorised by ANZ who had engaged in improper or non-compliant conduct between 1 January 2009 and 7 July 2015. ANZ also acknowledged that between 1 July 2015 and 31 December last year, it had made an additional 40 reports or notifications to ASIC concerning the conduct of a total of 41 financial advisers or authorised representatives.

The adviser misconduct covered by these notifications included improper use of customer funds, misleading conduct concerning advisers' qualifications or authorisations, falsifying customer or compliance documentation, deliberate overcharging of fees, provision of poor quality advice, and failures to comply with disclosure obligations. Among the notifications, ANZ acknowledged that there were at least 30 events of misconduct or potential misconduct in relation to the appropriateness of advice. This included advice that had been provided with a lack of a reasonable basis, advice that was of little or no benefit to the customer, but generated fees for the adviser, cases where there was no evidence that sufficient research had been undertaken before the advice was given, and cases where advisers had not accurately disclosed fees.

The provision of inappropriate financial advice by authorised representatives of two of ANZs aligned dealer group companies, RI Advice Group, and millennium3, each of whom ANZ acknowledged had engaged in misconduct, will be the subject of a case study in these hearings. ANZ also acknowledged at least 56 events of misconduct or potential misconduct relating to improper conduct by financial advisers. These included circumstances where customer signatures were forged or falsified, customers impersonated, where there had been use of powers of attorney, where financial advisers had falsely witnessed documents or facilitated documents being falsely witnessed or where customer funds had been transferred into a financial adviser's personal bank account.

ANZ acknowledged that on 14 January this year it had notified ASIC that a further 30 advisers had falsely witnessed or facilitated the false witnessing of certain forms signed by customers. Improper conduct by an authorised representative of millennium3, which ANZ has acknowledged constituted misconduct, will be the subject of a case study in these hearings. Further, ANZ acknowledged misconduct by ANZ Financial Planning in failing to pay agreed rebates on approximately $8.5 million of trail commissions to approximately 6800 customers between 2009 and

2017. By September 2010, compensation totalling $432,000, inclusive of lost earnings, had been paid to 698 affected customers.

By May 2014, further compensation totalling $114,000, had been paid to 506 affected customers. Further remediation is expected to commence in about March this year, and ANZ estimates it will pay affected customers in excess of $12.5 million in remediation in respect of this conduct, including lost earnings of customers of approximately $4.8 million. We turn next to CBA and its related entities which have provided three submissions to the Commission. CBA told the Commission that it provides financial advice services through its related licensees, including Commonwealth Financial Planning, Count Financial, Financial Wisdom and prior to 2016, BW Financial Advice. CBA has acknowledged misconduct and conduct falling below community standards and expectations in relation to the provision of financial advice.

Again, we give some examples of CBAs acknowledgements. First, CBAs acknowledged misconduct includes misconduct in relation to fees for no service. CBA identified instances in the period from July 2007 to June 2015 where clients of Commonwealth Financial Planning, BW Financial Advice and Count Financial were charged ongoing fees for financial advice where no financial advice services were provided. CBA acknowledged that as at the end of last year, approximately $118.5 million of refunds, including interest, has been offered or paid to customers affected by this conduct.

Shortly prior to the commencement of these hearings, on 9 April, Commonwealth Financial Planning and BW Financial Advice entered into an enforceable undertaking with ASIC in relation to a failure to provide or failure to locate evidence regarding the provision of annual reviews to approximately 31,500 ongoing service customers in the period from July 2007 to June 2015 for Commonwealth Financial Planning, and from November 2010 to June 2015 for BW Financial Advice. The enforceable undertaking requires, among other things, the entities to pay a community benefit payment of $3 million in total, Commonwealth Financial Planning to provide an attestation from senior management setting out the material changes that have been made to its compliance systems and processes in response to the misconduct, and Commonwealth Financial Planning is to provide further attestations from senior management supported by an expert report that its compliance systems and processes are now reasonably adequate to track its contractual obligations to its ongoing service clients, and that it has taken reasonable steps to identify and remediate its ongoing service customers who did not receive annual reviews in the period from July ’15 to January 2018.

CBAs conduct in respect of charging fees for no service will be examined in one of the case studies in these hearings. In respect of inappropriate advice, CBA acknowledged that in the period since 1 January 2013, it had made 20 breach notifications to ASIC in relation to actual or likely breaches of the Corporations Act by an adviser licensed by Commonwealth Financial Planning, Financial Wisdom or Count Financial. It had made a further five breach notifications in relation to

advisers identified through file reviews which were conducted in accordance with the additional licence conditions applied to the financial services licences held by Commonwealth Financial Planning and Financial Wisdom, that it had made notifications in respect of a further 20 advisers in relation to serious compliance concerns, that it had made good governance notifications in respect of a further 13 advisers which largely related to signature irregularities on clients' files.

That 15 former CBA employees or representatives had been the subject of ASIC banning orders or enforceable undertakings since 1 January 2013, and that as at the end of last year, it has paid or offered to pay approximately $96 million to customers relating to the provision of poor financial advice or adviser misconduct. In its third submission provided to the Commission on the final day of the first round of hearings, CBA acknowledged 76 specific events of misconduct over the last five years that related to financial advice.

We turn to NAB and its related entities which have provided two submissions to the Commission. NAB told the Commission that it provides financial advice services to consumers through financial advisers employed by NAB directly and through advisers employed or authorised by its related licensees, including Apogee Financial Planning, Godfrey Pembroke, GWM Adviser Services, JBWere and Meritum Financial Group. NAB acknowledged that it had engaged in misconduct and conduct falling below community standards and expectations in connection with the provision of financial advice. We give the following examples of those acknowledgements.

First, NAB also acknowledged misconduct in relation to fees for no service. NAB acknowledged misconduct concerning the charging of adviser service fees between 2008 and 2015, and of plan service fees between September 2012 and January 2017 in circumstances where no adviser was allocated to the client. NAB told the Commission that as at 31 January this year, it has paid or agreed to pay approximately $6.6 million in compensation to more than 25,000 clients affected by the misconduct concerning the charging of adviser service fees and approximately $35 million in compensation to more than 220,000 clients affected by the misconduct concerning the charging of plan service fees.

NAB also told the Commission that it was investigating further circumstances where fees were charged to clients but the relevant services may not have been provided. Second, NAB acknowledged a number of events in relation to the provision of inappropriate advice. NAB acknowledged that in the period from 1 January 2009 to 29 January this year, it had notified ASIC or otherwise discussed with ASIC approximately 68 advisers who it had identified as giving rise to serious compliance concerns. The concerns included conduct involving multiple instances of inappropriate advice leading to customer loss, backdating of documents, misleading statements, and repeated compliance breaches.

NAB acknowledged that between 1 January 2010 and 30 September 2017 it had paid approximately $38 million to customers which it said included amounts which were

not specified paid as compensation to customers for financial adviser misconduct. NAB acknowledged that in the period from 1 January 2009 to 29 January this year it had identified other instances where customers had been provided with inappropriate advice which failed to comply with the requirement to have a reasonable basis for the advice, and to act in the customer's best interests, including an unspecified number of instances of failing to provide advice tailored to the customer's objectives or appropriate for the customer's risk tolerance, an unspecified number of instances of recommendations of a geared strategy that was inappropriate and an unspecified number of instances of failing to recommend withdrawal from a geared financial product during a cooling-off period when the customer's circumstances had changed.

NAB also acknowledged that it had identified an unspecified number of other instances where customers had been provided with inappropriate advice about insurance, including failing to give appropriate insurance advice, given the customer's individual circumstances, including resulting in a customer being uninsured, cancelling a customer's insurance policies before new insurance was in place, and recommending a switch to new insurance which did not benefit the customer. Third, NAB identified instances of improper conduct by employed financial advisers and authorised representatives of NAB wealth entities, including dishonest or otherwise serious illegal conduct such as misappropriation of funds, and the provision of advice to invest in a company in which the authorised representative had a financial interest between at least 2011 and 2016.

NAB acknowledged involvement or potential involvement by advisers in inappropriate early release schemes between at least 2016 and 2017, allowing members access to superannuation benefits before they were entitled to them, and it acknowledged the provision of advice by advisers outside the scope of their authority between at least 2009 and October 2016. In addition, NAB acknowledged that in the period from 1 January 2009 to 29 January this year there were instances where it had failed to prevent the misappropriation of customer funds, including misappropriation by financial advisers. The acknowledgements of improper conduct by NAB also included an acknowledgement that as at October last year it had identified 353 NAB employees who had been involved in incorrectly witnessing binding beneficiary nomination forms for superannuation funds.

This incorrect witnessing potentially affected the validity of beneficiary nomination forms for about 2520 customers. This conduct will be the subject of a case study in these hearings. Fourth, NAB acknowledged a number of issues in relation to the disclosure that it has made to its customers. NAB acknowledged that a number of group licensees had failed to disclose relationships between advisers, advice licensees, and other members of the NAB group that issue investments products from 2008 to March 2016. The affected customers received advice to acquire products issued by certain group entities and were provided with statements of advice and financial services guides which did not fully disclose the association between the advice licensee and the issuers of the recommended investments. NAB also acknowledged that in the period from 2008 to March 2016, approximately 150,000 customers received deficient disclosure, either in statements of advice or financial

services guides in relation to MLC branded products and other investment manager products.

Finally, we turn to Westpac and its related entities which have provided a number of submissions and supporting documents to the Commission. Westpac told the Commission that its financial advice business unit, BT Financial Group provides financial product advice on wealth creation and protection, superannuation, and retirement planning. Financial advisers providing such advice are either employees of Westpac or Westpac Financial Consultants Limited or are authorised to provide advice under a financial services licence operated by two subsidiaries of Westpac, Securitor Financial Group and Magnitude Group.

As at December last year there were a total of 112 employed financial advisers or advisers operating under the Securitor and Magnitude licences. Westpac acknowledged that it had engaged in misconduct or conduct falling below community standards and expectations in connection with the provision of financial advice. Again, we give examples of those acknowledgements. The first example relates to acknowledged misconduct in relation to fees for no service. Westpac acknowledged that BT Financial Group commenced an ongoing advice services review program in 2016. This program identified retail clients who in the period from 1 July 2008 to 31 December 2015 had been charged fees for ongoing advice where they had not received the service paid or evidence of such service being provided could not be located in BT Financial Group's records.

As at 31 December last year, BT Financial Group, through its structured remediation programs, had paid compensation in excess of $3.2 million to 435 clients as a result of issues identified in the ongoing Advice Services Review Program. Westpac also noted that its FY17 annual results provisioned approximately $24 million for refunds of fee payments related to Westpac employed financial advisers identified in the ongoing Advice Services Review Program. Second, Westpac acknowledged misconduct or conduct falling below community expectations and standards in relation to inappropriate or inadequate advice, including the following.

A significant review established in 2015 and known as the Advice Compliance Program, had identified 22 financial advisers who had provided inappropriate advice and who were reported to ASIC. BT Financial Group also participated in ASICs advice compliance project, as a result of which a further 11 financial advisers were identified as potentially providing what was referred to as problematic advice. Since 2015 BT Financial Group has identified a further 15 advisers with inappropriate advice issues, and as at 29 January last year, Westpac had paid a total of $12.568 million in compensation to 205 clients with a further approximately $1 million in compensation offered but not yet accepted.

Westpac has not yet completed its review of the advice received by 468 customers who received advice from the original 22 advisers identified. Westpac also provided specific examples of inappropriate advice by four advisers, being an adviser who provided inappropriate personal advice primarily relating to gearing

recommendations which resulted in 116 clients requiring remediation. An adviser who had provided inappropriate advice relating to establishment of self-managed superannuation funds, and using limited recourse borrowing arrangements to fund the purchase of real property. Two advisers whose conduct gave rise to concerns of inadequate disclosure, charging of ongoing fees without providing the relevant services, inadequate documentation of clients' goals and objectives, inadequate risk profiling and no documented reasonable basis for providing the advice provided or for superannuation switching.

Westpac also identified an adviser who had provided standardised advice across his whole client base and recorded identical goals and objectives for many of his clients. These advisers were reported to ASIC and three have been the subject of banning orders. The provision of inappropriate financial advice by two employees of Westpac, each of whom Westpac has acknowledged engaged in misconduct will be the subject of a case study in these hearings. Westpac also acknowledged the following conduct or conduct falling below community expectations and standards in relation to improper conduct of financial advisers.

One BT Financial Group adviser had established 72 life insurance policies in the names of clients with no existing accounts with a view to dishonestly obtaining a benefit through the sale of these policies. Criminal charges were laid by Victoria police and the adviser was permanently banned by ASIC. A financial adviser employed by an authorised representative of Magnitude had performed unauthorised transactions in accounts of five of their clients. Three of the clients suffered losses as a result of the transactions. The adviser was criminally prosecuted and sentenced for charges including theft. And $2.75 million was repaid to 1996 impacted customers as a result of advice fees paid between 1998 and 2012 for BT Investment Wrap or SuperWrap that may have been higher than the maximum fee ranges noted in the disclosure documents.

We turn now to the particular topics through which the conduct of financial services entities will be addressed in this round of hearings. The first topic that we will explore is fees for no service. Two case studies will be presented which are relevant to the issues raised. The first case study concerns AMP. As we have already mentioned, AMP operates a very large network of authorised representatives through a number of licensees. Each licensee offers one or more services on an ongoing fee basis. The contractual arrangements between the licensees and the advisers, the authorised representatives, typically include a buy-back clause by which the adviser's client register can be acquired by the licensee to be held by the licensee until being onsold. The first case study will examine AMPs conduct in connection with the charging of fees to clients that its licensees had bought back from advisers who did not receive services.

The second case study about fees for no service concerns CBA, and, in particular, Commonwealth Bank Financial Planning, Count Financial and BW Financial Advice. Each of those entities offered service on an ongoing fee basis. The precise services that were offered in exchange for an ongoing fee differed but often clients

received no service or did not receive the services that they were contractually entitled to. Despite that, the ongoing fees continued to be deducted from the clients' investments.

The second topic we will deal with in these case studies relates to the provision of inappropriate advice. Inappropriate advice can be broadly described as advice that does not comply with the best interests obligation and related obligations in the Corporations Act, or advice which fails to take into account a client's circumstances. Three case studies about inappropriate advice will be presented.

The first case study concerns Westpac and two financial advisers who provided advice on behalf of Westpac, Mr Ramakrishnan Mahadevan and Mr Andrew Smith. This case study will consider the financial advice provided by those two advisers and the adequacy of Westpac's systems and processes for preventing and detecting inappropriate advice by employed financial advisers. The second case study concerns ANZ and two financial advisers who were authorised representatives of companies owned by ANZ: Mr John Doyle, who was an authorised representative of RI Advice Group, and Mr Christopher Harris, who was an authorised representative of millennium3. This case study will consider the financial advice provided by those two advisers and the adequacy of the systems of ANZ, RI Advice Group, and millennium3 for preventing and detecting inappropriate advice by authorised representatives.

The third case study concerns three advisers within AMPs network. The first was an authorised representative of AMP Financial Planning. The second, Jennifer Coleman, was an authorised representative of Charter. The third, Adam Palmer, was an authorised representative of Genesys Wealth Advisers. This case study will consider specific forms of inappropriate advice, including insurance switching, superannuation switching, self-managed superannuation fund advice, and conflicted advice. It will also consider systemic issues concerning the recruitment of advisers, the vetting of advice, and client remediation.

The third topic we will deal with in this round of hearings relates to conduct of financial advisers that can be described as "improper". Two case studies will be presented. The first concerns NAB and the incorrect witnessing of beneficiary nomination forms by NAB financial advisers. In late 2016, NAB identified a financial adviser who had forged two customers' initials and asked another employee to falsely witness a beneficiary nomination form. By October the following year, NAB had identified 353 employees who had been involved in incorrectly witnessing binding beneficiary nomination forms for superannuation funds. This incorrect witnessing, as we have already noted, potentially affected the validity of beneficiary nomination forms for about 2500 customers.

The second case study on this topic concerns a financial adviser who provided advice as an authorised representative of millennium3, which is wholly owned by ANZ. This financial adviser engaged in a range of improper conduct, including falsifying documents, misappropriating customer funds and engaging in misleading and

deceptive conduct in relation to customers. The final topic we will deal with in these hearings is the disciplinary system within the financial advice sector. Evidence will be received from representatives of Dover Financial Advisers, ASIC, the FPA and the AFA.

Through the witnesses throughout these hearings we will explore issues concerning the adequacy of the current arrangements for disciplining financial advisers. In particular, by examining the ways in which disciplinary matters are currently dealt with in relation to financial advisers, this case study will highlight some of the gaps in the existing system. The case studies that we will examine in these hearings raise a number of common themes and questions for consideration, including the following: was the misconduct in question attributable to a particular culture, system or practice within the entity, including, in particular, remuneration, incentive or commission arrangements.

Why did the misconduct go undetected and, in some instances, for a long period of time? Were the entities' processes adequate to prevent and detect misconduct of this nature? Did the entity respond in a timely and sufficient way to the misconduct? Have the legislative reforms to date been successful in preventing misconduct? If not, why is this the case? Over the course of the next two weeks, evidence will also be presented from some members of the public who will share their experiences with financial advice. One member of the public, Mrs McDowall, will give evidence about advice received from a senior financial adviser employed by BT Financial Group which is part of Westpac. Mrs McDowall and her husband sought financial advice about a retirement strategy which included purchasing and operating a bed and breakfast with superannuation funds.

Mrs McDowall will give evidence about the financial impact this advice had on her and on her husband, including the loss of their family home. Mrs McDowall will also give evidence about her experience with complaints processes relating to financial advice in relation both to Westpac and to the Financial Ombudsman Service. A second member of the public, Ms McKenna will give evidence about her experience with a financial adviser from a non-aligned financial advice entity, Henderson Maxwell. Ms McKenna similarly sought advice relating to superannuation and retirement strategy. She will give evidence that the advice she received, particularly in relation to a recommendation to establish a self-managed superannuation fund, was inappropriate for her circumstances and would have led to immediate and significant financial detriment had it been implemented. She will also give evidence about her experiences with the disciplinary processes of the FPA.

