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TRANSCRIPT OF PROCEEDINGS

O/N H-884961

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, FRIDAY, 27 APRIL 2018

Continued from 26.4.18

DAY 19

MS R. ORR QC appears with MR M. HODGE QC and MR M. COSTELLO as Counsel Assisting with MR M. HOSKING
MR M.J. STEELE SC appears with MR C.E. BANNAN for ASIC

THE COMMISSIONER: Just before we go on, I should say that, for reasons that are obvious to anyone who was in the hearing room yesterday afternoon, I have excused Mr McMaster from further attendance. If he were later to seek an opportunity to give further evidence to me, I would, of course, consider that application, and, of course, he will have leave to make submissions in response to any matters that Counsel Assisting may raise.

Just one matter that needs to be completed, just to regularise the transcript, there was a document about which Mr McMaster was being examined when he fell ill, and that document should be marked as an exhibit. Exhibit 2.245 will be Dover's Client Protection Policy, ASIC.0022.0001.1127.

EXHIBIT #2.245 DOVER CLIENT PROTECTION POLICY (ASIC.0022.0001.1127)

MR COSTELLO: Thank you, Commissioner.

THE COMMISSIONER: Thank you, Mr Costello. Ms Orr.

MS ORR: Commissioner, the final witness in this hearing block is Louise Macaulay.

<LOUISE ANN MACAULAY, AFFIRMED [9.47 am]

<EXAMINATION-IN-CHIEF BY MR STEELE

THE COMMISSIONER: Thank you very much, Ms Macaulay. Do sit down. Yes.

MR STEELE: Your full name is Louise Ann Macaulay?---Yes.

And your business address is Level 5, 100 Market Street, Sydney?---Yes.

And you are senior executive leader of ASICs financial advisers team?---Yes.

And you've received a summons to appear here today?---I have.

Do you have the original of that summons with you in the witness box?---Yes.

I tender that document.

THE COMMISSIONER: Exhibit 2.246. Yes, exhibit 2.246 will be summons to Ms Macaulay.

EXHIBIT #2.246 SUMMONS TO MS MACAULAY

MR STEELE: Ms Macaulay, have you prepared a witness statement dated 25 April 2018?---Yes.

And that witness statement is a corrected version of an earlier witness statement that you prepared which was dated 13 April 2018?---That's correct.

And the corrections made from that earlier version are confined to changes to some figures in the tables at paragraphs 20 and 43 of the statement?---That's correct.

And do you have the signed original of your witness statement dated 25 April 2018 with you?---Yes.

And is the contents of that statement true and correct to the best of your knowledge?---It is.

I tender the statement and the exhibits to it, Commissioner.

THE COMMISSIONER: Exhibit 2.247 will be the statement of Ms Macaulay, 25 April '18 and its exhibits.

EXHIBIT #2.247 STATEMENT OF MS MACAULAY AND ITS EXHIBITS DATED 25/04/2018

THE COMMISSIONER: Thank you very much. Ms Orr.

<CROSS-EXAMINATION BY MS ORR [9.49 am]

MS ORR: Ms Macaulay, you're the senior executive leader of ASICs financial advisers team?---Yes, that's right.

Could you explain what the work of that team is?---So we regulate the provision of financial advice by financial advice licensees and by the individual advisers who provide that advice. We regulate mainly in the area of the provision of personal advice to retail clients on complex products, but we also look at general advice that is provided.

So how many people are in ASICs financial advisers team?---At this point in time there is 60 people.

You have provided the Commission with a statement dealing with the regime for taking disciplinary action and making banning orders against providers of financial advice?---That's right.

How does ASIC become aware of misconduct by financial advisers?---There's a number of ways in which we become aware. Reports of misconduct that come from members of the public or from other financial advisers, notifications under section 912D of the Corporations Act, so breach notifications. Some of the material we come across during the course of our own surveillance and through other sources of market intelligence. We get information from FOS as well, sometimes we get information from industry associations.

And how can a member of the public report misconduct of a financial adviser to ASIC?---So on ASICs website there is an electronic form that can be filled in and submitted.

On average, how many complaints of potential misconduct by financial advisers does ASIC receive from members of the public each week?---I've got the figure for the financial year 2016 to 2017, and reports of misconduct in relation to financial advice was 170. So that's three – slightly more than three each week.

And each of those was a report by a member of the public; is that right?---It could have been by another financial adviser. Sometimes a member of the public goes to another financial adviser and that person makes a report.

And how many of those reports of potential misconduct does ASIC investigate?---It's about 40 per cent, on the figures for the last financial year.

And on average, how many notifications of potential misconduct from financial services entities does ASIC receive?---So in terms of breach reports, the figure for last financial year was 106.

And how many of those does ASIC investigate?---About 46 per cent. And so this is, generally speaking, in relation to financial advice. It's not pertaining just to financial advisers.

And how does ASIC decide which reports of potential misconduct it will investigate?---So we look at a number of factors. We look at the seriousness of the misconduct, the impact that it has on consumers. We look at the material that we're provided with in making our initial assessment. We – we look at the age of the conduct. If conduct happened a number of years ago, that's not, perhaps, quite as persuasive of conduct that is ongoing and needs to be stopped. We also look at what our strategic priorities and the areas of risk are at the particular time and whether that fits into those areas of risk, or whether it fits into another area where we want to,

perhaps, look at matters with a view to providing some kind of general deterrence message to the industry.

And what are ASICs current strategic priorities in relation to misconduct by financial advisers?---So it is around professionalism and training. So we would look at misconduct that relates to lack of skills, lack of monitoring and supervision around financial advisers. We're particularly interested in complex product advice being provided under a no advice or a general model advice. We're looking also at self-managed superannuation fund advice. We've got a stream of work in relation to life insurance and advice that is provided around that. We're also concerned about advice in relation to super and which may have an impact on super.

You mentioned areas of risk as well as strategic priorities. What are the areas of risk that ASIC is interested in at present?---Well, those are the areas that – that we see are risky.

The areas that you've just mentioned?---Yes.

And is there any obligation on financial services licensees to report misconduct by their employees or authorised representatives to ASIC?---Well, it depends on whether it fits within the provisions of the legislation. So it needs to be a significant breach, and whether or not a breach is significant will depend on the nature of the breach and also on the – the nature of the licensee. So if it's one adviser within a small licensee and there has been a breach that's affected a number of clients, the licensee may say that that is a significant breach. If it's a large licensee and there is one adviser with a limited number of clients, the licensee may form a view that that is not significant, because a significant breach aspect relates to the conduct of the licensee's business, not to the conduct of the individual adviser.

We've heard references throughout these hearings to communications with ASIC about Serious Compliance Concerns and Other Compliance Concerns. Can you explain those concepts and the origins of those concepts?---Yes. So those concepts are concepts that were developed by ASIC as labels for certain types of conduct. We use them in our advice compliance project where we were looking at the four big banks and AMP, the five largest financial institutions and their conduct around monitoring and supervising licensees and we wanted to engage – conduct around monitoring and supervising advisers and we wanted to engage with them around how they found poor performing advisers in their business and find out from them who the poor performing advisers in their business were. So we asked them to provide us names of advisers whose conduct had fallen within those two definitions.

Is there any obligation on a financial services licensee to notify ASIC where the conduct of one of its employees or authorised representatives is viewed by them as constituting a Serious Compliance Concern or an Other Compliance Concern?---No, their obligation is under section 912D of the Corporations Act.

And do some entities voluntarily notify ASIC where they have Serious Compliance Concerns or Other Compliance Concerns about their financial advisers?---Yes, they do.

And which entities do that?---It's – it's really the – the four big banks and AMP. We also get some from Macquarie Bank, so larger entities that we have engaged with.

And do you sometimes serve notices which have an element of compulsion asking entities to provide you with information about Serious Compliance Concerns and Other Compliance Concerns?---We did in the context of our advice compliance project, and it may be the case that subsequent to that project we are following up when we follow up on a number of advisers, we will serve a notice around those individual advisers to gain more information.

There's also the requirement that you've referred to in section 912D of the Corporations Act to report significant breaches of the general conduct obligations in section 912A. The introduction of the significance requirement in 2003 transformed what was previously an objectively based self-reporting obligation into a subjective one. Is that right?---Yes.

So licensees currently get to make a judgment about whether a breach is a significant one or not?---That's right.

And the factors that the Corporations Act tells them they need to consider in deciding whether a breach is significant or not involve financial impact of the conduct on consumers, but don't involve consideration of non-financial impact on consumers. Is that right?---That's correct.

And ASIC has recently recommended that the significance requirement be retained; is that right?---Yes, I believe so.

But that the legislation be amended to ensure that the significance of breaches is determined objectively instead of subjectively?---That's right.

And do you understand how that objective test is to work?---Not in – in detail.

Is it the case that the position that ASIC is pressing for is that a breach will be significant if there are sufficient facts or information to found an objectively reasonable belief that the matter should be reported to the regulator?---Yes.

And ASIC has also recommended that the timeframe for reporting a breach under section 912D be extended to 30 days?---Yes, that's correct.

And that the 30-day period is to run from when the licensee becomes aware of or has reason to suspect that the breach has or may occurred?---Yes, that's right.

And why has ASIC made that recommendation?---We find that there's often a delay in matters being reported to ASIC because it takes some time for a licensee to form a view. They undertake an investigation. I think the provision at the moment says breach has occurred. So this test is a broader test of when you form a view that there has been a breach or there may well be a breach. It allows a little bit more time for the licensee to do some internal investigation and form their view. We hope that what it will allow is more information to be provided to ASIC at the time that the breach report is made.

Has ASIC ever prosecuted a licensee for failing to comply with the existing 10-day time limit of reporting a breach under section 912D?---Not to my knowledge.

And why not?---We've certainly looked at it and we've obtained advice from senior counsel on that. There is a quite high evidentiary standard that would relate to that, and, crucially, the advice focused on the fact that the person who makes the decision about whether or not there's a significant breach can be a person quite senior within an organisation who may not become aware of the information until it's presented to them. So that allows for a licensee to undertake a considerable investigation, and sometimes put – in some occasions put in place a remediation program before they put together information and provide it to that decision-maker to make a decision. So what that means is a period of months can elapse between the licensee becoming aware of the conduct and it formally making a decision about whether or not it's a significant breach.

And is that a satisfactory situation in ASICs view?---It is not.

THE COMMISSIONER: Ms Macaulay, do you know whether any consideration has ever been given within ASIC to, in effect, testing where the bounds of 912A and D would be set by a court?---Commissioner, it has to the extent that we sought that opinion from senior counsel. My understanding is that based on that opinion we decided that we wouldn't test it in its current form and we would seek to agitate for some law reform.

Is a consequence of the view that was expressed in that opinion that the operation of 912D and reporting is affected by the internal administrative steps taken by the licensee?---Yes, that's my view.

In particular, is a consequence of the view expressed that according to the way in which the licensee orders its own internal administration, the Act may not apply until a particular organ of the licensee forms a view?---Yes.

Understanding that there is change in the wind following the enforcement review and that ASIC has made the submissions it has in relation to that, it is an unusual position to arrive at, isn't it, that the operation of the law depends upon the way in which those governed by the law organise their own internal affairs?---Yes, that's my view.

Yes.

MS ORR: Ms Macaulay, you say in your statement that ASIC does not expect that all misconduct should come to its attention. Why not?---Because there's some misconduct which doesn't require the more serious consideration that a regulator would give it around potentially doing a surveillance for a banning. So there may be – there may be some misconduct that does not cause any loss to clients which is not a breach of the law but is a breach of a licensee's internal practices. It – it may be that there's an occasion where there is an adviser who gives a piece of non-compliant advice in a situation where advice is otherwise correct. You need to allow for human error and mistakes. There's also the fact that there are – there is internal dispute resolution mechanisms required by each licensee, and then there's an external dispute resolution process. That's designed to deal with those sort of isolated situations. In my view, the regulator – regulator should become involved when there is serious misconduct which requires consideration of whether there should be some kind of outcome.

And is ASIC satisfied that all serious misconduct comes to its attention?---No.

And what is ASIC doing about that?---So we engage a lot with the industry around their obligations to breach report and the significance of that. We also talk a lot to industry about reference checking and the need to manage the risks of taking on advisers who are known – known to be poor. We engage with industry associations wherever we can to understand what the issues and likely areas of risk are.

So I think what you've just described is consultation and engagement with industry. Is that right?---Yes.

That's what ASIC is doing in response to the problem of not all serious misconduct coming to its attention?---That's – that's the best answer I can give at this point. There may be something else that I'm not thinking of.

Is ASIC exercising its powers to take action against financial services entities who have not brought misconduct to ASICs attention?---Yes. So we certainly look at the compliance and surveillance capabilities of licensees. So for example, the report that I've mentioned previously, our advice compliance report, but we also look at it in relation to other individual licensees. So they may come to our attention through looking at an individual adviser, and then we find concerns that we think need to be more broadly followed up with the licensee. So questions around why didn't the licensee know about the misconduct of the adviser, what other misconduct is occurring within that firm, are they properly monitoring and supervising it. So we've taken action against licensees in relation to that. So licence conditions, for example, were exposed on my planner. Recently, we took an EU from an entity called Neo. And again, it was founded on their lack of supervision and monitoring and, I guess, discernment of misconduct on the part of their advisers.

Where ASIC does make a decision to investigate potential misconduct of a financial adviser, you say in your statement that establishing that the advice is non-compliant is a resource intensive process?---That's correct.

Could you explain that?---Yes, I can. So when the information comes to ASIC that there's an adviser who has engaged in misconduct or we've come across the information, we need – well, first of all, to – we are always making choices about which matters we take on and which matters we don't take on, given our limited resources and the range of notifications of misconduct that we have. What we will typically do is serve notices on the licensee. So we will seek 10 or so files of the adviser's advice. Sometimes we have to serve notices on several licensees if the adviser has moved around. We will then do an analysis and assessment of those files. As a rule of thumb, it takes about one day to do an assessment of a file. We will look at other sources of information, so we might serve a notice on FOS, we might have a look at the adviser's complaint register to see what other complaints may have been made against the adviser. In some instances, we will speak to clients; in some instances, we will speak to advisers. Then based on our analysis of all that information, we will form a view about whether we should take some further regulatory action. In most cases, that would be preparing a brief to an ASIC delegate seeking either a temporary or a permanent banning of that adviser. That brief needs to be put together. It's essentially a set of observations or a narrative that sets out what we think has occurred and where the concerns are, and then it's supported by all of the material behind it. So depending on the matter, that can be voluminous and it may require more or less analysis depending on the nature of the advice. Then it is submitted to an ASIC delegate who reads that material, makes an assessment of whether or not they think there is a basis for serving a notice of concern on the adviser, and then that initiates the – the hearing process. There will be a hearing where the adviser can come and make submissions or written submissions can be made, and then the delegate will make a decision based on that material and submissions from the adviser.

I want to ask you some questions about that banning order process, but, before I do that, given the resource-intensive nature of that process, if more serious misconduct came to ASICs attention, would ASIC have the capacity to deal with that misconduct?---Well, not on our current resources. So we would need to engage in some kind of assessment of where those resources may come from.

THE COMMISSIONER: Can I just understand better than I presently do what you say about resource-intensive investigation. It occurs to me, at least at the theoretical level, perhaps at the unduly practical level, there would be cases where the poverty of the advice would be self-evident?---That's correct.

In the context of a former life and sentencing appeals, they're the jaw-drop tests; the advice that is given simply couldn't have been thought through. Is that right?---Yes, that is correct.

Does it remain a resource-intensive process, even in those cases, or is it resource-intensive in the disputed and disputable cases?---Well, the nature – how resource-intensive it is does depend on the information. We find even in the jaw-dropping cases, Commissioner, defences are put on, material is provided that was, you know,

not on the file, not provided to ASIC, in an attempt to explain why the advice was correct advice or other extraneous information is put before the delegate.

I'm not in the least surprised by that, but that's responding to the answer that is made. I'm just a little anxious to understand better than I presently do whether I should be approaching this as – how can I put this? – as a blanket problem, or as a problem where there is a range of possible cases, where, of course, any regulator has to determine how it's going to apply its resources. And can I just leap ahead about five steps to indicate what's troubling me. It's the notion of the regulator taking steps overtly to demonstrate that bad conduct will be called out and dealt with. Again, to hark back to the radically different field of discourse of the criminal law generally, it's the notion of public denunciation, that somebody is charged with an offence under the ordinary criminal law for various purposes, one of them is to publicly denounce conduct of that kind. Now, what I want to grasp better than I presently am now grasping is whether that sort of idea, the public message, plays a part in the way in which ASIC is approaching these issues?---It – I think you can probably say that it doesn't at the moment. I think you can probably say that it doesn't at the moment. There are constraints on what we can publicly say about bannings. It's a – our investigations and surveillances, of course, are private, and then the banning process also takes place privately. And the only – the decision is also private, and so we can make a – and we do always put out media releases which record the order, and we do have some brief explanation of the misconduct. So those constraints apply as a result of procedural fairness. We do, in the reports that we prepare and publish, put in there examples of behaviour that we have come across, and they are real-life examples and they are anonymised, and so they don't relate to the individual adviser, but they do give an idea of the kind of conduct that we are seeing.

Yes.

MS ORR: I want to ask you some questions about banning orders, Ms Macaulay. Who can be the subject of a banning order?---An adviser. We do occasionally do banning orders against people who are no longer in the industry, but, generally, we only do them against advisers who are in the industry.

And what type of conduct can result in a banning order?---Well, a range of conducts. So to start with, if there has been criminal conduct, we would take a banning order – we would apply for a banning order. We would also look at criminal proceedings. And then in terms of what is – so – so that will be some kind of dishonesty matter. Other things that support a banning order will be generally around the provision of poor advice. It may be a lack of training and education, so an inability to provide advice. We have looked, in some cases, around issues of the client's signature being applied by the adviser to documents.

A banning order can be permanent or for a specified period; is that right?---That's right.

And what's the average duration of a banning order that's made for a specified period?---Well, it's about four years. So the banning orders that have been made this year, it has been about – the average has been five years, but it's – it's about four years.

And how long does it generally take ASIC to make a banning order after being notified of potential misconduct by a financial adviser?---Well, from the time – I will answer that question in – in two ways. From the time that we have made a decision that we're going to commence looking at an adviser for the purposes of taking some action, it takes somewhere between six and 12 months, probably at the upper end of that, and if it's serious misconduct, criminal misconduct, leaving aside any criminal brief, it will take a little bit longer than that to get to the stage of putting the brief to the delegate, and then it will take, on average, about five months for that delegate's decision to be made. And the second part of the answer to that question is that's at a point of time when we decide to go ahead with some kind of surveillance. That won't be immediately that the information or the report of misconduct hits ASIC. In some cases, we will be waiting to get some further information from the licensee. So we might get some information under a breach report, the licensees undertaking further investigation. So in some instances, we may wait to get that information. In some instances, we may not have the resources at that point in time to commence the surveillance of the licensee, but it's one that we want to do so we will have to wait until we can shuffle around resources or resources become free.

So how long do you estimate that first period is, the period between being notified of the conduct and making the decision to commence an investigation into the conduct?---Well, that can vary. In some instances, it can be a couple of months. In other instances, it can be longer. So other situations are where we become aware of misconduct but the adviser is no longer in the industry. So we set that matter aside and we wait, and when – if we hear, we understand from the Financial Advisers Register that the adviser re-enters the industry, then we might start. So you know, it could be, you know – look, it could be any length of time up to a year.

So two months to a year to make the decision to commence an investigation, and after that point, six to 12 months to get the brief to the delegate?---That's right.

And after that point, about five months for the delegate to make the decision?---That's correct.

So just so I understand, the purpose of a banning order is protection of the public?---That's right.

But it might take a couple of years before ASIC gets a banning order for that purpose after being notified of potential misconduct?---That's right.

Is that satisfactory, Ms Macaulay?---No, it's not.

And what is ASIC doing about that?---Well, resources is part of the answer to the question. We are trying to – we are engaging with licensees about more prompt reporting of misconduct and provision of internal material that they have that supports a banning process.

So that relates to getting the information to you?---That relates to getting the information. We - - -

But what is ASIC doing about the time it takes?---Internally?

Yes?---Internally, so we – we – we have templates. So we attempt to speed up the process of preparing the brief by trying to organise it in the most efficient and effective way. How long it takes to do a surveillance depends on what resources we have available to do it. If a person is doing five of these matters at one time, it takes longer than if they're doing, say, three. The – the challenges are we seek material from licensees or other sources. It may take some time to get that material. When we get that material, it's not always everything that we ask for, and so we have to sometimes serve a series of notices. The analysis can take some time. So we have improved and worked on our skills in putting together the material and drafting the delegate's brief. We have engaged with the delegates to understand exactly what it is that they want in the brief so that we can put to them the best brief that is possible to get. Again, the time that a delegate will take to conduct the hearing can be – well, is influenced by any requests that an adviser makes for extra time before the hearing is conducted, and sometimes several of those requests can be made, and so it can take some months before we can get the adviser to appear at a hearing or we make a decision that we will just go ahead with the hearing.

In what circumstances does ASIC have to provide notice of the banning order application to the person who's the subject of the application?---When – when the delegate has had a look at the material and formed a view that there is – that material supports the basis of concerns that have been outlined to that delegate, and then it's provided to the adviser.

I see. So that's another step in the process?---Yes.

The brief is provided to the delegate?---Yes.

The delegate forms some views about whether notice should be given to the person the subject of the application?---Well, notice is always given to the person because that's part of the procedural fairness obligations. The delegate makes a decision about whether they think, on the material provided to them, there is, in a sense, a prima facie case. There's a basis upon which to make a banning order. And once that threshold has passed, the material is then sent to the adviser.

And the adviser has a right to appear at a private hearing before the ASIC delegate?---Yes, that's correct.

And to make submissions to the ASIC - - -?---Yes.

- - - delegate? And how does the hearing before the ASIC delegate work?---It's a private hearing. It takes place in ASICs offices. There are transcription services. Very often an adviser will come along with some legal representation, and the adviser is given an opportunity to make submissions as to why, essentially, they shouldn't be banned, and often, subsequently, there are written submissions as well provided. And so the delegate will ask questions of the adviser and the adviser will – has an opportunity to put, I guess, their case in answer to the brief that – of material provided to them.

And does a representative of ASIC appear before the delegate to challenge or respond to the contentions made by the adviser?---No, it's not an adversarial process; it's an administrative decision-making process.

Can a delegate's decision to ban an adviser be challenged by the adviser?---Yes, it can. So the Administrative Appeals Tribunal has jurisdiction. So that's a merits review. And there's also the ability to go to the Federal Court subsequently for a review on a question of law.

Do you know how long it generally takes formatters to work their way through the Administrative Appeals Tribunal on a review?---Generally speaking, about a year.

And if the matter is taken to the Federal Court, do you know how long it generally takes for the matter to work its way through that process?---No, I don't. That is not a – you know, it's a very occasional occurrence.

Can a delegate's decision not to make a banning order be challenged by ASIC?---Not practically speaking because it is a decision of ASIC.

Are there limitations on the scope of banning orders?---Well, yes, so – well, a banning order can be made permanently. So to that extent, there's no limitation on the scope of it. It generally is made in terms of an – an order provides an inability to provide financial services either permanently or for a set time. I'm not sure if it's the case that some kind of conditional cessation or suspension order can be made, but that's generally not made by a delegate.

