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TRANSCRIPT OF PROCEEDINGS

O/N H-896304

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, THURSDAY, 31 MAY 2018

Continued from 30.5.18

DAY 28

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

MR M. DARKE SC appears with MS P. NESKOVCIN for Westpac

**MS W. HARRIS QC appears with MR R. CRAIG, MS R. BURD and MR F.
LIPPETT for NAB**

MR J. KIRK SC appears for Suncorp

MR P. SILVER appears for the Australian Banking Association

MR P. COLLINSON QC appears for ASIC

MR M. TEHAN appears for Ross Dillon

DR O. BIGOS appears for Scott Gregson

THE COMMISSIONER: Yes, Ms Harris.

<ROSS ALAN DILLON, ON FORMER AFFIRMATION [9.45 am]

5

<CROSS-EXAMINATION BY MS HARRIS

10 MS HARRIS: Mr Dillon, we might fast forward to 2015 now. In your statement – do you have that with you in the witness box---I do, in my bag. I thought it came up here, but that’s all right.

WIT.0001.0045.00041---Yes.

15

And in paragraph 8 of your statement, you identify various facilities that National Music had with the NAB?---That’s correct.

20 And in addition to the ones you have listed there was also a business card facility, was there not?---There was.

25 And in paragraph 10 you say that a number of the facilities with the NAB were secured by Goanna Downs as was your personal home loan with the NAB. Others were secured by inventory and trade debts and you believe, correctly, that the market rate facility, the trade facility, the overdraft facility, and the bank guarantee were all secured by Goanna Downs?---Correct.

And you understood that in 2015?---Yes.

30 And the business card facility was also secured by Goanna Downs?---Yes. I would take your word for that. I wouldn’t – that’s the way I would expect it to be.

35 On a number of occasions yesterday you referred to the redraw facility. Is that the market rate facility you were referring to?---No, the redraw facility - - -

Overdraft?---No, the overdraft is separate to the redraw.

40 Yes. So which one of these were you referring to when you were talking about the redraw?---The redraw is the one that is attached to Goanna. So like the loan, the home loan and the redraw.

Okay. So your personal – your personal borrowings?---Yes.

45 I understand. Thank you. Now, you told Ms Dias yesterday that Mr Bassett became your relationship manager in about February 2015?---Yes.

And in paragraph 18 of your statement, if you still have that with you?---Yes.

5 You say that in about February 2015, you emailed Mr Bassett, as you were aware that he had met with Ms Buchanan and Mr McMahon from National Mutual on 18 February?---National Music, yes.

10 I beg your pardon, National Music. And Ms Buchanan was in charge of the business and financial affairs of National Music and Mr McMahon was it its managing director?---Yes. Louisa was in charge of the finances and the business side of it.

10 Thank you. Now, you weren't present at the meeting, were you?---No.

Because you were based in Brisbane?---In Scone.

15 In Scone, I beg your pardon, but you emailed Mr Bassett after the meeting to arrange a catch up with him?---I did.

20 Can we bring up NAB.134.006.4626, and can we have 4626 and 4627 side by side, please. And if look on the – at the bottom of the right page, this is your email to Mr Bassett, and – suggesting a catch-up. And do you see at the end of the second paragraph, you say:

Obviously, I can shed some light on the situation with Goanna Downs as well.

25 ?---Yes.

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

30 And then do you mind just reading to yourself the balance of the email chain?---Yes.

Now, we will leave that up on the screen, if you don't mind. In your statement at paragraphs 21 and 22, you have set out your recollection of that meeting and you gave some evidence about it yesterday also?---Yes.

35 And you say there that when you met Mr Bassett he immediately wanted to discuss the possible sale of Goanna Downs?---Yes.

That's your recollection?---It is.

40 And you say, you told him that you wanted to try and sell it so that you could move to Melbourne and obtain some cash to inject into National Music?---That's correct.

45 And you say you told him that you wanted to retain some sale proceeds to relocate and buy a small home near family in Melbourne?---That's correct.

And your recollection is that he told you that NAB had no issue with the retention of most of the proceeds, most of the excess funds generated by the sale?---No, I don't recall – I don't recall the word “most”, maybe.

5 Can I direct you to your statement?---Yes, I know. I'm looking at it, I can see it. I suppose, in reality, it is most of it, so maybe I have said that. But the amount retained was going to vary according to the price.