Commissioner, that concludes this opening address. The first witness will be Mr Peter Kell, the Deputy Chair of ASIC. If the Commissioner would give us a moment to arrange the bar table for ASICs representatives.

THE COMMISSIONER: ASIC can, I think – I think counsel can move in. There's not any move out, is there.

MS ORR: No, no.

THE COMMISSIONER: So I think we can wait long enough while ASIC counsel move their goods, chattels and baggage train. Maybe I am an optimist at heart.

<PETER RICHARD KELL, AFFIRMED [11.26 am]

<EXAMINATION-IN-CHIEF BY MS ORR

THE COMMISSIONER: Thank you very much, Mr Kell. Do sit down. Thank you.

MS ORR: I think perhaps there are some documents that you might need in the witness box, Mr Kell. Mr Kell, could you please state your full name?---Peter Richard Kell.

Your address?---[REDACTED].

Thank you. And your occupation?---I am the Deputy Chair of the Australian Securities and Investments Commission.

Thank you, Mr Kell. Mr Kell, you've made a statement for the Royal Commission dated 12 April 2018?---That's correct.

Do you have that statement there?---I do.

Are the contents of that statement true and correct?---They are with one modification.

Yes. Could you explain what the modification is, please, Mr Kell?---Yes. In paragraph 16 in the last sentence, just to provide a new date, an updated time for the table PK3. So 28 February.

Do I understand, Mr Kell, that the final sentence of paragraph 16 should read:

> *ASIC has prepared updated versions of those tables as at 28 February 2018 - - -*

?---That's correct.

Continuing:

> *... copies of which are produced and shown to me marked PK3.*

?---That's right.

Thank you. You have your original statement there?---I do.

Have you hand amended that statement?---I will do that right now.

THE COMMISSIONER: If you wouldn't mind initialling the amendment, Mr Kell - - -?---Yes.

MS ORR: You have made that and initialled that change, Mr Kell?---Yes.

With that change, are the contents of your statement true and correct?---Indeed, yes.

I tender that statement, Commissioner.

THE COMMISSIONER: Witness statement of Mr Kell and its exhibits, the witness statement dated 12 April 2018 will be exhibit 2.1.

EXHIBIT #2.1 STATEMENT OF PETER KELL DATED 12/04/2018

MS ORR: Mr Kell, did you receive a summons to attend today?---I did.

You have that summons there?---I do.

I tender that summons, Commissioner.

THE COMMISSIONER: Exhibit 2.2 will be summons to Mr Kell.

EXHIBIT #2.2 SUMMONS TO MR KELL

MS ORR: Mr Kell, you've been the Deputy Chair of ASIC since 2013?---Correct.

And you've been a Commissioner of ASIC since 2011?---Yes.

What responsibilities do you have in these roles in relation to ASICs regulation of the financial advice industry?---ASICs financial advice team reports to me, as does ASICs financial services enforcement team that deals with financial advice matters. In addition to that, ASICs investment managers and superannuation team also reports to me, and the credit and insurance team.

Approximately how many financial advisers are there presently in Australia, Mr Kell?---There are around 25,000 financial advisers in Australia. You can see them on the Financial Advisers Register.

And approximately how many financial services licensees are there presently in Australia?---There are around 6000 licensees, about three-quarters of those are authorised to provide personal financial advice.

Mr Kell, what can you tell the Commission about how the financial advice industry in Australia originally developed?---The financial advice industry is a relatively new industry. It emerged in a significant way in the 1980s, and – and thereafter. A key part of the financial advice industry in its early years, and one which is still important, has been the life insurance advice sector, and the – it's safe to say that a major part of the financial advice industry grew out of life insurance agents providing advice around life insurance and related products. Under a – very much a sales driven model with commission-based remuneration. As the industry grew, in part to serve a growing demand for financial advice as we saw superannuation balances grow, you had the entry of some of the larger financial institutions into the – the sector, in the late 1990s and early 2000s, several of the major banks made major acquisitions of wealth management or – or life insurance firms, and established major financial advice businesses in part as a result. That has been changing more recently. Some of those businesses have been sold, but it's still the case that those large – those large banks and AMP are major participants in the sector.

Is the financial advice industry in Australia a profession?---In ASICs view, it is not yet a profession. There are certainly professionals within the industry, but we do not view the industry as a whole as having reached what would normally be regarded as the standards of a profession at this point in time, and it's – I think you could say it's the objective of the regulator but also most of the industry participants and others, that we move to a profession. It's one of the reasons why the government has recently introduced reforms aimed at raising professional standards for the industry.

And why has the sector not reached yet the standards of a profession?---In – in ASICs view, we would say that the standards around competency and the qualifications that you have to have to be a participant in the financial advice sector, the ways in which advisers have been remunerated in many cases, and the conflicts of interest that – that that remuneration has generated between advisers and licensees and the clients, and, as you've documented this morning, some of the conduct and consumer outcomes that have been very poor on a widespread scale, indicate that we're not yet at a position where we have a profession. I would also note that we don't have in this sector a single, if you like, dominant professional association. There are some associations which have taken a more forward looking approach to standards, but we certainly don't have a professional association of the sort that you get in other sectors such as medicine.

Mr Kell, the first topic that you deal with in your statement is fees for no service, which you will have heard me speak about in the opening statement this morning. Could you explain to the Commission in ASICs view what it means for a financial services entity to charge fees for no service?---Fees for no service is a term that ASIC came up with to describe a situation where a customer is paying an ongoing

service fee to a license but where the service attached to that fee, most notably regular advice reviews, the service is – is not provided and, as you've indicated, this is an issue that we've identified as – identified as being widespread across the industry.

So typically, what is the consumer supposed to receive under an ongoing services arrangement with a financial adviser? You've mentioned a regular advice review?---In ASIC's opinion, that's the – the key service. If you have an ongoing relationship with an adviser, you would expect, we – we believe, that you would be getting regular advice reviews. There are many different versions of the – the sorts of ongoing service arrangements that we've seen across different licensees. Some of them also provide other services, such as newsletters or – or brochures, or – or other information, access to – to websites, and so on. In our view, the key offering, though, is the advice from the adviser.

And how do financial advisers typically charge for and receive ongoing service fees?---The fees are typically deducted automatically from the customer's investment account balance without the customer having to activate the – the payment. This is changing, to some extent, now under the future of financial advice reforms. There is an opt-in requirement so that now every two years the customer must be actively engaged around renewing the relationship, if that's – if that's what they wish, but prior to that, there were fees that could be deducted automatically over a long period of time.

You mentioned in your statement some similarities between ongoing service fees and the commissions that financial advisers used to receive prior to the FOFA reforms. You deal with this in paragraph 33 of your statement. Could you explain those similarities?---In – in our view, if – if ongoing service fees are improperly applied, then they do, unfortunately, have some similarities with some of the more problematic aspects of commissions, being that they are recurring, they can be invisible to the customer from a practical point of view, and – and there may be no clarity around what exactly the customer is getting or supposed to get in – in return for – for these payments. If properly applied, it can be different, but if improperly applied – and that's happened on a widespread scale – they do have some distinct similarities.

And what can you say about the quantum of annual service fees charged by financial advisers?---The annual fee, in ASIC's experience, varies quite considerably, depending on the – the licensee, but also the – the size of the customer's account. It tends at the lower end to be around 500 or so dollars and a more common amount would be around $2000 on an annual basis, and we have certain – we have seen examples where it is considerably higher than that. I mean, in – it – it – if it's charged on – as a percentage of assets, it could go up to quite high amount, up to, for example, in a small number of cases, $20,000.

You're talking about on an annual basis?---On an annual basis.

Thank you. And when did ASIC detect that fees for no service were being charged by financial services licensees?---We had a – we received a breach report in August 2013 from one of the large financial advice providers. As a result of that, it was apparent to ASIC that this may exist in other entities, and we – we received other breach reports subsequently. We made a public announcement that we were looking at this in more detail in 2015, and that generated some subsequent breach reports. I think it's safe to say that the new FOFA requirements around opt-in and also the annual fee statement led to some financial services licensees to look more closely at what had been the practices in their businesses, and that may have triggered the – the breach reports.

THE COMMISSIONER: Just – can you explain to me, what was the content of the breach report? What was the nature of the breach as described, for example, in that first report of August 2013?---It was a – that was a breach report from ANZ, who have subsequently entered into an enforceable undertaking with ASIC, and that was that they had identified that across their financial planning business, that they had been charging customers a fee without providing the annual advice that the customer had been led to expect they would receive.

MS ORR: And what provisions were identified by ANZ as having been breached by that conduct?---I would have to – I – I haven't got that in front of me. 912A is the provision that – that ASIC has most closely looked at in respect of this conduct, but I would have to check in – in relation to that particular breach.

How many entities is ASIC aware of to date as having charged fees for no service?---We are aware of eight entities. There may be multiple licensees under those entities but eight – eight financial services entities have reported breaches to us so far.

Are you able to list those entities, Mr Kell?---The big four banks, ANZ, CBA, NAB, and Westpac, AMP. We have also received reports from other entities, Yellow Brick Road, First State, and I've had a sudden blank on the last one. Bendigo. Bendigo. Sorry. Sorry about that.

And what did ASIC do when it became aware of the fees for no service problem. You talked about a public report that was released in 2015. What other conduct was ASIC involved in?---We – we announced that we were undertaking a review in 2015, and we released a public report around what we had found in 2016. That essentially had three elements to it. One was looking at how the – the affected customers could be remediated. That was a primary focus for – for ASIC. The second was engaging with those institutions to make sure they reviewed other parts of their businesses to see whether there were further examples of fees being charged without a service being provided. The third element was ensuring that those entities had the systems in place to avoid the risk of this sort of issue arising in the future. We also have looked at our enforcement options around this matter as well. We have ongoing investigations and ongoing negotiations with most of the firms around the remediation programs as well.

Does ASIC have views as to why this fees for no service conduct has occurred?---Well – well, yes. We – I think it's clear, from our experience, that the firms in question prioritised fee revenue from their advice businesses over the provision of services to the clients. We found in – in all the instances that the systems that underpinned the ability to collect revenue were better developed than the systems that ensured that the client received the advice – advice service. We would also note that the record keeping and systems for actually tracking whether the advice had been provided were – were poor, which meant that for many of these entities it was difficult to identify that – how widespread the problem was, and – and how long had it been running for. The nature of the – the contract between the consumer and the licensee was sometimes unclear as well, as to what service was – had actually been promised upfront. And I think it's also safe to say that because of the passive nature of the payment, that the fees came out automatically, that many consumers did not have a good understanding of what was being charged and – and why, so it didn't necessarily ring the alarm bell. If I was to make a broader observation, it would be that I think this is an example that we – we see a bit too often, whereby the promises made to consumer upfront when they enter into the relationship with a financial services firm, are not necessarily supported by the provision of services once they are a customer. Post-sale treatment of customers, unfortunately, does not match what customers might expect upfront.

Has ASIC met resistance from financial services entities or their representatives in getting them to remediate customers who have been charged fees for no service?---In short, yes. This – this has been, at times, quite a difficult process around two issues in particular. One is the remediation programs, and the second is around the nature of the reviews that are required to establish whether there has been further charging of fees for no service.

So we've ended up having, at times, reasonably vigorous debates around the scope of – of the reviews and how many licensees should be included. We had discussions with some firms who wanted to suggest that a remediation program where consumers had to actively opt in to get remediation was appropriate, whereas in ASIC's view, given the – the passive nature of many of these fees, that – that was not the right way to go, arguments about the length of the program, whether the – and whether a mere offer to conduct an annual review to the client was – even if that wasn't taken up or the client couldn't be contacted, whether that was sufficient to allow the fee to be charged. All of those issues and – and – and more, frankly, are – have been, at times, in dispute.

What regulatory action can ASIC take in respect of fees for no service?---ASIC has under – or has obtained two enforceable undertakings. They relate to the licensee's obligations under 912A to act efficiently, honestly and fairly. Those – that is, in a sense, the primary obligation that we're – we're looking to here. I would note that in relation to some of the provisions in the ASIC Act that go to, say, misleading and deceptive or false and misleading conduct that – that some of the formal disclosure documents are exempt from those provisions, so that's not necessarily a

straightforward path for us. We do have some other investigations underway but that – that is the primary obligation that we're looking to.

The 912A - - -?---Yes.

- - - obligation?---Yes.

And enforceable undertaking has been the only regulatory measure you've invoked so far in relation to fees for no service?---Yes. We do not have at this point in time a straightforward ability to require a remediation program of the sort that we think is – is, in many cases, desirable. That's a power that we have indicated in the current enforcement review of ASIC – ASIC's powers that would be of significant benefit under the – the area of having a directions power for ASIC. So at the moment, we – we don't have a directions power that would allow us to more easily impose a remediation program of the sort that we think would – would have been appropriate in these instances.

So is it the case, then, that a remediation program is an outcome that can only be achieved if the entity agrees to implement a remediation program such as – as a condition of an enforceable undertaking with ASIC?---It's – that's – we do not have a straightforward ability to – to obtain a remediation program, especially one that's very broad-based and one where we think there are issues around the focus on customer outcomes as being the driver for the remediation program. So - - -

THE COMMISSIONER: Are there no remediation terms in the additional licence conditions imposed in respect of CFPL and the other CBA entity?---There is a remediation program there, again, but the details - - -

Imposed as an additional condition of its licence?---Yes, that's – that's correct, Commissioner. Again, the ability to impose remediation program with some of the details that we think would be desirable is not – not as straightforward as we would like.

MS ORR: I just want to be sure I understand that, Mr Kell, because you've used that expression I think at least twice now, that it's not a straightforward way of doing things. Is there some complicated way that this could be done that ASIC has chosen not to pursue?---We are of the view that if we had the appropriate directions power, that would provide us with a better ability to set out what the remediation program should look like, who it should cover, the timeframes, so on and so forth.

Yes, but is there something else apart from the power that you don't yet have, the direction power that you could utilise to secure remediation for customers of these entities?---The – we could take, as we've said – seek a declaration by taking 912A action. It doesn't have a penalty related to it, and we could look, I think, to take – to – to seek such orders, but that has not been typically a straightforward way of obtaining remediation in the past.

I see. Mr Kell, the second topic that you deal with in your statement is financial advice that's inappropriate - - -

THE COMMISSIONER: Just before we come to that, Ms Orr.

Can I just go back to a couple of matters you raised, Mr Kell. Are you able to give any indication, broad or more precise, of whether ASIC was able to identify the proportion of clients who had been charged without provision of a service? Was it that some clients had been charged but no service, all clients had been charged but no service, or there was, more likely, somewhere in between? Can you give me some estimate of how many or what proportion?---I don't have those figures in front of me, Commissioner. We did undertake a project in around about 2014 that looked at the percentage of clients that might be described as passive, that is, that were not receiving advice on a regular basis across different entities, and I would be happy to provide that to the Commission. That doesn't necessarily indicate that all those clients were being charged fees for no service, but it would give you an indication across different licensees about who was not receiving regular advice.

You spoke of – my note is unduly truncated, but you spoke of firms making promises upfront which were not supported by post-sale treatment. Now, that's a very tendentious description, I think, of a rather long answer you gave. There's three radically different kinds of case, I think: selling what you can't deliver, selling what you won't deliver and selling what you don't deliver. Now, like any summary of that kind, those phrases might have a catchy appeal to them and they probably don't convey enough nuance in them. Selling what you can't deliver, selling what you won't deliver, selling what you don't deliver: do you have any response to any of those phrases in this context or connection?---I would – I – I think it's a good way to capture the issue, Commissioner.

Flattery will get you nowhere. You have got to answer the question, Mr Kell?---I would say in this instance the "don't deliver" would characterise the majority of the cases that we're talking about, with some of – it would appear some of the "can't deliver" perhaps being mixed in there as well, but this – this issue is one where I think there is more of a – a service where you don't deliver, rather than won't.

Selling what you can't deliver might raise issues about application of the law that are - - -?---Yes.

- - - rather different from either of the other two categories, I would have thought, but those are matters that perhaps we will look at. Yes. Sorry, Ms Orr.

MS ORR: No, I was going to move to inappropriate advice - - -

THE COMMISSIONER: Yes.

MS ORR: - - - if that's convenient, Commissioner.

And I was saying, Mr Kell, that you have described inappropriate advice in your statement as inappropriate advice in the sense that it fails to take into account the client's circumstances or doesn't comply with the best interest duty and regulated obligations in the Corporations Act. That's in paragraph 43 of your statement. In ASIC's view, how much of the financial advice being provided in the industry is inappropriate in that sense that you've described in paragraph 43?---It's – it's difficult to land on an exact percentage. ASIC doesn't look at all the advice provided right across the financial advice sector, and, for fairly obvious reasons, we – we tend to focus on those areas where we think there may be higher risk of poor quality advice. So it's – it's difficult to – to generalise. We have undertaken some reviews in – in recent times that have looked, amongst other things, at advice including its – whether it complies with the best interest duty and related obligations, one in relation to advice around superannuation through the large vertically integrated firms. We found there that when we looked at the files, so upon a file review, that around three-quarters, 75 per cent of the files did not demonstrate compliance with the best interest duty and related obligations. More recently, we've done a survey of advice around establishing self-managed super funds. We've found there, unfortunately, an even higher rate of advice that doesn't comply with the best interest duty when assessed by looking at the files of around nine in 10 pieces of advice.

THE COMMISSIONER: Sorry, nine in 10; 90 per cent?---Yes.

Yes.

MS ORR: So the first figure you gave, Mr Kell, of 75 per cent, that came, did it, from the work that was published by ASIC in January this year in relation to vertically integrated institutions and conflicts of interest?---That's right. That's right.