Can the delegate ban individuals not just from providing financial advice or financial services but from managing a financial advice or financial services firm?---No.

Is it satisfactory that ASIC doesn't have the ability to do that?---It's not satisfactory.

And the ASIC Enforcement Review Taskforce has recommended that ASIC should be able to ban a person from performing a specific function or any function in a financial services business?---That's correct.

And last week the government agreed to that recommendation?---That's right.

Now, just coming back to the purpose of banning orders, you said in answer to my question before that it was about protection of the public. Is it also about punishing poor conduct by advisers?---The AAT and the courts have said there is a deterrence element to those sorts of decisions. The practical effect of it is that it does provide punishment because it takes away the adviser's livelihood. But the – as I understand it, the legal precedent is that it is protective of the public.

And in your statement you have provided the Commission with some statistics on the number of banning orders made by ASIC in the last 10 years?---That's right.

You've set out a table in your statement at paragraph 20. So the top table we see there is the number of banning orders made in respect of financial advisers, and the second table is the total number of banning orders, which includes the banning of company directors and others. Is that right?---No, it's not. It's only banning orders under section 920A. So it's in relation to financial services.

So who are the "others" who are not financial advisers who are captured by the second table?---So insurance brokers, it may be people who have run an unregistered managed investment scheme. Sometimes we include in that table stockbrokers if the misconduct is just in relation to stock broking conduct.

So we can see from the first table that since 2008, ASIC has made 229 banning orders against financial advisers. How many of these were permanent banning orders, as opposed to orders for a specified period of time?---So 46 per cent of them were permanent.

And the year in which most banning orders was made is 2016, when 36 financial advisers were banned?---That's correct.

And as at the date of your statement, 10 financial advisers have been banned this year?---That's correct.

You heard Mr Kell's evidence that there are approximately 25,000 financial advisers in the industry?---Yes.

And are you aware of the evidence in these hearings about the different types of misconduct engaged in by financial advisers across multiple licences?---Yes.

Do you think that ASIC has used its banning powers enough to deal with misconduct in the financial advice industry?---No, I don't think that we have. I think we have used them to the best of our ability, given our resourcing levels and – and the other areas in which we need to regulate financial advice.

How many of the 229 banning orders were the subject of an appeal to the Administrative Appeals Tribunal?---86 were.

And how many of those 86 resulted in the banning order being varied or set aside?---In 21 cases, I say in my statement.

And you say that 17 of those were varied and four were set aside; is that right?---That's right.

You say in your statement that ASIC can also take civil penalty proceedings against a financial adviser?---That's correct.

How many civil penalty proceedings has ASIC instigated against a financial adviser in the last five years?---None.

Why is that, Ms Macaulay?---So several reasons. First of all, a civil penalty order can't include a banning order. So it doesn't have that immediate protective effect. So we would need to do a banning as well as a civil penalty order. Now, that can certainly be done. We have looked at doing a civil penalty order – civil penalty action against individual advisers. We've decided not to do it in the particular instance I'm thinking of. It was in the

context of a broader civil penalty action. It was the first civil penalty action taken, so we wanted to just focus on the action against the licensee. But one aspect that we would consider is having banned the adviser, what is the utility in also taking a civil penalty action, which will take some time and will be costly in terms of resources, and measuring or balancing the value that we would get out of that against the value in, perhaps, using those resources to ban another adviser that we are aware of who is providing poor advice to consumers.

What about the utility in public denunciation of that adviser's conduct, both as a measure for deterrence of that adviser and general deterrence of advisers in the industry engaging in similar sorts of conduct?---Yes, and I agree, that is a way to consideration.

But ASIC has not commenced any civil penalty proceeding, despite having the power to do so since 2013?---That's correct.

And that means, as I understand it, that ASIC has not instigated a single civil penalty proceeding against a financial adviser for breach of the best interests duty in the Corporations Act; is that right?---That's correct.

And is that satisfactory, Ms Macaulay?---No.

You say that ASIC can also seek corrective action in relation to financial advisers by engaging with the licensee responsible for their conduct?---That's correct.

What sort of corrective action are you referring to there, Ms Macaulay?---So part of the corrective action would be having – providing remediation to the clients, but

there would also sometimes be corrective action in relation to – sorry, I'm just refreshing my mind from my statement.

You deal with this in paragraph 31 - - -?---That's right.

- - - if it assists, Ms Macaulay?---So that would be in a circumstance where we were confident enough in the licensee and their ability to supervise and monitor to engage with them to impose some kind of enhanced supervision regime in relation to the adviser. So vetting of all advice, having the adviser shadowed by a more senior or another adviser to ensure that the engagement with the clients was correct and doing a remediation program, looking back at the advice that the adviser had provided in the past and correcting any loss that that advice had caused.

But presently, you don't have any power to require a licensee to take that sort of corrective action?---That's right.

And your Enforcement Review Taskforce has recommended that ASIC does have a power to direct financial services licensees in the conduct of their business, where necessary, to address or prevent risk to consumers?---That's right.

And the government has accepted that recommendation in principle but said it will consider the recommendation in conjunction with any findings from this Royal Commission; is that right?---Yes, that's right.

You also say in your statement that ASIC can enter into enforceable undertakings or negotiated outcomes in relation to financial adviser misconduct?---That's right.

Why does ASIC negotiate with financial services entities about sanctions for financial advice misconduct?---We would do so in circumstances where an adviser – where we've got a matter underway. We're looking at the adviser with a view to taking some kind of banning action. The adviser approaches us and, essentially, makes an offer. We would consider that offer. We take enforceable undertakings where we think it would give a better outcome than the alternative; in this case, administrative proceeding. So we would accept an enforceable undertaking in circumstances where what was offered to us was better than we thought we could get before a delegate, and an example of that would be a period out of the industry that we thought was a realistic assessment of what a delegate might decide to impose, plus something else, such as before re-entering the industry, further education would be undertaken, or there would be an arrangement with the licensee that there would be pre-vetting of the files.

What are the consequences if you enter into an enforceable undertaking with a financial adviser and they breach the enforceable undertaking?---So an enforceable undertaking is enforceable before the court. So we would need to go to the court and get an order. And I think there's a range of orders, including obliging the adviser to engage in the conduct that they undertook to engage in.

And does ASIC supervise the implementation of the work that's required by the enforceable undertaking of the financial adviser?---Yes, we do, to some extent. We tend to monitor enforceable undertakings more closely in relation to licensees, but we certainly look very closely, for example, if an adviser has come back into the industry and they've promised that they will do some further education. Before they come back into the industry, we will check that.

ASIC has the power to disclose information about specific financial advisers to the relevant licensee; is that right?---Yes, 916G. Yes, that's right.

And you tell us in your statement that that power is rarely, if ever, used?---That's correct.

Why is that?---We need to be reasonably satisfied about the information before we release it, and, usually, that involves us doing – undertaking some kind of surveillance. If it relates to the compliance or the abilities of the adviser, we need to satisfy ourselves that there are some issues there. Practically speaking, very often in the course of doing that we will be serving notices on the adviser's licensee. And so the adviser would become aware of that through the notice. There has been one occasion – the only occasion I'm aware of – where we released information, and it didn't relate directly to the ability of the adviser but it was information in relation to a substantial betting account that we had become aware that adviser held and we felt whilst it had no relationship to the provision – or there was no link between that and his financial advice, we thought it was a significant risk factor that the licensee should be aware of.

And that's the only instance that you're aware of where ASIC has exercised that power to disclose information to the licensee?---That's correct.

ASIC also has a power to disclose information about advisers to prescribed disciplinary bodies; is that right?---That's right.

And neither the FPA or the AFA, the two financial planning industry bodies, is a prescribed disciplinary body?---That's correct.

Why not?---I – I don't know the answer to that question. It's not something that I've looked at. I – I suspect it may be because they don't have, you know, significant indicia to meet the – the standard of a professional body that would be required, but that's just speculation on my part.

Does the current regulatory structure mean that misconduct by a financial adviser is predominantly dealt with by the licensee?---Yes.

And is that a consequence of the way the financial advice industry has developed?---Yes, but it's also a consequence of the way that the legislation is currently constructed.

And is it appropriate, do you think, in a professional or quasi-professional industry for a large amount of the disciplinary power and responsibility to be left with the bodies who profit from the work of the financial advisers?---No.

Other professionals, such as doctors and lawyers and dentists, tend to be individually licensed. Are you aware of whether any consideration has been given to requiring financial advisers to hold individual licences rather than for the licensing to be at the entity level?---No, I'm not aware of that.

Do you think there should be consideration of that, Ms Macaulay?---Speaking personally, yes, I think there should, and I – there has certainly been broader discussion with the – within the industry around that possibility, but that – that is a large policy question, and the place that would be discussed would be within treasury.

And what would be the advantages, in your view, of individual licensing of financial advisers?---Well, you wouldn't have the intermediary, the licensee. It would be a direct obligation on the individual. They would need to meet the professional standard. If they were unable to do that, then they would be out of the industry. So yes, it would be a more direct form of regulation.

Has the movement of financial advisers who have engaged in misconduct between licensees been a problem in the industry?---Yes.

And you're aware of the ABA protocol that deals with that?---Yes, I am.

Perhaps if we could have brought up RCD.0021.0003.0024. You're familiar with this document, Ms Macaulay?---Yes.

This is the Financial Advice – Recruitment and Termination Reference Checking and Information Sharing Protocol, which is current, having been promulgated in September 2016?---Yes.

I tender that document, Commissioner.

THE COMMISSIONER: Exhibit 2.248 will be ABA Financial Advice recruitment and Termination Reference Checking and Information Sharing Protocol, 20 September '16, RCD.0021.0003.0024.

EXHIBIT #2.248 ABA FINANCIAL ADVICE RECRUITMENT AND TERMINATION REFERENCE CHECKING AND INFORMATION SHARING PROTOCOL (RCD.0021.0003.0024) DATED 20/09/2016

MS ORR: Does this protocol, in your view, Ms Macaulay, fix the problem of financial advisers who have engaged in misconduct moving from one licensee to another?---No.

Why not?---It only – ABA members are the only people who can become signatories, and the obligation on signatories is only to provide information to other signatories. That's a very small part of the industry. 95 per cent of licensees, you know, are not members of the ABA, so there's no obligation that applies across the industry. I think, secondly, the protocol recognises that there is no obligation to provide information in certain circumstances, so where there's legal proceedings on foot, where legal professional privilege applies, where the Privacy Act applies, where there is a historic employment agreement or where there is some other pre-existing document which might have confidentiality obligations. So we're engaging with the ABA to understand how the protocols are being used and how effective they are within the group of ABA members, but we're also engaging them and other industry associations in discussions around how the protocols can be extended more broadly throughout the industry.

I want to turn to asking you some questions, Ms Macaulay, about action that ASIC can take against the licensee?---Yes.

We've been talking so far about action against individual financial advisers. What powers does ASIC have to take disciplinary action against licensees?---So there's a range of powers. We have the ability to take civil penalty proceedings. We have the ability in the administrative area to cancel or remove licences or to place conditions on licences.

How many times has ASIC taken action against a licensee for a breach of section 912A of the Corporations Act and the general obligations contained in that provision?---So the remedy for that is a licensing remedy. So that would be either placing conditions on the licence or seeking to remove the licence. In terms of seeking to remove the licence, we have found that that is a difficult process. I think there has been one occasion where we have succeeded. In a couple of other occasions, we've had short suspensions imposed on licences.

By virtue of breaches of section 912A?---Yes.

Okay. So one instance of expulsion referable to a 912A breach; is that what you said?---Yes, Morrison Carr. That's my recollection – understanding.

I'm sorry, I missed that?---Morrison Carr was - - -

Thank you?--- - - - the name of the licensee.

And a small number of suspensions in reliance on a breach?---Two.

Two suspensions on reliance of a breach under 912A. That's the entirety of the action that ASIC has taken in response to breaches of section 912A?---So we have taken other action, other administrative action in relation to licensees. It has ended in cancellation of the licences, around things such as failure to lodge audited financial statements annually, failure to have professional indemnity insurance, failure to have a responsible manager or a key person insolvency. I just can't tell you at this point whether we did that under 912A or there was another specific provision.

There are specific provisions that relate - - -?---Okay.

- - - to those matters, aren't there?---Yes, that's my understanding. I'm not sure if there's a provision for each of those things.

You've included a table at paragraph 43 of your statement that shows the frequency of disciplinary action against licensees?---That's correct.

I will just wait till that's brought up. I think it's at 335 – no, I'm sorry. We have it now. 0015. And that shows us that, by far, the most common action taken against a licensee is licence cancellation?---That's correct.

And do those figures we see in relation to licence cancellation, but for the one instance you identified, relate to matters such as failing to file annual compliance statements, failing to have a key person, failing to have professional indemnity insurance?---There are included within those statistics, for instance, where a licence was cancelled as a result of an enforceable undertaking, and I refer to that a bit earlier in my statement.

Yes. So four instances of cancellation because of breach of an enforceable undertaking; is that what you're saying?---Not because of a breach of an enforceable undertaking but as a result of an enforceable undertaking, a licensee has agreed to cancel their licence.

I'm sorry. I'm sorry. I misunderstood. So the licensee has agreed to have their licence - - -?---Yes.

- - - cancelled - - -?---Yes.

- - - as part of an enforceable undertaking entered into with ASIC?---That's correct.

And the figures here include four instances where that has occurred?---They do. And in relation to some of those figures where the cancellation involved failure to lodge accounts or have professional indemnity insurance, there have been elements of failure to properly monitor and supervise advisers. So that would be a 912A element.

Has the cancellation been in reliance on a breach of 912A?---I suspect it has been done more in reliance on that more binary factor, which is have the statements been filed, is the insurance in place.

Yes. Those are more specific ascertainable obligations than the general obligations in 912A, are they not?---That's correct.

Okay. Now, how does ASIC tend to identify the sorts of action that you've referred to, noncompliance with the requirement to file annual statements, failing to have professional indemnity insurance, those sorts of matters?---So we've got a program in relation to lodging audited annual financial statements and auditor's report, where we – our registry area tracks the submissions of those and sends out reminder notices, and then after a certain period, we get that data and engage with the licensees, ask them why they haven't lodged the documents. Sometimes it's not one year, it's several years. If they don't then lodge the documents, we commence licence cancellation proceedings.

So the vast majority of the cancellations recorded in this table relate to that conduct, conduct where you have identified as part of your program that the licensee has not filed annual statements?---It – I wouldn't say it's the vast majority. It's the majority. And then you need to add to that not being member of an EDR scheme, not having professional indemnity insurance in place, no responsible manager.

So since 2013, over the last five years, what proportion of licence cancellations has been in relation to the provision of financial advice?---Those two instances I referred you to.

And that's the entirety of the instances?---Yes, except other than to the extent that I outlined where it was part of other failures.

In what circumstances relating to the provision of financial advice has ASIC taken the step of suspending a licence in recent years?---So in relation to an entity called FTS, they had a program where they were putting clients into a double-geared strategy, so it was a cookie-cutter approach. It was a very risky strategy. So we became aware of that. We conducted a surveillance. We put together a brief to the delegate. During the course of that, the licensee ceased that strategy. We continue – and put in place some other compliance arrangements. We continued with the hearing before the delegate. At the hearing before the delegate, evidence was put on by the licensee that they didn't – they recognised that practice was bad, they didn't engage in it any more. They – the other parts of their business were fully compliant, and so there was no need to protect the public by removing the licence.

But that was an instance where the licence was suspended; is that right?---Yes, it was suspended for - - -

So that's one instance?---That's one instance.

With one set of circumstances. Are there any others?---The other instance was an entity called Massu. I'm just trying to recollect whether there was specific misconduct or it was more a general failure of the compliance and monitoring and supervision aspects of that entity's obligations. But in any event, again, the same thing happened. As we were conducting the surveillance and engaging with the licensee, they put in place new compliance arrangements, you know, they may have put in place a new compliance manager, they may have got an external compliance consultant to provide assistance, and then the argument before the delegate was that whilst there may have been problems in the past, the problems are now all fixed, and so there is no need to make any order protecting the public.

So does that mean that since 2013, just two licensees have had their licences suspended in connection with the provision of financial advice?---Yes, that's correct.

And how long were the suspensions for those two entities?---In relation to the second one, it was eight weeks, and I think it was six weeks in relation to the first entity.

And what were the practical effects for each of those licensees of the suspension of their licence?---Well, it would mean that the advisers who were authorised under that licence were unable to provide advice to their clients during the period of suspension.

And did those advisers find another way to provide advice during the period of the suspension?---My understanding is yes. I don't have evidence of that, but what I understand would have happened is those advisers would have gone and used the licence of another licensee, either individually or en masse because they needed to continue to service their clients during that period.

And do you mean another licensee connected with the suspended licensee?---Yes, it may well have been. So in relation to the first licensee, there was another licence held within that group.

So what was the practical effect of the suspension, then, Ms Macaulay?---My view is not – not a great practical effect.

Another form of action that you refer to in this table is enforceable undertakings with a licensee. And we've seen examples of those undertakings against CBA and ANZ recently in respect of the fees for no service issue?---Yes.

Each of those required payment of a community benefit payment. What's the purpose of that sort of payment?---I think it's to mark the level of misconduct that was engaged in by those licensees. Remediation was addressed in a – in a separate stream of work and is ongoing.

And how much was the community benefit payment required from CBA and ANZ in those recent enforceable undertakings?---It was – my understanding is $3 million from each entity.

Three million dollars from each to mark the level of misconduct. How did ASIC determine that $3 million was an appropriate figure for those community benefit payments?---I'm – I'm not really aware of that. That was a – not a decision that was made by me. I was aware of discussions around it, but I – I can't say how that figure was fixed and reached.

Do you think those figures were adequate, given the size of those two organisations and the seriousness of the conduct that was the subject of the enforceable undertaking?---Well, certainly when you look at the balance sheet of those institutions it's enormous. So $3 million is not a large amount of money at all.

To your knowledge, are enforceable undertakings with ASIC heavily negotiated?---Yes, they are.

And why does ASIC engage in this process of negotiating outcomes with licensees rather than exercising its powers to bring enforcement proceedings such as civil penalty proceedings?---In some instances, they can get a better outcome. Not in every instance. So if what we're trying to do is ensure that good advice is provided to Australian consumers, and I think that's sort of the – the – the – one of the general objectives of ASIC as set out in the ASIC Act, then engaging with a licensee to ensure that it puts its business on a footing where it is going to be set up and – to enable its advisers or require its advisers to provide compliant advice, can be a better outcome than simply levying a fine or even removing the licence. If you remove the licence, then the advisers will move on to other licensees who may not have good supervision and monitoring processes. So if we keep the business on foot, there is an opportunity for it to be improved going forward. There's also an opportunity for a remediation process to be put in place to look back at customers who have received poor advice and suffered a loss as a result of that.

Is ASIC concerned about a public perception of ASIC negotiating and reaching consensus with financial services entities about appropriate sanctions for their misconduct?---Yes, I'm aware of that public view. I – while you're correct that we do negotiate with them, ultimately, we need to be happy. We – we accept what they offer, and – and there is a process of negotiation around that, but if they're not going to offer something that we think is appropriate, then we will have an alternative action.

Your table shows that ASIC has taken no criminal action against any licensee in the last 10 years. Why not? I'm sorry, I - - -?---One.

There is one?---Yes.

One criminal proceedings that was instituted in 2010?---Yes, that's correct.

Why only one criminal proceeding instigated over the last 10 years against a licensee by ASIC?---We usually look at the conduct of the individuals who are behind that licensee. The consequence of a criminal finding against a corporate entity is that

there would be a fine imposed. We generally address the – the motivating minds of the corporation and their conduct. So that's the individuals who were involved, and so we would take criminal proceedings against the individuals.

And what – I ask you again. What about the value of public denunciation of the licensee for their conduct that comes with a criminal outcome imposed by a court?---Yes, there is certainly that.

ASIC hasn't sought that in all but one instance over the last 10 years. Does it not see value in that?---We weigh up – in any situation where we're thinking about what an enforcement or a regulatory outcome should be, we weigh up the various avenues we have available and the deterrent impact that they can have. So thought would be given to what you have – have said, the – the deterrent value of doing that. There would also be the issue that the corporate entity could be put into liquidation before the proceedings are completed. There's always the balancing exercise of where we place our resources to get impact, and so what is the impact of a criminal decision that may – may take two or three years to achieve, as opposed to, perhaps, using those resources to deal with some current ongoing conduct.

But on your evidence, the action taken by ASIC to secure a banning order against an individual takes roughly the same time?---Yes, that's correct.

And your table also shows that over the last 10 years, ASIC has commenced only six civil penalty proceedings against licensees with four of those commenced this year?---Yes, that's correct.

So why so few civil penalty proceedings against licensees?---So the power only came into effect in 1 July 2013.

Yes?---So that's the last five years.

Yes?---So you can only use civil penalty proceedings to address conduct that occurred after that date. So there needs to be a period in which the conduct occurred. So it may not have occurred right on 1 July 2013. ASIC then needs to become aware of it and take action. We have taken – it's essentially two sets of proceedings while the 2018 figure says there were four defendants, and it has really been in relation to egregious misconduct that needed to be dealt with by way of a significant response, and some of the proceedings had injunctions as part of those proceedings as well to stop the conduct occurring.

Thank you, Ms Macaulay. I have no further questions, Commissioner.

THE COMMISSIONER: Yes, thank you, Ms Orr. Does anybody other than ASIC seek leave to examine Ms Macaulay? No. Mr Steele.

MR STEELE: Just a handful of questions, Commissioner.

<RE-EXAMINATION BY MR STEELE [11.03 am]

MR STEELE: You were asked some questions by the Commissioner, Ms Macaulay, about the speed with which jaw-dropping cases could be dealt with?---Yes.

In that context, can I ask you - - -

THE COMMISSIONER: I am going to regret that expression, aren't I, Mr Steele?

MR STEELE: We're working with it, your Honour. I'm sorry, Commissioner.

In that context, can I ask you to what extent do licensees commonly share information with ASIC as to the detail of the misconduct by advisers that's notified by them to ASIC?---Not often. So in some instances, there is no detail within the licensee other than the files or a complaints register. In some instances, there has been internal investigations of some nature conducted by the licensee. We find that there's a reluctance to share that, legal professional privilege is often claimed, and also the fact that the investigation has not yet been completed. So there – there's no material to provide to us.

When ASIC gives a notice to a licensee for the report of the outcome of an investigation, for example, are such reports always provided in answer to the notice?---I'm sorry, are such?

Are such reports always provided in answer to such notices?---No, claims for legal professional privilege are often made.

You were asked some questions also about the importance of public denunciation in the context - - -?---Yes.

- - - of misconduct by advisers. Does ASIC take criminal action against conduct of advisers?---Yes, we certainly do.

In what sorts of cases?---Fraud or dishonesty cases.

And how frequently does that occur?---Very frequently. So if it comes to our attention that there is fraud and dishonesty and we can find the evidence, then we will take a criminal prosecution and we will also ban the adviser. We will generally take the banning action first.