10 Of the replacement property?---No, according to – according the sale price of the farm. So if we had achieved what we were thinking we would achieve at that time, it would have been 910,000 less two or three hundred. So it is probably most. As it was actually sold at 2.22, the residual was about 670. If you took 300 out of that, it's just in excess of half.

15 I understand, Mr Dillon. But your recollection is that Mr Bassett assured you that NAB had no issue with you retaining those excess proceeds of sale?---No. He never expressed any issues at all. He basically said we – it was a good plan. I don't remember the exact words, but that was the inference.

20 So you remember him saying that or do you remember that he didn't object?---No. I remember him commenting that it was a satisfactory or a good plan. I don't remember the wording.

25 I see?---And there was no objection to it.

I see. And he asked you questions about the sale price you wanted?---He did.

And how you were marketing the property?---He did.

30 And he asked you – you said yesterday, it doesn't appear in your statement, but you said in evidence yesterday that he asked you whether you were going to reduce the price on the property?---He asked if that was a possibility or did we need to do that.

35 I see. And he didn't – you say he didn't discuss with you alteration of National Music's facilities once Goanna Downs was sold or whether NAB would require any further security?---No.

40 But you did, as you just told the Commission, you did understand at that time that Goanna Downs was security for your personal borrowings, the market rate facility, the trade finance facility, the overdraft facility, the bank guarantee facility and the business card facility?---I did.

45 Now, the only record of the meeting with Mr Bassett that you referred to in your statement is the email train that we have on the screen?---That's correct.

And you don't have any other written records of that meeting, I take it?---I didn't feel it was necessary to take notes.

I understand. But you've set out your recollection as best you can, bearing in mind that it was three years ago?---Mmm.

5 Now, in the course of preparing your statement, were you made aware that Mr Bassett had created a note of that meeting?---I don't – don't believe I am aware of that, no.

10 So you don't believe you were shown any note that was created by Mr Bassett of the meeting. It's not in your statement?---No. I have read copious quantities, and your submission is 60 pages long, which I still haven't finished reading. So no, I don't remember whether I've read a note about that or not.

15 There's no criticism, Mr Dillon. I just want to establish whether you have read it or not read it. Can we bring up please NAB 005.376.1199. Yes, it's an exhibit to Mr McNaughton's statement at tab 91. So you see this is headed Close Monitoring Action Plan, customer name, National Music. Can you see the date there, 19 March 2015?---I do.

20 And would you mind reading, please – I know it's a bit, but would you mind reading the text from the words "Comments details" about a third of the way down the page, down to the end?---Okay.

25 Thank you. And so you see, from the first paragraph, Mr Bassett has referred to his meetings with National Music but the separate catch-up that was necessary for you because you were not based in Brisbane?---That's correct.

And then under the heading Other Cash Flow Request you see:

30 *The client has identified a cash flow requirement for assistance to a level of \$200,000 for a period of four months, the request coming for 200,000 for six months.*

35 And that was what you were asking NAB for at that time?---That's, I believe, what we were asking for. Louisa was managing that.

Thank you. Now, under the heading Additional, Mr Bassett discusses matters pertaining to Goanna Downs?---He does.

40 And his note correctly reflects, does it not, that when you met with him, you told him that you had recently put Goanna Downs back on the market?---We had.

And his note correctly reflects that you told Mr Bassett that you had chosen different Sydney-based agents?---We had.

45 For the purposes of marketing the property. It correctly reflects that you told Mr Bassett that you were going to employ a different marketing strategy than strategies you had previously used with Goanna Downs?---We were.

And, in particular, it correctly reflects that you told him that you were going to put the property to auction and that the Sydney agents were trying to raise interest among Sydney buyers in particular?---Correct.

5 And it correctly reflects that you told Mr Bassett that you had already spent \$20,000 on marketing?---Correct.

And it correctly reflects, does it not, that you told him that the lowest price you were willing to accept was around \$2.2 million?---That's correct.

10

And, indeed, that was the bottom of the range in which the property was being advertised at that time, wasn't it? It was being advertised in the range of 2.2 to 2.4?---That is not my recollection. It was going to auction, so there was no price.

15 Okay. We will come back to this document in a moment but can I take you to NAB.005.477.0001. This is tab 144 to Mr McNaughton's statements, and can we have 0001 and 0002, please. Do you see that that is an article, as it were, relating to the sale of your property, which quotes you as telling the author of the article some things about Goanna Downs and the proposed sale?---I don't actually remember who
20 Nick Aiden is.