And that work was directed to reviewing files – files for licensees controlled by AMP, ANZ, CBA, NAB and Westpac?---Yes.

And the second figure that you gave, the nine in 10 figure, do I understand that that relates to work that ASIC has done which has not yet been published in relation to self-managed superannuation funds?---That's – that's correct, and across a much wider range of licensees and advice firms.

Yes. So in attachment A of your statement, you refer to that work being review work done by an independent expert across 137 different licensees. Is that right?---That's correct.

And from that work, you say that ASIC has concluded that nine out of 10 client files didn't demonstrate compliance with the best interests duty and other associated obligations in the Corporations Act?---That's correct.

That's a very high figure, of course, Mr Kell. What does ASIC make of that, that 90-odd per cent of the files examined in that recent review did not demonstrate compliance with a critical duty in the Corporations Act for financial advisers, the

best interests duty?---Well, it is, obviously, very disappointing, to say the least. I should note that for the majority of those files there is no necessary indication that that immediately signals consumer detriment. There's a smaller percentage where we think consumer detriment is – is apparent. But what we have found across large and small licensees in our reviews of recent times is that the industry as a whole is – is struggling to get to grips with how best to implement the key best interests duty requirements, including how they are documented in – in the advice files. And it's not simply – I want to emphasise, it's not simply just a matter of record keeping. If, for example, there are disputes between a client and an adviser or a licensee down the track, then ensuring that the reasons why the client received the advice that they did is on file and all set out, is – is critical. And ASIC has certainly been signalling for some time now that licensees need to improve their record keeping and their documentation.

Does it create problems for remediation if remediation is necessary that these files have not been kept in a way that records those matters?---That's – that can certainly be the case. That has been the case with remediation programs in the past, that they're more difficult to implement if required – if the record keeping is – is poor. I might say, it primarily has arisen in both of those examples around two – two issues as well, around whether the adviser adequately takes into account the value or nature of the financial product that the client is currently in, vis-à-vis the one that they may be moved into or switched into, and, secondly, whether the adviser adequately takes into account the objectives and needs of the client, and their particular circumstances.

What particular types of inappropriate financial advice does ASIC regard as most prevalent currently?---Well, across a number of areas you have advice where consumers are switched out of their current product into a new product without any, it appears, reasonable basis upon which – which to do so. That – that often involves superannuation. As we've just mentioned, advice to establish an SMSF particularly where a client has, for example, a lower balance, or may not understand the obligations that attach to being a SMSF trustee. We've also seen regular advice around life insurance where the switching to the new insurance would substantially erode the superannuation balance if it's paid for out of super, or may result in pre-existing conditions creating problems for the customer. We've seen advice around a one size fits all type of model, which has been discussed earlier this morning but, again, where clients, irrespective of their circumstances, get placed into a very, very similar strategy, and advice again particularly in the SMSF context where people are being encouraged to undertake borrowing to invest in – in real property. So there – they are some examples.

And what does ASIC regard as the principal causes of inappropriate advice?---There are a number of causes. Conflicts of interest that are not either avoided or appropriately managed. One of the other key reasons that we see again and again is – is inadequate monitoring and supervision by licensees of their advisers, including poor audit processes that don't pick up poor advice early enough. There is still the issue - - -

THE COMMISSIONER: You say "early enough". Pick up poor advice before it's acted on, and once the advice is acted on, the horse is out of the stable, isn't it?---Either before it's acted on or given the long-term nature of some of this advice, it might be picking up poor advice before the harm manifests itself, which can be some time down the track, but, yes. The earlier the better, Commissioner, but it's not always the case that the detriment occurs immediately. One of the challenges is that it may not be for several years that – before the harm occurs.

The archetypical case I had in mind was switching - - -?---Yes.

If a switch is done, then the horse really has left the stable, hasn't it? Or is it possible to unwind the transaction?---It can be particularly difficult in the life insurance situation to unwind, that's for sure. In some cases in the investment situation there ought to be more opportunity to consider it, but it will vary.

Yes. I'm trying to get a grip on at what point, in effect, the supervision task, if carried out differently, might intercept bad outcomes?---Okay.

That's what I'm trying to grapple with?---The other – the other way of looking at it is that if an adviser provides one or two instances of poor advice to a client, it's better to pick it up then before the same adviser has provided 25 - - -

25, yes?---instances of – of poor advice. So it's – it may well be that – and – and you can see that that's where some of the most significant failings have occurred.

Yes. Thank you.

MS ORR: Were there any other matters that you wanted to refer to, Mr Kell, in relation to the causes of inappropriate advice?---Well, I – I think it's generally accepted that the levels of competence and professionalism need to be improved in the industry, and we would see that as contributing to – to poor quality advice. And then on the demand side, if you like, the – the nature of financial products and financial advice means that it's – it's often difficult for the consumer to understand the full implications of – of the advice, and – and thereby to put pressure on themselves. So this is not an industry where consumers themselves are always best placed to drive widespread higher quality outcomes.

In your statement you state ASICs view that a substantial proportion of inappropriate advice is likely to cause detriment to customers. You make that statement at paragraph 66 of your statement. And you give some examples that illustrate the potential consequences of inappropriate advice in paragraph 68 onwards. Could you explain one or two of those examples for the Commission, examples of inappropriate advice resulting in detriment for customers?---Certainly. I will seek to give the abridged version. But an example that we see, I think unfortunately too regularly, involves life insurance advice where the advice results in insurance that is in some cases simply unaffordable but that also substantially erodes the client's superannuation balance because it's paid for out of superannuation. So one example

we saw was an adviser providing risk insurance and superannuation advice to a couple whose combined income was around $200,000. This is the example in paragraph 71. They were paying for their existing insurances around $3400 per – per annum, around that mark, and they had around $185,000 together in various super accounts. The adviser recommended they switch into new insurance products and increase their cover so that the premium would now be more than $55,000. So it went from three thousand – $3400 to around – to more than $55,000, which obviously represents more than a quarter of their gross income. $33,000 of that was to be paid out of their superannuation account, and the impact of that would be that their superannuation accounts would be dramatically eroded, in the case of the wife would – would go into the negative after – after a year. The annual cost of the insurances was also significantly greater than the annual amount they were contributing to super, so 35 per cent greater. In the case of the husband, 223 per cent greater than the wife's annual superannuation guarantee contribution. I might say, we did end up banning the adviser in that case in relation to that piece of advice but also other advice that he provided.

Did the adviser gain financially through commissions for that advice?---Yes. While I do not have the exact figure on me, the adviser would have received a very substantial upfront commission for insurance at – at that level.

And how did ASIC detect that incident?---That was as a result of ASIC – an ASIC surveillance into an authorised representative in – that we took across parts of the sector in 2014 and 2015.

Is there any other example that you'd like to give? You've provided a few in this part of your statement about - - -?---Sure. Well, the other, on a different issue, involves the establishment of an SMSF as we will document in our upcoming report. We saw an example where a client obtained advice to establish an SMSF in order to invest in a property in Queensland. It was a townhouse worth $400,000. The consumer found that the costs of managing the property, the costs of administration of the SMSF were much greater than he had been led to believe, that he had anticipated. So he's presently trying to, if you like, unwind the situation, to sell the townhouse, which is not going to be possible for the price – for the purchase price, around $22,000 less, and overall the loss to him is in the order of $70,000.

And what has happened, if anything, to the adviser who provided that advice?---The – in relation to the recent SMSF project we are still looking at appropriate action against advisers who provided inappropriate advice.

What could you say about the relationship between financial literacy on the part of consumers and the provision of inappropriate advice?---Advisers – well, sorry, consumers in – in one sense go to an adviser because they don't necessarily have the financial literacy or experience or skills to – to understand the ins and outs of financial products and appropriate financial strategies. So the fact that they've gone to an adviser generally indicates that they are looking for help to understand and navigate the financial system. So while our aim at ASIC is to help equip consumers

to make better decisions, in this instance it's how they can best choose the right adviser, rather than doing it all themselves. The fact that they've gone to an adviser indicates that they need to be able to trust someone to help them navigate their own financial strategy, and in many cases where they're going to be in retirement.

You've referred earlier in your evidence to the various teams within ASIC that you are responsible for in connection with the regulation of financial advice. Across the 25,000 financial advisers operating in Australia at the moment, how many staff does ASIC have involved in regulating their conduct?---Our financial advisers team, in part as a result of some recent additional government funding, has – has around 60 members of that team. We also have, within our financial services enforcement team, staff who will come in on – in or out of financial advice matters as required. So the core team of 60 and then depending on how many matters are on foot, there may be another 10 or 20 or more that come through with the financial services enforcement team. I'm not sure exactly how many from our enforcement team at the moment are working on financial advice matters, I would have – but we could provide that.

But that is the extent of the number of people in ASIC engaged in regulation of the financial advice industry?---Broadly speaking, that's correct, yes. There may be others in – who work on financial advice in our financial capability team but that's – that's the core team, is – is 60 people.

Yes. Thank you. Mr Kell, the third topic that you deal with in your statement is conflicted remuneration?---Yes.

Could you explain to the Commission what conflicted remuneration is?---Yes. It – it refers to a benefit. It can be a monetary or a non-monetary benefit given – given to a licensee or adviser that could be reasonably expected to – to influence the financial product advice that is given, or the financial product that is recommended.

And could you explain, in brief terms, the recent reforms in relation to conflicted remuneration?---Under the future of financial advice reforms, there have been significant prohibitions against conflict – conflicted remuneration, commissions and volume bonuses as they apply to investment products going forward, existing remuneration arrangements were – were grandfathered, so to speak, at the time that FOFA was introduced. There have also been some more recent reforms around life insurance advice, conflicted remuneration is – is still allowed, but the scale of that remuneration has been reduced starting from 1 January this year. It will be on a path down to a maximum of 60 per cent upfront commission, and volume payments have also been removed from the life insurance sector.

You've mentioned life insurance. What are the other most common financial products or financial services that continue to be excluded from the ban on conflicted remuneration?---General insurance products, such as car insurance or home insurance. Basic banking products, time share, time share products, so-called execution only services, as long as there hasn't been an established relationship with

the – the client, or advice hasn't been provided in the previous 12 months. Certain non-monetary benefits such as training and education, or IT software and support, and benefits arising from related non-financial products of which direct property is a notable example.

Does ASIC have a view on whether any or all of these exclusions from conflicted remuneration are appropriate?---Well, our – our starting point is that any conflicted remuneration has the capacity to create the wrong incentives, which can – can lead to inappropriate advice. So it certainly has to be carefully managed. We have, I think, made our views clear that the conflicted remuneration that was available on the life insurance sector until recently was contributing to – to poor advice, hence the recent reforms and the government has asked ASIC to review the impact of these reforms in a few years' time to see whether they show improvements in the quality of advice. So that's, in some sense, it's still an open question. We also are of the view that commissions in relation to time share products, where there have been longstanding concerns about high pressure selling and misleading conduct are inappropriate.

You mentioned the grandfathering provisions in the regime. Under the grandfathering provisions, arrangements that are entered into before 1 July 2013 that provide for conflicted remuneration can continue. Is that right?---Yes.

And you mention in your statement that they continue with no statutory end date?---That's correct.

So there is no timeframe within which the grandfathering provisions will cease?---That's correct.

And does ASIC have any view about that?---We do have concerns that the grandfathering provisions can incentivise the wrong sort of behaviour. They can encourage advisers to retain clients in products which enjoy grandfathered remuneration even in circumstances where they may more appropriately be moved to other products as their needs change over time. It's not an area where we've undertaken any recent sort of extensive work to establish how heavily different licensees are relying on grandfathered remuneration. So I'm not sure I could give you an answer that goes to exactly what sort of problems it's creating, but it is an area that we intend to review.

To what extent does ASIC think that the conflicted remuneration reforms have been successful in achieving their purposes?---Well, we certainly have been – or we have supported the introduction of the conflicted remuneration reforms, and in assessing – well, sorry, stepping back a bit. It's not necessarily straightforward to assess the impact of the conflicted remuneration reforms when you consider that there have been a lot of other reforms coming in at around the same time. So it's disentangling the effect of those reforms from, say, the opt-in requirement or the fee disclosure statement or others is not straightforward. Nonetheless, we would observe that we have seen a decline in the sale of certain widespread higher risk problematic products, such as agricultural investment schemes, such as higher risk retail

structured products, or leveraged investment strategies. And that, in our view, has been positive. It's – it's difficult – and it's difficult to see how, for example, those agricultural investment schemes would have been sold on such a widespread basis without generous upfront commissions.

Another topic that you deal with in your statement, Mr Kell, is conflicts of interest, and you say in your statement that the financial advice industry has historically been plagued by the prejudicial impact of conflicts of interest. That's paragraph 210 of your statement?---Mmm.

And an area of concern to ASIC, you say in your statement, in relation to conflicts of interest is advice businesses which also involve themselves in the provision of financial products, either of their own manufacture or on a white label basis. Is that right?---Correct.

Could you explain the nature of those concerns?---ASIC – well, vertically integrated businesses, which is the – the phrase that I think is used to describe the sorts of business models that you were talking about, in our view have an inherent conflict, and you do see these models across the financial advice and financial services sector in – in the largest entities but also beyond that. There is inherently a conflict between manufacturing a product and supplying a product but then having advice network or advisers who are supposed to be providing advice in the best interests of the clients, putting the clients – or prioritising the interests of the clients, so doing both within the same firm is allowed under the regime, but it does produce a conflict that needs to be appropriately managed.

You say at paragraph 216 of your statement that:

> *The conflict between the interests of the licensee and the interests of the customer is most significant when the licensee decides which products to include on its approved product list and the adviser decides which products to recommend to an individual customer.*

Can you explain to the Commission how approved product lists work and any concerns that ASIC has in relation to the use of approved product lists?---Many – many licensees will have so-called approved product lists, that is, a list of products, be they investment products or life insurance, for example, that an adviser is allowed to recommend. At one level, this can be a useful way of ensuring that only an appropriate set of products is considered by an adviser, but if that approved product list is – is very narrow and only includes products related to the licensee, then it may not ultimately ensure that the client gets the best – the best product. So there is also an issue about how products get on to the APL, and whether there is a consistent process applying both to products related to the firm and external – external products. Having said that, and this is why the second part of that formulation is important, you can have a broad-based approved product list, but if the adviser is still, through various ways, ending up recommending a very narrow set of products, and only in-house products to the individual customer, then that itself may not be

appropriate either. So it's the interaction between the two may result in conflicts not being managed appropriately.

What did ASICs report 562 published earlier this year identify in relation to the impacts of this vertically integrated model in five of Australia's major banking and financial services institutions?---Report found that there was in most instances a reasonably broad range of products – in fact, in most cases, a majority of products on the APL were external products. However, the products in – that were recommended to clients were, on average in the majority of cases, internal in-house products. So that, to sum it up, is – is what we found around the way in which internal products were recommended versus external products. The second part of that project looked at the quality of advice, especially as it applied to recommendations for a client to switch into a new superannuation product, and that's where we found that around 75 per cent of the files that we reviewed didn't demonstrate compliance with the best interests duty and with – perhaps more worrying in the immediate term, 10 per cent of files indicated a significant risk of detriment in the short term.

Thank you, Mr Kell. I have no further questions, Commissioner.

THE COMMISSIONER: Thank you. Now, does any party other – who has leave to appear other than counsel for ASIC seek leave to cross-examine Mr Kell? No. Mr Steele?

MR STEELE: Nothing, thank you, your Honour.

THE COMMISSIONER: Yes, thank you.

Mr Kell, may I raise one matter with you?---Sure.

I think you may have given your personal address when you commenced your evidence. It occurs to me that may present a problem?---Sorry.

MR STEELE: Perhaps if I could ask that that be suppressed, Mr Commissioner.

THE COMMISSIONER: I think hitherto we have not given personal addresses of office holders and I don't think we should start by making an exception for you, Mr Kell?---Thank you, Commissioner.

I will make a non-publication direction which I will execute at lunch, but if I could just say to the media present that although his personal address was given, there will be a non-publication direction in respect of that personal address?---Well, that's – thank you.

Yes. Thank you. Thank you, Mr Kell. You may step down?---Thank you.

<THE WITNESS WITHDREW [12.32 pm]

THE COMMISSIONER: Ms Orr.

MS ORR: Commissioner, Mr Kell's evidence touched on vertical integration, which is a topic which has recently attracted significant interest in the financial advice industry, and the Commissioner heard evidence from Mr Kell about Report 562, which dealt with vertically integrated institutions and conflicts of interest in the financial advice industry.

We asked AMP, ANZ, CBA, NAB and Westpac to provide us with statements addressing some or all of three topics connected with vertical integration in the financial advice industry. The first topic was approved product lists, and we asked the entities about the processes that they have in place for selecting products for inclusion on their approved product lists and for deciding whether to allow their financial advisers to recommend financial products that are not on their approved product lists. We also asked the entities about how they managed conflicts of interest in connection with their approved product lists.

The second topic was conflicted remuneration. As you've heard, since 1 July 2013, the FOFA reforms prohibit financial services licensees from providing and financial advisers from receiving benefits that could reasonably be expected to influence the choice of financial product recommended by an adviser, or to influence the advice given to clients by an adviser. As you've also heard, the prohibition on conflicted remuneration is subject to certain exceptions. We asked the entities about the benefits they have provided to financial advisers since the ban on prohibited conflicted remuneration and the processes they have in place to ensure that they do not provide prohibited conflicted remuneration.

The third topic was white label products. A white label product is a generic financial product like a managed fund, a platform or a superannuation fund that the product issuer makes available to other companies to sell under their own branding. We asked the entities whether they create white label products and about the fees that they receive in relation to those products. We will tender each of the statements that we received from the entities about these topics and summarise some key aspects of those statements.