And in the context of the distinction between the Serious Compliance Concerns and Other Compliance Concerns that you were asked about, you talked about the advice compliance project in 2015?---Yes.

And that was a project in which ASIC gave notices to the big licensees, the four banks and AMP, to identify advisers who had – about whom they had Serious Compliance Concerns or Other Compliance Concerns. Is that right?---Yes, that's correct.

And as a result of those notices, how – what number of Serious Compliance Concern advisers were notified to ASIC?---My recollection was it was somewhere around 147 reported to us by those five institutions.

And that occurred in the second half of 2015. Is that right?---Yes, I think so.

And how many other compliance concern advisers were notified to ASIC at that time?---I can't recollect the figure. I think it was somewhat more than 147.

Like 200, or substantially more?---Yes, no, around 200, I think.

All right. And that presented a body of work, then, for ASIC, one assumes?---Yes, that's correct.

And how is that work dealt with and over what timeframe?---We're dealing with it now. So of those 147, we had a look at which advisers we had already banned and there were a significant number where we had already taken action or there was action on foot. We then did some preliminary – we looked at which advisers were no longer in the industry. We did some preliminary inquiries of the other advisers in an attempt to assess the seriousness of the misconduct, and then those remaining, about 60, we are slowly working our way through doing a banning action. Most of that advice is now somewhat old and we need to have a look at more current advice and make an assessment of whether the poor advice practices are continuing.

When you say "slowly", what's dictating the pace at which you're able to do that?---Well, what I outlined previously. So we need to gather material, we need to put together a brief of evidence, we need to provide it to the delegate. So we've got a team of about eight people who are doing that. We've got streamline procedures. One of the things that we do as a rule there is call the adviser in at the end of our surveillance and put to them all of the issues that we find that that – that helps in getting the outcomes.

And you said in answer to one question from Counsel Assisting that ASIC had found it difficult to get a – to get licences cancelled for contraventions - - -?---Yes.

- - - of section 912A obligations?---Yes.

Can you explain how and why it's difficult?---Because licensees, when they become aware that they are subject to this kind of surveillance and banning action, put in place arrangements to improve their compliance. We then need to, in essence, start the surveillance again to assess what those compliance procedures are. If we've got concerns about them. Because otherwise, when they – they come to the hearing

before the delegate and say, "Well, the problem is fixed, there's no need to protect the public." So it becomes an ongoing course where we would need to pursue the licensee as they put in place new arrangements.

You were also asked some questions about the number of civil penalty proceedings that ASIC has taken in recent times - - -?---Yes.

- - - in this area - - -?---Yes.

- - - and why enforceable undertakings are sometimes preferred to civil penalty proceedings?---Yes.

Is it possible for ASIC to take civil penalty proceedings in relation to a breach of the obligations in section 912A?---No, it isn't at this point in time.

And when you say "at this point in time", what do you mean?---Well, I understand that the enforcement review has had a look at this, and a recommendation has been made that that power be provided to ASIC, and I understand it has been accepted by the government.

Thank you. You were also asked some questions by Counsel Assisting about the $3 million community payments that were included in the enforceable undertakings in relation to a couple of the fee for no service licensees?---Yes.

Remember that? Do you know what the level of penalties would be if ASIC took proceedings in relation to that matter?---It would be certainly less than $3 million. I'm not sure off the top of my head.

And is it your experience that the level of penalties - - -

THE COMMISSIONER: Sorry, on what do you base that, Ms Macaulay? Are you saying that there's a maximum that would be engaged, or are you making a prediction about what the court would do? What's the - - -?---Well, I don't think I can make a prediction of what a court would do, but I'm imagining that it would be – if it was treated as one contravention, the maximum penalty I think is less than $3 million, and now there's a question about how many contraventions there have been.

I should say I'm a little surprised by the answer, but perhaps it's so. I haven't looked at it.

MR STEELE: Perhaps it might be something we could take up in submissions, Commissioner.

THE COMMISSIONER: Yes.

MR STEELE: Is it your experience – is it ASICs experience that the level of penalties provided for in the current regime is adequate to effectively punish and deter wrongdoers in this area?---No, it's not adequate.

No more questions, thank you.

THE COMMISSIONER: Yes, thank you, Mr Steele. Ms Orr.

MS ORR: No, thank you, Commissioner.

THE COMMISSIONER: Thank you very much, Ms Macaulay. You may step down. You are excused.

<THE WITNESS WITHDREW [11.12 am]

MS ORR: Commissioner, as I said, Ms Macaulay is the last witness in this hearing block. There are, however, some documents I wish to tender before our closing statement.

THE COMMISSIONER: Yes.

MS ORR: These are additional documents that we or AMP consider may be relevant to the AMP fees for no service case study. A number of these documents were provided to the Commission by AMP over the weekend prior to Mr Regan giving evidence and have now been reviewed. The first of those is AMP.6000.0006.2286, minutes of a meeting of the board of AMP Limited on 16 December 2017.

THE COMMISSIONER: That is exhibit 2.249.

EXHIBIT #2.249 MINUTES OF MEETING OF BORAD AMP LIMITED (AMP.6000.0006.2286) DATED 16/12/2017

MS ORR: The second is AMP.6000.0052.1607, an email from Nicholas Mavrakis to Brian Salter dated 15 October 2017 attaching marked-up pages of the Clayton Utz report.

EXHIBIT #2.250 EMAIL FROM NICHOLAS MAVRAKIS TO BRIAN SALTER ATTACHING MARKED-UP PAGES OF CLAYTON UTZ REPORT (AMP.6000.0052.1607) DATED 15/10/2017

MS ORR: The next is the attachment to that email, AMP.6000.0052.1608.

THE COMMISSIONER: That's exhibit 2.251.

EXHIBIT #2.251 ATTACHMENT TO EMAIL IN EXHIBIT #2.250 (AMP.6000.0052.1608)

MS ORR: AMP.6000.0054.6721, an email from Brian Salter to Nicholas Mavrakis and Melissa Baker-cook dated 11 October 2017.

THE COMMISSIONER: Exhibit 2.252.

EXHIBIT #2.252 EMAIL FROM BRIAN SALTER TO NICHOLAS MAVRAKIS AND MELISSA BAKER-COOK (AMP.6000.0052.1608) DATED 11/10/2017

MS ORR: The attachment to that email being a section 33 notice from ASIC dated 6 October 2017. AMP.6000.0054.6722.

THE COMMISSIONER: Exhibit 2.253.

EXHIBIT #2.253 ATTACHMENT TO EMAIL IN EXHIBIT #2.252 BEING A SECTION 33 NOTICE FROM ASIC (AMP.6000.0054.6722) DATED 06/10/2017

MS ORR: A second attachment to that email, being an attachment to the section 33 notice, a paper prepared by Brian Magellan entitled FOFA Practice Proposition Stream, Orphan Contracts, Policy and Process Changes and Recommendations, AMP.6000.0054.6732.

THE COMMISSIONER: Exhibit 2.254.

EXHIBIT #2.254 SECOND ATTACHMENT TO EMAIL IN EXHIBIT #2.252 BEING AN ATTACHMENT TO THE SECTION 33 NOTICE, A PAPER PREPARED BY BRIAN MAGELLAN ENTITLED FOFA PRACTICE PROPOSITION STREAM, ORPHAN CONTRACTS, POLICY AND PROCESS CHANGES AND RECOMMENDATIONS (AMP.6000.0054.6732)

MS ORR: AMP.6000.0054.6816, an email chain between Brian Salter of AMP and Tim mall alley of ASIC dated 18 October 2017.

THE COMMISSIONER: Exhibit 2.255.

EXHIBIT #2.255 EMAIL CHAIN BETWEEN BRIAN SALTER OF AMP AND TIM MULLALY OF ASIC (AMP.6000.0054.6816) DATED 18/10/2017

MS ORR: AMP.6000.0054.7532, an email from Brian Salter of AMP to Tim Mullaly of ASIC dated 7 February 2018.

THE COMMISSIONER: Exhibit 2.256.

EXHIBIT #2.256 EMAIL FROM BRIAN SALTER OF AMP TO TIM MULLALY OF ASIC (AMP.6000.0054.7532) DATED 07/02/2018

MS ORR: AMP.6000.0054.7602, a letter from Tim Mullaly of ASIC to Brian Salter of AMP dated 14 March 2018.

THE COMMISSIONER: Exhibit 2.257.

EXHIBIT #2.257 LETTER FROM TIM MULLALY OF ASIC TO BRIAN SALTER OF AMP (AMP.6000.0054.7602) DATED 14/03/2018

MS ORR: AMP.6000.0054.8616, a letter from Brian Salter of AMP to Peter Kell of ASIC, dated 14 November 2017.

THE COMMISSIONER: Exhibit 2.258.

EXHIBIT #2.258 LETTER FROM BRIAN SALTER OF AMP TO PETER KELL OF ASIC (AMP.6000.0054.8616) DATED 14/11/2017

MS ORR: A notice issued by ASIC under section 33 of the ASIC Act dated 9 January 2018, AMP.6000.0056.5796.

THE COMMISSIONER: Exhibit 2.259.

EXHIBIT #2.259 NOTICE ISSUED BY ASIC UNDER SECTION 33 OF ASIC ACT (AMP.6000.0056.5796) DATED 09/01/2018

MS ORR: An email from Larissa Baker Cook to Nicholas Mavrakis and Edmond Park dated 12 September 2017. AMP.6000.0062.2748.

THE COMMISSIONER: Exhibit 2.260.

EXHIBIT #2.260 EMAIL FROM LARISSA BAKER COOK TO NICHOLAS MAVRAKIS AND EDMOND PARK (AMP.6000.0062.2748) DATED 12/09/2017

MS ORR: An email chain between Larissa Baker cook and Nicholas Mavrakis dated 25 September 2017. AMP.6000.0062.6260.

THE COMMISSIONER: Exhibit 2.261.

EXHIBIT #2.261 EMAIL CHAIN BETWEEN LARISSA BAKER COOK AND NICHOLAS MAVRAKIS (AMP.6000.0062.6260) DATED 25/09/2017

MS ORR: An email chain between Brian Salter and Nicholas Mavrakis dated 8 and 9 October 2017, AMP.6000.0062.7596.

THE COMMISSIONER: Exhibit 2.262.

EXHIBIT #2.262 EMAIL CHAIN BETWEEN BRIAN SALTER AND NICHOLAS MAVRAKIS (AMP.6000.0062.7596) DATED 08 and 09/10/2017

MS ORR: An email from Nicholas Mavrakis to Brian Salter, dated 9 October 2017, AMP.6000.0062.7702.

THE COMMISSIONER: Exhibit 2.263.

EXHIBIT #2.263 EMAIL FROM NICHOLAS MAVRAKIS TO BRIAN SALTER (AMP.6000.0062.7702) DATED 09/10/2017

MS ORR: An email chain between Brian Salter and Nicholas Mavrakis dated 13 October 2017, AMP.6000.0062.8245.

THE COMMISSIONER: Exhibit 2.264.

EXHIBIT #2.264 EMAIL CHAIN BETWEEN BRIAN SALTER AND NICHOLAS MAVRAKIS (AMP.6000.0062.8245) DATED 13/10/217

MS ORR: An attachment to that email, AMP.6000.0062.8247, being an email chain dated 6 September 2011 between Tom Galletta and Maria Corpell.

THE COMMISSIONER: Exhibit 2.265.

EXHIBIT #2.265 ATTACHMENT TO EMAIL IN EXHIBIT #2.264 BEING EMAIL CHAIN BETWEEN TOM GALLETTA AND MARIA CORPELL (AMP.6000.0062.8247) DATED 06/09/2011

MS ORR: A second attachment to that email being AMP's internal audit report dated 18 October 2011, AMP.6000.0062.8252.

THE COMMISSIONER: Exhibit 2.266.

EXHIBIT #2.266 SECOND ATTACHMENT TO EMAIL IN EXHIBIT #2.264 BEING AMP'S INTERNAL AUDIT REPORT (AMP.6000.0062.8252) DATED 18/10/2017

MS ORR: An email from Nicholas Mavrakis to Brian Salter and Larissa Baker cook, dated 16 October 2017, attaching the final report of Clayton Utz dated 16 October 2017, AMP.6000.0062.8584.

THE COMMISSIONER: Exhibit 2.267.

EXHIBIT #2.267 EMAIL FROM NICHOLAS MAVRAKIS TO BRIAN SALTER AND LARISSA BAKER COOK ATTACHING FINAL REPORT OF CLAYTON UTZ (AMP.6000.0062.8584) DATED 16/10/2017

MS ORR: The attachment to that email being the final report of Clayton Utz dated 16 October 2017, AMP.6000.0062.8585.

THE COMMISSIONER: 2.268.

EXHIBIT #2.268 ATTACHMENT TO EMAIL EXHIBIT #2.267 BEING FINAL REPORT OF CLAYTON UTZ (AMP.6000.0062.8585) DATED 16/10/2017

MS ORR: A Microsoft Outlook schedule acceptance of meeting to take place on 17 August 2017, AMP.6000.0061.7848.

THE COMMISSIONER: Exhibit 2.269.

EXHIBIT #2.269 MICROSOFT OUTLOOK SCHEDULE ACCEPTANCE OF MEETING TO TAKE PLACE ON 17/08/2017 (AMP.6000.0061.7848)

MS ORR: An email from Larissa Baker Cook to Nicholas Mavrakis and Edmond Park dated 13 September 2017, AMP.6000.0062.2774.

THE COMMISSIONER: Exhibit 2.270.

EXHIBIT #2.270 EMAIL FROM LARISSA BAKER COOK TO NICHOLAS MAVRAKIS AND EDMOND PARK (AMP.6000.0062.2774) DATED 13/09/2017

MS ORR: An email from Nicholas Mavrakis to Brian Salter, dated 4 October 2017 regarding BOLR report revised draft AMP.6000.0052.1097.

THE COMMISSIONER: 0052, is it?

MS ORR: 0052.1097.

THE COMMISSIONER: Exhibit 2.271.

EXHIBIT #2.271 EMAIL FROM NICHOLAS MAVRAKIS TO BRIAN SALTER REGARDING BOLR REPORT REVISED DRAFT (AMP.6000.0052.1097) DATED 04/10/2017

MS ORR: An attachment to that email being a BOLR report incorporating changes in mark-up following discussions with Catherine Brenner, AMP.6000.0052.1098.

THE COMMISSIONER: Exhibit 2.272.

EXHIBIT #2.272 ATTACHMENT TO EMAIL EXHIBIT #2.271 BEING BOLR REPORT INCORPORATING CHANGES IN MARK-UP FOLLOWING DISCUSSIONS WITH CATHERINE BRENNER (AMP.6000.0052.1098)

MS ORR: An email from Larissa Baker Cook to Nicholas Mavrakis and Edmond Park dated 24 September 2017, regarding final draft of the BOLR report, AMP.6000.0062.6108.

THE COMMISSIONER: Exhibit 2.273.

EXHIBIT #2.273 EMAIL FROM LARISSA BAKER COOK TO NICHOLAS MAVRAKIS AND EDMOND PARK REGARDING FINAL DRAFT OF BOLR REPORT (AMP.6000.0062.6108) DATED 24/09/2017

MS ORR: An email from Brian Salter to members of the board, dated 15 October 2017, regarding update on the CU report, AMP.6000.0075.8381.

THE COMMISSIONER: Exhibit 2.274.

EXHIBIT #2.274 EMAIL FROM BRIAN SALTER TO MEMBERS OF THE BOARD REGARDING UPDATE ON CU REPORT (AMP.6000.0075.8381) DATED 15/10/2017

MS ORR: The attachment to that email, being pages of the Clayton Utz report updated with updates in mark-up, AMP.6000.0075.8302.

THE COMMISSIONER: Exhibit 2.275.

EXHIBIT #2.275 ATTACHMENT TO EMAIL EXHIBIT #2.274 BEING PAGES OF CLAYTON UTZ REPORT WITH UPDATES IN MARK-UP (AMP.6000.0075.8302)

MS ORR: And finally, an email dated 15 October 2017 from Nicholas Mavrakis to Brian Salter regarding liability under the corporations and ASIC Acts, AMP.6000.0062.8472.

THE COMMISSIONER: Exhibit 2.276.

EXHIBIT #2.276 EMAIL FROM NICHOLAS MAVRAKIS TO BRIAN SALTER REGARDING LIABILITY UNDER THE CORPORATIONS AND ASIC ACTS (AMP.6000.0062.8472) DATED 15/10/2017

MS ORR: That concludes the evidence that we wish to rely on in this block of hearings, Commissioner. Perhaps if we could have a brief break to reset the bar table before the closing statement.

THE COMMISSIONER: When do you want me to come back, Ms Orr?

MS ORR: At half past, if convenient to the Commissioner.

THE COMMISSIONER: 11.30 it is.

ADJOURNED [11.21 am]

RESUMED [11.30 am]

THE COMMISSIONER: Just before I call on you, Ms Orr, to make submissions, I should indicate to those who have leave to appear, the course I propose about submissions in response. The general structure of what I propose has two parts. First, parties to particular case studies should make written submissions not exceeding 20 pages about the findings which they submit should be made as arising from those case studies. Those submissions will be due by 4 pm on Friday, 4 May. Now, my intention is that the page limit should apply in respect of each case study, 20 pages per case study, but there is evident advantage if there can be aggregation and abbreviation by those who are engaged in more than the one case study, but the base rule is 20 pages per case study for the parties to that case study.

The second part of it is that all parties having leave to appear in this round of the hearings will have until 4 pm on Monday the 7th to make written submissions about the more general issues which are identified by Counsel Assisting in the course of closing submissions. Some of those issues, I think, are likely to be large and quite complex, and I'm concerned, therefore, that the parties having leave to appear should have a full opportunity to develop their submissions properly, and yet at the same time encouraging parties to distil their arguments and to express them concisely and precisely.

Now, to that end, I'm minded to fix an initial page limit of 35 pages in respect of these general issues. If a party seeks to submit that it can't deal with the issues fully with that page limit, then that party may and should apply for an extension of the permitted length of submission, but I do ask that the basis for that application be explained and supported in detail. Putting it bluntly, it won't be enough just to say,

"I want more." I will need to be persuaded about why you need more. Just for the avoidance of doubt, I should also remind parties that there are some statements that have been tendered in evidence in the course of this round of hearings that have been tendered without challenge. Those statements are part of the material to be considered in respect of both the particular case studies and the more general issues. Don't forget about them simply because they have not been the subject of oral examination in the course of hearings.

Now, that's the course that I propose. I thought I should announce it now so that parties who are represented in the hearing room can listen to the closing submissions bearing in mind what is proposed as the regime that will govern their responses. Ms Orr.

MS ORR: Commissioner, over the last two weeks, the Commission has heard evidence of misconduct and of conduct falling below community standards and expectations in relation to the provision of financial advice by employees and authorised representatives of financial services entities. This conduct has occurred in the context of fees being charged for no service, platform fees, inappropriate advice, improper conduct, and the disciplinary regime. In this closing address, we will deal with each of the case studies that has been the subject of evidence in turn. For each case study, we will identify the findings that Counsel Assisting regard as being open on the evidence which we will invite the entity involved in the case study to respond to in written submissions. The findings will be articulated by reference to the Commission's Terms of Reference.

For each case study and in connection with certain other topics that have arisen in these hearings, we will also identify more general questions that arise, and any party with leave to appear, as you have indicated, Commissioner, will be permitted to provide written submissions addressing these questions. The first topic that was examined in these hearings was fees for no service. The first case study concerned the charging of fees for no service by AMP. The Commission heard evidence from Mr Anthony Regan, the group executive of Advice and New Zealand of AMP Limited and the senior executive within the AMP Group responsible for the management of AMP's advice business.

The Commission heard evidence that wholly owned subsidiaries of AMP, being AMP Financial Planning, Hillross Financial Services, Charter Financial Planning, and ipac Securities, all holders of Australian Financial Services licences, charged fees to clients in circumstances where they did not and could not provide services to the clients for those fees. This conduct arose because of the buyer of last resort policy, or the BOLR policy, which forms part of the contractual arrangements between, for example, AMP Financial Planning and its authorised representatives.

In general terms, the 2012 version of the BOLR policy enabled an authorised representative to sell a book of clients to another authorised representative and subject to certain conditions being satisfied, allowed AMP to buy the book of clients in circumstances where the authorised representative was unable to sell it to another

authorised representative. The BOLR policy typically valued the book of clients on the basis of a four times multiple of ongoing revenue from the clients. The revenue subject to this four times multiplier included advice fees that were automatically deducted from the client's products in the 12 months preceding the valuation.

When it came time for AMP to sell the book of clients that it had purchased, AMP would make a loss on the sale if the ongoing fee agreement with the client was terminated. This was because, in those circumstances, AMP would not be able to realise the capitalised value of those ongoing fees. It was, therefore, in the financial interests of the AMP advice licensees and AMP to continue the ongoing fee arrangement with the client after the client was purchased by AMP. Generally, if a client was on a register acquired by AMP under the BOLR policy, the client was moved into what was known as the BOLR pool. The Commission heard evidence of a practice of AMP to place clients into the BOLR pool and not dial down the fees being charged to those clients. In other words, AMP would intentionally keep the ongoing service fee arrangement on foot. Mr Regan's evidence was that until very recently, AMP had no capacity to provide services to clients who were in the BOLR pool.

In addition, even when AMP intended to dial down fees for clients who were in the BOLR pool, it did not have adequate systems in place to ensure that this occurred. The first time that AMP identified to ASIC that it had systematically failed to dial down ongoing service fees for clients in the BOLR pool was in a report made to ASIC under section 912D of the Corporations Act on 15 January 2009. That breach report identified that the breach had occurred in September 2007, and that AMP Financial Planning first became aware of the breach in September 2008. However, AMP's conduct in transferring clients into the BOLR pool and continuing to charge them fees without providing services continued at AMP after the conduct was reported to ASIC on this date.

Internal AMP documents from 2013 and earlier suggests that, over time, a general rule developed where fees would be left on for clients for up to 90 days after the clients had been moved into the BOLR pool. In January 2014, following the implementation of changes to the law after the introduction of the FOFA reforms, a business rule, referred to as the 90 day exception, was developed. Mr Regan referred to the 90 day exception as an exception to the BOLR policy granted by the managing director of the AMP advice licensee. However, the nature of the 90 day exception may have changed over time, as internal AMP documents created post January 2014 appear to describe it in different ways. It is unclear the extent to which after January 2014 AMP continued to apply a general rule rather than the 90 day exception in the way Mr Regan described it, that fees could be left on for up to 90 days.

In any event, AMP Financial Planning did not notify ASIC until 17 October 2016 of this deliberate decision by application of the 90 day exception to charge clients in the BOLR pool fees for services it knew it would not and could not provide. The 90 day exception business rule appears to have ceased in November 2016. However, there was a further business rule by which AMP made deliberate decisions to charge

clients fees for the provision of no service. This was known as ringfencing. This rule appears to have developed after January 2014. Ringfencing occurred where, for some books of clients purchased by AMP, AMP would make the decision to ringfence the clients, meaning that they would not be placed into the BOLR pool and the register would be kept separate for later sale as a whole.