No, I understand that, Mr Dillon. I am really wanting to orient you in the document and if you would like to read it, you will see that it quotes you as talking about the sale of Goanna Downs?---It does.

25

And then in the second last paragraph on page 2, do you see it says:

It's scheduled for auction on April 23 with price expectations in the range of 2.2 to 2.4 million.

30

?---It says that.

And that's consistent with what Mr Bassett has recorded in his note?---Well, he obviously had a copy of this.

35

So you might have provided him with a copy of this document?---We provided him with all the advertising from the time he asked for it.

Thank you. Now, if we go back to Mr Bassett's note, which is NAB.005.376.1199.
40 And, looking at the bottom of the page, Mr Bassett's note correctly reflects that you told him that you were currently motivated by health concerns of yourself and your wife and having new grandchildren in Melbourne, so that you wanted to move to Melbourne?---Correct.

45 And it correctly reflects, does it not, that you told Mr Bassett that you wanted to move to Melbourne and rent?---No. Definitely not.

So Mr Bassett got everything else in this note right, but that last - - -?---But that - - -

THE COMMISSIONER: Just a moment. That question is, I think, unfair to seek to elicit a generalised acceptance of the whole of a note which is not of this witness's
5 creation, Ms Harris. If you want to – if we have to go through it line by line, and that is to achieve some end, we will do that. But not a generalised acceptance of somebody else's note of this length and complexity.

MS HARRIS: Commissioner, I will rephrase the question so that it is specific to the
10 matters which I have put to Mr Dillon arising from the note.

Mr Dillon, you have agreed with me that the note correctly reflects a number of things that you told Mr Bassett about the sale of Goanna Downs?---It does.

15 And is it the case that you say Mr Bassett's note does not correctly reflect that you told him that you wanted to move to Melbourne and rent?---It does not.

And, Mr Dillon, do you recall yesterday that I showed you a document created in April 2010 by your former banker, Mr Matthews. And we can bring it up, if you
20 like, once I've finished the question. And that document, EBL.23, said that you planned to use part of the proceeds of Goanna Downs to buy another principal place of residence, which could then be offered as security?---Correct.

25 And so what I'm suggesting to you, Mr Dillon, is that it's possible is it not that you have got those two conversations confused. That you have confused what you told Mr Matthews in 2010 with what you told Mr Bassett in 2015?---It's simply not possible.

30 Now, you accept that there's no reference in the document that you've read to any plan on your part to buy a property?---Which document?

The one in front of you that I asked you to read?---No. Because he's inferring I'm renting, not buying.

35 There's no reference in it to you buying a property?---No, I realise that.

No. And at the time you were speaking to Mr Bassett you hadn't identified a property that you wanted to buy in Melbourne?---No.

40 And so you didn't have any alternative property which you could offer as security if Goanna Downs was sold?---No property, but the intent was that the money that was the residual to be used as the deposit would be put on fixed deposit in the NAB and they would have a hold or a lien or whatever over that until we had purchased.

45 Well, Mr Dillon, you refer to that in paragraph 23 of your witness statement, but you don't say in your statement that these are matters which you actually told to Mr

Bassett, and you don't have any recollection of doing so, do you?---The detail of the facilities and ongoing security was not discussed at all at that meeting.

5 I understand that. So paragraph 23 reflects your then present intention, but not something that you had explicitly discussed with Mr Bassett?---Not at that meeting.

10 I understand. Thank you. Now, going back to Mr Bassett's note, just for completeness, we see in the penultimate paragraph on the page the reference to the Mooloolaba unit and that that – at that stage it was going on the market in late March/early April, and the plan was to sell it for 800,000 to a \$1 million and deposit your half into a trust which would then on loan some funds to National Music and then, upon selling of Goanna Downs, you would inject between 200 and 400 into National Music and pay back the corresponding amount by the trust. Do you recall telling Mr Bassett that?---No.

15 Is it consistent with your plans at the time?---No.

20 It's not. All right. Thank you. Now, the things that are recorded in Mr Bassett's close monitoring action plan were recorded in that document on 19 March, two and a half weeks after he met with you. We saw that from the date?---I did.

25 And you've told the Commission that you kept no note, understandably, of your discussion with Mr Bassett and you're relying on your memory of the discussion?---I am.

30 And no one is criticising you, Mr Dillon for failings of memory, but do you accept that, generally speaking, it's more likely that if someone made a contemporaneous or near contemporaneous note of a meeting three years ago that note is likely to be more accurate than the unassisted memory of a participant in the meeting now?---I would accept that's - - -

THE COMMISSIONER: Just a moment. Yes, Ms Dias.