We start with ANZ, which provided one statement dealing with all three topics. The statement was provided by Mr Donald Sillar, who is the head of sales for ANZ Wealth. In relation to approved product lists, Mr Sillar explained that ANZ maintains a master approved product list for each product type and that each of ANZ's licensees maintains its own approved product list. He described the process by which ANZ decides whether to include products in an approved product list or remove them from the list, which involves internal research that is considered by a number of forums and committees.

Mr Sillar also explained the process for deciding whether to grant approval for advisers to recommend products that are not on an approved product list. This process has three stages reflecting the different circumstances in which an adviser

might seek such approval. Mr Sillar told the Commission about the proportion of in-house products on ANZ's approved product list. He said that in 2017, 27 per cent of the products on the approved product list for ANZ Financial Planning were in-house financial products. Mr Sillar did not provide information about the proportion of funds invested in or insurance premiums paid in respect of in-house products.

In relation to conflicted remuneration, Mr Sillar said that he had been informed by the heads of each of the 10 entities associated with ANZ that to the best of their knowledge since 1 July 2013, none of these entities had provided any prohibited conflicted remuneration. Mr Sillar did not provide any details about the permitted conflicted remuneration provided by any of these entities. Mr Sillar also said that he was informed that since 1 July 2013, ANZ and its licensees had not identified any instances of an employed financial adviser or authorised representative receiving prohibited conflicted remuneration.

In relation to white label products, Mr Sillar told the Commission that since 1 July 2013, no entity associated with ANZ has made available any new white label products. However, he noted that there are a number of white label products that entities related to ANZ have continued to make available after that time. These products were generally administration services or RAP accounts. In relation to each of these products, customers paid fees directly to the product issuer and the product issuer paid a distributor or promotor fee to the intermediary. Commissioner, I tender the statement of Mr Donald Sillar, S-i-l-l-a-r, dated 11 April 2018.

THE COMMISSIONER: That will be exhibit 2.3.

EXHIBIT #2.3 STATEMENT OF MR DONALD SILLAR DATED 11/04/2018

MS ORR: We turn to AMP. AMP also provided one statement dealing with all three topics. This statement was provided by Mr Bradley Green who is the director of advice and research at AMP. In relation to approved product lists, Mr Green explained that AMP's licensees have approved product lists and explained the process by which decisions are made about, including products on those lists. He also referred to AMP's policies that govern the management of conflicts of interests in connection with the composition of approved product lists. AMP said that they would provide a spreadsheet setting out the proportion of in-house products and the proportion of funds invested in in-house products. This spreadsheet was not provided to the Commission until after 9.30 last night, and we have not, in the time available, been able to review that. In relation - - -

THE COMMISSIONER: Can I ask when it was asked to be provided by?

MS ORR: Yes, I will find that date, and we can – we will tell you that date in a moment, Commissioner.

THE COMMISSIONER: Both the request and the due date.

MS ORR: Thank you. In relation to conflicted remuneration, Mr Green did not provide information about the kinds of permitted conflicted remuneration provided by AMP's licensees. But Mr Green explained the steps that ANZ takes to ensure that its advisers do not receive - - -

THE COMMISSIONER: AMP, I think.

MS ORR: I'm sorry.

THE COMMISSIONER: Mr Green?

MS ORR: Mr Green, I'm sorry.

THE COMMISSIONER: AMP.

MS ORR: Yes.

THE COMMISSIONER: Yes.

MS ORR: Mr Green explained the steps that AMP takes – I am sorry if I confused things there – to ensure its advisers don't receive prohibited conflicted remuneration. He said that these include training its advisers and, in relation to recent changes in the law in relation to life insurance commissions, requiring advisers to attest that they do not receive prohibited conflicted remuneration.

However, despite these steps, Mr Green identified a number of instances where AMP's licensees have provided prohibited conflicted remuneration since 1 July 2013. These included in 2014, AMP waived para planning fees in relation to 913 customers worth approximately $411,000, where the adviser recommended that the customers transfer a sum invested in an external product into a product on AMP 's approved product list. Between January and September 2015, AMP waived para planning fees worth approximately $352,000 in relation to a further 856 customers in the same circumstances.

In 2015, AMP waived para planning fees total $17,780 in certain instances where customers transferred out of an external superannuation product into an AMP product. Between April and August 2015, AMP passed on approximately $10,600 in product commissions paid by an external provider to its advisers. And between 2013 and 2017, one AMP adviser received approximately $25,879 in asset-based fees, some part of which was asset-based fees on borrowed amounts. AMP did not disclose any of these events in any of the three submissions to the Commission that it made earlier this year, despite each of these events constituting a breach of the Corporations Act.

In relation to white label products, Mr Green said that neither AMP nor any entity associated with AMP manufactures products that are made available to any intermediary to sell under its own branding. I will tender the statement of Mr Green dated 12 April 2018.

THE COMMISSIONER: That will be exhibit 2.4.

EXHIBIT #2.4 STATEMENT OF MR GREEN DATED 12/04/2018

MS ORR: And in response to your question, Commissioner, about the timing, the request to AMP was sent on Wednesday, 28 March seeking the statement and the exhibits by Tuesday, 3 April. An extension was granted at AMP's request to Wednesday, 4 April. The statement was provided in its final form on 12 April and the spreadsheet provided, as the Commissioner has heard, late last night.

THE COMMISSIONER: Yes.

MS ORR: We turn to CBA, Commissioner. CBA provided three statements. The first was provided by Mr Hugh Humphrey, who is the general manager of bank financial planning at CBA. This statement deals with the topic of conflicted remuneration in relation to Commonwealth Financial Planning and BW Financial Advice. Mr Humphrey told the Commission that since 1 July 2013, the only benefits that Commonwealth Financial Planning and BW Financial Advice have provided to financial advisers that could reasonably be expected to influence their advice were payments of commission in relation to insurance.

Mr Humphrey said that in some cases these payments were shared directly with advisers, and in other cases they contributed to increasing the advisers' variable remuneration. Mr Humphrey also explained the measures that Commonwealth Financial Planning and BW Financial Advice have taken to ensure that their advisers do not receive prohibited conflicted remuneration. These measures include training for advisers and the analysis of payments received from product providers to identify particular types of prohibited conflicted remuneration. I tender the statement of Mr Hugh Humphrey dated 13 April 2018.

THE COMMISSIONER: That will be exhibit 2.5.

EXHIBIT #2.5 STATEMENT OF MR HUGH HUMPHREY DATED 13/04/2018

MS ORR: The second CBA statement was provided by Mr Mark Ballantyne who is the financial manager of Financial Wisdom and CFP Pathways. This statement deals with the topic of conflicted remuneration in relation to Financial Wisdom, CFP

Pathways and Count Financial. Mr Ballantyne told the Commission that Count Financial and Financial Wisdom provide a number of different types of permitted conflicted remuneration to financial advisers. They pass on insurance commissions as well as fees and commissions that are subject to the grandfathering arrangements that accompanied the FOFA reforms. Mr Ballantyne also explained the measures that Count Financial and Financial Wisdom have taken to ensure that their advisers don't receive prohibited conflicted remuneration.

However, Mr Ballantyne identified instances where, despite these measures, Count Financial and Financial Wisdom advisers have received prohibited conflicted remuneration. These included seven cases where Financial Wisdom advisers received non-monetary benefits in excess of the $300 threshold, an unspecified number of instances where Count Financial and Financial Wisdom advisers received payments from superannuation account product issuers in 2014 and '15, and an unspecified number of instances where Count Financial and Financial Wisdom Advisers received brokerage payments.

Mr Ballantyne also specifically excluded from his statement instances where Count Financial or Financial Wisdom paid prohibited conflicted remuneration. So it is not clear whether there have been further contraventions by either of those entities. I tender the statement of Mr Mark Ballantyne, dated 13 April 2018.

THE COMMISSIONER: Exhibit 2.6.

EXHIBIT #2.6 STATEMENT OF MR MARK BALLANTYNE DATED 13/04/2018

MS ORR: The third CBA statement was provided by Mr Linda Elkins, who is the executive general manager of Colonial First State. This statement deals with the topic of CBA's white label products. Ms Elkins said since 1 July 2013, two members of the CBA Group, Colonial First State Investments and Avanteos Investments, have manufactured products that have been made available to intermediaries, which Ms Elkins refers to as promoters, to sell under their own branding. These products include platforms and managed accounts.

Where Avanteos makes products available to a promoter, it generally pays the promoter certain fees. However, it does not pay fees to promoters that provide financial advice in respect of any accounts opened after 1 July 2014. I tender the statement of Ms Linda Elkins dated 13 April 2018.

THE COMMISSIONER: Exhibit 2.7.

EXHIBIT #2.7 STATEMENT OF MS LINDA ELKINS DATED 13/04/2018

MS ORR: We turn to NAB. NAB provided two statements. The first statement was from Mr Ross Barnwell, who is a general manager in NAB's advice business. This statement deals with the topics of NAB's approved product lists and with conflicted remuneration. In relation to approved product lists, Mr Barnwell told the Commission that decisions about including products on NAB's approved product list are made by an internal committee after considering research undertaken by 360, a division of NAB's consumer banking and wealth division. Mr Barnwell described the matters that the committee considers in deciding whether to include products on the list and the processes that NAB adopts for managing conflicts of interest in relation to that decision-making process.

Mr Barnwell also described NAB's processes for granting waivers to allow advisers to recommend products that are not on NAB's approved product list. Mr Barnwell provided some information about the composition of NAB's approved product list. He explained that as at 1 January last year, 38.26 per cent of the products on NAB's approved product list were in-house products, that is, a product issued by an entity associated with NAB. He also explained that in the period from 1 January last year to 31 March last year, the proportion of funds invested in or insurance premiums paid in respect of in-house products, as opposed to external products, by new clients of NAB were 66.39 per cent.

In relation to conflicted remuneration, Mr Barnwell told the Commission about the steps that NAB takes to ensure that its advisers do not receive prohibited conflicted remuneration. These measures mostly involved providing training and guidance to its advisers about conflicted remuneration. Mr Barnwell noted that NAB recently introduced a working group with responsibility for reviewing and designing controls to prevent advisers from receiving conflicted remuneration. Mr Barnwell said that in each year since 2013, NAB and its associated licensees have paid hundreds of millions of dollars, in some years in excess of half a billion dollars, in permitted conflicted remuneration.

However, Mr Barnwell acknowledged that there have also been a number of instances where NAB has provided or NAB advisers have received benefits that were prohibited conflicted remuneration. These included, between 1 July 2013 and 25 May 2017, entities associated with NAB provided non-monetary benefits in the form of free support services to financial advisers who recommended particular NAB products.

From 1 July 2013 to the present, NAB and its associated entities have paid referral partners under its introducer program and other referral arrangements to refer potential loan customers to NAB. Where these fees were paid to financial advisers, they might reasonably have been expected to influence the advice provided. Mr Barnwell said that NAB was investigating this issue, that its investigation is ongoing and that NAB has suspended the ability for financial advisers to establish new broker relationships under the introducer program and other referral arrangements.

Also, between 1 July 2013 and 17 March 2017, NAB and its associated entities provided non-monetary benefits with a total value of over $500,000 to advisers in contravention of the conflicted remuneration provisions. NAB did not disclose any of these events of prohibited conflicted remuneration to the Commission in the two submissions it provided earlier this year, despite each of them constituting a breach of the Corporations Act. I tender the statement of Mr Ross Barnwell dated 13 April 2018.

THE COMMISSIONER: That will be exhibit 2.8.

EXHIBIT #2.8 STATEMENT OF MR ROSS BARNWELL DATED 13/04/2018

MS ORR: The second NAB statement was provided by Mr Matthew Lawrance, L-a-w-r-a-n-c-e, who is the executive general manager of wealth and CEO of MLC Super in the Consumer Products and Services Division at NAB. This statement deals with NAB's white label products. Mr Lawrance said that since 1 July 2013, associated entities of NAB and its subsidiary, GWM Adviser Services, have manufactured products that are made available to intermediaries to sell under their own branding. These have included superannuation products, investor directed portfolio services, managed investment schemes, and a transactional cash account.

Many of these products have since been terminated, and for each of these products clients paid fees directly to the product issuer. The product issuer generally paid fees to the intermediary for its role in promoting and distributing the product. I tender the statement of Mr Matthew Lawrance dated 15 April 2018.

THE COMMISSIONER: Exhibit 2.9.

EXHIBIT #2.9 STATEMENT OF MR MATTHEW LAWRANCE DATED 15/04/2018

MS ORR: Finally, Westpac provided two statements. The first was a statement from Mr Michael Wright, who is the national head of BT Financial Advice. Mr Wright's statement deals with the topic of conflicted remuneration. Mr Wright described the steps that Westpac took to ensure that its financial advisers would not receive prohibited conflicted remuneration. One of the measures that Westpac takes is to generate a banned commissions report, which identifies payments that have been received from product providers. These payments are classified as either banned or permitted and only permitted payments are passed on to financial advisers.

Mr Wright explained that in each year since 2013, Westpac has paid around $200 million in payments that constitute permitted conflicted remuneration. However, Mr Wright acknowledged that since 1 July 2013, there have been a number of instances

where Westpac has provided or Westpac advisers have received benefits that constitute prohibited conflicted remuneration.

These included $24,844 in payments received under a brokerage referral arrangement between 1 July 2013 and 5 May 2015, approximately $64,745 in percentage-based adviser fees paid to dealer groups before December 2014, $61,000 in volume-based payments made to AMP after 1 July 2014, $23,000 in adviser commissions deducted from customer accounts between 1 July 2013 and 29 August 2013, $27,895 in commissions that were paid in relation to superannuation accounts between 1 July 2013 and 14 July 2016, and $20,800 in commissions paid in relation to the ASGARD platform in August and September 2014. Westpac disclosed some but not all of these events in its submissions to the Commission earlier this year. I tender the statement of Mr Michael Wright, dated 16 April 2018.

THE COMMISSIONER: Exhibit 2.10.

EXHIBIT #2.10 STATEMENT OF MR MICHAEL WRIGHT DATED 16/04/2018

MS ORR: The second Westpac statement was provided by Ms Constandina Kotsopoulos, who is the head of Platforms Product Management for BT Financial Group. This statement deals with the topic of white label products produced by Westpac. Ms Kotsopoulos said that since 1 July 2013, Westpac has made three platforms available as white label products to be sold under the branding of certain dealer groups. Any fees payable by clients in relation to these products are paid to product issuers which are subsidiaries of BT Financial Group.

Under arrangements that were entered into before 1 July 2013, the product issuers remit a proportion of those fees to the dealer groups but only where those fees were paid by clients who entered into the product before 1 July 2014. That is because those payments continue to be permitted under the grandfathering arrangements that accompanied the FOFA reforms. I tender the statement of Ms Constandina Kotsopoulos dated 16 April 2018.

THE COMMISSIONER: Exhibit 2.11.

EXHIBIT #2.11 STATEMENT OF MS CONSTANDINA KOTSOPOULOS DATED 16/04/2018

MS ORR: Commissioner, if that is a convenient time, after lunch we will turn to the first case study.

THE COMMISSIONER: Yes, 2 pm?

MS ORR: Thank you.

THE COMMISSIONER: Two pm.

ADJOURNED [12.58 pm]

RESUMED [2.00 pm]

THE COMMISSIONER: Mr Hodge.

MR HODGE: Commissioner, the witness for the first case study is Mr Regan.

THE COMMISSIONER: Is Mr Regan in court – in the room? If you would come into the witness box, please, Mr Regan.

<ANTHONY GEORGE REGAN, AFFIRMED [2.01 pm]

<EXAMINATION-IN-CHIEF BY MR CRUTCHFIELD

THE COMMISSIONER: Do sit down, thank you, Mr Regan. Yes, Mr Crutchfield.

MR CRUTCHFIELD: If the Commissioner pleases.

Now, Mr Regan, do you have an original of your witness statement with you.

THE COMMISSIONER: We better have name, rank and serial number and all the Geneva Convention details first, Mr Crutchfield.

MR CRUTCHFIELD: We will do that. Do you have it there?---Yes, I do.

THE COMMISSIONER: Well, can we have his name.

MR CRUTCHFIELD: Is your full name – could you tell the Commissioner your full name, please?---Anthony George Regan.

And your business address?---Is 33 Alfred Street, Sydney.

And your current occupation?---Group executive for advice in New Zealand for AMP.

Now, do you have with you the summons that you were issued by the Royal Commission to give evidence today?---Yes, I do.

Do you have an original of that document with you?---Yes.

That's the summons?---Yes, I do.

That's the summons you were given, is that right, Mr Regan?---It is.

Commissioner, I tender the summons.

THE COMMISSIONER: Exhibit 2.12, summons to Mr Regan.

EXHIBIT #2.12 SUMMONS TO MR REGAN

MR CRUTCHFIELD: Mr Regan, you have your statement there, you have already said, I think?---Yes, I have.

Have you read your statement recently?---Yes.

I understand there's one matter that you want to update, and, Commissioner, it's paragraph 335.

THE COMMISSIONER: Yes.

MR CRUTCHFIELD: Do you have that there, Mr Regan. If you go to paragraph 335 of your statement?---Yes. I have the paragraph.

Now, could you look, please, at paragraph 355(b)?---Yes.

And there's a statement in that paragraph:

The charging of OSFs prior to certain customers going into the buyback pool –

Delete – ignore the brackets for the moment –

to date, approximately –

And do you see that number there, ten thousand - - -?---685.

Yes. Is that number correct?---I believe it has been updated.

Yes. And what's your belief as to the updated number?---I don't believe I've been provided with that - - -

If you don't - - -?---About a thousand to 1500.

About 1000 to 1500?---I believe is the correct number.

And if you go over the page, do you see the last sentence in that subparagraph:

AMP estimates that approximately 1.06 million will be paid.

Is that figure correct?---I believe that has been updated to 2 to 300 thousand.

All right. Look at paragraph (c), please. Do you see the reference to the customers there, 3108?---Yes.

Has that figure been updated?---Not that I'm aware of.