The ringfenced clients would continue to pay fees without receiving any services whilst they were held separate from the BOLR pool. It is unclear whether there was any 90 day limit on the period over which clients would continue to pay fees. It appears that from at least June 2015 joint approval of both the managing director of the relevant AMP licensee and the head of licensee value management was required for ringfencing a book of clients. AMP did not report its ringfencing conduct to ASIC until 3 May 2017, though at that time AMP did not describe the conduct as a business practice. It is not clear when the ringfencing practice ceased.

Mr Regan's evidence was that it ceased in November 2016. However, an email referred to in the Clayton Utz report, to which we will come, shows that the managing director of AMP Financial Planning approved a ringfencing exception on 18 January 2017. By the ringfencing conduct and the various permutations of the 90 day exception, AMP decided to continue to charge ongoing service fees to customers in circumstances where it would not be providing and could not be providing services for those fees. In addition, when AMP charged fees for services to clients in the BOLR pool due to a failure to have adequate systems in place to dial down fees, AMP accepted payment for financial services that it had no reasonable grounds to believe it would supply to the clients.

Mr Regan accepted that there was no lawful basis for the 90 day exception, or the ringfencing business rules. He accepted that it was obvious that charging clients fees for services that are intentionally and knowingly not being provided was both unlawful and ethically and morally wrong. Mr Regan also accepted that unless there was a customer complaint, the only way AMP could detect that advisers were not providing services in exchange for fees was through audits, which AMP did not consistently and regularly undertake. Mr Regan could not offer any details of work undertaken by AMP to address issues with AMP's risk management systems identified by PwC in an external audit conducted on 30 March 2015.

Mr Regan was also asked whether it was appropriate for planners to continue to take grandfathered commissions in respect of their clients. Mr Regan said that his preference would be for fee arrangements. Mr Regan's view was that a fee arrangement rather than a commission arrangement was much more consistent with a professional environment. In its submissions to the Commission on 13 February 2018, AMP acknowledged that it had engaged in fees for no service conduct from 1 January 2013, which in its words involved possible contraventions of sections 180, 912A(1)(a), 952E, 961B, 961K, 962P, 1041H, and 1308 of the Corporations Act, as well as provisions of the ASIC Act, sections 12CA, 12CB, 12DA, 12DB, 12DF and 12DI.

Since the 15 January 2009 breach report made to ASIC, AMP has issued five separate breach reports pursuant to section 912D of the Corporations Act to ASIC, notifying it of breaches of section 912A(1)(a) of the Corporations Act in relation to the charging of fees for no service. One was on 27 May 2015, another on 5 December 2016, two on 3 May 2017, and one on 8 June 2017. On the evidence, it is open to the Commissioner to find that the charging of fees for no service by AMP and its advice licensees might have amounted to misconduct. AMP acknowledged as much in its initial submissions and in evidence to the Commission.

In particular, it is open to the Commissioner to find that the AMP advice licensees may have engaged in misconduct in the following ways: first, by contravening their statutory obligation under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure the financial services covered by their licence are provided efficiently, honestly and fairly. The relevant conduct is the application of the 90 day exception to clients in the BOLR pool or ringfencing of clients knowing that they would be continued to be charged fees for services with which they would not and could not be provided, and the failure to have adequate systems to turn off ongoing fees for all clients in the BOLR pool. AMP acknowledged these breaches in the five breach reports it issued to ASIC under section 912D of the Corporations Act.

Second, by contravening their statutory obligations under section 912A(1)(ca) of the Corporations Act by failing to take reasonable steps to ensure that their representatives would act in accordance with the norm of conduct prescribed by section 12DI(1) and (3) of the ASIC Act. At the time of payment of fees by clients subject to the 90 day exception or ringfencing, authorised representatives of the AMP advice licensees did not intend to supply services. There were also reasonable grounds for believing that the AMP advice licensees would not or would not be able to supply financial services within at least 90 days in respect of the 90 day exception, and for an indeterminate amount of time in respect of ringfencing and the practice adopted post-2009.

Third, separate from the buying of books of clients from advisers, by contravening their statutory obligation under section 912A(1)(h) by not having adequate risk management systems in place. As Mr Regan admitted, the only real way in which AMP was able to detect individual advisers charging for services that they did not provide was through audits which AMP did not consistently and regularly undertake.

Fourth, by contravening their statutory obligation under section 912D(1)(b) of the Corporations Act to report, as soon as practicable, and in any event within 10 business days, a breach or likely breach of their obligations under sections 912A(1)(a), (ca) and (h) of the Corporations Act. At least some of the AMP advice licensees had been aware of the charging of fees for no service to clients in the BOLR pool since 2009. In respect of the formal 90 day exception, the AMP advice licensees had been aware of this conduct since January 2014. And despite lodging a report with ASIC about the conduct on 27 May 2015, the AMP advice licensees did not notify ASIC of the extent and nature of the conduct until 26 November 2016. In

respect of the ringfencing conduct, the AMP advice licensees had been aware of the conduct since May 2015 and did not notify ASIC until May 2017.

Fifth, by engaging in conduct that was, in all of the circumstances, unconscionable in connection with the possible supply of financial services, contrary to section 12CB of the ASIC Act. Sixth, by contravening their statutory obligation under section 912A(1)(c) of the Corporations Act to comply with the financial services laws, namely, the laws in 912A(1)(a), (ca) and (h) and 912D of the Corporations Act as well as sections 12CB and 12DI of the ASIC Act. Seventh, by contravening sections 12DI(1) and (3) of the ASIC Act in relation to the acceptance of payment from clients subject to the 90 day exception and ringfencing and section 12DI(3) of the ASIC Act in relation to acceptance of payments for advice services from any client in the BOLR pool, AMP acknowledged so much in relation to section 12DI(3) in the five breach reports that it issued to ASIC under section 912D of the Corporations Act.

It is open to the Commissioner to find that this conduct was attributable, at least in part, to the culture and governance practices within AMP. The evidence of Mr Regan demonstrated that senior management and employees of AMP advice licensees were aware that the conduct was a breach of their financial services licences but continued to engage in the conduct. It also showed that despite attempts from more junior staff to convince senior management of AMP advice licensees to cease charging fees for no service, they continued to do so. Mr Regan admitted that this conduct showed that the culture at AMP was not as robust as it should be. He agreed that it showed a culture in which conscious decisions were made to protect the profitability of AMP and put the interests of shareholders first at the expense both of the interests of clients and of complying with the law.

A question raised by the approach of AMP is this: why has it placed such emphasis on the question of whether an employee or executive received legal advice explaining that it was unlawful to charge for fees for no service? While the receipt of such advice might be an aggravating factor in the culpability of an individual, it is difficult to understand why so many employees and executives at AMP were unable to recognise something that was plain to Mr Regan, namely, that to charge fees for services that will not and cannot be provided is unlawful and ethically and morally wrong.

In addition, the receipt of payments from clients without the necessity to provide any accompanying service has been, we observe, and continues to be, fundamental to the financial advice industry through the commissions system. In reliance upon grandfathering arrangements, a substantial proportion of AMP's income in connection with its clients continues to come from commissions. It is also open to the Commissioner to find that the conduct was attributable to poor risk management practices at AMP. As Mr Regan conceded, the audit process was the only real way for failures by authorised representatives to provide ongoing services to be detected.

By delaying and adopting PwC's recommendations about the audit system, AMP continued to allow its risk management practices to be deficient in detecting this type of conduct. The evidence also establishes that over a two-year period between 27 May 2015 and 3 May 2017, AMP and the AMP licensees made 20 false or misleading statements or representations in 12 communications to ASIC about the extent and nature of its ongoing service fee conduct. In its initial submissions to the Commission, AMP admitted that it engaged in possible misconduct in relation to the extent and nature of its reporting to ASIC in relation to this conduct.

On the evidence, it is open to the Commissioner to find that AMP's communications with ASIC might have amounted to misconduct on the basis that it may have contravened sections 1308(2) and (3) of the Corporations Act, and in respect of the breach reports that were lodged with ASIC on 25 May 2017 and 3 May 2017, which contained four of the 20 misleading statements - - -

THE COMMISSIONER: Sorry, what dates, Ms Orr?

MS ORR: 3 and 25 May 2017.

THE COMMISSIONER: Yes.

MS ORR: Containing four of the 20 misleading statements, it may have contravened sections 1308(4) and (5) of the Corporations Act. It is open to the Commissioner to find that those false or misleading statements were material because they would be likely to affect, and appear intended to affect, the manner in which ASIC went about investigating the conduct and the approach of AMP to the appropriate method of compensation for the victims of the conduct. It is also open to the Commissioner to find that AMP's conduct in misleading ASIC fell below community standards and expectations. Through AMP's dealings with ASIC regarding the extent and nature of its fee for no service conduct, AMP adopted an attitude toward the regulator that was not forthright or honest, and demonstrated a deliberate attempt to mislead.

It is open to the Commissioner to find that AMP's conduct in misleading ASIC was attributable to the culture and governance practices of AMP. The senior management and executives who contributed to the misleading of ASIC over the two-year period had knowledge of the extent and nature of the conduct and were warned by junior staff about it being a breach, but continued with a misleading narrative to ASIC. The evidence also established that on 16 October 2017 when AMP met with ASIC and presented the report from Clayton Utz and its letter of instructions to Clayton Utz, AMP may have misled ASIC as to the character of the Clayton Utz report.

The letter of instructions appointed and instructed Clayton Utz to undertake an external and independent investigation into the BOLR matters which investigation was said in the letter to be "entirely independent of the business" and "commissioned

exclusively by the board through the Chair and the CEO." The letter of instructions also stated that at the conclusion of the investigation, Clayton Utz would provide to the AMP board the final report which set out its findings and advice in accordance with the terms of reference provided to Clayton Utz. The report also itself stated that Clayton Utz had been retained to conduct an external and independent investigation.

It follows that in producing the Clayton Utz report and the letter of instructions to ASIC under a section 33 notice on 16 October 2017, AMP represented to ASIC that this report was external and independent. On 14 November 2017, Mr Salter, the general counsel of AMP, wrote to ASIC in a letter that we have tendered today, and stated that we:

> *are committed to having an open and transparent relationship with ASIC and that it was in this vein that AMP had produced to ASIC a copy of the Clayton Utz report.*

The evidence suggests that the description of Clayton Utz's work as being external and independent may be at least inaccurate, if not misleading. We note the following matters. Clayton Utz provided AMP with 25 drafts of the report and AMP provided comments on the drafts; AMP and Clayton Utz participated in at least two phone calls, one on 21 September 2017 and the other post 25 September 2017, about the contents of the draft report; employees and officers of AMP, including Mr Regan, Ms Brenner, the Chair of AMP, Mr Meller, the CEO of AMP, and particularly Mr Salter, either marked-up or suggested amendments to the draft report.

The effect of some of those mark-ups or suggestions by Mr Salter appears, on their face, to be to limit the findings as to the extent of the knowledge and involvement of the most senior executives of AMP in the impugned ongoing service fee conduct. Following the phone call on 21 September 2017, Mr Meller's name was removed from the draft report as a person involved in either the BOLR decision-making or the internal process to report to ASIC following the 2015 breach report. In an email, Clayton Utz explained that a reason for removing his name was that it would:

> *Attract unnecessary attention to him by ASIC.*

Clayton Utz also explained that it found that Mr Meller was not aware of the 90-day exception or ringfencing, and he was not involved in the communications with ASIC after the breach report on 27 May 2015, so instead included this in the summary of the legal advice. Mr Salter sought, on more than one occasion, to alter the language used by Clayton Utz as to Clayton Utz's findings with respect to the knowledge by Mr Caprioli of internal legal advices that advised that the conduct was illegal and had to cease. Mr Salter was successful in doing so.

After the final report was delivered by Clayton Utz on 6 October 2017, Ms Brenner requested that a statement be incorporated into the copy of the report to be handed to ASIC on Monday to the effect that Mr Meller was unaware of the BOLR practices or their illegality. In the final report dated 16 October 2017, a new paragraph was

included that explained that Mr Meller confirmed to Clayton Utz that he was not aware of the 90-day exception and ringfencing and that he did not receive, nor was he aware of, any of the legal advices, and that Clayton Utz had come to the same conclusion.

That paragraph did not appear in the report until 15 October 2017, and was in a different form to the finding originally proposed by Clayton Utz. Mr Salter then amended the language of the proposed finding so that Clayton Utz instead expressed the positive conclusion that it had come to the conclusion that Mr Meller was unaware of the 90-day exception.

The board of AMP may have approved the changes to the Clayton Utz report before it was submitted to ASIC. Mr Regan's evidence was that the report was substantially settled by the board and general counsel and Clayton Utz in the weeks leading up to the ultimate final report on 16 October 2017. The minutes of the AMP board meeting held on 16 October 2017, which we have tendered today, record the board having considered the proposed amendments to the report. Clayton Utz then finalised and issued the report.

AMP did not refer to any of this conduct in its submissions to the Commission. In the course of giving evidence, Mr Regan conceded that he felt a level of discomfort with the fact that AMP had met with ASIC and represented to it that the Clayton Utz report was an external and independent report. On this evidence, it is open to the Commissioner to find that the conduct in connection with the Clayton Utz report might have amounted to misconduct by contravening sections 1308(2) and (3) of the Corporations Act, and section 64 of the ASIC Act.

Having regard to changes made to the report, there is a reasonable basis for concluding that AMP, by one or more of its senior employees or officers, knew that the representation that the report and the findings made within it were entirely independent was materially incorrect. Again, such a representation is material as it is likely to affect, and appears intended to affect, the manner in which ASIC went about investigating the conduct, as well as the relationship between ASIC and AMP.

It is open to the Commissioner to find that this conduct by AMP in its further dealings with the regulator and its mischaracterisation of the nature of the Clayton Utz report was also attributable to culture and governance practices within AMP. It is open to the Commissioner to find that it reflects an absence of a compliance culture and a persistent and prevalent attitude at a very senior level within AMP, that it is acceptable to deal with ASIC other than frankly and candidly. AMP is invited to provide written submissions addressing each of the findings that we have identified as open, as well as any other findings that it regards as available on the evidence.

Before I move to the second case study in relation to fees for no service, Mr Costello informs me that one of the dates that I gave you, Commissioner, in response to your question at transcript 1931, line 25, should have been 27 May 2015, not 25 May 2017.

THE COMMISSIONER: Thank you.

MS ORR: The second case study concerned the charging of fees for no service by CBA. One witness gave evidence in this case study, Ms Marianne Perkovic, the executive general manager and director of Commonwealth Private Limited. Ms Perkovic previously had overall responsibility for each of CBA's financial services licence-holding subsidiaries, being Commonwealth Financial Planning, Financial Wisdom, Count Financial and BW Financial Advice. Ms Perkovic gave evidence that CBA had paid out or offered approximately $118.5 million of refunds, including interest, to customers who had been charged fees for no service by CFPL, Count and BW Financial Advice.

The clients who were charged fees for no service by CBA entities fell into two categories. The first category was clients who were allocated to a financial planner in circumstances where the financial planner failed to provide ongoing services to the client, and the relevant entity had no systems in place to ensure the services were delivered. These clients were charged fees for no service by CFPL and BW Financial Advice. Count has not acknowledged a systemic problem with the charging of fees to this first category of clients. However, the Commission heard evidence about a number of Count advisers identified in one Count risk and compliance forum who were not providing services in exchange for the fees they were charging.

Ms Perkovic said that ASIC had requested in 2014 that CBA undertake sample testing in relation to both Count and another CBA licensee, Financial Wisdom. Work in response to this request was ongoing, but Ms Perkovic said that she understood the fail rates for both licensees to be less than two per cent.

The second category of clients who were charged fees for no service were orphaned clients. Orphaned clients were no longer allocated to a planner and there was, therefore, no possibility that advice would be provided to them. CFPL, BW Financial Advice, and Count each charged this category of clients fees without providing services. On the evidence, it is open to the Commissioner to find that the conduct of the CBA advice licensees, CFPL, BW Financial Advice and Count might amount to misconduct.

In particular, it is open to the Commissioner to find that each of these entities may have contravened their statutory obligation under section 912A(1)(a) of the Corporations Act to do all things necessary to ensure the financial services covered by their licence are provided efficiently, honestly and fairly. Each of these entities may also have contravened their statutory obligation under section 912A(1)(d) of the Corporations Act to have available adequate resources, including technological resources to provide the financial services covered by the licence and to carry out supervisory arrangements.

In respect of orphan clients, each of these entities may have contravened their statutory obligation under section 12DI(3) of the ASIC Act to not accept payment or

other consideration for financial services if at the time of accepting the payment there were reasonable grounds for believing that the person will not be able to supply the financial services within the period specified by the person.

The evidence also established that each of CFPL, BW Financial Advice and Count, gave notice pursuant to section 912D of the Corporations Act to ASIC of their respective possible breaches in relation to fees for no service conduct in the second half of 2014. The first documented instance of a CFPL client paying for but not receiving service arose from a customer complaint in July 2008. CFPL received complaints in each of the years from 2008 to 2013 about fees being charged but no services being provided.

In April 2012, high-level analysis was conducted with a view to determining if there were any ongoing service fee issues within the CBA advice business, including CFPL. That analysis identified 257 clients who were paying ongoing service fees but were not attached to a planner. Various systemic failings were identified, including that there was no supervision or monitoring to identify whether ongoing service obligations were being met by planners, there were CFPL clients who were not assigned to an active adviser, there was no single source of data by which the status of ongoing service fee clients could be identified, financial planners were not required to maintain a register of their ongoing service clients, and the position of ongoing service fee clients could only be ascertained by manual searches across a number of systems.

From at least May 2012, a number of senior people within the CBA advice business, including the group executive, were aware of these issues. The possible exposure arising from the issues was estimated at this time as $6 million. Count was also asked to consider whether it could have similar issues. In May 2012, it was identified that Count had an orphan client list that earned fee income of between 1.5 and two million dollars per annum, and that the clients on this list did not receive any type of review.

In June 2012, Deloitte issued a report that found that a potential issue for CFPL was that systems to identify clients that have signed up to or receive ongoing service arrangements are inadequate. Deloitte issued a further report in July 2012. Deloitte concluded that clients in ongoing service programs were at risk of not receiving contracted services, and controls had not been designed to ensure the provision of ongoing reviews. Deloitte identified over $700,000 in ongoing service fees being charged on an annual basis to over 1050 clients allocated in the system to over 50 inactive planners. The risk of ineffective provision of ongoing service was rated by Deloitte as very high.

Ms Perkovic agreed that at the time of this report, CBA did not know whether services were being provided or not. She agreed that CFPL did not have effective controls in place to prevent ongoing service fees being charged inappropriately, CFPL did not have effective controls in place to assess whether clients were receiving the services for which they were being charged, CFPL did not know what

advice was being given to clients who were paying for ongoing advice, CFPL did not have controls in place to ensure when an adviser left the adviser's clients were moved to a new adviser, CFPL did not have controls in place to stop fees being charged to clients who became orphaned, CFPL did not have controls in place to ascertain if clients were being notified of significant events that may require action to be taken to protect their position, and CFPL used ad hoc systems to store data that could not be centrally checked other than by manual processes.

Deloitte was also asked to provide a report in relation to Count. Deloitte issued a draft report on 20 November 2012 which noted that as at 5 September 2012, Count had an orphan client book which held approximately 10,200 policies. CFPL first notified ASIC of a suspended breach on 11 July 2014. That was not a formal notification pursuant to section 912D of the Corporations Act but an early warning. CFPL advised that it had identified 5838 customers who had paid ongoing service fees amounting to $12.9 million in revenue, and was investigating the circumstances of each customer. CFPL then made a formal notification to ASIC pursuant to section 912D in August 2014.

However, on the evidence, it is open to the Commissioner to find that senior management of CBA, CFPL and Count had been aware for at least 18 months before the breach notices were given of the likelihood that ongoing services were not being provided to customers who were being charged ongoing service fees. It is therefore open to find that each of CFPL and Count may have contravened their statutory obligations under section 912D(1)(b) of the Corporations Act to report as soon as practicable and in any event within 10 business days of becoming aware of the breach or likely breach of its obligations under section 912A.

It is open to the Commissioner to find that this conduct was attributable to the remuneration practices of CFPL and its advice licensees. Ms Perkovic accepted that CFPLs remuneration and performance targets were not aligned so as to ensure delivery of service. It was only in 2015 that CFPL changed its remuneration policy to align remuneration and performance targets to ensure delivery of service. It is also open to the Commissioner to find that the conduct in question was attributable to a cultural tolerance on the part of CBA and its advice licensees of risks and conduct that were potentially detrimental to clients but which were to the financial advantage of CBA through its advice licensees.

This cultural tolerance is highlighted by several aspects of Ms Perkovic's evidence. Ms Perkovic agreed that CFPLs response to the introduction of the FOFA reforms reflected an attitude that unless it was required by law to provide fee disclosure statements, CFPL would not do so. CFPL continues to receive grandfathered commissions from clients who entered into commission arrangements before 1 July 2013. Ms Perkovic said that CFPL has given no consideration to dialling down those commissions to zero. Her explanation was that grandfathering arrangements allow us some relief.

Whilst Ms Perkovic said that CFPL was considering applying opt-in requirements to pre 1 July 2013 clients, it appears that CFPL has been considering that possibility for six months and has not made a decision. The evidence also suggests that CBA has taken an approach to grandfathering arrangements which is that, at least for arrangements made between fund managers and CBA platforms pre 1 July 2013, the commissions provided for under those arrangements extend to clients of CBA advice licensees that have first become clients after 1 July 2013.

Finally, the evidence suggests that in recent years, CFPL acted to lessen rather than increase the prospects of clients receiving meaningful services. In the period from 2008 to 2017, the number of financial planners employed by CFPL fell by approximately 25 per cent, but the number of clients increased by almost 100 per cent. The service packages offered by CFPL were also recast. Up to 2013, the critical element of the Legacy ongoing service package was an annual review.

The equivalent package now offered by CFPL and, indeed, the only package now offered by CFPL, the local ongoing service package, provides for an offer of an annual review, rather than an annual review. These matters suggest a culture at CBA, or at least at CFPL, of taking an approach to clients that maximises revenue streams, rather than one which focuses upon providing meaningful, professional service.

It is open to the Commissioner to find that a reason for CBA's failure to give timely notice of a breach to ASIC may be a consequence of the manner in which CBA's practice for considering whether to notify a breach takes into account the size of CBA's advice licensees. Ms Perkovic explained that determining the number of clients affected was important to determining the significance of the breach. Each of the CBA advice licensees have many clients, exponentially more than the number of clients than a small independent operator would have.

In the case of authorised representative of Count, the evidence suggests that if that authorised representative is consistently failing to provide service to ongoing service clients, then that might be a significant failure at the level of the individual authorised representative but would not be treated under CBA's governance practice as a significant breach at the level of Count. Therefore, the size of CBA may reduce the likelihood that ASIC receives timely notice under section 912D of risks to members of the public who are dealing with CBA or its subsidiary licensees.

It is open to the Commissioner to find that internal systems of CFPL were inadequate to ensure the provision of services for which fees were charged and to report contravening conduct. Ms Perkovic sought to explain the failure to give earlier notification of significant breaches as being due to a "known problem" that some licensees had no systems to identify whether services had been delivered, with the consequence that CBA could not know for how many clients its licensees had failed to deliver ongoing services.