35 MS DIAS: Commissioner, Ms Harris is putting forward a submission at this point about the document or the documents. It's not something that Mr Dillon should have to answer, Commissioner.

THE COMMISSIONER: Yes, Ms Harris.

40 MS HARRIS: Commissioner, it's a fair question, because Mr Dillon's evidence - - -

45 THE COMMISSIONER: What do I do with his answer, Ms Harris? I mean, it hardly comes after however many years as a judge as surprise to have counsel say, "Look at the contemporaneous notes, they are more likely to be accurate than memory some years after the event." Now - - -

MS HARRIS: Commissioner - - -

THE COMMISSIONER: What am I meant to do with Mr Dillon's answer?

MS HARRIS: Commissioner, that will be my submission and, as a matter of fairness, I'm putting it to Mr Dillon. And if I'm not required to do that as a matter of
5 fairness, then I will move on.

THE COMMISSIONER: Well, if you think it fair to put it to him, you put it to him.

THE WITNESS: I – am I allowed to answer?
10

THE COMMISSIONER: Having cut you off, Mr Dillon?---Sorry.

Having cut you off, I can now say yes, go ahead and answer?---Well, I would accept that the hypothesis that his short-term memory is going to be better than my long-
15 term is true. However, I know for a fact – I'm not using memory to say that I never spoke about putting money in a trust and all that sort of thing, because I never had that plan. Ever. And I know that for a fact. So I know, therefore, that part of that comment is not accurate.

20 MS HARRIS: You did tell Ms Dias yesterday that you were planning to sell the Mooloolaba unit?---We were.

But that it didn't sell?---It didn't.

25 So at least that part of the note, you would accept, is correct?---And we pulled it off the market because our advice became that to use superannuation to pay down this was crazy, even though the bank wanted that. So we pulled it off the market and it has not been back off the market since.

30 I understand. Now, again, these are matters that I need to put to you as a matter of fairness, Mr Dillon, because the evidence that will be led on behalf of the bank and also from Mr Bassett is different to your recollection?---I'm sure it is.

You say in your statement that NAB had no issue with you retaining excess funds
35 generated by the sale of Goanna Downs?---Correct.

And you are aware, having read the statement, that there's no mention of it in this document created by Mr Bassett.

40 THE COMMISSIONER: Sorry, what's "it". What is the question?

MS HARRIS: The assurance by Mr Bassett that NAB had no issue with you retaining funds generated by a sale of Goanna Downs.

45 THE COMMISSIONER: So put the question again, because I'm not – I'm confused by it. Put it again.

MS HARRIS: If the Commission pleases.

5 You accept that there is nothing in Mr Bassett's record to the effect that he had given you an assurance that NAB had no issue with you retaining excess funds generated by a sale of Goanna Downs?---I accept that.

And, as I know you are aware, Mr Bassett will give evidence to the Commission and has sworn a statutory declaration for that purpose?---I'm aware of that.

10 And his evidence – it will be to the effect that, in accordance with his experience and usual practice, it would have been highly unlikely for him to have given you any assurance regarding the application of the sale proceeds?---People often say things to achieve an outcome that they normally wouldn't, but I accept what was said.

15 So again do you accept that the absence of that important detail from Mr Bassett's near contemporaneous note may be a more reliable indicator as to whether or not that assurance was given than your unassisted recollection, Mr Dillon?---No, I don't accept that.

20 Okay. Mr Dillon, in paragraph 23 of your witness statement – actually, Mr Dillon, I think we have covered the ground we need to cover there and I won't trouble you further on that. Just excuse me, please. Now, Mr Dillon, the property went to auction in April 2015, on the 22nd of that month?---I think that's the date. I would say that's correct.

25 You said very early yesterday, but then assisted by that email that we saw - - -?---Yes, I saw the dates on the email where he wished us luck, so I'm assuming that's correct.

30 That's the date. And in paragraph 25 of your witness statement, you say:

35 *We sold Goanna Downs on 30 April for 2.2 million to the highest bidder at the auction. The offer was below what we were hoping to receive for the property. However we decided to accept this lower offer because I felt some pressure from the NAB to sell.*

?---Correct.

40 And you repeated that yesterday in your evidence you said yesterday:

We accepted it because we felt under pressure from NAB.

?---Yes.