And what about the monetary sum in the second last line, 1.2 million?---Not that I'm aware of.

Are there any other amendments that you wish to make to your statement?---No.

Are you otherwise satisfied the contents of your statement are true and correct, Mr Regan?---Yes.

Commissioner, I tender the statement.

THE COMMISSIONER: Exhibit 2.13, statement of Mr Regan.

EXHIBIT #2.13 STATEMENT OF MR REGAN

MR CRUTCHFIELD: And its exhibits.

THE COMMISSIONER: And its exhibits. Just to be clear about this, Mr Crutchfield, do you propose to have the witness change what appears in 335(b) or simply have his evidence amended in the fashion, or amplified in the fashion you've indicated?

MR CRUTCHFIELD: The latter. It's an update, yes.

THE COMMISSIONER: Very well. Exhibit 2.13 will be the statement of Mr Regan.

MR CRUTCHFIELD: If the Commissioner pleases.

THE COMMISSIONER: Yes. Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner.

<CROSS-EXAMINATION BY MR HODGE [2.05 pm]

MR HODGE: Mr Regan, you're the group executive for AMP in relation to Advice and New Zealand. Is that right?---I am, indeed.

And you've been put forward by AMP as its witness to give evidence in response to a series of questions that the Commission has asked in relation to misconduct concerning fees for no service?---I have.

And you've only been in your present role since 1 January 2017?---That's correct.

But you were already a group executive of AMP at that time?---Yes, I was.

And as at 1 January 2017, the change was that advice was added to your portfolio of responsibilities?---Broadly speaking, yes.

You were already the group executive for New Zealand?---Yes, I was the managing director for New Zealand and in that role part of the group leadership team.

I see?---But the title wasn't formally group executive.

I understand. And the group leadership team is also referred to as the GLT. Is that right?---It is.

And the GLT reports to Mr Meller?---That's correct.

Mr Meller is the CEO of AMP?---That is correct.

And your immediate predecessor as group executive for advice was Robert Caprioli?---That's correct.

Now, you've indicated, you were already the managing director of AMP New Zealand, and in fact you've been at AMP for about 20 years. Is that right?---Since 30 June 1999, I believe.

I see. 19 – almost 19 years. And the GLT, that also includes Brian Salter?---It does.

And Mr Salter is the general counsel for AMP?---Yes, he is.

And he has been in that role since about 2008?---That would be approximately correct.

And Mr Meller in addition to being the CEO is also the managing director of AMP?---That's correct.

And he was appointed as CEO in January of 2014?---I believe so.

And ultimately, the GLT is responsible for implementing the policies and strategies that are set by the AMP board?---Yes, they are.

And Mr Meller, as managing director, is a member of the board?---Yes, he is.

And the current chairman of the board is Catherine Brenner?---Yes, she is.

She has held that position as chairman since June of 2016?---I couldn't recall that off the top of my head but it would be very close.

All right. Now, I want to ask you some questions about AMPs advice business, just to lay out the structure of it?---Mmm.

The advice business of AMP is comprised of how many licensees?---There are four main licensees, and there's a further – I will say approximately 10 or so but I would have to go to the list to double-check the absolute number.

All right. So are the four main licensees AMP Financial Planning Proprietary Limited?---Yes.

Charter Financial Planning Limited?---Yes.

Hillross Financial Services Limited?---Yes.

You were the previous managing director of Hillross. Is that right?---I was up until two thousand – the end of 2006.

The fourth is AMP Direct. Is that right?---No, so the main – the other main licensee would be what was ipac, still partly trades as ipac but now part of a business we call AMP Advice.

I see.

THE COMMISSIONER: You are going to have to keep your voice up, Mr Regan.

MR HODGE: So AMP Direct is a separate licensee?---Yes, it is.

And what is the function of AMP Direct?---AMP Direct or what is otherwise known as AMP Assist is essentially a contact centre styled environment where we deliver responsive services to clients and provide other financial services, but typically a telephone-based environment, primarily.

And how long has AMP Direct been in operation?---I am not certain.

Was it in operation when you commenced with the business?---Yes.

Sorry, when you commenced as group executive - - -?---Yes.

- - - for advice?---Yes, it was.

Now, AMP has about 2800 financial planners operating within its network?---Approximately.

And most of those planners are not employed by AMP or an AMP subsidiary?---No, about 90 per cent are authorised representatives.

I see. And the other 10 per cent are employed by – is it principally ipac?---Yes, that's correct.

Does any other licensee within the AMP group employ planners?---AMP Direct does have some employed planners, I believe.

Okay. And as you say, the vast majority then of AMPs planners are authorised representatives. Can you just explain what does that mean about the nature of their relationship with AMP?---So an authorised representative is typically a self-employed adviser as distinct from an employed adviser or representative, and so where someone is directly employed in the employment relationship with the institution, it's not anything other than an employment relationship, whereas in the case of the authorised representatives, they're licensed by the licensee, in our case the ones that you've mentioned predominantly cover the range of authorised representatives, and they typically then have their own businesses, they're self-employed, but it's the case that they will also employ advisers themselves. But those people will also be known as authorised representatives.

Can we just break that down a little bit. There are authorised representatives that are companies?---There are corporate authorised representatives.

Yes?---So they are entities, yes, corporate entities.

And they might be an authorised representative of an AMP subsidiary, like AMP Financial Planning?---That's correct.

And in turn, that corporate authorised representative might employ representatives?---That's correct.

And the number of approximately 2800, does that include representatives who are employed by a corporate authorised representative?---Yes.

Okay. So the 2800 financial planners might be self-employed authorised representatives. That's one possibility?---Mmm.

You just need to say yes or no?---Yes.

They might be employed directly by an AMP licensee in limited circumstances?---Yes.

And they might be representatives who are employed by a corporate authorised representative?---That's correct.

And are authorised representatives commonly referred to as ARs within the AMP business?---That's correct, they would.

And the authorised representatives or the representative of a corporate authorised representative will enter into an agreement to provide financial services to a client?---Yes.

And the services that are going to be provided by the authorised representative are a matter for negotiation between the authorised representative and the client?---Yes, that's correct.

And also then the price that's going to be charged for the services is a matter of negotiation between the authorised representative and the client?---That's correct.

And that would include whether or not the services are to be provided on a one-off basis or an ongoing basis?---Yes.

And if the services are to be provided on an ongoing basis then there are specific legislative requirements that apply?---Yes, that's correct.

And one legislative requirement is that the authorised representative must provide a fee disclosure statement?---That's correct.

And another legislative requirement is that the authorised representative must provide a fee renewal notice every two years to the client?---That's correct.

And if the client doesn't opt in to continue the services and continue paying the fee, then the fee has to stop?---That's correct.

And a very common way in which ongoing fees are paid to an authorised representative is by an automatic payment from a particular product?---Yes, that would be a typical method.

It's unusual for an authorised representative to be directly invoicing a client for fees for service?---I don't have any data to sustain the proportionality but it would be far more common for it to be drawn in the manner that you outlined.

And so one way, as an example, that that might happen is that the financial planner might suggest to the client who wants to invest some money that that money should be invested through a platform?---Yes.

And the client's money would be, effectively, transferred on to the platform or into the platform?---Yes.

And then the adviser would cause that money to then be disbursed or invested into various – for example, a managed fund or some other investment product through the platform?---Yes.

And the platform would automatically deduct an amount from the client's cash balance on a regular basis and pay it to the authorised representative?---The payment would be through to the licensee, so all moneys paid to the adviser must go through the licensee in the first instance.

I see. So the platform would deduct the money from the cash balance, pay it to whichever is the relevant AMP licensee; is that right?---That's correct.

And then the AMP licensee would then on-pay it to the relevant authorised representative?---That's correct.

And can you just explain to the Commissioner, what is the process by which AMP checks whether its authorised representatives are issuing fee disclosure statements?---So the fee disclosure statements are issued to the clients. They're generated through business process. The authorised representative will then just ensure that they're passed on to the client. It's – it's then up to the authorised representative, I believe, to ensure that those fee disclosure statements are then returned to the authorised representative within 30 days of the end of the disclosure period.

And I'm sorry, does this vary depending on whether it's a fee disclosure statement or an opt-in notice or is the process the same?---I'm not entirely certain of the detail process around the opt-in notice, but the opt-in notice has a – a similar process in that it is a two-year period, and then there is – it has to be dispatched, I think, within 60 days of the opt-in date. I would need to verify that. But it then needs to be returned within 30 days. There is a 30-day grace period after which – or during which time all fees must be turned off if it hasn't been returned within that 30 days.

Does AMP have any process for checking whether its authorised representatives are sending out fee disclosure statements, sending out opt-in notices, receiving opt-in notices back?---Significantly through the audit program we would test for that.

Okay. And could you just explain then what is the audit program that AMP is operating at the moment?---So we have a audit program which addresses the audit requirements across all of the authorised representatives, and that process is, effectively, risk-weighted. So those advisers that are deemed higher risk are audited

more frequently than those that are deemed lower risk. But typically, advisers will be audited somewhere between three and 24 months on a rolling cycle.

Does AMP have any automatic process for checking whether an opt-in notice has been returned by a client?---I don't know the answer to that.

All right. Are you aware of any discussion within AMP about the possibility of automating the process of checking for the return of opt-in notices?---I know that we are looking at a number of projects to improve a lot of those business tasks, but I'm not entirely sure of the detail of your question.

All right. Now, I'd like to now ask you some questions about the buyer of last resort policy. Is that – it's often abbreviated as BOLR. Is that typically pronounced as "bolar" within the business?---Yes, it is.

All right. And you've exhibited a BOLR policy, which is tab 20 of your statement or tab 20 of the exhibits to your statement, and the reference is AMP.6000.0007.0658?---Would you like me to go to that?

Yes, I think if you have that open - - -?---Yes.

- - - Mr Regan. There is a screen next to you, Mr Regan, if you wanted to look at it on the screen. It's up to you?---Thank you.

I don't think you can flick. It's not a touchpad?---It's not touchpad.

You only get to see what I want you to see, Mr Regan?---Okay.

THE COMMISSIONER: Sometimes.

MR HODGE: Yes. Well, we will see. Sometimes we don't get to see anything that any of us want to see.

Can I just ask you to explain in a very general way how the BOLR process works?---So the buyer of last resort is a facility offered – and if we talk perhaps specifically about AMP Financial Planning because that's the relevant policy you've got there, noting that there are various other buy-back arrangements but the AMPFP, BOLR arrangement effectively enables an adviser to have sale back rights to AMP under certain conditions. Those conditions vary based on the tenure of the advisers. So for example, generally speaking, you have to be with the business for at least four years before you have an entitlement to sell back. That will vary for those advisers who, I believe, have more than 15 years worth of service in that the notice period for those people will be shorter compared to the people that are only serving or have served four years. It's the case then that AMP will, based on various conditions that attach to the sale back process, and that will go to, for example, the quality of files and a range of other indicators that AMP will then undertake to buy those clients back or that register back. It will be for, generally speaking, an agreed value of

approximately four times the recurring or ongoing revenue of the business, regardless of whether that is made up of commissions, as in grandfathered-style commissions or payments that relate to mortgages or, indeed, fees. And then typically, the BOLR is then subject to some notifications. So the notification, I think, has to go in initially at six months, and then the application has to be made around six to eight months from the date of expected departure.

Let me break down some elements of that with you. Is it fair to say that within the AMP network, it's an intention of AMP that it be possible to effectively sell books of clients?---That's correct.

And the books of clients might be sold by one authorised representative to another authorised representative - - -?---That's correct.

- - - of AMP. But if an authorised representative is unable to sell the book of clients to another authorised representative, then, subject to satisfying certain conditions, AMP will buy that book of clients?---That's correct.

And the BOLR policy sets out a particular method by which that book of clients is valued?---Yes.

And, as you've said, typically, it's valued on four times revenue?---That's correct.

And there's some adjustments, and we will come to that in a moment?---Yes.

Now, the policy that's up on the screen is one that was effective as at 1 July 2012?---Yes.

And that continued to be the current BOLR policy of AMP Financial Planning until a new policy was brought in in June of 2017?---I'm not entirely certain of that.

Well, if you look at tab 21 of the exhibits to your statement, that's the new policy?---I believe so. I just don't know whether there were any in between the two. That's all. I wasn't in the business at that time. I don't have firsthand knowledge. I'm not suggesting it's not, I'm just not certain that it is. That's all.

All right. Well, we might come back to that. But there's been a relatively significant change between the 2012 policy and the 2017 policy?---Yes.

And in a sense, one of the things that the 2017 policy tries to address is the problem of orphan clients and the charging of fees to orphan clients. You agree with that?---It's certainly an updated policy, and it certainly looks to improve the arrangements for ongoing fee clients, yes. I would agree with that.

Okay. Now, if we go back to this idea, then, of AMP buying the book of clients, is it fair to say a significant problem with that until very recently was that AMP had no

capacity to be able to provide any service to those clients that it bought?---Yes, that's correct, where they are fee-paying clients.

THE COMMISSIONER: Sorry, speak up. What did you say?---Where they're fee-paying clients.

MR HODGE: Sorry, you – is that suggesting you did have capacity to service clients who weren't fee-paying clients?---Commission-based clients.

You could provide services to commission-based clients?---In the limited sense, yes, because commission-based clients don't require the same degree of servicing.

I see. They don't really require any servicing; therefore it's possible to service them?---So the servicing is more reactive.

And is what that means that AMP had a telephone call centre that you - - -?---Yes.

- - - could call into?---That's correct.

And that telephone call centre wasn't staffed by financial planners?---Generally, no.

So they couldn't actually provide financial advice?---That's correct.

It was a purely administrative call centre?---Service-based.

I'm sorry, I'm not sure what that means?---Well, providing services to those clients. So for example, checking balances or undertaking transactions, notifications of changes of address, things of that nature.

Yes. Administrative services, rather than providing any advice at all?---That's correct.

And so when you say it was possible to service commission clients, that just means so long as they didn't require any advice, then AMP didn't have a problem?---That's correct.

The problem was all of the clients that were paying fees for advice?---That's correct.

And I just want to delve a little bit into the detail of the BOLR policy. Can we go to page 9 of the policy, which is .0666.

THE COMMISSIONER: So this is the July '12 or June '17 policy?

MR HODGE: I'm sorry, this is July 2012. I think we've gone - - -

THE COMMISSIONER: AMP.6000.0007 at?

MR HODGE: 0666.

THE COMMISSIONER: Thank you.

MR HODGE: I think we've got the wrong document up on the screen. Thank you.

THE WITNESS: That was page 9.

MR HODGE: Yes. That should be headed Approved Product and Services List?---That's correct.

And what this is explaining is that one aspect of the BOLR policy as it applied under this policy was that you would only be paid the multiplier on revenue or, indeed, paid anything, for a client if that client's products were on the approved products list?---I am not sure I know the answer to that.

Well, if we pop out the paragraph that comes after the dashes that begins:

> *BOLR is not applicable to products that are not on the APSL.*

?---Thank you, yes.

Do you agree with that?---Yes, thank you.

And what's also explained is:

> *Where a product is on the APSL but the related platform is not an AMP Financial Planning approved platform provider, the combination is considered not to be on the APSL.*

Is that your understanding of how the policy worked, or do you not have any understanding of how the policy worked?---I don't have a detailed understanding. I'm familiar with the policy itself, but in terms of operationalising the policy, I've never been – never had any material role in operationalising the BOLR policy per se.

All right. Well, you understand, in any event, the mechanics that we've talked about already, the idea of a platform and investment in a managed fund?---Yes, I have. Yes.

And what this appears to mean is that if a client is invested through a platform into a particular managed fund, even if the managed fund is on AMP's approved products and services list, if the platform isn't, then BOLR does not apply?---I believe that's what it says, yes.

And that means, for example, if a platinum international fund is on the approved products list but the client has been invested in that fund through Macquarie's platform, BOLR won't be applicable?---I believe that's the case.

And that's because the platforms that are available on the approved product list of AMP are primarily limited to its own brand platforms?---As it was at that time, yes.

And can I suggest that creates a very strong incentive for the adviser or the planner to place the client on to a platform on the approved product list?---Yes, noting that that was 2012.

Well, it was the – you're not accepting, are you, that this remained the policy up until 2017?---I would have to check the policy to – to be able to confirm that.

If you go to – or if we bring up paragraph 155 of your statement. And can we pop that out. You see this version of the BOLR policy was current until it was superseded by a revised BOLR policy dated 1 June 2017?---Yes.

That was your evidence. Is that still your evidence?---Yes, it is, but does that not say that it was superseded by the revised policy on 1 June.

On 1 June 2017?---Yes.

So we're agreed this is the policy that applied from July 2012 until the end of May 2017?---Yes.

Okay?---Sorry, I might have been at cross-purposes.

No, that's fine.

THE COMMISSIONER: Earlier you said to me that you weren't sure whether there was any intervening policy. Are you now sure that there's no intervening policy?---I'm not sure, your Honour, no.

Well, you see, you've said that what's in your statement is true. I read your statement as telling me there was a policy as at 1 July 2012, then there was a change of policy at 1 June 2017, and I read it as saying there was nothing in the middle?---And I agree with you, on having reread it.

Do go on.

MR HODGE: Thank you, Commissioner.

And are you aware, Mr Regan, of what proportion of the platforms available on the AMP approved product list are own brand platforms?---Certainly the vast proportion.

All right. Can we go back to the 2012 BOLR policy. That's tab 20 of Mr Regan's – the exhibits to Mr Regan's statement. And could we go to page 28, which is the page ending .0685. Now, this sets out the method of valuation that was used in order to determine the value of a book of clients. Are you – do you have any familiarity with this method, Mr Regan?---Not particularly, no.

Okay?---So I'm familiar with the policy. I've read through it. But as I said earlier - - -

All right. Well, your general understanding is that four times revenue is paid?---Yes, that's correct.