Ms Perkovic gave evidence that CFPL did not have systems to supervise and monitor the effective provisioning of ongoing service and accepted that CBA's systems were so inadequate that it had no idea what was going on in its business. As Ms Perkovic agreed, as at 2012, the only system that CFPL had in place that was effective was a system for charging clients. CBA is invited to provide written submissions addressing each of the findings that we have identified as open, as well as any other findings it regards as available on the evidence.

All parties with leave to appear will be permitted to provide written submissions addressing the following questions which arise from the two case studies in relation to fees for no service. Do clients receive any meaningful benefit from ongoing service arrangements? To what extent does the continued legislative condoning of grandfathered commissions shape and influence the culture and attitudes of financial advice licensees so as to create a disconnect between community expectations as to the charging of fees and the tolerance of licensees for the charging of fees for no or little service? And thirdly, should grandfathered commissions cease?

The second topic that was examined in these hearings was platform fees. This topic was examined through two entities: AMP and CBA. We will address each entity separately and then consider the common questions to which all parties given leave to appear will be invited to respond.

First, as to AMP, the Commission heard evidence from Mr John Keating, head of the Platform Products team at AMP. Mr Keating's evidence raised three key issues. First, the absence of any controls in AMP's platforms to prevent advice fees being automatically deducted unless the client has opted to continue to pay ongoing advice fees. Financial advisers have been required since 2013 to give renewal notice to their clients every two years, and to only continue to charge fees to a client who has opted in in writing to continue the ongoing fee arrangement.

Mr Keating's evidence was that AMP platforms automatically deduct advice fees from the cash balance in clients' accounts, and remit those fees to the relevant licensee or authorised representative. Where the cash balance of a client is insufficient to meet the fees, the platform will liquidate sufficient of the clients' non-cash investments to meet the fees. The subsidiaries of AMP that operate AMP's platforms have not taken any steps to develop the technological capacity for the AMP platforms to ensure that fees are only being automatically deducted and remitted to the advice licensee if the customer has opted to continue to pay the fees.

Mr Keating conceded that it was possible for AMP to implement such controls in its platforms. He could not give any reason as to why AMP had not developed the technology to ensure this could occur. To Mr Keating's knowledge this was not something that AMP had considered. The second issue raised by Mr Keating's evidence is that as at 2015 AMP knew there were AMP clients who had been placed in two particular platforms and who were being charged uncompetitive fees for the platform. AMP's own benchmarking rated these products as red compared to

competitor products in the market. Since late 2016, those uncompetitive platforms have been placed on hold by AMP, and can no longer receive new investors.

Nevertheless, there are AMP clients who remain invested in those platforms, and AMP knows this. However, the AMP subsidiary that operates these platforms has taken no step to either make the platforms cost competitive or put in place features that would enable those customers to be smoothly transitioned to a cost competitive platform. Instead, the decision was made to just leave them as they were. Similarly, the AMP advice licensees have taken no steps to obtain information from the AMP subsidiary that operates the platforms about the clients that remain invested in these uncompetitive platforms, or the AMP advisers that are supposed to be looking after those clients' best interests.

Mr Keating acknowledged that as at 2017 there was still 1286 customers of AMP affiliated advisers who were invested in WealthView, one of those two uncompetitive platforms. Of the 10,500 customers who were still invested in PortfolioCare, the other of the uncompetitive platforms, 90 per cent of those customers were clients of AMP affiliated advisers. Mr Keating said all of those clients of affiliated advisers in the WealthView platform were AMP financial planning clients and most of the clients of affiliated advisers in the PortfolioCare platform were Hillross clients. At no time has either AMP Financial Planning or Hillross sought from Mr Keating the names of the financial planners who continue to have clients invested through WealthView or PortfolioCare respectively. AMP has not produced any further benchmarking guides since 2016. Mr Keating conceded that as a result, he was not aware of whether the competitiveness of AMP platform products has improved or worsened.

The third issue raised by Mr Keating's evidence is that there are arrangements operating between AMP's platform operator NMMT Limited and certain funds managers which came into existence pre-1 July 2013 under which a fee calculated by reference to a percentage of the total value of the funds invested in the fund by AMP was paid to NMMT by the funds manager. Mr Keating's evidence was that no fees were charged in respect of new investment funds added to the platform after 1 July 2013. Mr Keating did not think that fees were payable by the funds managers in respect to new clients that invested after 1 July 2013. Mr Keating could not explain what benefit the funds managers derived by paying this commission to NMMT.

On the evidence, it is open to the Commissioner to find that at least each of AMP Financial Planning, and Hillross, two AMP advice licensees, engaged in conduct that might have amounted to misconduct in the following ways: first, the AMP advice licensees may have contravened their statutory obligation under section 912A(1)(a) to do all things necessary to ensure the financial services covered by their licence are provided efficiently, honestly and fairly. This arises from the failure to act in an efficient manner in identifying clients who remain in the two uncompetitive platforms so as to advise them of the position with respect to those platforms, and to, if necessary, facilitate any changes those clients may require as a result of becoming aware of that position.

It also arises from the failure to act in an efficient manner in ascertaining whether WealthView or PortfolioCare remain uncompetitive or, indeed, have become even more uncompetitive. And it arises from a failure to identify for audit financial advisers who are likely to be at risk of failing to provide advice in the best interests of the client, given that the advisers have clients who are still invested in AMP platforms known to be uncompetitive.

Second, the AMP advice licensees may have contravened section 912A(1)(aa) of the Corporations Act by failing to have in place adequate arrangements to manage the conflicts of interest that arise from the recommending of AMP platforms by AMP authorised representatives. It is open to the Commissioner to find that the conduct of AMP, the two licensees, and AMP's platform operator, NMMT is also below the standards expected by the community. NMMT has no technological systems to ensure it is only deducting fees to which AMP financial planners have a lawful entitlement, and is continuing to derive fees from AMP clients that have been invested in uncompetitive platforms despite the fact that AMP, NMMT and the two licensees know that these two platforms are not competitive on cost.

It is open to the Commissioner to find that the internal systems of AMP and the two advice licensees that govern the relationship between the licensees and the platform operators has contributed to this conduct that falls below community standards and expectations and is insufficient to address the challenges that vertical integration presents to the best interests duty. Vertical integration of platform operators with advice licensees raises a potential conflict between the interests of clients and the interests of the financial services entity that owns both the platform operators and the advice licensees. It is open to the Commissioner to find that the interests of the client would be best served by the client only being invested in a platform if investment through the platform is necessary to meet the client's financial needs and objectives.

If it is appropriate for a client to be invested through a platform, then the client's needs and objectives would be best served by being invested through whichever is the most appropriate platform regardless of manufacturer. However, authorised representatives and employees of advice licensees are typically limited to being able to recommend products on the approved products and services list, unless the representative or employee seeks special dispensation. An approved product list approved independently of a licensee's parent entity would not be expected to be limited solely or primarily to platforms operated by one of the subsidiaries of the parent company.

On its face, this suggests that advice licensees using such lists that are limited or primarily limited to platforms operated by their related companies are creating a systemic risk of planners failing to act in the best interests of their clients. The potential conflict is further exacerbated with respect to clients that have already invested through a particular platform. In those cases, the risk to the client is that the platform is not kept cost competitive, but the client remains on the platform and the client suffers financial detriment as a result. It is unsurprising that a client would not leave a platform on his or her own initiative. The client has been invested in the

platform on the advice of a financial adviser. Clients are unlikely to be comparing the cost competitiveness of platforms.

They are, therefore, in a position in which inertia makes them vulnerable to exploitation. If there was a separation between platform operators and advice licensees, then it would be expected that the advice licensee acting on behalf of and in the interests of the licensee's clients might place pressure on the platform operators to charge competitive fees and offer competitive features. The advice licensees would have an informational advantage based on their knowledge of the market and the bargaining power over the platform operators of being able to threaten to move clients to other platforms.

On its face, there is a risk that vertical integration of platform operators with advice licensees has reduced competitive tension that would have advantaged clients and impeded the independence of the advice licensee who ought to be acting in the best interests of the client. The limited benchmarking and guidance provided by AMP to its advice licensees has not been sufficient to overcome challenges presented by ownership by AMP of both the advice licensees and the platform operators. It is also unclear why a platform operator ought receive and keep a rebate from a fund manager based on the value of funds invested by the clients in one of the fund manager's funds.

If there is to be a rebate, then it might be expected that in a competitive market with vertical separation of advice licensee from platform operator, the licensee would place pressure on the platform operator to pass on any rebate to the clients whose funds are the basis for the rebate. For these grandfathered arrangements relied upon by AMP, the platform operator appears to give nothing for the fees or rebates that it receives from the fund's manager.

We turn now to CBA and platform fees. The Commission heard evidence from Linda Elkins, Executive General Manager of Colonial First State. Ms Elkins has since August 2012 had direct responsibility for two platform providers: Colonial First State Investments and Avanteos Investments. Ms Elkins' evidence raised two further issues connected with the role and obligations of platform operators and the appropriateness of platform operators within vertically integrated financial institutions. The first is the reasonableness and appropriateness of fee structures based on the amount of funds under management. The second is whether platform operators should satisfy themselves that third party fees such as adviser service fees charged under an ongoing service arrangement with a financial adviser are properly payable before deducting those funds from the client's investment.

As to the first question, Ms Elkins' evidence was that across the two platforms offered by Colonial First State, at least two fees are commonly charged: an administration fee and an investment fee. The administration fee relates to the provision of service to investors that utilise the platform. The investment fee includes but may not be limited to the underlying fund manager's fee. Ms Elkins did not seek to justify the method of charging investment fees and administration fees

based on the amount of funds under management. Her evidence was that there was no direct relationship between the amount of funds under management for an individual and either of those fees. She pointed out that such a method of charging was the longstanding industry practice.

Ms Elkins acknowledged that one reason the investment fee is a rate in excess of the fund manager's fee is to price in the risk of a miscalculation of the unit price by Colonial First State. In addition to those two fees, investors placed into a platform by a financial adviser who have agreed to an ongoing arrangement with the financial adviser may and often will have the adviser's fee deducted from their investment. In that respect, the platform operator facilitates the payment of ongoing service fees and provides a ready means of regular payment to financial advisers. That may, of itself, act as an incentive for financial advisers to place their clients into managed investments by way of a platform in preference to direct investment in a managed fund or investment in other asset classes.

In that sense, while financial advisers are prohibited from receiving conflicted remuneration from product manufacturers, there remains a strong incentive to prefer the use of platforms. That incentive is perhaps increased in circumstances where the platform operator takes no steps to ascertain whether the fee is properly payable.

Ms Elkins' evidence was that Colonial First State takes no steps to ascertain whether advisers have complied with their statutory obligations in sections 962G to K of the Corporations Act to provide annual fee disclosure statements to ongoing clients and renewal or opt-in notices every two years. Ms Elkins' evidence also was that Colonial First State takes no steps to obtain confirmation from financial advisers that they have complied with their contractual obligations to provide ongoing service.

Ms Elkins did, however, point to Colonial First State's dealer terms of trade which impose a requirement for licensees with access to platforms to adhere to various legal obligations, including those arising from the Corporations Act. Ms Elkins could not point to any occasion on which those provisions of the dealer terms of trade had been enforced.

Given that, like Colonial First State, many platform operators share an ultimate owner with one or more licensees, the probability of any contractual term being enforced as against a related licensee might be thought to be very low. Ms Elkins conceded in her evidence that it would be unlikely that Colonial would deny a CBA-owned licensee access to their platform because of a breach of the dealer terms of trade.

Once the centrality of platform operators to the practical operation of many ongoing service fee arrangements is recognised, a question arises as to whether those operators should take steps to ensure that funds deducted from client accounts are properly owing. It is open to the Commissioner to find that Colonial First State may have breached its obligation under section 912A(1)(aa) of the Corporations Act to

have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the provision of financial services.

It is open to the Commissioner to find that Colonial First State preferred its own interests and those of its related entities, CBA's advice licensees, to the interests of those invested in products via its platforms. It has relied exclusively upon its dealer terms of trade to manage those conflicts. Those terms have not been enforced and are not practically enforceable, given the vertically integrated environment in which Colonial First State operates.

It is also open to the Commission to find that the conduct of Colonial First State fell below the standards expected by the community. Colonial First State facilitated the deduction of fees from client investment accounts in circumstances where those fees were not, in fact, owing. It has taken no steps to put in place systems that would allow it to ascertain or at least have a high degree of comfort that the fees deducted are, in fact, owing.

We have already made some observations about the governance practices of the industry in relation to platforms in connection with the AMP case study. The Colonial First State case study pointed to the same type of conflicts in connection with the vertically integrated model of many institutions which manufacture platforms, manufacture products accessible via platforms and own advice licensees whose authorised representatives recommend that clients invest in those products through those platforms.

In light of both the AMP and CBA case studies in relation to platform fees, the following questions are raised for all parties given leave to appear to address. Does vertical integration of platform operators with advice licensees serve the interests of clients? If so, how? Why should a platform operator continue to receive a fee or rebate from a fund manager calculated by reference to the value of client funds invested in the fund if that fee or rebate is not wholly passed on to the clients whose funds are the basis for the fee or rebate?

If platform operators continue to automatically deduct advice fees from clients' investments, why should the platform operator not be required to have controls in place to ensure that subdivision (b) of division (3) of Part 7.7A of the Corporations Act has been complied with? Put another way, why should platform operators not be expected to ascertain that there is a lawful entitlement on the part of fee recipients to the moneys that the operators automatically pay to the fee recipients at the expense of clients?

The third topic that was examined in these hearings was inappropriate advice, and the fourth topic was improper conduct by financial advisers. We will deal with these topics together because they raise some similar issues in relation to the monitoring and supervision of financial advisers. The first case study concerned Westpac's financial advice business and the conduct of two employed financial advisers, Mr Mahadevan and Mr Smith. Two witnesses gave evidence, Mrs Jack well McDowall,

who received financial advice from Mr Mahadevan in 2015, and Mr Michael Wright, who is the national head of Westpac's financial advice business, BT Financial Advice.

The Commission heard evidence that Mrs McDowall approached Westpac in 2015 seeking financial advice about her retirement strategy. Mrs McDowall was referred to Mr Mahadevan, a senior financial planner within BT Financial Group. The Commission heard that Mr and Mrs McDowall told Mr Mahadevan that they wanted to purchase a property so that they could operate a bed and breakfast in their retirement. They had a number of debts, including a mortgage over their home, and the only money they had available to contribute to the purchase of the property was their combined superannuation balance of around $200,000.

Mr and Mrs McDowall told Mr Mahadevan that they wanted to establish a self-managed superannuation fund and use the fund to take out a loan to buy a property to run the bed and breakfast. They said that they expected the property would cost around $1 million. Mr Mahadevan introduced Mr and Mrs McDowall to Mr Karl Sleiman, a business banker, who told them they could borrow enough money to achieve their goal. Following this meeting, Mr Mahadevan told Mr and Mrs McDowall to put their home on the market, which they did.

A couple of months later, Mr Mahadevan provided Mr and Mrs McDowall with a statement of advice. He recommended that they establish a self-managed superannuation fund, roll over their existing superannuation balances into that fund and each take out life insurance and income protection insurance at a level that would cover the debt they expected to incur to purchase the bed and breakfast property. He did not provide Mr and Mrs McDowall with advice about whether their strategy was viable.

Mr and Mrs McDowall authorised Mr Mahadevan to implement the advice. They sold their house in the expectation that they would soon purchase and move into their bed and breakfast property. They moved into short-term rental accommodation and used the proceeds of the sale to pay off a number of their debts. However, as the Commission heard, Mr and Mrs McDowall's retirement strategy was never viable. While preparing to purchase the bed and breakfast property, Mr and Mrs McDowall were told by Mr Sleiman that they could not borrow enough to buy such a property.

The Commission heard evidence that a paraplanner had warned Mr Mahadevan that he should advise Mr and Mrs McDowall to delay establishing the self-managed superannuation fund and taking out new insurance until after a suitable property had been found, but that Mr Mahadevan overrode the paraplanner. Westpac received $17,600 in upfront commissions as a result of the implementation of the advice, and this contributed to Mr Mahadevan receiving a monthly bonus following the implementation of the advice.

Mr and Mrs McDowall made a complaint to Westpac about Mr Mahadevan's advice. Westpac made offers to settle the complaint in early 2017, but Mr and Mrs

McDowall rejected these offers. In March 2016, Mr and Mrs McDowall made a complaint to the Financial Ombudsman Service. Almost 18 months later, in August 2017, the Financial Ombudsman Service determined the complaint in Mr and Mrs McDowall's favour requiring Westpac to pay them $107,475.

Although the Westpac employee who investigated Mrs McDowall's complaint formed the view in December 2015 that Mr Mahadevan had put Mr and Mrs McDowall in a worse off position and Westpac made offers to settle the complaint in early 2016, Westpac did not discipline Mr Mahadevan until October 2017, more than 18 months later. Westpac did not report Mr Mahadevan's conduct to a professional association or to ASIC.

The Commission also heard evidence about the conduct of Mr Andrew Smith. Mr Smith was a senior financial planner employed by Westpac. Mr Wright gave evidence about Westpac's consequence management policy and how that policy had been applied to Mr Smith. Under that policy, financial advisers at Westpac begin with a total of 60 points and have points deducted for non-compliant activities such as poor audit results. The number of points that an adviser has determines the adviser's risk rating which, in turn, determines the level of supervision to which the adviser is subject, and whether the adviser receives a monthly bonus.

Between 2011 and 2015, Mr Smith was subject to a number of audits and had points deducted as a result of poor ratings on a number of those audits. However, until 2015, the number of points that were deducted was never high enough for Mr Smith to be ineligible for a monthly bonus or for Mr Smith to be subject to increased monitoring and supervision. This was, in part, because these audits were held more than six months apart and points deducted were restored every six months. Mr Wright agreed that Westpac's monitoring and supervision failed in relation to Mr Smith.

In 2015, Mr Smith's poor audit results caused him to be identified as extremely high-risk. Westpac then conducted an investigation into Mr Smith's conduct. Following that investigation, Westpac put a series of allegations of misconduct to Mr Smith, and he resigned. Westpac continued to investigate Mr Smith. It later found that he had recommended strategies or investments that were too risky for customers, transacted without customers' authority, charged ongoing advice fees without providing the promised services, and provided inappropriate advice to customers. Westpac has since paid $1.6 million in remediation to 32 former clients of Mr Smith, and has provisioned a further $600,000 to remediate a further 59 former clients.

Although Westpac made allegations of misconduct against Mr Smith that could have resulted in his termination, it did not report Mr Smith to ASIC as a Serious Compliance Concern. Westpac did not file a significant breach notification with ASIC until November 2015, several months after the reports of its investigations into Mr Smith. Mr Wright did not know if Westpac reported Mr Smith's conduct to any professional association.

When Mr Smith's new licensee, Dover Financial Services, asked Westpac for information about Mr Smith's conduct, Westpac did not provide any information except to state that there was an ongoing investigation and Westpac had concerns about Mr Smith's conduct. Mr Wright was not aware of Westpac ever communicating the results of its investigations to Dover. If that's a convenient time, Commissioner.

THE COMMISSIONER: How are we travelling for time, Ms Orr?

MS ORR: We will conclude today. I'm not sure how much within today we will conclude, but we will conclude today, Commissioner.

THE COMMISSIONER: This day, like all days, will end, Ms Orr. Two pm.

ADJOURNED **[1.00 pm]**

RESUMED **[2.00 pm]**

THE COMMISSIONER: Yes, Ms Orr.

MS ORR: Commissioner, I was dealing with the Westpac inappropriate advice case study and the evidence of Mr Wright. Mr Wright also gave evidence about the way in which Westpac remunerates its financial advisers. Mr Mahadevan and Mr Smith were both entitled to participate in an incentive scheme that rewarded financial advisers with a monthly bonus calculated as a percentage of the revenue that they generated above a target threshold. Mr Wright gave evidence of his view that one of the reasons Mr Smith gave inappropriate advice was for the purpose of maximising his share of revenue under that scheme.

Mr Wright also gave evidence about Westpac's financial advice business more generally. This evidence included an acknowledgement that the current remuneration framework at Westpac, with its emphasis on revenue measures, could place the interests of customers at risk. Mr Wright gave evidence about some recent reports concerning Westpac's financial advice business. One of those reports identified issues with Westpac's policies, including that policies were not supported by practical guidance to enable advisers to understand what was required of them. Mr Wright accepted that Westpac is very poor at showing its advisers how to comply with its policies. In addition, a report prepared in January this year identified that there are still significant weaknesses in Westpac's consequence management system.

The Commission also heard evidence that despite the changes that Westpac has made to its risk and compliance system since 2015, the residual risk of adverse consequences resulting from the provision of inappropriate advice to Westpac

customers has remained high, and the likelihood of those consequences has increased in recent years from possible to likely, that is, between 50 and 85 per cent.

On the evidence, it is open to the Commissioner to find that Mr Mahadevan's conduct, in connection with the advice that he gave to Mr and Mrs McDowall, might amount to misconduct. Westpac conceded so much in its submissions and evidence. In particular, it is open to the Commissioner to find that Mr Mahadevan may have breached his statutory obligation under section 961B(1) of the Corporations Act to act in the best interests of Mr and Mrs McDowall in relation to the advice. Mr Mahadevan may also have breached his obligation under section 961G of the Corporations Act only to provide advice to Mr and Mrs McDowall if it would be reasonable to conclude that the advice was appropriate to them.

On the evidence, it is open to the Commissioner to find that aspects of Mr Smith's conduct, in connection to the advice that he gave whilst employed with Westpac, might amount to misconduct. Again, Westpac conceded so much in its submissions and evidence. In particular, it's open to the Commissioner to find that Mr Smith may have breached his statutory obligation under 961B(1) of the Corporations Act to act in the best interests of certain clients. Mr Smith may also have breached his statutory obligation under section 961G of the Corporations Act only to provide advice to certain clients if it would be reasonable to conclude that the advice was appropriate to the clients.

On the evidence, it is open to the Commissioner to find that Westpac's conduct, in the period when Mr Mahadevan and Mr Smith provided the advice that was the subject of this case study, might amount to misconduct in the following ways. First, Westpac may have breached its statutory obligation under section 912A(1) of the Corporations Act to do all things to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. Second, Westpac may have breached its statutory obligation under section 912A(1)(ca) of the Corporations Act to take reasonable steps to ensure that representatives such as Mr Mahadevan and Mr Smith complied with the financial services laws.

Third, Westpac may have breached its statutory obligation under section 961L of the Corporations Act to take reasonable steps to ensure that representatives such as Mr Mahadevan and Mr Smith complied with sections 961B and G of the Corporations Act. Fourth, Westpac may have breached its statutory obligation under section 912D to report a significant breach to ASIC within 10 business days after becoming aware of the breach in relation to the conduct of Mr Smith.

In connection with the first three of these four available findings, we note, in particular, that at the relevant time Westpac's variable remuneration scheme for financial advisers directly incentivised the generation of revenue, Westpac's consequence management system failed to identify advisers who presented a high risk to clients, meaning that those advisers did not face disciplinary consequences or receive increased monitoring and supervision. Westpac's advisers were able to circumvent the recommendations of paraplanners, and Westpac had not instituted

many of the changes to its systems and processes that it now claims have reduced the likelihood that customers will receive inappropriate advice.

On the evidence, it's also open to the Commissioner to make findings of conduct by Westpac that fell below community standards and expectations. First, having identified that Mr Mahadevan provided advice to Mr and Mrs McDowall that left them in a worse off position, Westpac made inadequate offers of compensation resulting in Mr and Mrs McDowall needing to make a complaint to the Financial Ombudsman Service to obtain appropriate redress, and Westpac did not impose any disciplinary consequences on Mr Mahadevan until almost two years after Mrs McDowall made her complaint.

Second, having identified Mr Smith as having received consistently poor audit ratings and as having breached a number of internal Westpac policies, and also having made serious allegations of misconduct against Mr Smith, Westpac failed to report Mr Smith to ASIC in response to a notice given by ASIC under section 912C of the Corporations Act in July 2015, and failed to provide adequate information about those matters to Dover Financial Services, Mr Smith's new licensee.

On the evidence, it's open to the Commissioner to find that Westpac's misconduct in connection with the provision of inappropriate advice by financial advisers can be attributed, at least in part, to Westpac's remuneration practices. Over the whole of the period covered by this case study, Westpac had a system of remuneration for employed financial advisers that incentivised revenue generation and created a risk that customers would not be provided with financial advice that was in their best interests. Under that system, financial advisers received a percentage share of the revenue they generated above particular thresholds, which increased as higher thresholds were met. This created an incentive for financial advisers to recommend strategies and products which increased the revenue earned by Westpac and, therefore, increased the potential share of revenue earned by the adviser.

While advisers are disqualified from participating in the scheme if they fail certain compliance measures, until at least 2017, those compliance measures were inadequate to prevent even high-risk advisers like Mr Smith from receiving a share of revenue. Although Westpac has announced plans to shift to a new variable remuneration model for financial advisers, the new system will not commence operation until October this year. Further, the variable remuneration model will continue to have a component, 20 per cent, that directly rewards the generation of revenue by employed financial advisers.

It is also open to the Commissioner to find that Westpac's misconduct in connection with the provision of inappropriate advice by financial advisers can be attributed, at least in part, to the inadequacy of Westpac's consequence management system. Until at least April 2017, this system operated in a way that failed to ensure that advisers who failed to follow Westpac's policies and procedures or failed to comply with financial services laws were subject to increased monitoring and supervision

and appropriate disciplinary processes, including ineligibility to receive variable remuneration.

Westpac relied too heavily on a system of demerit points to identify financial advisers who represented compliance concerns and failed to structure that system in a way that would bring such advisers to the attention of management. This meant that even where Westpac's monitoring activities such as compliance audits identified advisers who represented a risk to customers, nothing was done to reduce the risk.

The evidence supports a finding that Westpac did not adequately respond to the detriment suffered by Mr and Mrs McDowall. As we've already noted, having identified that Mr Mahadevan provided advice that left them in a worse off position, Westpac made inadequate offers of compensation and did not impose disciplinary consequences on Mr Mahadevan in a timely fashion. Westpac is invited to provide written submissions addressing each of the findings that we have identified to be open, as well as any other findings that it regards as available on the evidence.

All parties with leave to appear are invited to provide written submissions addressing the following questions which arise from this case study. First, do remuneration and incentive policies that reward financial advisers for revenue generated for a licensee or employer create an unacceptable risk that financial advisers will prioritise the generation of revenue over the licensee's obligation to provide financial services in a manner that is efficient, fair and honest over their own obligation to act in the best interests of the customer, and over their own obligation to prioritise the interests of the customer above their own interests and the interests of the licensee?

Second, how can financial services licensees best incentivise the provision of good-quality financial advice, including in situations where the best advice for a customer is not to change anything at all? And third, how can financial services licensees best ensure that the results of routine compliance measures, such as compliance audits, are appropriately escalated so that potential risks to customers are identified and managed in a timely manner?

THE COMMISSIONER: Can I just come back and just try to create a framework of thought or reference for the moment. Step 1, I think, may be identification and examination of the content of the relevant norms of behaviour. If I stop there, I observe you refer to a number of provisions of the relevant Act.

MS ORR: Yes.

THE COMMISSIONER: Notably, the 912A(1)(a) obligation of – and I can never get the triplet right, fair, honest, efficient. I always mis-order that. And in 961L coupled with G or – 961B, rather, coupled with 961G. So best interests, duty, appropriate advice.

MS ORR: Yes.

THE COMMISSIONER: So level 1, norms of behaviour is the first area of inquiry. Are they appropriate? Are they sufficient? Now, as I understand it, as far as your address has been permitted to go before rude interruption, you've said nothing suggesting that the norms of behaviour require modification.

MS ORR: No, we have not, Commissioner.

THE COMMISSIONER: Step 2, then, in the analysis is questions of structure, structure of the industry. Is there any set of questions about structure? You have referred to some issues that you can draw together in the perhaps opaque expression of vertical integration. There are at least three elements at play, I think. There are product manufacture, product sale, advice, and the way in which those three elements either fit together or don't fit together according to both existing firm structures and according to some view of what is appropriate.

Below that you then have, I think, a division between what I would tend to call internal measures and external measures. Internal measures, it seems to me, you mention questions of remuneration and its associated issue generally of culture, rewarding good conduct, penalising bad conduct, and all of that suite of issues, monitoring internally to detect departure from what is seen as desirable. Then consequence management. What happens when you have detected departure? And then, so far as the client is concerned, issues of remediation, to which we will perhaps come in due time.

And then associated with those internal measures but, in a sense, standing apart from them, is external measures which can be wrapped up as ensuring compliance and enforcing compliance with the norms of behaviour. But is that an available structure for getting thoughts into some sort of order?

MS ORR: It certainly is, Commissioner, and there are some themes within - - -

THE COMMISSIONER: Because if it's not the best form of approach to this, then I need the parties to tell me, "No, don't think of it according to that order of – or structure. Think of it according to this form of structure." But somewhere, somehow, I've got to get my head around how best to pull thoughts together.

MS ORR: There are questions that we will pose, Commissioner, in relation to vertical integration and structural separation of product and advice which we had in mind posing by reference to the statements that we had tendered dealing with vertical integration. They may assist on these topics as well.

THE COMMISSIONER: Then you're ahead of me.

MS ORR: I doubt that, Commissioner.

THE COMMISSIONER: Go on.

MS ORR: The second case study in relation to inappropriate advice concerned ANZ's financial advice business and the conduct of two financial advisers, Mr John Doyle, who was an authorised representative of RI Advice Group, a subsidiary of ANZ, and Mr Christopher Harris, who was an authorised representative of Millennium3 Financial Services, another subsidiary of ANZ. The fifth case study also related to ANZ and concerned the conduct of Mr A, a financial adviser who was an authorised representative of Millennium3.

In the second case study, the Commission heard evidence from Mr Darren Whereat, the general manager aligned licensees and advice standards, and Ms Kylie Rixon, the chief risk Officer For Digital and Wealth Australia. As the Commission heard, ANZ provides financial advice services through four entities: ANZ Financial Planning and three aligned dealer group entities owned by ANZ, RI Advice Group, Millennium3 and Financial Services Partners. Mr Whereat gave evidence that he's responsible for the supervision and monitoring of the activities of ANZ's aligned dealer group entities, and he also supervises the advice review team, which determines whether clients have suffered financial detriment as a result of misconduct engaged in by an ANZ adviser, and the compensation to be paid to such clients.

Mr Whereat gave evidence about the two financial advisers the subject of the case study. The first of those was Mr John Doyle. Mr Doyle entered into an authorised representative agreement with RI Advice Group in May 2013. RI had actively sought to recruit Mr Doyle and other financial advisers who were authorised representatives of another licensee, Australian Financial Services. These advisers were offered financial incentives, including upfront payments, to move to RI. Despite warnings from ASIC about the need for enhanced due diligence in relation to former Australian Financial Services advisers, and a customer complaint RI received about Mr Doyle in August 2013, no enhanced monitoring or supervision of Mr Doyle was applied after he commenced with RI.

Mr Doyle's files were not audited until nearly two years after he commenced in February 2015. Despite Mr Doyle selecting the files to be audited, contrary to the standard file selection process, Mr Doyle failed the audit receiving the worst possible rating. Issues identified with Mr Doyle's advice included recommendation of products not included on RI's approved product list which RI had seemed inappropriate due to their complexity. Mr Doyle's poor audit results were so significant that they skewed the audit results across the RI business. However, the only step RI took as a result of the audit was to require Mr Doyle to submit all of his advice documents to a vetting officer for review prior to the advice being provided to the clients.

There was a further targeted audit of Mr Doyle's files in May 2015. The results of this audit were worse than the February 2015 audit. Again, an issue identified was the recommendation of products not on RI's approved product list. Following this audit, Mr Doyle recommended that a number of his clients invest in Macquarie Flexi 100 structured products. These products were not on RI's approved product list at

the time Mr Doyle recommended them because of the degree of complexity and risk associated with the products.

ANZ later found that these products were not appropriate for the clients Mr Doyle recommended them to. Mr Whereat terminated the authorised representative status of Mr Doyle and his company, Carrington Corporation, in June 2015. The termination was expressed to be effective six months later. Another audit, a month later, identified further issues and Mr Doyle was then suspended but was permitted to continue providing advice to approximately 700 existing clients until March 2016. At the time of Mr Whereat's evidence, RI had not yet completed its review and remediation of Mr Doyle's clients. Mr Whereat acknowledged that it was unacceptable that it has taken two to three years to remediate clients found to have been given inappropriate advice.

The second adviser about whom Mr Whereat gave evidence was Mr Christopher Harris. In July 2013, an audit was conducted on Mr Harris' files in which he received the lowest available score. As a result of the audit, Mr Harris was required to submit advice for pre-vetting. Mr Harris' conduct was discussed at consequence management committee meetings in 2013 and 2014. In July 2014, Mr Harris passed an audit and, in August 2014, the consequence management committee decided to close the incident in relation to Mr Harris. Mr Harris wasn't audited again until July 2015.

The Commission heard about advice Mr Harris gave to two clients in the period between the July 2014 and July 2015 audits. The first of these clients was an elderly widow who received advice from Mr Harris in April 2015 in relation to the investment of a $32,000 term deposit. Mr Harris' advice was to invest in a wrap account, the result of which was the client incurred high upfront and ongoing costs with no distinguishable benefits. The second client was advised to roll her superannuation into a new account in order to save approximately $238 a year. Mr Harris charged $3330 for this advice and signed the client up to a $3790 ongoing service fee. Mr Whereat agreed that the advice given to both of these clients was inappropriate.

Mr Whereat also gave evidence that during this period a customer made a complaint about Mr Harris questioning the fees she had been charged and claiming the advice she received did not meet her needs. Following this complaint, a state development manager met with Mr Harris. She expressed concerns after this meeting about the risk that Mr Harris posed to Millennium3 and about his attitude to compliance, and she noted that she had raised these concerns previously. These concerns were forwarded to the CEO and the Chief Operating Officer of Millennium3. Despite the recommendation of the state development manager that the authority of Mr Harris be terminated, Millennium3 instead decided to issue Mr Harris with a letter of censure which imposed certain requirements on Mr Harris including pre-vetting of advice.

In February 2016, further concerns were raised about Mr Harris' practices, including a failure to provide ongoing services for which clients were paying fees.

Millennium3 attempted to access Mr Harris' files but were unable to do so for over a year. The Commission heard that despite being on Millennium3's watch list for two to three years, receiving the lowest possible scores on at least two audits, and the serious concerns raised by the state development manager, Mr Harris was permitted to continue providing advice to clients during the 13 months that Millennium3 was attempting to access his files.

There were a number of meetings at which Mr Harris was discussed in late 2016 and early 2017. The report of a targeted review, which had been requested in November 2016, was not provided until April 2017. It identified a list of issues with Mr Harris, including the provision of inappropriate advice and advice outside authorisation. Millennium3 decided to terminate Mr Harris' status as an authorised representative in April 2017.

In July 2017, Millennium3 sent a letter to ASIC about Mr Harris' conduct but did not identify this as a significant breach under section 912D of the Corporations Act. As at the time of Mr Whereat's evidence, none of Mr Harris' clients had been remediated for inappropriate advice or for having been charged fees without receiving services. The Commission also heard that Mr Harris is still providing financial services on behalf of Dover and that Millennium3 did not mention the matters raised in this case study to Dover in response to a request by Dover for information about Mr Harris.

The Commission also heard evidence about ANZ's financial advice business more generally from Ms Rixon. Ms Rixon had oversight of the risk and compliance of the advice business within ANZ, including ANZ Financial Planning and the aligned dealer groups. Ms Rixon gave evidence about the remuneration and incentives that apply to advisers employed by ANZ Financial Planning.

Until this year, the calculation of bonuses for advisers included a component determined by the revenue that the financial adviser generated. Leaderboards were also published which ranked advisers on various criteria, including amount of revenue generated. Ms Rixon accepted that this reflected a culture of emphasising the growth of business more than the best interests of the client. The Commission also heard that the calculation of bonuses for management within the advice business still includes a revenue component, as does the calculation of bonuses for advisers in ANZ's aligned dealer groups.

In the fifth case study, the Commission heard evidence from Mr Kieran Forde, the health of wealth solutions and partnerships at ANZ. Mr Forde gave evidence about Mr A, who became an authorised representative of Millennium3 in 2009. Mr A was not permitted to provide advice to customers to invest in particular properties. Mr A contacted a number of his clients in his capacity as an authorised representative of Millennium3 in relation to a potential property investment. Mr A informed the clients that although the initial price of the property was over $2 million, he had negotiated a lower purchase price and believed the property could be sold at a profit.

He told the clients that he required $600,000 from investors for the deposit and stamp duty. Mr A convinced five of his clients to invest through their self-managed superannuation funds. Four invested $100,000, and the fifth $200,000. The clients believed that they were subscribing for units in a unit trust that would acquire the property. However, Mr A acquired the property in the name of a company of which he was the sole director and not the unit trust.

The Commission heard evidence about audits of Mr A's practice shortly prior to these events. In February 2011, Millennium3 audited five of Mr A's files, each of which was rated as very poor advice, the lowest possible rating. Mr A did not face any disciplinary consequences as a result of these results. In November 2011, four files were rated very poor advice, and the fifth was rated poor advice. Again, Mr A did not face any disciplinary consequences through these audit results. The only step Millennium3 took was to require Mr A to pre-vet his advice before providing it to clients.

In 2012, after a further poor audit, Mr A's status as an authorised representative was terminated. Despite the poor audit results and the termination of Mr A's status, Millennium3 did not investigate Mr A's other client files to determine whether any of his clients had been given inappropriate advice. In September 2013, one of the clients who had invested $100,000 in the purchase of the property sent a complaint to Millennium3 about Mr A, noting that they had lost the $100,000.

In December 2013 and January 2014, Millennium3 identified the four other self-managed superannuation funds that were listed as unit holders in the unit trust and were the clients of Mr A's when he was an authorised representative of Millennium3. Millennium3 and ANZ did not attempt to contact those clients or to investigate whether they had suffered any loss but, instead, left it to those clients to come forward and prove that they had suffered loss. Mr Forde said this had occurred because Millennium3 had prioritised its commercial interests ahead of the interests of its clients. Neither ANZ nor Millennium3 had access to Mr A's files, which Mr Forde accepted would have made it very difficult to determine whether any of Mr A's clients had suffered loss.

In 2016 and '17, further complaints were made by former clients of Mr A relating to unauthorised withdrawals from self-managed super funds and investments in the unit trust. And in August 2017, ANZ appointed McGrathNicol to conduct an investigation into Mr A's conduct. Following receipt of their report, ANZ decided to have its advice review team review the advice given by Mr A to 103 customers during his time as an authorised representative of Millennium3. ANZ has not yet determined how many customers were affected by Mr A's conduct as they are still reviewing the files. ANZ has notified the West Australian police of allegations made by three of Mr A's clients that he withdrew funds totalling $234,590 from their accounts between March 2011 and February 2012 without their authority.

On the evidence, it is open to the Commissioner to find – I deal with each of the advisers in turn – that Mr Doyle's conduct, in connection with the advice he gave to

clients to invest in the Macquarie Flexi 100 line of products might amount to misconduct. ANZ conceded as much in its evidence. In particular, it is open to the Commissioner to find that in giving advice to his clients, Mr Doyle may have breached his statutory obligation under section 946A(1) of the Corporations Act to give certain clients a statement of advice. Mr Doyle may have breached his statutory obligation under section 961B of the Corporations Act to act in the best interests of certain clients, and Mr Doyle may have breached his statutory obligation under 961G of the Corporations Act to only provide advice to certain clients if it would be reasonable to conclude that the advice was appropriate to the client.

On the evidence, it is open to the Commissioner to find that Mr Harris' conduct in connection with the advice he gave to the clients in the statements of advice that are exhibits DJW 115 and DJW 120 to Mr Whereat's statement may have amounted to misconduct. Again, ANZ conceded so much in its evidence. In particular, it is open to the Commissioner to find that in giving that advice to his clients, Mr Harris may have breached his statutory obligation under section 961B to act in the best interests of certain clients, and breached his statutory obligation under 961G to only provide advice to certain clients if it would be reasonable to conclude that the advice was appropriate to them.

On the evidence, it's open to the Commissioner to find that Mr A's conduct, in connection with the advice that he gave to clients to invest in the unit trust to fund the purchase of the property, may also have amounted to misconduct. Again, ANZ conceded so much in its submissions and evidence. In particular, it's open to the Commissioner to find that Mr A may have breached his statutory obligation under section 961B to act in the best interests of those clients, his obligation under section 1041G of the Corporations Act not to engage in dishonest conduct in relation to a financial product or financial service, his obligation under section 1041H(1) of the Corporations Act not to engage in conduct in relation to a financial product or financial service that is misleading or deceptive or likely to mislead or deceive, and Mr A may also have breached his statutory obligation under section 12DA of the ASIC Act not to engage in conduct in relation to financial services that is misleading or deceptive or likely to mislead or deceive.

On the evidence, it's open to the Commissioner to find that the conduct of RI Advice Group in the period when Mr Doyle provided the advice that was the subject of this case study might also amount to misconduct in the following ways. First, RI Advice Group may have breached its statutory obligation under section 912A(1)(a) of the Corporations Act to do all things to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. Second, RI may have breached its statutory obligation under section 912A(1)(ca) of the Corporations Act to take reasonable steps to ensure that representatives such as Mr Doyle complied with the financial services laws.

Third, RI may have breached its statutory obligations under section 961L of the Corporations Act to ensure that representatives such as Mr Doyle complied with sections 961B and 962G of the Corporations Act. RI Advice Group, finally, may

have breached its statutory obligation under section 952H of the Corporations Act to take reasonable steps to ensure that representatives such as Mr Doyle complied with their obligations under Part 7.7 of the Corporations Act to give clients a statement of advice.

In connection with these available findings, we note in particular that RI Advice Group recruited Mr Doyle from a licensee that had been the subject of regulatory action by ASIC. RI allowed Mr Doyle to provide advice in circumstances where he had failed a competency test at the start of his time with RI Advice Group. RI failed to audit Mr Doyle for two years after he commenced, and after Mr Doyle received poor audit results, RI failed to stop him from providing advice to clients as its contractual documents required it to do. RI, instead, placed Mr Doyle on pre-vetting in circumstances where it knew that this was an ineffective control that could be circumvented, and it was, in fact, circumvented by Mr Doyle. And at the relevant time, RI and ANZ had not instituted many of the changes to its systems and processes that they now claim have reduced the likelihood that customers will receive inappropriate advice.

On the evidence, it's open to the Commissioner to find that Millennium3's conduct in relation to the period when Mr Harris and Mr A provided the advice that was the subject of these case studies, might also amount to misconduct in the following ways. Millennium3 may have breached its statutory obligation under section 912A(1)(a) of the Corporations Act to do all things to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly; its statutory obligation under section 912A(1)(ca) to take reasonable steps to ensure its representatives complied with the financial services laws; its statutory obligation under section 912A(1)(d) of the Corporations Act to have available adequate resources to carry out supervisory arrangements; its statutory obligation under section 912A(1)(h) of the Corporations Act to have adequate risk management systems; and in respect of the period after October 2016, Millennium3 may have breached its statutory obligation under section 912G of the Corporations Act set out in ASIC class order CO14 of 923 to ensure that it kept client records in such a way that they were accessible to Millennium3 at all times in a way that enabled Millennium3 to produce the records.

In connection with these available findings, we note in particular that Millennium3 allowed Mr Harris to continue to provide advice to clients for several years after it identified that he had not been complying with financial services laws. Millennium3 failed to have in place arrangements to ensure that it could access and review Mr Harris or Mr A's client files. It twice placed Mr Harris on pre-vetting in circumstances where it knew that it was an ineffective control that could be circumvented, and, despite warnings from Mr Harris' supervisors over a considerable period of time, Millennium3 consistently failed to take adequate steps to terminate Mr Harris' authorised representative status.

On the evidence, it is also open to the Commissioner to make findings of conduct by RI Advice Group that fell below community standards and expectations. First, RI Advice Group failed to take adequate steps to protect customers of Mr Doyle from

receiving inappropriate advice after it had repeatedly identified issues with his advice. Second, RI has delayed in implementing a review and remediation program in that the majority of Mr Doyle's clients' files have not yet been reviewed, over two years since RI decided to terminate Mr Doyle's status.

On the evidence, it's also open to the Commissioner to make findings of conduct by Millennium3 that fell below community standards and expectations. First, Millennium3 failed to take adequate steps to protect customers of Mr Harris from receiving inappropriate advice after it had repeatedly identified issues with his advice. Second, Millennium3 has delayed in implementing a review and remediation program with no client of Mr Harris yet being compensated for losses caused as a result of Mr Harris' advice.

Third, having terminated Mr A in circumstances where he had received extremely poor audit results, Millennium3 took no steps to investigate whether any of his clients had suffered detriment as a result of his advice. And finally, after identifying specific clients of Mr A who may have suffered loss because of Mr A's conduct, Millennium3 took no steps to contact those clients or investigate whether they had suffered detriment as a result of Mr A's advice.

On the evidence, it's open to the Commissioner to find that RI Advice Group and Millennium3's conduct in connection with the provision of inappropriate advice by financial advisers can be attributed, at least in part, to the inadequacy of their risk management systems. Ms Rixon gave evidence that since January 2014, the residual risk of adverse consequences resulting from customers of ANZ and its aligned dealer groups receiving inappropriate financial advice has remained high.

For a period of more than four years, covering the whole of the period in which Mr Doyle and Mr Harris provided the advice that was the subject of the second case study, ANZ's risk management committee continued to accept that high risk, they continued to accept that risk and to approve risk treatment plans that did not reduce that risk below its high level. These continuing high levels of risk were, at least in part, the result of underinvestment by ANZ in the systems and processes necessary to improve its control environment and ensure that customers of ANZ, RI and Millennium3 were receiving appropriate advice.

In November 2016, more than two years after ANZ first approved a risk treatment plan in relation to the risk of adverse consequences resulting from the provision of inappropriate financial advice, an internal audit report noted that a quantum shift in investment was required to enable the aligned dealer groups to meet regulatory expectations, to deliver on customer remediation programs and improve the control environment.