You see in the formula that the way in which that seems to be broken down principally is that there's four times base ongoing commission?---Yes.

Then there's one times fee for service?---Yes.

And perhaps a little confusingly, base ongoing commission also includes fee for service. Are you aware of that?---Fee for service is in the other part of the calculation.

Well, you recall we talked about the two ways in which fee for service could be charged to a client. One is by the adviser or planner directly invoicing the client, and the other is by the fees for service being automatically deducted from a product?---Yes.

And if you – if we go to page 29 of the policy, which is the page ending .0686, and, first, if we blow up the section which – or the row which begins:

> *One times fee for service.*

You will see:

> *A one times multiple will be applied to regular invoiced fee for service revenue earned by the practice in the past 12 months.*

?---Yes.

And then if we blow up the row beginning:

> *Four times base ongoing commission.*

And do you see there:

> *Actual ongoing commission rate for all policies classified as new book, the AOC rate will reflect the actual advice fee deducted against the policy in the 12 months prior to the valuation.*

?---Yes.

So you understand, looking at this now, as I pointed it out to you, that base ongoing commission in this formula actually includes fees for service that are automatically deducted from a product?---Yes, I think that's the case.

And if we go over to page 30, which is the page ending .0687, and blow up the second paragraph from the top beginning:

Actual ongoing commission.

And that also accords with what we're talking about, that actual ongoing commission includes ongoing planner service fees, ongoing member advice fees and plan service fees from the product?---It appears to, yes.

So, for example, if a client has invested in a platform and the platform is automatically deducting the fee for service and paying it first to the licensee and then to – then the licensee is paying that to the authorised representative, that automatic deduction is part of actual ongoing commission?---I believe that's the case based on that, yes.

Now, one of the things that you've said in your statement is that the intention, when a client was moved into the BOLR pool, was that the ongoing fees that they were paying would be dialled down to just product commission?---That's correct.

That's your evidence and what you understand was the intention with respect to the policy?---Yes.

As we've seen, though, in the BOLR policy, at least as it applied up until 1 June 2017, ongoing commission was defined to include fees that are being automatically deducted from a product?---Yes.

Do you know whether – when the fees are being dialled down, they are dialled down to just strict commission or to what is product commission as defined by the BOLR policy?---I understand it would be dialled down to just commission.

All right. Are you certain about that?---No, I'm not entirely certain.

Okay. And one of the issues – if that was to occur, one of the issues that would create is that AMP would buy the book of clients from an authorised representative at four times the product commission, including the ongoing fees. So that's the first part?---Mmm.

Do you agree with that?---Yes.

But then those fees would all disappear, and when AMP came to sell the book it would no longer be able to sell a capitalised version of those ongoing fees?---That's correct.

So that effectively, every time AMP bought back a book of clients under the BOLR policy, it would lose money?---That's correct.

And because – well, I'm sorry, I withdraw that and break this down. From 2010 AMP tried to get ahead of the game and switch its authorised representatives over to ongoing fees rather than product commissions. Is that right?---I believe so, yes.

And so even by the time we reach 2013, a substantial amount of the revenue stream that was coming from clients of AMP authorised representatives was coming in the form of fees for service rather than commission on products, or you're not sure?---Not substantial.

Certainly, then – let's do it another way – by 2016, the substantial or a substantial amount of the fees being received in respect of clients of authorised representatives of AMP was fees for service rather than commission?---It only really turns on what you mean by substantial but I gather it was certainly around 30 per cent, if we were to try and approximate.

But that's by 2016. Is that right?---Yes, yes.

So the other 70 per cent, that's still grandfathered commission. Is that right?---That's correct.

Okay. And so when you do the dial down, you would only be dialling down the 30 per cent. You wouldn't dial down the 70 per cent of grandfathered commission. Is that right?---That's correct.

Okay. But in any event, there is a disparity that is created by the BOLR policy if you can't keep the fees for service going on?---That's correct.

And if we then move to the next topic, which is a summary of the types of fees for no service issues that have arisen for AMP, you've identified in your statement two types of fees for no service issues that AMP has?---Yes.

One of those – or the first type is a fees for no service issue at the advice licensee issue?---That's correct.

And the second type is a fees for no service issue at the adviser level?---Yes.

And the charging of fees for no service by advice licensees arises in relation to what are sometimes referred to as orphan clients?---That's correct.

And in AMPs case, every client that goes into the BOLR policy is an orphan client?---Typically, yes.

Because an orphan client is one that doesn't have a financial planner allocated?---That's correct.

In addition, orphan clients have arisen in other ways for AMP. One is AMP terminated some advisers for cause?---That's correct.

And the problem was that AMP provided no services to the clients of those advisers but continued to collect fees from those clients?---That's correct.

And that was the subject of a breach report by AMP to ASIC on 3 May 2017?---I think that's correct.

And that was actually – well, you can satisfy yourself based on your own evidence, if you want, Mr Regan. You refer to this at paragraph 136 of your statement?---I am aware of the breach, just the connection about the date.

The date?---Yes.

I see. You might be confused, too, because in fact AMP gave two breach notices on that day to ASIC about fees for no service?---Yes.

You're aware of that?---That's correct.

And the second of those breach notices was in relation to ringfencing?---That's correct.

And ringfencing is another variation on how orphan clients could arise for AMP?---Yes.

Which is AMP would be buying back the register of clients but not actually putting those – or that register of clients into the BOLR pool?---Typically, with ringfencing, it was expected that there would be a sale from an exiting to an acquiring adviser, and the register was, essentially, held under those terms to enable that transaction to take effect.

Can we just break that down a little bit. What you're talking about is at the time that the sale of the clients to AMP occurred, it was, in some cases hoped and in some cases expected, that it would be possible to very quickly on sell those clients to another authorised representative?---Yes.

And that the desire was to sell that entire book or register of clients in whole to that other authorised representative?---Generally, yes.

But the authorised representative wasn't in a position to buy those clients on the day that the transaction took place – or, I'm sorry, the purchase by AMP took place?---Yes.

And it might be that AMP anticipated that in a few weeks' time it would be able to sell the clients, it might be that it just had a hope that at some time some unknown time in the future it would be able to sell the clients?---Typically with ringfencing, there was an expected transaction to occur.

Okay. But not necessarily a date of that transaction?---That's correct.

And so the clients would be ringfenced, meaning they don't go into the BOLR pool but they keep paying fees?---That's correct.

Even though nobody is providing them with any services?---That's correct.

All right. And that was the second breach notice that AMP gave to ASIC on 3 May 2017?---Yes.

Now, on the other hand, the charging of fees for no service by advisers is simply that the adviser doesn't provide any services to the client, even though the adviser is contracted with the client to provide the services?---Yes, they will be receiving a payment but haven't provided the services in those instances where that occurs.

Or AMP is probably receiving the payment, isn't it?---That's correct.

And then remitting that payment - - -?---That's correct.

- - - to the planner, but the planner isn't actually providing the services?---That's correct.

All right. And the only way that AMP would pick that up is by doing an audit of the adviser's practice?---Generally, yes.

What's the other way that it could pick it up?---It – it may be as a result of a complaint from a client, for example, but, generally speaking, we didn't have systems in place to monitor those payments.

Okay. Now, I want to then move to another topic, which is your recognition of problems in the business on your appointment. Upon your appointment as the group executive for advice, it became apparent to you that there were significant problems with the governance and oversight of AMPs advice business?---Yes.

And one of the things that alerted you to this was that ASIC had issued 112 notices to the AMP group in 2016 seeking production of documents?---That's correct.

And of those, 85 notices went to AMP Financial Planning?---Yes, that's correct.

Just the one licensee?---That's correct.

And ASIC had also required 18 current and former AMP employees and AMP financial planning planners to attend compulsory examinations in 2016?---I haven't got the number in front of me but that sounds correct.

And do you know, were all of those people connected with the advice business?---I couldn't be certain – they would be in some form or another related to the advice business, yes.

Okay. And that was apparent to you as at 1 January 2017 when you took over?---Not immediately but, I mean, progressively - - -

Pretty soon - - -?--- - - - through – yes. Yes..

And as we're going to see, the scale of the problem got worse?---Yes.

Now, one of the things that you've said in your statement at paragraphs 31 and 32 is that – and I will break this down – first, ASIC issued a notice to AMP Financial Planning dated 3 April 2017 requiring AMP Financial Planning to produce certain documents?---Yes.

Second, those documents were located over a period up until about 20 May 2017?---Yes.

Third, those documents were then brought to the attention of the AMP General Counsel Dispute Resolution?---That's correct.

And what is her name?---Larissa Baker Cook.

Thank you. And fourth, she, in turn, brought those documents to the attention of Mr Salter?---That's correct.

The general counsel of AMP?---That's correct.

And then together, they informed you of the documents some time before 19 May 2017?---I think it was perhaps, but we met on 19 May to discuss the documents.

And you met and discussed them on the 19th. And did Clayton Utz also attend that meeting?---Yes, I believe they did.

And we will come in a moment to what happens after that, but what were the documents that had caused this issue to be elevated up to you?---There was a series of emails that were concerning in relation to the knowledge of approving the continuation of fees and comments that people had made about the appropriateness of that. Secondly, there was a document related, as I recall, to a particular project that was linked to the FOFA program of change, and there were emails related to specific legal advices suggesting or outlining particular advices in respect to the ability to charge fees under circumstances where the fee – where the services weren't being provided. I can't recall if there were others but they – they're examples of what we discussed.

All right. And I will just ask you a few questions about that and then no doubt we will come to some of these documents. The project document that you're talking about: was that a document that was prepared by Brian Magellan?---Yes, that's the document I'm referring to.

Okay?---And I think that was shown to us on the day.

I see. And the specific legal advices, are they internal legal advices from internal lawyers at AMP - - -?---Yes.

- - - saying, "If you bring a client into BOLR, you have to turn off the fees for them."?---Legal advices were related to particular instances where inquiries have been made of legal – for example, in relation to the ability to retain the fees without services being provided on an exceptions-type basis.

Perhaps we will do this by reference to some documents, but I just want to understand, what is the – was there some novel thing that you became alerted to as a result of seeing those legal advices, some novel proposition?---The – the issue that was being canvassed was what's become known as the 90 day exception.

Yes?---If that's what you were getting at in terms of the novel.

I understand. Is it - - -?---Yes.

Was it – and what you're referring to, then, is there were emails you saw which were effectively making clear there is no lawful basis for implementing what's referred to as the 90-day exception?---That – that's – that is consistent with the advice, yes.

And when you saw that, were you already aware of the 90-day exception at that time?---The 90-day exception had been raised as an issue in relation to a matter that had been reported to ASIC.

Yes. It had already been reported - - -?---That's correct.

- - - at the end of the previous year?---Yes.

And the 90-day exception, as you've explained it, was an exception where fees would be left on in the BOLR pool for up to 90 days after the client had been moved into the BOLR pool. Is that right?---Mmm.

Sorry, again, just because it is being recorded - - -?---Could you – could you repeat the question?

Yes. That the fees would be left on for a client for up to 90 days after the client went into the BOLR pool. Is that right?---Yes.

Okay. And the legal advices, internal legal advices said there's no lawful basis for doing that?---That's correct.

Did that come as a surprise to you, that there was no lawful basis for doing that?---No, not a – no. It's not a surprise that it's not lawful.

It's just obvious, isn't it - - -?---Yes.

- - - that you can't charge somebody for 90 days for providing services that you're not going to provide?---Mmm.

You agree with that?---That's correct.

All right. And so then whatever the particular matter is was something you then felt you needed to bring to the attention of the CEO?---Well, this is in the context of the meeting that Larissa, Mr Mavrakis, Mr Salter and I had on that day - - -

Yes?--- - - - where we became aware of these.

And what is it, then, that you are going to meet with the CEO to inform the CEO about?---To make him aware of those advices, to make him aware of the circumstances that we had come across in – in relation to the legal advices, the other documents that I referred to and so on.

All right. So you see in the middle of paragraph 32, you say:

> *The group general counsel and I then raised the matter immediately with the CEO.*

?---Yes.

So just – if you can, just tell the Commissioner what is the matter that you're referring to there?---This is the issue of being made aware of the legal advices, along with the other documents that I referred to.

And - - -?---And that there had been legal advice provided in that regard.

Okay. So is the issue – I'm not trying to trick you here, Mr Regan. I'm just trying to understand what it is that was so novel that struck you and Mr Salter on 19 May. Was it that employees lower down the chain than you had been specifically advised that it was not lawful to continue fees for 90 days?---No, that matter had been dealt with previously. So the 90-day exception, as it was, was known and, in fact, there was a direction to cease that in November of 2016.

Yes. So what was the novel point that had arisen that you felt you needed to immediately inform the CEO of?---The – that there was specific legal advices showing that people had approved some of these things against legal advice.

I see. That is, they had been specifically advised it's not lawful to implement this 90-day exception and they just went ahead and implemented the 90-day exception?---That's correct.

And that was the point of particular concern?---That's correct. It had previously been described as an administrative oversight. What was different is that we became aware that it was a conscious business practice.

Now, that can't be right because you already knew as at the end of 2016 that it was a conscious business practice, didn't you? That was why you had given another notice to ASIC?---It was identified as a – as a – as a commercial practice.

Yes. But that had already occurred as at the end of 2016?---Yes, that's correct.

All right. So was the novelty just to discover that this commercial practice had been – which you already knew about – had been implemented in the face of legal advice?---Yes, that's correct, I think, in part. Yes.

I'm not – again, I just want to understand. When you say, "The group general counsel and I then raised the matter immediately with the CEO", what is the matter that you are raising with the CEO?---So there – there was the specific issues in relation to the exceptions that had been approved without – or, sorry, what we understood to be against legal advice, but there was also the, as I recall, the practice propositions stream document which indicated that it might have been formally approved through a process.

I see?---And – yes.

Okay?---I did have something else, but I've forgotten.

It's all right. Do you need to think about it?---No, it's fine.

Okay. And then in turn, that was raised with the board of AMP?---That's correct.

And ultimately, then, AMP commissioned Clayton Utz to provide a report?---That's correct.

And Clayton Utz was asked to investigate what was occurring in relation to the BOLR policy and ringfencing?---Yes.

And also - - -?---Well - - -

I'm sorry?---Yes.

And also to investigate the reporting of these matters to ASIC?---Yes.

All right. Now, at paragraph 46 of your statement, if we just bring that up, you make an apology on behalf of AMP?---I do.

And you say:

I apologise unreservedly for the failings in respect of advice and service delivery to our clients and for the regulatory breaches which are discussed below.

What are the regulatory breaches that you, on behalf of AMP, are apologising for?---The various breaches of the Corporations Act that have been incurred as a result of these practices.

Well, do you know what specific breaches they are?---I don't have them to hand.

Okay?---Yes.

Do you know whether before this moment when you've said that AMP is apologising for specific breaches of the Corporations Act, AMP has acknowledged that it has actually breached the Corporations Act in relation to this conduct?---Yes, I think we accept – yes, we accept that we have.

You think you have accepted that you have? I will just show you your submissions on behalf of AMP. Can we bring up RCD.0001.003.0003. Have you read the submissions made by AMP to the Royal Commission?---I've read the witness statement and I've been through the various exhibits.

I see. Perhaps what we might do it by reference to is RCD.0001.0033.0041. Have you seen this document before, Mr Regan?---Is it possible to make it larger?

Can we – thank you?---I can't recall it from the attachment itself.

All right. Well, if we go to page 3 of that document. Page 3 of 6. If you zoom in on there you will see this is the fees for no service, the licensees' issue that you referred to?---Yes.

And you see what's said on behalf of AMP is:

The conduct involves possible contraventions of various provisions of the Corporations Act and provisions of the ASIC Act.

Do I understand that you are now saying we should – or the Commissioner should ignore the word "possible", that AMP acknowledges that there were contraventions of the Corporations Act by AMP?---No.

No. So - - -?---I don't believe we've acknowledged – we've admitted those as yet.

Okay. So when you say you're apologising for regulatory breaches, what are you apologising for? What breaches?---Well, for example, we know that we have committed breaches in relation to retaining fees on client accounts where fees have been charged where they shouldn't, and we know that that is a breach. So that is a breach of our licence condition, and that's what I'm apologising for.

I see. You're apologising for breaching your licence condition?---That's correct.

And what is the particular condition that you're apologising for breaching?---That which relates to our inability to charge those fees where otherwise the services aren't being provided.

Well, that's not a licence condition of your licence, is it?---I believe we have to act honestly, efficiently and fairly.

All right. So are you acknowledging – is AMP acknowledging that it has failed to act honestly, fairly and efficiently in relation – in relation to the charging of fees for no service?---Yes, we have.

Okay. Sorry, when you say "yes, we have", are you aware of ever having done it before now, this very moment when you've done it?---Yes, I'm uncertain.

All right. If you look at – I'm sorry, do you know what the statutory source is of the obligation to act honestly, fairly and efficiently?---The Corporations Act.

You know it's section 912A(1)(a) of the Corporations Act?---Not exactly, but sounds right.

Take my word for it?---Yes.

And you see, if you go back to the submission that is in front of you, what's said is:

The conduct involves possible contravention of –

And then one of the sections is 912A(1)(a)?---Yes.

I just want to be fair to you. The submission that has been made by AMP to the Royal Commission is that it's possible that it might have contravened this section?---Yes.

Are you changing that position?---No.

Okay. So we can eliminate, then, that you're apologising for a breach of the requirement to act honestly, efficiently and fairly. What else are you apologising or not apologising for?---So we did issue a breach notice, which is acknowledged as part of what we laid out earlier. So if you go back to the breach notices, the five breach notices that relate to the charging of fees under circumstances where that wasn't permissible.

Sorry, you've issued a breach notice. Is it your understanding that by issuing a breach notice you're admitting a breach of the statutory obligation?---I'm uncertain of that.

Okay?---Yes.