On the evidence, it is also open to find that RI Advice Group's conduct in connection with the provision of inappropriate advice can be attributed, at least in part, to the inadequacy of RI's recruitment processes. In around March and April 2013, shortly prior to the date on which the FOFA conflicted remuneration reforms were to

become mandatory, ANZ and RI Advice Group decided to actively approach a number of financial advisers who were authorised representatives of Australian Financial Services.

The targeted advisers were selected because they held $677 million in funds under management in products issued by an entity associated with ANZ which ANZ wished to retain. The targeted advisers included Mr Doyle, who had $60 million in funds under management in that product. The advisers were offered financial incentives including upfront payments to move to RI.

The Commission also heard evidence that ANZ and RI were aware at the time they pursued these advisers that ASIC had imposed additional licence conditions on Australian Financial Services as a result of adviser misconduct. ASIC contacted ANZ to express concerns about the recruitment of these advisers and RI assured ASIC that it would only on-board advisers who met enhanced due diligence standards. Mr Doyle entered into the authorised representative agreement with RI in May 2013, and one element of the increased due diligence standards to be applied by RI to former Australian Financial Services advisers, was that competency and knowledge tests were to be administered prior to advisers being issued.

Mr Doyle completed a test on 15 July 2013, a couple of months after he commenced. He failed the test and was assessed as not yet competent. Despite the results of this test, the warnings from ASIC about former Australian Financial Services advisers, and the customer complaint that RI had received in August 2013, no enhanced monitoring or supervision of Mr Doyle was applied.

On the evidence, it is open to find that RI and Millennium3's conduct in connection with the provision of inappropriate advice can be attributed, at least in part, to the inadequacy of their internal systems. First, RI and Millennium3 allowed high-risk advisers to continue to provide advice to customers subject to a requirement that the advice could be pre-vetted in circumstances where they knew that pre-vetting could be circumvented and was ineffective as a control. Second, because of the complex internal structure for decision-making about consequence management, Millennium3 delayed in imposing consequences on advisers who were identified as being a high risk to customers.

Third, RI and Millennium3 did not take adequate steps to ensure that their authorised representatives kept client files in a way that would enable them to be easily reviewed to identify whether inappropriate advice had been provided. At no stage was it mandatory for authorised representatives of Millennium3 to store client files electronically in XPLAN. An audit of advice provided by ANZ financial advisers between 2013 and 2015 found that as many as one in five files sampled did not contain adequate file notes and records to enable verification of the quality of the advice.

The evidence also supports a finding that RI and Millennium3 did not effectively and adequately respond to the potential detriment suffered by customers of Mr Doyle, Mr

Harris and Mr A. In the case of Mr Doyle, RI assigned the review and remediation of his customers a low priority in circumstances where it had not yet taken adequate steps to determine whether Mr Doyle's customers had suffered detriment. As a result, the files of the majority of Mr Doyle's customers have not yet been reviewed over two years after an internal investigation identified a risk that Mr Doyle's clients had suffered detriment as a result of his advice.

In the case of Mr Harris, despite audit reports over a period of several years indicating serious deficiencies, it was not until March 2017 that Millennium3 undertook a targeted review of Mr Harris' files. That review identified the potential for client detriment in almost all of the files reviewed, but ANZ's remediation program in respect of Mr Harris' clients remains in the scoping and investigation stage over a year later.

In the case of Mr A, as we have noted, having terminated Mr A in circumstances where he had received extremely poor audit results, Millennium3 took no steps to investigate whether any of his clients had suffered detriment as a result of his advice. And even after identifying specific clients of Mr A who may have suffered loss, Millennium3 took no steps to contact those clients or investigate whether they had suffered detriment.

RI Advice Group and Millennium3 are invited to provide written submissions addressing each of the findings that we have identified to be open, as well as any other findings they regard as available. All parties with leave to appear are invited to provide written submissions addressing the following questions that arise from this case study. First, is it possible for financial services licensees to adequately monitor the quality of advice provided by employees and authorised representatives where that advice is provided in a manual environment?

Second, are improvements in technology the only way to ensure that financial advisers provide quality advice? Third, how should financial services licensees ensure that customers of their authorised representatives are adequately protected while the licensee investigates the conduct of the authorised representative? And fourth, taking into account that it may never be possible to reduce the risk to zero, what is an acceptable level of risk that customers will be provided with inappropriate advice?

THE COMMISSIONER: And associated with the acceptable level of risk must be also a connection with identification and investigation and remediation. It may be that all of those elements, and perhaps others as well, need to be considered as a whole, rather than distinctly. But again, let's hear what the parties have to say about that.

MS ORR: The third case study in relation to inappropriate advice, Commissioner, concerned AMP's financial advice business and the conduct of three authorised representatives: Mr E, who was an authorised representative of AMP Financial Planning, a subsidiary of AMP, Ms Jennifer Coleman, an authorised representative

of Charter Financial Planning, also a subsidiary of AMP, and Mr Adam Palmer, an authorised representative of Genesys Wealth Advisers, which was a subsidiary of AMP at the relevant time.

One witness gave evidence in this case study, Sarah Britt, head of compliance at AMP Limited. The Commission heard that in November 2016, Mr E provided advice to a married couple who were seeking advice to improve the performance of their superannuation funds to meet their long-term goal of accumulating more wealth. Mr E recommended that the married couple roll over their superannuation benefits from their existing funds, which were not owned by AMP, into MyNorth Super, a fund owned by AMP.

The effect of that advice was that the husband sacrificed approximately $16,000, close to 25 per cent of the balance of the fund, on the transfer to MyNorth Super. Ms Britt conceded that in making this recommendation, there was no attempt by Mr E to compare the husband's likely returns if he were to remain in his current funds with the likely returns from moving to MyNorth Super. The wife was also charged a higher ongoing fee as a result of her rollover. Ms Britt conceded that Mr E's evidence was – I'm sorry, that Mr E's advice was inappropriate. Mr E was first audited by AMP Financial Planning in September 2016, about two months before giving the advice to the married couple. He received a C rating for that audit.

Although the audit revealed deficiencies in Mr E's advice of the same kind as the advice that he ultimately provided to the married couple, the remedial action that followed the audit did not prevent Mr E from continuing to provide inappropriate advice. Mr E was audited again in March 2017, and this time received an E rating. Following this audit, Mr E failed to comply with the required remedial actions.

Subsequently, it was recommended that Mr E's personal authorisation be revoked and the agreement with AMP Financial Planning be terminated immediately. However, AMP did not support the recommendation to terminate the adviser. Ms Britt conceded that there was certainly some discomfort around that decision. AMP Financial Planning has been aware of Mr E's misconduct for over 12 months, since March 2017. Despite this, as at the date Ms Britt gave evidence, AMP Financial Planning had not yet remediated the married couple for, or even contacted them regarding, the inappropriate advice.

The second authorised representative whose conduct was the subject of this case study was Ms Coleman. In February 2016, Ms Coleman gave financial advice to a de facto couple. The couple had recently had a child and they were seeking insurance advice to ensure that their family would be secure in the event anything happened to either parent. Ms Coleman recommended that the male client replace each of his existing insurances with the recommended insurance which was said to be cheaper by just less than $1000 per annum.

However, Ms Coleman misled the clients in the following ways. First, by misquoting the insurance premiums which were higher than the amount stated in her

advice; second, by not disclosing that the premiums were going to be paid out of the couple's superannuation funds; third by not disclosing the exit fees that applied to the' superannuation funds; and fourth, by failing to disclose she may receive an activation payment in respect to one of the products that she recommended.

Ms Britt conceded that Ms Coleman got it wrong and accepted that the clients had been misled by Ms Coleman about the amount of money it would cost to replace their existing insurance policies with the ones recommended by Ms Coleman. The Commission heard evidence that on 6 June 2016, Ms Coleman was audited. She received a D rating, and this was Ms Coleman's third consecutive D rating. Following this rating, the issues panel determined to revoke Ms Coleman's authorisation. Ms Coleman's corporate authority was terminated in June 2016, and Ms Coleman resigned from Charter in July 2016.

On 6 July 2016, the matter of Ms Coleman was passed to the AMP Review and Remediation Program for review. That was almost two years ago. The Commission heard evidence that Ms Coleman's clients have not yet received compensation for, or even been contacted by AMP about, the inappropriate advice they received from Ms Coleman. Ms Britt agreed that if the insurance policies were renewable annually, that, by now, the couple would have missed their opportunity to elect not to renew the policies. Ms Britt also agreed that if the policies were being renewed annually, it would be better for the clients to know about the inappropriate advice they had received now so that they may be able to make decisions about whether or not to renew.

The third authorised representative whose conduct was the subject of this case study was Adam Palmer. Mr Palmer became an authorised representative of Genesys in May 2013. Ms Britt accepted that the interview and appointment process of Genesys conducted with respect to Mr Palmer was deficient. Despite the fact that Genesys was aware of issues at the time Mr Palmer commenced as an authorised representative of Genesys, Mr Palmer was not required to submit any files for vetting until February 2014, approximately 10 months after he started. There was no audit of his files until July 2014, over 12 months after he started.

Mr Palmer received an E rating for that July 2014 audit, the lowest possible rating. One of the files the subject of the audit disclosed that Mr Palmer had given advice to a couple who were wanting to renovate their home to establish a self-managed super fund and roll over their super into the self-managed superannuation fund and purchase an investment property. There were a number of problems with this advice identified by the audit, including that there was no evidence of any assessment of the couple's risk tolerance, the advice fell outside the scope of Mr Palmer's accreditations as he did not have self-managed super fund or gearing accreditations, and Mr Palmer was providing advice that could be deemed property advice.

The audit also identified that Mr Palmer had a conflict of interest. Mr Palmer had a direct interest, a 60 per cent ownership, in a property business which acted as a buyer's advocate and to which he referred clients to assist with the purchase of

properties. Ms Britt accepted that Mr Palmer's conduct was dishonest. Ms Britt also agreed that Mr Palmer's case was an example where, had Genesys followed adequate procedures at the time or immediately after Mr Palmer was made an authorised representative, it would have rung alarm bells.

Following the audit in July 2014, Mr Palmer's matter went to the AMP Issues Panel and a decision was made to terminate Mr Palmer. However, Mr Palmer resigned before he was terminated. In October 2014, Mr Palmer moved to Dover Financial Advisers. ASIC conducted a review of Mr Palmer's files at Dover and identified multiple breaches of the Corporations Act in connection with those files.

In October 2014, a breach assessment was prepared in respect of Mr Palmer. It was determined that his conduct did not constitute a breach reportable under section 912D of the Corporations Act, and AMP did not resolve to report his conduct as a Serious Compliance Concern. Ms Britt accepted that the decision not to report the conduct as a Serious Compliance Concern was a decision she would not make today based on everything she has seen, particularly as he was later notified to ASIC on this basis.

AMP did not report Mr Palmer's conduct to ASIC until July 2015, 12 months after the audit, in response to a request by ASIC for information. Ms Britt accepted that Genesys failed to provide adequate training regarding the best interests duty and related obligations. Since terminating Mr Palmer's authorisation in September 2014, no client has received remediation for inappropriate advice given by Mr Palmer. Although AMP has commenced its review of Mr Palmer's files, a number are still yet to be received and Ms Britt could not provide a date for when the assessment of those files will be complete. Ms Britt's evidence was that AMP has not made any specific provision for compensation for any of Mr Palmer's clients.

On the evidence, it is open to the Commissioner to find, firstly, that Mr E's conduct, in connection with the advice that he gave to the married couple, might amount to misconduct. AMP conceded this in its submissions and evidence. In particular, it's open to the Commissioner to find that Mr E may have breached his statutory obligation under section 961B to act in the best interests of his clients. He may have breached his statutory obligation under section 961G to only provide advice if it would be reasonable to conclude that the advice was appropriate to the clients.

And in relation to Ms Coleman, on the evidence, it's open to the Commissioner to find that Ms Coleman's conduct in connection with the advice that she provided to the de facto couple might also amount to misconduct. Again, AMP conceded this in its submissions and evidence. In particular, it's open to the Commissioner to find that Ms Coleman may have breached her statutory obligation under section 961B of the Corporations Act to act in the best interests of her client's, her obligation under 961G of the Corporations Act to only provide advice if it would be reasonable to conclude that the advice was appropriate, and her obligation under section 961J of the Corporations Act to give priority to her clients' interests in circumstances where,

in recommending a product for which she may have received an activation payment, there was a conflict of interest between her interests and the clients' interests.

On the evidence, it's open to the Commissioner to find that Mr Palmer's conduct, in advising clients to open self-managed superannuation funds and purchase investment properties with the assistance of a business in which he had a direct interest, might also amount to misconduct. Again, AMP conceded this in its submissions and evidence. In particular, it's open to the Commissioner to find that Mr Palmer may have breached his statutory obligation under section 961B of the Corporations Act to act in the best interests of the clients, his obligation under section 961G to only provide advice to clients if it would be reasonable to conclude that the advice was appropriate to the client, his obligation under section 961J by failing to give priority to the clients' interests when giving advice in circumstances where, by reason of his 60 per cent interest in the property business, there was a conflict between his interests and the interests of the clients.

He may have breached his obligation under section 1041H(1) of the Corporations Act not to engage in conduct in relation to a financial product or financial service that is misleading or deceptive, or likely to mislead or deceive, and he may have breached his obligation under section 12DA of the ASIC Act not to engage in conduct in relation to financial services that is misleading or deceptive, or likely to mislead or deceive.

On the evidence, it's open to the Commissioner to find that AMP Financial Planning's conduct in the period when Mr E provided the advice that was the subject of this case study might amount to misconduct in the following ways. First, AMP Financial Planning may have breached its statutory obligation under section 912A(1)(a) to do all things to ensure that financial services covered by its licence were provided efficiently, honestly and fairly. Second, AMP Financial Planning may have breached its obligation under section 912A(1)(ca) of the Corporations Act to take reasonable steps to ensure that representatives such as Mr E complied with financial services laws.

Third, AMP Financial Planning may have breached its obligation under section 912A(1)(h) of the Corporations Act to have adequate risk management systems. And fourth, AMP Financial Planning may have breached its obligation under section 961L of the Corporations Act to ensure that Mr E complied with sections 961B and 961H of the Corporations Act. In connection with the first three of these available findings, we note, in particular, that at the relevant time AMP Financial Planning failed to ensure that its audit standards were such that Mr E's conduct could be detected and remediated at the earliest opportunity.

On the evidence, it's open to the Commissioner to find that Charter's conduct, in the period when Ms Coleman provided the advice that was the subject of this case study, might also amount to misconduct in the following ways. First, Charter may have breached its statutory obligation under section 912A(1)(a) to do all things necessary

to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly.

Second, Charter may have breached its obligation under section 912A(1)(ca) to take reasonable steps to ensure that representatives such as Ms Coleman complied with financial services laws. Third, Charter may have breached its statutory obligation under section 912A(1)(h) to have adequate risk management systems. And fourth, Charter may have breached its statutory obligation under section 961L to ensure that Ms Coleman complied with sections 961B, 961G, and 961J of the Corporations Act. In connection with the first three of these available findings, we note in particular that at the relevant time, Charter failed to ensure that its audit standards were such that Ms Coleman's conduct could be detected and remediated at the earliest opportunity.

In relation to Genesys, on the evidence, it's open to the Commissioner to find that Genesys' conduct in the period when Mr Palmer provided the advice that was the subject of this case study might amount to misconduct in the following ways. First, Genesys may have breached its obligation under section 912A(1)(a) to do all things to ensure the financial services covered by its licence were provided efficiently, honestly and fairly. Second, Genesys may have breached its obligation under section 912A(1)(ca) of the Corporations Act to take reasonable steps to ensure that representatives such as Mr Palmer complied with financial services laws.

Third, Genesys may have breached its statutory obligation under section 912A(1)(f) to ensure that its representatives were adequately trained and competent to provide services. Fourth, Genesys may have breached its obligation under section 912A(1)(h) to have adequate risk management systems. And fifth, Genesys may have breached its obligation under section 961L to ensure that Mr Palmer complied with section 961B, section 961G, and section 961J of the Corporations Act.

In connection with the first four of these available findings, we note in particular that at the relevant time, Genesys failed to ensure that the process of assessment of its authorised representatives prior to them commencing with Genesys were such that Mr Palmer's conduct could be detected and remediated at the earliest opportunity. Genesys failed to ensure that its audit processes were such that Mr Palmer's conduct could be detected and remediated at the earliest opportunity, and Genesys did not take any steps to ensure that Mr Palmer had the necessary qualification or to prevent him providing advice for which he was not qualified to give until after the audit.

On the evidence, it's also open to the Commissioner to make the following findings of conduct by AMP Financial Planning, Charter and Genesys that fell below community standards and expectations. First, despite having been aware of Mr E's conduct for more than 12 months, AMP Financial Planning have still not remediated the married couple or even contacted them about the inappropriate advice they received. Second, despite the advice given by Ms Coleman to the de facto couple, having been passed to the AMP Review and Remediation Program almost two years ago, Charter has not yet contacted those clients or remediated them for the

inappropriate advice they received from Ms Coleman. Third, despite having terminated Mr Palmer's authorisation in September 2014, AMP has not yet completed reviewing his client files or made any specific provision for compensation for any of his clients.

On the evidence, it's open to the Commissioner to find that the conduct of Genesys in connection with the provision of inappropriate advice by Mr Palmer can be attributed, at least in part, to a culture of emphasising the growth of the business over ensuring that advisers are appropriately qualified. Mr Palmer had a significant and valuable client base that he was willing to transfer to Genesys. The evidence supports a finding that in order to obtain this client base, Genesys failed to take adequate steps to ensure that Mr Palmer was appropriately qualified to provide all of the kinds of advice that he intended to provide. In July 2014, AMP detected that there was no record of Mr Palmer having completed either an external self-managed superannuation fund accreditation or the AMP in-house introduction. However, no steps were taken at this time by AMP to prevent Mr Palmer from providing advice regarding self-managed superannuation funds.

It is also open to the Commissioner to find that the conduct of Genesys in connection with the provision of inappropriate advice by Mr Palmer can be attributed, at least in part, to Genesys' recruitment processes. Mr Palmer became an authorised representative in May 2013, having been an authorised representative of Australian Financial Services, the same licensee as Mr Doyle in the ANZ case study. As we've already noted, ASIC had imposed restrictions on this licensee's licence in 2011 as a result of misconduct by its advisers. Ms Britt accepted that the interview and appointment process of Genesys conducted with respect to Mr Palmer was deficient. Mr Palmer had disclosed that he did not hold the relevant qualifications for the services he was to carry out. He did not provide a copy of his previous audit or the audit rating achieved, and, despite all of this, the interviewer recommended that Mr Palmer proceed to application stage.

In Mr Palmer's authorised representative application form in respect of the areas of advice that Mr Palmer wished to appear on his financial services guide, Mr Palmer ticked most areas, including self-managed super funds. The form required that specialist qualification accompany the application for this area of advice. However, Mr Palmer did not provide any specialist qualifications. He did not list any financial planning industry qualifications on the application form either. Despite the fact that Genesys was aware of these issues at the time Mr Palmer commenced, Mr Palmer was not required to submit any files for vetting until February 2014 and there was no audit of his files until July 2014, over 12 months after he started with Genesys.

On the evidence, it's also open to the Commissioner to find that the conduct of AMP's licensees is attributable, at least in part, to the inadequacy of the audit processes within those licensees. Ms Britt gave evidence that audits are AMP's principal method by which it detects inappropriate advice and ensures that it is not given. A review conducted by PwC in November 2017 of AMP's advice control

framework identified two high priority areas of improvement. These related to file audits and vetting.

In particular, PwC expressed concerns about inconsistencies between the audit scores reached by the AMP auditor and the audit scores reached by PwC. PwC's conclusion was that the approach was very sensitive, and the difference between an A, B and C result could be quite subjective. In PwC's words:

> *A small discrepancy in interpretation could lead to a vastly different audit outcome.*

The evidence also supports a finding that AMP and its licensees did not adequately respond to the detriment suffered by the clients of the advisers considered in the case study. As we've already noted, AMP and its licensees have failed to remediate the clients of any of those advisers. Ms Britt gave evidence that the remediation program of AMP was moving very slowly. Ms Britt attributed this to the seize and scale of the remediation program at AMP and the complexity of some of the remediation issues.

Ms Britt was able to say that AMP had completed the remediation of 14 adviser books but was unable to give any specific information about how many further clients were in the pool yet to be remediated, or contacted about the possible inappropriate advice they had received. Essentially, as Ms Britt put it, AMP has underestimated the size of the task. AMP Financial Planning, Charter and Genesys, are invited to provide written submissions addressing each of the findings that we have identified as open, as well as any other findings that they regard as available on the evidence.

All parties with leave to appear are invited to provide written submissions addressing the following questions which arise from this case study. First, what is an acceptable period of time after identifying that a client has been or may have been provided with inappropriate financial advice to inform the client of that fact? Second, what is an acceptable period of time after identifying that a client has been or may have been provided with inappropriate financial advice to remediate the client for any losses suffered? Commissioner, I would move next to the NAB case study, but I wonder if the Commissioner might allow us a very brief break before we move to that case study?

THE COMMISSIONER: Yes, of course. If I come back, what, at a little after 25 past, something like that?

MS ORR: Yes, thank you, Commissioner. Thank you.

ADJOURNED **[3.20 pm]**

RESUMED **[3.26 pm]**

MS ORR: Thank you, Commissioner. The fourth case study concerned the incorrect witnessing of beneficiary nomination forms by financial advisers at NAB. One witness gave evidence in this case study, Mr Andrew Hagger, the chief case officer in the Consumer Banking and Wealth Management division at NAB. Mr Hagger gave evidence that the incorrect witnessing of beneficiary nomination forms by financial advisers at NAB was first identified as an issue in connection with the conduct of a particular financial adviser, Mr Bradley Meyn.

In 2016, Mr Meyn met with two customers who agreed that Mr Meyn would provide them with advice in relation to their superannuation and insurance. Mr Meyn presented the customers with a statement of advice, including a recommendation to reduce their level of life insurance cover and switch to paying the premiums for that cover through their superannuation. The customers completed insurance application forms. In those forms, they chose to make non-lapsing binding death benefit nominations, each nominating the other as the beneficiary under the life insurance policy.

However, the customers did not fill in the space in the form identifying the portion of the benefit that the other should receive, and although the form required that the customers' signatures on the binding nomination be witnessed by two people, only Mr Meyn witnessed the customers' signatures.

Subsequently, Mr Meyn's client service officer noticed that the forms had not been witnessed by the required second witness. Even though the client service officer was not present at the time the customers signed the forms, Mr Meyn asked her to witness their signatures, which she did. She also noticed that the customers had not completed the percentage of benefit in relation to their nominations. Mr Meyn completed this figure himself and initialled incorrect client details on both forms.

Mr Hagger gave evidence that the failure to comply with the witnessing requirements for a non-lapsing binding death nomination created the potential for the beneficiary nomination form to be invalid and opened up the possibility that the trustee would allocate funds differently to the wishes expressed by the client. The following month, during a routine compliance check of Mr Meyn's files, a regional wealth executive noticed an irregularity in the initialling on the forms. Mr Meyn admitted to initialling the forms himself and to asking the client service officer to witness the forms even though she was not present when they were signed. NAB suspended Mr Meyn and then terminated his employment.