You know – and we're going to come in some detail to the fact that AMP did not notify ASIC in relation to these potential breaches. You know that there was a significant delay in giving notification to ASIC, and that a number of the communications given to ASIC were false or misleading?---That's correct.

And are you apologising for some misconduct in relation to that?---Yes.

Okay?---Yes, we are.

Again, if we go then to page 4 of 6 of that table, and can we blow up the last row. You will see what was said in that submission was:

> *There was possible misconduct in relation to the extent and nature of AMPs reporting to ASIC in relation to fees for no service (licensees).*

Can the Commissioner now take it that the word "possible" no longer applies, that you are acknowledging on behalf of AMP that there was actual misconduct?---I'm uncertain.

All right. Doing the best you can, when you say in paragraph 46 of your statement:

> *On behalf of AMP, I apologise unreservedly for the failings in respect of advice and service delivery to our customers and for the regulatory breaches which are discussed below.*

What is it that you are apologising for?---The failure to deliver those services to those clients.

Okay. So that's the first part of the statement. And in relation to "the regulatory breaches which are discussed below", do you know what it is that you are apologising for?

MR CRUTCHFIELD: Does my friend mean the facts or the legal conclusions because there is significant difference and this gentleman is not a lawyer so I think it's leading to some confusion, with respect.

THE COMMISSIONER: Well, Mr Crutchfield, what am I to do about the fact that this is his statement. paragraph 46. What am I to make of it? I thought that was what counsel was exploring.

MR CRUTCHFIELD: Yes, sure but Mr Regan has already said he had nothing to do with the preparation of the submission to the Commission and that document contains legal conclusions and it is manifest this witness is not in a position to deal with that.

THE COMMISSIONER: I thought Mr Hodge was examining the witness about the content of paragraph 46 of his statement.

MR CRUTCHFIELD: Yes.

THE COMMISSIONER: Is there any difficulty about that?

MR CRUTCHFIELD: Absolutely not.

THE COMMISSIONER: No. Do go on, Mr Hodge.

MR HODGE: Thank you, Commissioner. When you say, Mr Regan:

On behalf of AMP I apologise unreservedly –

relevantly –

for the regulatory breaches which are discussed below –

What are you apologising for?---I will have to take that on notice.

That's not really how it works. Is the answer you just don't know?---Yes, I'm uncertain.

Was this apology agreed to by the board of AMP?---This is my witness statement.

Did the board of AMP, as far as you're aware, resolve to make an apology?---No, I didn't seek their approval to make the apology.

All right. And they didn't authorise you to do so?---Well, I'm authorised to give the witness statement.

Was the apology something that was, to your knowledge, discussed by any committee of AMP?---Not that I'm aware of.

Was there anybody else employed by AMP who was involved in the drafting of your statement?---Yes.

And who was that?---Our legal team.

Okay. Was Mr Salter involved in the drafting of your statement?---He would have been – he certainly was familiar with the statement. Yes, he was involved with the statement.

All right. Was Mr Meller involved with the drafting of your statement?---Mr Meller has seen a draft version of the statement, I believe.

Did he provide any comments on your statement?---Yes, I believe he would have.

Was Ms Brenner involved in the drafting of your statement?---I'm not aware that she was.

I would like to move now to a different topic, Mr Regan, and as you know, Clayton Utz reviewed many documents for the purposes of preparing a report for AMP?---Yes.

Have you looked at the documents that Clayton Utz reviewed?---Not all of the documents, I don't believe, no.

But some of them?---Yes.

Okay. Now, the first time AMP gave a significant breach notice to ASIC in relation to orphan clients was in 2009. It's not a trick. We will bring up the document. It's AMP.9000.0001.163?---Yes. I believe that's correct. I believe it's correct.

THE COMMISSIONER: What was the number, Mr Hodge, 9000.0001?

MR HODGE: .1460.

THE COMMISSIONER: Thank you.

MR HODGE: It's actually an exhibit to your statement, Mr Regan. It's tab 33 to your statement?---Thank you.

So this is a notification given pursuant to section 912D on 15 January 2009?---Yes.

And you're familiar with it, obviously? You've looked at it, you've exhibited it to your statement?---Yes, I have had a look at it, yes.

And it gives notification that clients were being charged an additional fee for service where what they were paying was dialled up above base commission?---That's correct.

And that when they were then – when the adviser or planner left and the client was transferred either to another planner or, alternatively, into the BOLR pool, that they continued to be charged this dialled up commission but no services were provided to them?---Yes, I understand that's the basis of the breach.

All right. That was the notification that was - - -?---Yes.

- - - given in 2009?---Yes.

And what's explained as to the reasons for this was that there was an absence of adequate monitoring arrangements. We see that on page 2, which is 1460_0001. Do you see:

> *There was an absence of monitoring arrangements in place to ensure that this activity was followed.*

?---What was that number again?

No, if you just look about two-thirds of the way down the page, do you see the sentence:

> *There was an absence of monitoring arrangements in place to ensure that this activity was followed.*

?---Yes, yes.

And what AMP said it was going to do – and we go to page 4, which is _003, was to put in place detailed processes relating to the adjustment of additional fees when a client's servicing rights are surrendered back to AMPFP under a BOLR arrangement.

Do you see that?---Yes.

And:

> *Ensure relevant staff receive training on the new procedures.*

?---Mmm.

Again, just because it's being recorded, you will need to say "yes" or "no"?---Yes.

And then you see the third thing was:

> *To put into place monitoring controls in our risk and control system covering compliance with the abovementioned process.*

?---Yes.

And you're obviously aware of this document. You've looked at it; you've exhibited it to your statement. Have you gone back to try to understand why since – or whether and to what extent since 2009 any of those three things occurred?---I wasn't, obviously, in the business for a lot of that period of time, but, that said, we've obviously had other similar breaches since then. I believe in 2013 and 2015. So this has occurred on a number of occasions. What we have done in more recent times is implemented a number of reviews to try and investigate to put improvements into place in relation to these types of controls.

We should be clear about this. This problem has been occurring continuously at AMP since 2009, hasn't it?---Yes, that's correct.

And my question was: have you gone back to look at the extent to which there was an attempt to do any of these three things?---No.

Okay?---Not specifically on those, no.

All right. Now, you agreed with me that the problem had been occurring continuously since 2009. To make good that proposition, can we – I'm sorry, Commissioner, I should – no, I don't need to tender that document.

To make good that proposition, can we go to document AMP.0001.0094.4475. And you will see this is a chain of emails from 2011, Mr Regan?---Yes.

It's two pages long. Can we bring both pages up on the screen. Thank you. Is this a document that you've looked at before now?---Yes.

Okay. And so you know, if we go to the first email in time, which is one sent by Anne Singh on 7 January 2011, that she has raised an issue which is:

> *When we buy back a partial or full book from a financial planner, which is BOLR, one of our processes is to request the removal of any fees that were dialled up by the previous planner above the standard fee. In 2008, we identified this had not occurred and lodged a compliance breach.*

And then it goes down and says under the heading Issue:

> *We have now identified that there are gaps in the process.*

So that was how this kicked off?---Yes, that's correct.

And then over the page, an email is then sent by Ms Sneddon to Mr Guggenheimer and Mr Helmich saying:

> *Just wanted to give you a heads up on this issue. And a draft ASIC letter has been prepared by Group Risk and Compliance, and this is currently being reviewed by Legal.*

Do you see that?---Yes.

And, oddly, the response from Mr Guggenheimer is:

> *Deb, I would like to challenge the notion of this being a breach. It's not an AFSL requirement; it's a business rule. Happy to chat about it if you need any context to help discussions with Legal.*

?---Yes.

And as it turned out, no breach notice was ever given to ASIC in 2011 in relation to this?---That's correct.

Do you know why no breach notice was given to ASIC in 2011?---As I understand it, there was a decision taken based on legal advice not to issue the breach notice.

Who made that decision?---I'm uncertain of that.

What is the basis for your belief that somebody made that decision?---I've been advised of that.

By whom?---Ms Baker Cook, I believe.

Okay. Was she in the legal department at that time?---No.

I see. So she has been told by somebody else?---That's correct.

Is there any record kept within AMP as to the decision-making or the making of decisions about whether or not to give a breach notice?---There is, yes. I don't know the history of it but certainly there's a breach committee process which is documented today.

What was Mr Helmich's role at that time?---Mr Helmich, I believe, would have been in a role responsible for all of the advice licensees at that time. I'm not – I can't recall the title, but it would be a role of that nature.

Is it the practice now of AMP to document a decision as to whether a breach notification is or is not given to ASIC?---I'm not familiar firsthand with the process. I'm not part of the breach committee process.

And it's fair to say, isn't it, the problem of charging fees to clients sitting in the BOLR pool continued to be an issue in 2013?---Yes, that's correct.

And can we – I'm sorry, Commissioner, I should tender that document.

THE COMMISSIONER: Exhibit 2.14 will be emails January 2011 concerning approval of dial-up fees for buyer of last resort AMP.0001.0094.4475.

EXHIBIT #2.14 EMAILS OF JANUARY 2011 CONCERNING APPROVAL OF DIAL-UP FEES FOR BUYER OF LAST RESORT (AMP.0001.0094.4475)

MR HODGE: Thank you.

Now, Commissioner – I'm sorry, Mr Regan, I will show you now a document which is AMP.0001.0092.7314. Now, you will see this is a Program Steering Committee pack from 6 May 2013. Are you familiar with exactly what the structural arrangement was in 2013 in relation to this Program Steering Committee?---I believe Mr Mellor was the chair of that committee and a number of the attendees would have been members of that steering committee.

And was the aim of the committee or was the purpose of the committee to get AMP ready for the changes that were about to come under the future of financial advice amendments?---I believe so.

All right. And as you said, Mr Mellor, who is now the CEO, was the chair of the committee, and you're saying the – you think the attendees listed there were the other members of the committee?---I'm not entirely sure of the composition of the committee, but I'm sure it – it would be from amongst those attendees.

All right. But in any event, we can see there that Mr Caprioli, your predecessor, was an attendee at that meeting?---Yes.

And if we go to page 7326 of that document, you will see this is a memorandum to the committee from Mr Himmelhoch. What was Mr Himmelhoch's role at that time?---I'm uncertain of his title, but I'm' sure it's in one of the documents there.

All right. Well, in any event, if we bring up – can we bring up next to that page page 7330. Can we blow up the paragraph about two-thirds of the way down the page beginning:

> *With respect to our orphan books…*

So this is a report to that committee explaining that as at that time:

> *Our initial analysis indicates that there are quite a number of accounts with dial-ups and other ongoing fee arrangements in place.*

And then it goes on to say:

> *Once data accuracy in this area is confirmed, we will be making a recommendation to the PPSC –*

that's the steering committee –

> *…in relation to options. For example, either dial all fees back to the base-level commission or establish a servicing arrangement with the client.*

?---It's a different committee, though. So the recommendation is to the practice proposition steering committee, not the one that's referred to in this document or that this document is the subject of.

Well, this is a report to the Program Steering Committee, isn't it?---That's correct.

And the Program Steering Committee is the one chaired by Mr Mellor?---Program Committee, yes, that's correct.

So the report at this time that's being made to the Program Steering Committee is – part of it is, "We've identified that we're still charging fees to orphan clients sitting in the BOLR pool."?---Yes.

And they will be making a recommendation to, as you say, the PPSC, which is a different steering committee?---That's correct; it's a subgroup.

And that's a subcommittee under this overarching committee - - -?---Yes.

- - - chaired by Mr Mellor?---Yes.

As to what exactly it is that's going to happen or how this should be dealt with?---Yes.

All right. Can I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 2.15 will be future financial advice Program Steering Committee pack 6 May 2013, AMP.0001.0092.7314.

EXHIBIT #2.15 FUTURE FINANCIAL ADVICE PROGRAM STEERING COMMITTEE PACK DATED 06/05/2013 (AMP.0001.0092.7314)

MR HODGE: Now, I think we've agreed about this already, but I will just confirm this with you, Mr Regan. The obvious problem with charging fees to clients that are sitting in the BOLR is that they're not receiving any services?---Yes.

And certainly from your perspective, there's no dispute that there was no capacity of AMP to provide services to the clients sitting in the BOLR pool?---That's correct.

That's something that very recently AMP has attempted to address?---There have been attempts to do servicing of clients for that purpose in the past, as I understand, but we are undertaking a program now.

Now, there was a lot of internal legal advice, which I think you've already referred to as being concerning, that charging clients in the BOLR pool for services that they could not possibly be receiving was unlawful?---Mmm.

Again, just because it's being - - -?---Yes.

And I think you've agreed with me that advice, when you saw it, didn't come as a surprise to you?---That's correct.

It's obvious that it's not lawful to be charging somebody for services you're not providing?---That's correct.

All right. Can we just – to understand the extent of this advice, can I show you first AMP.0001.0016.7990. Now, this is an email from Tom Galletta, who was a solicitor at AMP at the time the email was sent?---Yes.

And the email is not dated but Clayton Utz have identified it as being sent in approximately 2010, which is at paragraph 71(b) of their report. Can I just ask that the middle section of the email be blown up, which begins:

> *If you want to maintain the planner service fee…*

?---Mmm.

What Mr Galletta says is:

> *If you want to maintain the planner service fee, you need to provide the client with the services that the former planner agreed to provide and the client agreed to pay for.*

Which you and I have already agreed is an unsurprising proposition. Can we just agree on the reasons for that. The first is, obviously, as a matter of contract, that's what has been agreed between the planner and the client?---Yes.

This is what will be provided and what will be charged for it. The second is, you understand that as a matter of statutory obligation, a licensee cannot be charging for financial services that it either intends not to provide or knows are not to be provided?---That's correct.

And the third is, can I suggest, just a matter of basic ethics and morality, that you would not be charging for something that you know you're not going to provide?---I agree.

You agree? And then Mr Galletta suggests as an alternative, in the next paragraph:

> *...to be upfront with the client and to effectively say to the client we're now going to provide something different to you.*

That alternative, being upfront with the client, wasn't a plan that was taken up by AMP?---Mmm.

Do you agree?---Yes.

I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 2.16, email Galletta to Steinthal. Could I date it approximately 2010?

MR HODGE: Yes, Commissioner.

THE COMMISSIONER: AMP.0001.0016.7990.

EXHIBIT #2.16 2010 EMAIL GALLETTA TO STEINTHAL (AMP.0001.0016.7990)

MR HODGE: Thank you, Commissioner.

So that's legal advice dating all the way back to 2010. What happens in 2015 is that AMP begins an internal investigation into the – into the charging of fees for no service to the clients sitting in the BOLR pool. Is that right? In 2015?---This is in relation to the breach notice lodged?

Yes, before the breach notice is given?---Yes.

An investigation - - -?---As I understand it, yes, that's the case.

And the reason that an investigation commences is because there was public reporting of ANZ having charged fees for no service?---I understand that was the trigger, yes.

Now, when that internal investigation begins, there are a lot of emails that pass between various people, in particular Mr Morgan, Mr Caprioli, Mr Paff and Ms Turner?---Yes.

And you're familiar with those documents?---Yes. Well, I'm familiar with documents, yes.

Can we bring up AMP.0001.0043.4407. This is an email from Ms Turner, who is the legal manager for advice?---Yes, that's correct. Well, was at that time.

And is being sent to Wayne Marsh. What was Mr Marsh's role?---I believe he was in a role that was involved with the buy-back arrangements. His title I'm not exactly sure.

Okay. And it's copied to Mr Morgan, and it has an attachment which is a document titled Ongoing Services Fees. Sorry, Ongoing Service Fees?---Mmm.

Again, Mr Regan, because it's being recorded - - -?---Yes.

- - - you need to say yes or no. Thank you. And Ms Turner, on 19 May, is raising a concern which is:

> *We have well passed the 10 day reporting period. So I want to expedite the breach reporting decision.*

?---Yes.

And if we go to the attachment, which is – begins at AMP.0001.0043.4408. So this is the document that Ms Turner was attaching. And can we bring up on the screen two pages. The first is .4409, the second is .4410. And can we blow up the last paragraph of 4409 and put below it the first paragraph on 4410. So what's set out in the memorandum is that:

> *Until 12 months ago the business practice of AMP licensees was to leave ongoing advice fees in place in the expectation that advised customers would be placed with a new adviser. 12 months ago AMP brought together all of its licensee support infrastructure into single centres of excellence. An early commercial focus was to ensure that ongoing service fees on advised customers were immediately cancelled and the customer needed to renegotiate the ongoing fee arrangement with their new financial adviser.*

Are you aware of what the basis is for the statement that things changed 12 months before the date of this document?---No.

And you haven't seen anything that would suggest that there was some change in the middle of 2014?---I wasn't involved but around the middle of 2014 was the implementation of FOFA.

So, that was the middle of 2013?---That's correct, that was the legislation effective date, yes. I thought there was a facilitative period but - - -

All right?---Yes.

But in any event, as part of the investigations that had been carried out at your request and by people under you, you hadn't seen anything to indicate some change in mid-2014 at AMP?---Not that I can recall.

All right. And what Ms – if we then go to page 4415. And can we blow up the line beginning "When plans are acquired" and include the comment next to it. So what seems to have happened is this paper was originally prepared by Mr Morgan. Is that your understanding?---I'm not sure.

All right. But in any event, there was a paper prepared and then a comment made on it by Ms Turner. You know that that comment is by Ms Turner?---I don't know that it is.

All right. Well, in any event, what's set out is:

> *When plans are acquired under a licensee buyback the current business rule is that advice and servicing fees be turned off within three months.*

And the comment is:

> *This is a rule that has been set arbitrarily. There is no legal basis for the period of three months. This rule will probably need to be revised.*

?---Yes.

Now, again, I realise I have repeated this a number of times. That doesn't surprise you, the idea that there be no legal basis for three months?---That's correct.

And you wouldn't expect that to come as a surprise to any other senior executive in the business, would you?---I don't know whether I can speak for their mind, but – and it would depend, I imagine, on whether they've received legal advice.