A couple of months later, in January 2017, NAB's Breach Review Committee considered Mr Meyn's conduct. It determined that his conduct did not fit the Serious Compliance Concern criteria and it did not report him to ASIC at this time. Mr Hagger gave evidence that he thought this decision was wrong. NAB also did not report Mr Meyn's conduct to any professional association. Between February and

May 2017, NAB identified other financial advisers who had been involved in incorrectly witnessing beneficiary nomination forms.

On 23 May 2017, a memo was prepared for the Breach Review Committee. The memo recorded that NAB employees believe that incorrect witnessing of the forms was common practice and that employees did not understand the seriousness of their actions. Mr Hagger gave evidence that the incorrect witnessing of the forms had become a social norm within NAB. He accepted that this behaviour was evidence of a failure of discipline and a failure of culture at NAB.

On 31 May 2017, NAB's Breach Review Committee decided that the incorrect witnessing of the forms represented a significant breach and was, therefore, reportable to ASIC. On 5 June, about six months after it had terminated Mr Meyn's employment, NAB included Mr Meyn in a list that it gave to ASIC about advisers with compliance concerns. Mr Hagger gave evidence that NAB made a wrong judgment in not reporting Mr Meyn's conduct to ASIC earlier.

On 15 June 2017, NAB lodged a significant breach notification with ASIC in relation to the issue of invalid binding nomination witnessing on the basis that NAB had breached its obligations under sections 912A(1)(a) and 1041H of the Corporations Act. By this time, NAB had identified 325 staff who were involved in incorrectly witnessing beneficiary nomination forms, 204 of whom were financial advisers employed by NAB.

In March this year, NAB provided a further update to ASIC about this matter. By that time, NAB had identified that 2520 clients were affected by invalid binding nomination witnessing. Mr Hagger gave evidence about the steps that NAB has taken to ensure that the incorrect witnessing of beneficiary nomination forms does not affect clients' estate planning wishes. He also gave evidence about the consequences that have been imposed on financial advisers and their managers at NAB as a result of this conduct.

Financial advisers who self-reported having been involved in incorrect witnessing received an irreversible amber conduct gate which reduced their short-term incentive payment by 25 per cent. Depending on their level of seniority, managers in NAB's financial advice business, including Mr Hagger, received between a 10 and 100 per cent reduction in their short-term incentive payment as a result of the incorrect witnessing of beneficiary nomination forms and other issues in the wealth division.

On the evidence, it's open to the Commissioner to find that Mr Meyn's conduct in connection with the advice that he gave to the two customers in 2016 might have amounted to misconduct. NAB acknowledged as much in its evidence. In particular, it is open to the Commissioner to find that Mr Meyn may have breached his statutory obligation under section 1041H of the Corporations Act not to engage in conduct in relation to a financial product or financial service that is misleading or deceptive, or likely to mislead or deceive. Mr Meyn may have also breached his statutory

obligation under section 12DA of the ASIC Act not to engage in conduct in relation to financial services that is misleading or deceptive, or likely to mislead or deceive.

On the evidence, it's also open to the Commissioner to find that NAB's conduct in connection with the incorrect witnessing of beneficiary nomination forms might have amounted to misconduct. NAB acknowledged so much in its submissions and evidence. In particular, it is open to the Commissioner to find that NAB may have breached its statutory obligation under section 912A(1)(a) of the Corporations Act to do all things to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly, and NAB may have breached its statutory obligation under section 912A(1)(ca) to take reasonable steps to ensure that its representatives complied with the financial services laws.

On the evidence, it is open to the Commissioner to find that the conduct was attributable to the broader culture of the financial advice business within NAB. Although the incorrect witnessing of beneficiary nomination forms was first identified in connection with one adviser, it later became clear that the practice of incorrectly witnessing such forms was widespread in NAB's financial advice business. Many employees explained that they engaged in the practice of incorrectly witnessing the forms or asked others to do so because they believed it was common practice.

That so many employees would be willing to sign a formal document attesting to a particular fact that they had witnessed a customer's signature when that fact was not true indicates a lack of understanding of and respect for ethical and legal obligations within NAB's financial planning business. This, in turn, reflects a culture which appears to have prioritised the convenience of financial advisers and customers above ethical and legal obligations.

The Commission heard that in November 2015, NAB had commissioned a review into conflicts of interest between 360 Research and its internal stakeholders, and within NAB. The reviewer found that there was a widespread absence of knowledge of NAB's code of conduct and expected behaviour standards. Mr Hagger gave evidence that he was not provided with this report in 2015 and had only recently become aware of its existence.

NAB recognised that the widespread incorrect witnessing of beneficiary nomination forms within its financial advice business was attributable to the internal culture of the financial advice business and took steps to impose financial consequences for the leaders of the business who were responsible for that culture. NAB is invited to provide written submissions addressing each of the findings that we have identified to be open, as well as any other findings that it regards as available on the evidence.

All parties with leave to appear are invited to provide written submissions addressing the following questions which arise from this case study. First, how should financial services licensees balance the need to ensure that employees are held responsible for misconduct against the risk that punishing poor behaviour will encourage employees

to conceal that behaviour? Second, how should financial services licensees recognise and reward ethical conduct by financial advisers? Third, are there particular characteristics of the financial advice industry that lead to there being a higher incidence of improper, unethical or dishonest conduct than in other industries? If so, what should be done to address that issue?

THE COMMISSIONER: Well, it would be not only what is to be done, but what are those characteristics, I think. What are those characteristics?

MS ORR: Yes.

THE COMMISSIONER: And what do you do about them?

MS ORR: The fifth topic that was examined in these hearings, Commissioner, was the disciplinary processes in the financial advice industry. The first case study on this topic concerned Ms Donna McKenna and the financial advice she received from Henderson Maxwell. Three witnesses gave evidence in this case study: Ms McKenna, Mr Henderson, the chief executive officer of Henderson Maxwell, and Mr Dante De Gori, the chief executive officer of the Financial Planning Association of Australia.

The Commission heard that in late 2016, Ms McKenna approached Henderson Maxwell for financial advice after seeing Mr Henderson on television. Ms McKenna told Mr Henderson that she was seeking advice about her superannuation contributions ahead of the changes in taxation laws that were to take effect on 1 July 2017. She also sought advice about potentially buying an investment property.

In November 2016, Ms McKenna met with Mr Henderson and provided him with details about her financial situation, including details about her State Authority Superannuation Scheme, her SASS account. At that meeting, Mr Henderson asked Ms McKenna whether she would be interested in establishing a self-managed superannuation fund. Ms McKenna gave evidence that she initially told Mr Henderson that she had no interest in establishing such a fund but Mr Henderson persisted in promoting the benefits of self-managed super funds.

Following the meeting, one of Mr Henderson's employees telephoned Ms McKenna's superannuation fund to confirm the details of her accounts. The Commission heard an audio recording of that conversation in which Mr Henderson's employee impersonated Ms McKenna while speaking with SASS. The SASS representative explained that if Ms McKenna were to access the funds in her SASS account earlier than aged 58, she would be entitled to about $500,000 less than if she were to wait until age 58 and be permanently retired.

The Commission heard that Mr Henderson's employee impersonated Ms McKenna in several other telephone calls to the superannuation fund. The Commission heard that Mr Henderson did not conduct any other research into superannuation funds for Ms McKenna and did not conduct any research into whether managed accounts other

than the Henderson Maxwell managed account might be more suitable in Ms McKenna's particular circumstances.

In December 2016, Mr Henderson presented Ms McKenna with a statement of advice. Mr Henderson recommended that Ms McKenna establish a self-managed superannuation fund, roll over her superannuation into the fund and set up a Henderson Maxwell managed account. Had Ms McKenna implemented this advice, she would immediately have forfeited her entitlement to around $500,000 in her SASS account.

For this advice, Mr Henderson charged a plan preparation fee of $4950. Had the plan been implemented, he would have charged an establishment fee to set up the Henderson Maxwell managed account of $1980, brokerage fees of $4105, and an ongoing fee of $14,642 for investment management services. The Commission heard that the fee for investment management services was materially higher than the fees Ms McKenna was paying on her existing superannuation accounts.

Ms McKenna met with Mr Henderson again in January 2017. Ms McKenna gave evidence that Mr Henderson accepted that his advice would have caused Ms McKenna to lose about $500,000 but that he claimed it was only a draft and told Ms McKenna she could still implement the advice when she turned 58. Mr Henderson offered Ms McKenna a refund of her advice fees. Ms McKenna made a complaint about Mr Henderson to the FPA. In responding to this complaint, Mr Henderson described Ms McKenna as aggressive and nit-picking.

The Commission also heard that while the complaint was being investigated, Mr Henderson contacted Mr De Gori, the CEO of the FPA saying that he was very disappointed with the process and the FPAs treatment of members and describing the complaint as a seemingly minor matter.

In October 2017, the FPAs investigating officer concluded that Mr Henderson had a case to answer in respect of a number of breaches of the FPA Code of Ethics and Practice Standards. Mr Henderson provided a response to the investigating officer's report. Despite asking for them, Ms McKenna was not provided with either of these documents or given an opportunity to be heard in connection with the disciplinary proceedings.

In November 2017, the FPA commenced disciplinary proceedings against Mr Henderson. Following a negotiation, Mr Henderson agreed to accept a number of findings, including that he had failed to take due care in delivering professional services, failed to consider whether Ms McKenna's current superannuation strategy could have met her objectives, needs and priorities, and failed to identify why the Henderson Maxwell managed account service was suitable for Ms McKenna. Mr Henderson also agreed to a series of sanctions on the basis that the FPA would not publish his name in connection with the disciplinary proceedings.

In March this year, that negotiated agreement was submitted to the Conduct Review Commission, the independent disciplinary body connected with the FPA. The Chair proposed an additional sanction that Mr Henderson not be permitted to engage in public media appearances for 12 months. Mr Henderson asked for some modification to that sanction and later resiled from his previous acceptance of the proposed findings against him. To date, there has still not been a formal resolution to Ms McKenna's complaint in the Conduct Review Commission.

On the evidence, it's open to the Commissioner to find that Mr Henderson's conduct in connection with the advice that he gave to Ms McKenna might amount to misconduct. In particular, it is open to the Commissioner to find that Mr Henderson may have breached his obligation under section 961B of the Corporations Act to act in the best interests of Ms McKenna, his obligation under section 961G to only provide advice to Ms McKenna if it would be reasonable to conclude that the advice was appropriate to her, and his obligation under section 961J to give priority to Ms McKenna's interests over his own interests and the interests of Henderson Maxwell in circumstances where, if Ms McKenna had implemented Mr Henderson's advice, Henderson Maxwell stood to earn a significant amount in ongoing investment management fees.

On the evidence, it is also open to the Commissioner to find that Henderson Maxwell's conduct in connection with the advice that Mr Henderson gave to Ms McKenna might amount to misconduct. In particular, it is open to the Commissioner to find that Henderson Maxwell may have committed an offence under section 952E(1) of the Corporations Act by giving a defective financial services guide dated January 2016.

On the evidence, it is also open to the Commissioner to make findings of conduct by Mr Henderson and Henderson Maxwell that fell below community standards and expectations. First, Henderson Maxwell is responsible for the conduct of its employees, and an employee impersonated Ms McKenna in telephone calls with Ms McKenna's superannuation funds on at least five occasions. Second, Mr Henderson's conduct in response to the complaint made against him to the FPA, including his failure to provide adequate assistance to the FPA with its investigation, and his personal criticisms of Ms McKenna fell below community standards and expectations.

The second case study in relation to this topic concerned Dover Financial Advisers. The Commission heard evidence from Terrence McMaster, the sole owner and one of three responsible managers of Dover Financial Advisers. Dover has in excess of 400 authorised representatives, making it one of the largest licensees in Australia. The examination of Dover's practices and conduct centred around three issues: its internal audit control, its conduct in respect of recruitment of new authorised representatives and its conduct in dealing with liability to the clients of authorised representatives and complaints made by those clients. We will focus on two of those aspects: conduct in respect of recruitment and conduct in respect of liability to and complaints by clients.

In evidence, Mr McMaster was presented with three situations in which Dover had authorised a person to be its representative without first having made contact with the former licensee and in circumstances where matters had been disclosed to Dover that would cause a reasonable licensee acting properly to take further steps before authorising the person. The first relevant authorised representative was Adam Palmer. Mr Palmer first made contact with Dover before 25 September 2014, the day on which he gave notice to Genesys of his intention to move to Dover. Mr Palmer forwarded an email to Dover within a minute of sending an email to Genesys. An inference arises that Mr Palmer had been told before that day that Dover would accept his application.

Two weeks later, on 14 October 2014, Mr Palmer completed a reference checking form in which he disclosed that his files were the subject of an audit by Genesys. Mr McMaster's evidence was that Mr Palmer had already disclosed to Dover that he was also under investigation for matters connected with direct property investment which Dover determined would not present a problem provided they were disclosed in Mr Palmer's financial services guide and conflict register. Despite Mr Palmer's written and oral disclosures, no reference check was sought from Genesys until 26 December 2014, two months after the date that Mr Palmer was authorised by Dover and three months after Mr Palmer had been told that he would be authorised by Dover.

The second relevant authorised representative was Julie Hamilton. Ms Hamilton was advised by Mr McMaster that she could become an authorised representative of Dover within two hours of her advising Mr McMaster that her current licensee, Financial Wisdom, intended to report her to ASIC for a serious breach. Mr McMaster's response was that he was not unduly troubled by this. He then offered for Dover to take Ms Hamilton on as an authorised representative with immediate effect. Ms Hamilton was later banned by ASIC from providing financial services for three years.

The third relevant authorised representative was Koresh Houghton. Mr Houghton had advised Dover that Financial Wisdom had concerns about advice he had provided while an authorised representative. Dover appointed Mr Houghton as a representative on 22 January 2015. Dover first contacted Financial Wisdom by letter on 10 February 2015. Mr Houghton was later permanently banned by ASIC from providing financial advice.

Each of those examples demonstrates that while Dover had policies in place with respect to the on-boarding of advisers and undertook reference checks, it did not undertake those checks in a timely fashion and undertook the checks because of ASICs expectations and not because of an interest in the outcome of the checks.

We turn to the evidence of Dover's conduct in respect to client complaints. There were three distinct topics that related to that issue. The first was advice given by Mr McMaster to Ms Hamilton by email about a limited indemnity she had offered her former employer. The tenor of the advice was the difficulties faced by clients in obtaining financial redress against a financial adviser. Taken in isolation, that advice

may not provoke concern, but when coupled with two other pieces of evidence it might be thought to take on a different complexion.

The second piece of evidence relevant to client complaints was a letter sent by the Financial Ombudsman Service to ASIC in which the Financial Ombudsman Service pointed to potential serious misconduct by Dover in the handling of a consumer complaint, and possible systemic issues in Dover's provision of financial services efficiently, honestly and fairly. The letter explained that, contrary to FOS's terms of reference as interpreted by FOS's operational guidelines, Dover had sent a letter to the complainant that outlined that making false complaints about financial advisers can give rise to defamation actions and similar proceedings.

The third piece of evidence is Dover's attempt to exclude itself from liability for the conduct of its authorised representatives by the Dover Client Protection Policy. That policy was in place prior to April 2018. By the policy, Dover sought to establish contractual exclusions of liability in reliance on section 917D of the Corporations Act. Mr McMaster accepted that Dover's position was to seek to obtain the maximum exclusion possible, even if ultimately some clauses of the client protection policy were found to be unlawful.

On this evidence, it is open to the Commissioner to find that Dover might have engaged in misconduct in the following ways. First, by engaging in misleading and deceptive conduct contrary to section 1041H of the Corporations Act or section 12DA of the ASIC Act in connection with the Dover Client Protection Policy. Second, contrary to section 912A(1)(c) of the Corporations Act, Dover failed to comply with financial services laws, namely, section 1041H of the Corporations Act and section 12DA of the ASIC Act by its incorporation of the client protection policy into all contracts of the authorised representatives and their clients. Third, Dover breached a recognised and widely adopted benchmark for conduct by including unfair contract terms in the Dover client protection policy contrary to section 12BF of the ASIC Act.

It is also open to the Commissioner to find that Dover's practices fell below the standards and expectations of the community in the following respects. First, its recruitment practices fell below community standards and expectations as they failed to make adequate inquiries before authorising representatives, and by authorising representatives known to be under investigation by prior licensees without first making adequate inquiries. Second, Dover's practices fell below community standards and expectations when Dover alluded to the risk of defamation proceedings in correspondence to the complainant to the dispute submitted to the Financial Ombudsman Service.

All parties with leave to appear and Dover, which did not seek leave to appear, are invited to address the following questions. First, are the steps required by the ABA reference checking and information sharing protocol adequate to protect the public when financial advisers transfer between licensees? Second, should licensees be required to maintain a minimum degree of satisfaction as to the competence and

integrity of applicants to become authorised representatives before authorising? If so, what form should that requirement take, and what minimum levels should be set?

In connection with this topic, the Commission heard evidence from witnesses from the FPA, the AFA and from ASIC about the existing disciplinary processes in the financial advice industry. Mr De Gori, the CEO of the FPA, gave evidence about the FPAs disciplinary processes and about the FPAs handling of the complaint made by Ms McKenna. The Commission heard that the FPA has the power to impose different types of sanctions, the most serious of which is expulsion from the FPA. However, as there is no requirement for financial advisers to be members of the FPA, advisers who are expelled may continue to provide financial advice.

The Commission also heard that the FPA is required by its constitution to keep all complaints and disciplinary matters concerning its members confidential, unless the matter becomes subject to its publication provisions. In the 18 determinations made by the Conduct Review Commission since 2009, in seven of those cases, the identity of the adviser is confidential. The Commission also saw that in all cases where a matter was summarily disposed of, the FPA kept the identity of the member confidential.

The Commission heard that the FPA does not receive formal referrals from ASIC, and that the primary way in which it becomes aware of professional conduct issues is through self-declarations by applicants for membership, and at membership renewal time. Mr Philip Kewin, the chief executive officer of the AFA, told the Commission about the AFAs disciplinary process. The Commission heard that the AFA had an oversight function added to its constitution in 2017, and that the association aims to function as a co-regulator in relation to its members with regulatory authorities and statutory bodies. However, over the last five years, the AFA has had only two complaints referred to its disciplinary committee. The main way in which professional conduct issues of members come to the attention of the AFA is through public announcements made by ASIC.

This morning, the Commission also heard evidence from Louise Macaulay, the senior executive leader of the financial advisers team at ASIC. Further, in connection with the other topics in this module, the Commission heard evidence about the internal disciplinary processes of Westpac, ANZ, AMP, and NAB. The evidence given in relation to the disciplinary processes of ASIC, the FPA, the AFA and financial services licensees during this hearing block gives rise to a number of questions relevant to the adequacy of existing laws and policies and industry self-regulation to identify, regulate, and address misconduct in the industry.

All parties with leave to appear are invited to provide written submissions addressing the following questions. First, are the general obligations set out in section 912A of the Corporations Act expressed at too high a level of generality to be capable of being effectively enforced? What alternative obligations would be more appropriate? Second, is the current division of responsibility for professional discipline of financial advisers between employers, ASIC and professional

associations operating effectively to ensure that financial advisers face appropriate consequences for breaching their statutory and professional obligations?

Third, does that division of responsibility create gaps in the disciplinary system? If so, what are they? Fourth, is it possible to implement a single system for professional discipline of financial advisers? Would structural changes to the financial advice industry be required to bring that about? Would a system of licensing at both an individual and an entity level be more appropriate than the existing system of licensing only at the entity level?

Fifth, is there a particular regulatory culture that has developed in relation to the regulation of the financial advice industry? What is that culture? And what has contributed to its development? And sixth, has the existing regulatory culture in the financial advice industry contributed to the occurrence of misconduct in the financial advice industry? What changes in regulatory culture might assist in reducing the incidence of misconduct in the financial advice industry?

Finally, Commissioner, at the start of this hearing block we tendered a number of statements dealing with the topics of approved product lists, conflicted remuneration and white label products. All parties with leave to appear are invited to provide written submissions addressing the following questions arising from those statements. First, can financial advisers effectively manage the conflicts of interest associated with providing advice as a representative of an institution that also manufactures financial products? Is it necessary to enforce the separation of products and advice? Second, should the statutory carve-outs to the ban on remuneration, including the recent carve-out in relation to insurance commissions, be maintained. If so why? Commissioner, that concludes our closing statement.

THE COMMISSIONER: Thank you very much, Ms Orr. Before we adjourn, I want to return to state more precisely, perhaps, the directions that I will give about the making of written submissions. There are some variations that, having heard the final submissions of Counsel Assisting, I think may be desirable.

By 4 pm Friday, 4 May, the parties to the following case studies may make written submissions not exceeding the length about to be specified, about the findings which those parties submit should be made as arising from the relevant case study as follows: (a) fees for no service, AMP, 30 pages; (b) fees for no service CBA, 20 pages; (c) platform fees, AMP and CBA, treating them as a single case study, each of AMP and CBA, 20 pages; (d) Westpac arising out of the advisers Mahadevan and Smith, 20 pages in total for the two of them together, ANZ arising out of the cases of Doyle, Harris and Mr A, together 20 pages, AMP arising out of the matters of Mr E, Coleman and Palmer, 20 pages, NAB arising out of the beneficiary forms, 20 pages.

Then in connection with disciplinary issues concerning Henderson, Henderson Maxwell, McKenna and FPA, the Henderson and Henderson Maxwell interests may have 20 pages and FPA may have 20 pages. Then as to Dover Financial Advisers, as

Ms Orr noted, that entity and those associated with that entity have not yet sought leave to appear.

I should re-state and re-emphasise that having regard to the circumstances in which Mr McMaster's evidence came to be cut short, if he were later to seek an opportunity to give further evidence on the matters that were the subject of examination, I would, of course, consider that application, and I should say also that in considering the evidence he has given, a matter that I will have to be conscious of is whether, especially towards the latter part of his examination, I should conclude that he was in a state where he was able to give a proper account of himself.

There was, I should say, no immediate cause for concern apparent to me. Had there been, I would have stopped the proceedings sooner than I did. But no doubt, I should have regard to the circumstances in which he ceased to give evidence. But in respect of Dover Financial Advisers, if it is so advised and/or Mr – it really is the end of a two-week sitting block. His name has just - - -

MS ORR: Mr McMaster, Commissioner.

THE COMMISSIONER: McMaster. Thank you very much. The name had completely blotted from my mind. Should have together a total of 20 pages. That, I think, takes account of the written submissions about specific case studies. And then in addition, by 4 pm Monday, 7 May, any party having leave to appear may make such written submissions as it is advised, not exceeding 35 pages, on any or all of the general questions or issues raised by Senior Counsel Assisting in the course of her closing submissions.

Ms Orr, is there anything arising out of that unduly long direction that I should think about?

MS ORR: No, Commissioner.

THE COMMISSIONER: No. Well, may I thank all counsel concerned for their assistance during this block of hearings and adjourn the Commission until the next block of hearings.

MATTER ADJOURNED at 4.09 pm UNTIL MONDAY, 21 MAY 2018

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