You didn't need to receive legal advice to know that you can't charge somebody for services that you're not providing. You agree with that?---Yes, I agree with that.

And, for example, you would expect your predecessor, Mr Caprioli, to have had the same understanding?---I can't speak for Mr Caprioli.

All right. You're aware that the Clayton Utz report is at great pains to say that there is no evidence that Ms Turner's email was provided to Mr Caprioli, this email with the attachment?---Sorry, what was the question?

You're aware that the Clayton Utz report is at great pains to say that there is no evidence that Ms Turner's email was provided to Mr Caprioli?---Yes, I understand that's what it says.

And do you know why such an emphasis is placed upon the proposition that there's no evidence that this email was provided to Mr Caprioli?---I don't know whether there was a particular emphasis.

Do you know why – I withdraw that. Are you aware of any reason for Clayton Utz to make a particular point that there was no evidence that this email was provided to Mr Caprioli?---I know that was part of the work that Clayton Utz did to establish who was given that legal advice. So I assume it's because of that.

Right. I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 2.17, email Turner to Marsh and Morgan 19 May '15 with attachment concerning an Ongoing Service Fees BOLR and Orphans. AMP.0001.0043.4407.

EXHIBIT #2.17 EMAIL TURNER TO MARSH AND MORGAN RE ONGOING SERVICE FEES BOLR AND ORPHANS DATED 19/05/2015 (AMP.0001.0043.4407)

MR HODGE: And then there was a chain of emails between Mr Morgan and Mr Caprioli copied to Mr Paff and Mr Guggenheimer which I will ask be brought up. It's AMP.0001.0016.7288. You have seen this document before?---Yes.

And Mr Morgan is emailing Mr Caprioli, and he says that he understands Mr Paff has already provided a high level overview of the issue in relation to – in relation to ongoing advice fees?---Yes.

And I would like to blow up the dot points at the top of the second page, if we can. Now, the first full point there which is:

> *Our historic business rule around retaining fees for three months (since amended) and allowing client registers to be ring-fenced for future sale carries with it an inherent risk of the fees not being removed.*

Are you – or do you have any understanding as to what the supposed amendment was to the business rule that's referred to there?---Not – not anything specific, no.

Okay. But do you agree with me what must be known to every recipient of this email is that there was a business rule around retaining fees for three months. That's the first thing?---Yes.

And also that there was some process in which registers were ring-fenced for future sales?---Yes.

And also that each of those things, the business rule and the ring-fencing of registers carried with it or with them an inherent risk of the fees not being removed?---Yes.

And that must be obvious, you would agree, to anyone receiving that email?---Yes.

I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 2.18, email 20 May 2015, Morgan to Caprioli and others, AMP.0001.0016.7288.

EXHIBIT #2.18 EMAIL MORGAN TO CAPRIOLI AND OTHERS DATED 20/05/2015 (AMP.0001.0016.7288)

MR HODGE: Now, Clayton Utz were asked to investigate two specific misrepresentations that AMP had identified that had been made to ASIC. Do you agree with that?---Yes.

And in addition, Clayton Utz identified a further five – what they termed mistaken representations to ASIC by AMP?---Yes.

I want to take you through the false and misleading statements that AMP made to ASIC. Can we bring up first AMP.6000.0001.1469 which is tab 24 of Mr Regan's statement. So this is the initial breach notice that was given by AMP to ASIC on 27 May 2015?---Yes.

You're familiar with it. You've exhibited it to your statement?---Yes.

All right. And if we go to page 2, if we blow up, first, the first paragraph. You see the last sentence says:

> *In the situation of this breach report, the services did not include the provision of personal advice by way of a review or any other scenario of personal advice.*

?---Yes.

And that was untrue, wasn't it?---Yes, I believe it was.

Because, in fact, for at least some of these clients their service that they were paying for did include personal advice?---Yes, reviews.

And then if we blow up the section headed Protocols, and the paragraph beneath it. And this says that:

> *Internal protocols had been in place ... to turn off fees when a financial planning register had been purchased by an advice licensee.*

And then if we take that down and bring up the section under The Issues. It says:

> *The processes between the advice licensees and the product administrators have failed in some instances.*

And that was the second false or misleading statement made in this notice to ASIC? The processes didn't fail, did they, Mr Regan? There was a deliberate decision made by AMP to retain fees on some of these clients?---As I recall, I think it's both.

In some cases there was a failure of process, but in other cases it was a deliberate decision - - -?---That's correct.

- - - by AMP. And AMP didn't tell ASIC that they had made this deliberate decision?---That's correct.

And then if we bring up the third page of the notice and blow up the last paragraph under Timing of This Notice. It says:

> *The issue was initially identified in AMP Financial Planning and Hillross about one month ago, and they are therefore reporting outside of the 10-business day requirement as it has taken some time to identify if there actually was an issue.*

And that statement is completely false, isn't it?---Yes, I think it is.

So those are the first three false or misleading statements that AMP made to ASIC. Can we now bring up AMP.0001.044.2936. Now, this is a letter from AMP to ASIC dated 19 June 2017. Sorry, you will need to say "yes" or "no"?---Yes, sorry, I thought the question was still going.

I'm just confirming this is - - -?---Right.

That's what this document is. Have you seen this document before?---Yes.

And under the heading Summary, you see it says:

> *We are in the process of reviewing about 29,000 client files dating back to July 2010 where we have cause to believe our processes may have failed and fees not turned off.*

Do you see that?---Yes.

And do you agree with me that statement was also misleading because there was no reference or explanation that, in fact, in some cases it wasn't a failure of process, it was a deliberate decision that had been made by AMP?---I have, in fact, asked that matter to be investigated. I became aware of that wording, and then I have asked the chief risk officer to investigate the circumstances behind that wording and whether or not we have, in fact, taken that to ASIC and clarified that situation. I'm not aware of the status of that today.

No, but if you just listen to my question - - -?---The answer to your question is yes.

Thank you. And then if we bring up page .2938. And can we blow up the section under number 3, Fix the Processes That Failed. And you see it says:

> *Interim processes have been put in place to ensure no new clients are added during this remediation period.*

?---Yes.

Can I suggest that was also misleading because, in fact, AMP was continuing with the 90-day exception and ringfencing at this time?---That's correct.

I tender that document, Commissioner.

THE COMMISSIONER: It will be letter AMP to ASIC dated – Mr Hodge?

MR HODGE: 19 June - - -

THE COMMISSIONER: 19 June '17, 0001.00442936.

MR HODGE: Sorry, Commissioner, I think that's an error. I think it should be 15. We agree that should be 15.

THE COMMISSIONER: 15 June?

MR HODGE: 19 June 2015.

THE COMMISSIONER: Sorry.

MR HODGE: 19 June 2015.

THE COMMISSIONER: '15.

MR HODGE: Thank you.

THE COMMISSIONER: Sorry, 19 June 2015. I'm innumerate. Exhibit 2.19.

EXHIBIT #2.19 LETTER AMP TO ASIC DATED 19/06/2015 (AMP.0001.0044.2936)

MR HODGE: Thank you.

And then if we can bring up AMP.1000.0001.8157. This is a letter from AMP to ASIC dated 31 August 2015?---Yes.

And can we bring up page 2, which ends in .8518. And can we blow up the section under the heading Advised Customers. And do you see in the second paragraph:

> *From July 2010 to December 2013, the licensees allowed fees to continue for up to three months for a transition to complete.*

And then two paragraphs down:

> *Since January 2014, the commercial practice changed and fee arrangements have been cancelled immediately the licensee acquires the account.*

?---Yes.

And that was just false, wasn't it?---Yes.

So that was the sixth false or misleading statement that ASIC had made up until this point in time?---That AMP had made to ASIC.

AMP, sorry, had made to ASIC. I tender that document.

THE COMMISSIONER: Exhibit 2.20, letter AMP to ASIC 31 August 2015 AMP.1000.0001.6517.

EXHIBIT #2.20 LETTER AMP TO ASIC DATED 31/08/2015 (AMP.1000.0001.6517)

MR HODGE: Thank you. Now, can I suggest to you the fact that this process – I'm sorry, the fact that the three-month rule was still in application was, it has now turned out, well-known within the company?---Yes.

And I want to just understand, as you understand it at the moment, how high up that knowledge went. It certainly extended up to Mr Guggenheimer - - -?---Yes.

- - - the – and Mr Guggenheimer at the time was the managing director of AMP Financial Planning Proprietary Limited?---Yes.

And who did Mr Guggenheimer report to?---Mr Caprioli.

And Mr Caprioli was the group executive for Advice and Banking at the time?---That's correct.

And is it your understanding that Mr Caprioli was aware of the three-month rule?---I'm not certain of that, no.

All right. Well, we've seen already an email that Mr Morgan sent that referred to this rule, although he does refer to it as a historic rule. Are you aware of any other document that might have alerted Mr Caprioli to the existence of the rule?---Not that I'm aware of.

Are you aware of any document that might have alerted Mr Meller to the existence of the rule?---No.

Have you looked at the internal audit report in 2014 - - -?---Yes, I have.

- - - for AMP? All right. Can we bring up AMP.6000.0006.4372, and that's tab 26, I believe, Mr Regan - - -?---Yes.

- - - of your statement?---Yes.

You've obviously looked at it before?---Yes.

And can we go to page 8 of that internal audit report, which is the page ending .4379, and blow up the section under the underlined heading Ongoing Fee Arrangements. And do you see there's an explanation that:

> *The introduction of the FOFA fee disclosure statement obligations has created additional considerations during the purchase and sale of client registers. Selling planners are now required to submit an OFA –*

which is an ongoing fee agreement –

> *…listing which provides their client's fee disclosure information and last fee disclosure statement issue date. Planners are also required to provide fee disclosure statements to clients, where appropriate, for a period of up to three months post the intended BOLR execution date. This provides a grace period for AMP Financial Planning to dial down any ongoing client fees following a BOLR transaction.*

Now, that's a reference, isn't it, to the 90-day rule?---I'm not sure. I have inquired about that document. I am uncertain as to why that three-month grace period is there.

Is it still there?---No, as in reflected in that document. So I don't understand the purpose of that reference, so the linkage of the three-month grace period to the FDSs.

Sorry, you don't understand why the FDSs are linked to the three-month grace period?---Yes.

But the audit report explains why that is, which is that by implication, so that you don't need to issue another FDS within the first three months of the client register hitting the BOLR pool, that the selling adviser will have given an FDS that extends out. That's what it's saying, isn't it?---I – I'm not entirely certain.

Well, do you agree that this is plainly a reference to the continued existence of the 90-day grace period or exception - - -?---I – I'm not sure that it is.

What else could it mean?---I'm uncertain. I have – I have inquired as to whether or not there is any linkage to that three-month rule with the – the FDSs.

I'm sorry, what is it that you've inquired into?---The linkage between the three-month grace period and the issuance of the FDS. So the question is whether or not that was to enable fees to remain on or not.

Well, let's break it down. It refers to a period of up to three months post the intended BOLR execution date. Do you see that?---Yes.

And then it says:

> *This provides a grace period for AMP Financial Planning to dial down any ongoing client fees following a BOLR transaction.*

?---Yes.

It's explicitly referring to the fact that fees might not be dialled down for up to three months after a client register hits the BOLR pool, isn't it?---It could mean that, yes.

What else could it mean?---As it was explained to me when I asked the question, it could be to set processes up, but it certainly could mean to dial those – for that – for that to be a grace period, yes, I agree.

Who did you – when you say when it was explained to you, who explained to you?---Just in terms of asking questions in – in respect of this with our legal team.

Your legal team explained it to you?---Yes.

That it might - - -?---Well - - -

Yes, go on?---So I agree that it could well be what you're suggesting it is, but I'm not entirely certain.

And you're aware of who the internal audit report was distributed to?---Yes, I am.

And one of those people is Mr Caprioli, your predecessor?---Yes.

Another of those people is Mr Meller, the Chief Executive Officer?---Yes.

And have you asked Mr Caprioli what he made of this statement in the audit report?---No.

Have you asked Mr Meller what he made of this statement in the audit report?---No.

Why not?---I don't believe we've discussed it.

Commissioner, do you – what time did you propose to sit till?

THE COMMISSIONER: Just teasing me, isn't it, Mr Hodge? I had intended to go through till 4.15, but what do you want to do?

MR HODGE: I'm happy to keep going.

THE COMMISSIONER: I think – well, how are you going for time, is the real question?

MR HODGE: We will be back tomorrow in any event. There's no doubt about that.

THE COMMISSIONER: Well, let's go on for another 10 minutes at least.

MR HODGE: Thank you.

Now, I think by my count we just finished with the sixth false or misleading statement that AMP made to ASIC. Can we now bring up the document which is AMP.0001.0049.0708. We've skipped over one, Mr Regan, out of order. This is a letter of 17 August 2015 from AMP to ASIC?---Yes.

And – just give me one moment. And can we bring up page 0716. And do you see – or if we blow up the almost – or the last lengthy paragraph on that page beginning "The breach dated 27 May 2015" and do you see the sentence:

> *Requests were made to product issuers by the licensees to have service fees turned off. Through errors on the part of both the licensees and the product issuers, fees continued to be deducted after the servicing arrangement had come to an end.*

That was also a misleading statement, wasn't it - - -?---Yes.

- - - Mr Regan, because it excluded references to the intentional decisions - - -?---That's correct.

- - - by AMP to keep the fees on. Thank you. I tender that, Commissioner.

THE COMMISSIONER: That will be exhibit 2.21, letter AMP to ASIC, 17 August 2015, AMP.0001.0049.0708.

EXHIBIT #2.21 LETTER AMP TO ASIC DATED 17/08/2015 (AMP.0001.0049.0708)

MR HODGE: And then can we bring up AMP.0001.0017.3286. Now, this is a set of PowerPoint slides that was prepared for the purposes of a meeting with ASIC?---Yes.

And we go to page 6 of that document. You will see this is a template letter that was – that ASIC was informed had been sent to customers?---Yes.

And about halfway down the page it says:

> *When we set up your financial products we negotiated a planner service fee in return for certain additional financial services to be provided to you as AMP*

will no longer be able to provide you with all those additional services, the planner service fee will be removed.

?---Yes.

Now, had those letters been sent to all clients, then that would have been a misleading statements to the clients. Do you agree?---Yes.

But, in fact, even though ASIC was told that these letters had been sent to the clients, in fact, they weren't sent to the clients – or they weren't sent to all clients?---I understand that to be the case.

All right. So the further misrepresentation made by these slides was that AMP had been informing clients that it would turn off the fees. If we go back to page 3, which is .3288, and you see the opening sentence says:

Various AMP kept entities self-reported the discovery of an administrative error where ongoing services were not turned off.

And then under the heading Background, the third point:

When licensees purchase register rights, the normal process is for the ongoing service agreements to be terminated and the ongoing service fees to be turned off.

Do you agree that that statement was misleading?---Yes.

Thank you. I tender that, Commissioner.

THE COMMISSIONER: Exhibit 2.22, PowerPoint – is this the PowerPoint presentation?

MR HODGE: Yes, Commissioner.

THE COMMISSIONER: Yes, PowerPoint presentation AMP to ASIC 17 September 2015 Ongoing Service Fee Remediation, AMP.0001.0017.3286.

EXHIBIT #2.22 POWERPOINT PRESENTATION AMP TO ASIC DATED 17/09/2015 (AMP.0001.0017.3286)

MR HODGE: And then can we bring up AMP.1000.0001.4754. And this is a letter from AMP to ASIC in response to a notice of direction under section 412C. Do you see that, Mr Regan?---Yes.

And if we go to page 3 of the document. And we blow up the top half of the page, you see:

The administrative processes that failed are –

And there's then various explanations about the failure of administrative processes?---Yes.

And, again, you agree that was misleading?---Yes.

And that, by my count, is the 10th false or misleading statement that was made to ASIC. Now, it also says that:

The agreements were terminated and the clients were not entitled to receive fees.

THE COMMISSIONER: Where are you reading from, Mr Hodge?

MR HODGE: I think it needs to go - - -

THE COMMISSIONER: It might have to come out from the - - -

MR HODGE: Yes. I will come back to that.

THE COMMISSIONER: Yes.

MR HODGE: I'm sorry, it's actually at the top. You see:

Therefore, the responses below relate only to the 6963 formally advised customers of AMPFP whose service arrangement had been terminated before they were affected by the reported breach.

THE COMMISSIONER: I'm lost.

MR HODGE: I'm sorry, it's page 4758 on page – I beg your pardon, it's page 5. If we go to page 5, .4758.

THE COMMISSIONER: I think I'm being told I should have stopped at 4 o'clock by this course of events, Mr Hodge.

MR HODGE: Well, Commissioner - - -

THE COMMISSIONER: Get to the end of it and then we will stop.

MR HODGE: I will tender that document, Commissioner.

THE COMMISSIONER: Well, can we just find where this passage is. It's page 5, do you say?

MR HODGE: Yes. Do you – do you see the statement, Mr Regan:

> *Therefore, the responses below relate only to the 6963 formally advised customers of AMPFP whose service arrangement had been terminated before they were affected by the reported breach.*

And that was incorrect, wasn't it, because, in fact, in many cases their service arrangement hadn't been terminated?---Sorry, Mr Hodge, I'm just not quite understanding it.

That's all right. I will tender the document, Commissioner.

THE COMMISSIONER: Perhaps come back to it in the morning, if we need to. Letter AMP to ASIC dated?

MR HODGE: It doesn't have a date on the document, Commissioner.

THE COMMISSIONER: Letter AMP to ASIC, AMP.1000.0001.4754 will be exhibit 2.23.

EXHIBIT #2.23 LETTER AMP TO ASIC (AMP.1000.0001.4754)

MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: And we will resume at 9.45 tomorrow.

MR HODGE: Thank you.

MATTER ADJOURNED at 4.10 pm UNTIL TUESDAY, 17 APRIL 2018

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