45 Now, the \$2.2 million was within the range for which the property was advertised?---That was not an ad, it was a story, and I don't remember that fellow, and giving him those numbers. It was never advertised at 2.2 million.

That article, of course, quoted you extensively, Mr Dillon - - -?---Doesn't mean it's accurate.

5 So are you – you're still disputing that those were the figures that were given to the author?

THE COMMISSIONER: Well, given by whom, Ms Harris?

10 MS HARRIS: Are you disputing that those figures were given - - -?---I certainly do not recall ever giving him a number at 2.2. Ever.

I see. All right. Now, we saw yesterday the email exchange that you had with Mr Bassett on 22 and 23 April where he wished you luck and asked you how it went?---Yes.

15 And you came back and told him your story of your "strange day". Now, we can bring that email train back up, if you like, Mr Dillon, but there was nothing in that email exchange, was there, that you could characterise as pressure from NAB to sell the property?---No, not in that exchange, I don't think so.

20 So Mr – and there were no communications that you recall after that exchange between you and Mr Bassett prior to you doing the deal at 2.2 million?---No.

25 Now, I want to understand then, and give you an opportunity, Mr Dillon, to say why you felt pressure from NAB to accept \$2.2 million when you did so on 30 April?---We had felt pressure for some months, from the very first meeting with Mr Bassett, when he was quite aggressive about the whole Goanna Downs situation, "We have got to get it sold, we have got to get money into the business," etcetera, etcetera, etcetera. That was the first time I felt really pressured. I have to say up
30 until Mr Bassett became our business – or he was a business manager at that stage, we had never felt pressure, but just that they would like it sold to make things easier for us. We had conversations. I cannot quote the dates, the times, because we did speak in between the two, and it was quite clear from the conversations that over that
35 period of months that I had with Mr Bassett that they were very keen to see the property sold. We also were keen to see the property sold. It's not like we didn't want to sell it. We were keen to move to Melbourne, my kids were coming back, all that sort of thing. But we had an expectation of a price. I had another – he was a client actually, a client of the farm who is a very wealthy fellow, who was prepared to pay 2.5, he had told me that, but he couldn't pay it for a year because he had to
40 wait until he got his stallion check, he's a stallion owner, and we had to make a calculated decision, "Do we say no and wait for Ray and see what sort of pressure comes on or do we just bite the bullet and accept the lower number and move on with our lives? We can go to Melbourne and buy a house and get things done." We took the latter option.

45 And was that – was the 2.5 offer in 2015, was that the one that you had reluctantly accepted in the sale that fell through in 2010?---No, it was not.

I see. Mr Dillon, the property was already on the market by the time you met Mr Bassett on 2 March?---I would think so, yes. The timing of all this is difficult, because every year we had to take it off the market for around about five months, because once we had made a commitment to our clients to foal their mares down and
5 do all that, you can't just pull out in the middle of the season and they don't know what to do with the mares and foals and all the rest of it. So each year we had to make a decision, come foaling season which starts on 1 August, to pull it off if it hadn't sold, and then reinstitute the process once the foaling season was over after Christmas.

10 But at the meeting on 2 March you discussed the agents you had the property with, the marketing plans, the amounts that you had spent on advertising, that was your evidence to the Commission this morning?---That would more than likely be correct, yes.

15 Indeed. And at that meeting, or thereafter, you provided Mr Bassett with advertising material?---We did.

20 Whether or not created by you, that said the range is 2.2 to 2.4?---Well, I obviously supplied him that story. It wasn't an ad, because we managed to get a couple of stories in various papers from journalists who look for interest pieces, and that was clearly one of them, I would say.

25 And you've said that you conversations with Mr Bassett in between 2 March and his email to you on 22 April, but you can't recall any of the detail?---No.

And you don't have any record of those conversations?---No, I don't.

30 Thank you. Mr Dillon, you do recall having a conversation with Mr Bassett on 30 April, do you, after the sale contract had been signed in which you discussed your plans for the sale proceeds. Do you remember that?---Not really.

35 Can I bring up NAB.134.007.9169. It's at tab 104 of McNaughton. Have you seen this document before?---I have.

When did you see that?---I – I've seen it in the preparation for this Commission.

I see?---Whether I saw it before, I don't remember.

40 Whether you saw it before you prepared your statement or not, you mean?---Yes.

MS DIAS: Commissioner, sorry to interrupt. Might pull this down. It has a redaction that hasn't been made that needs to be made.

45 THE COMMISSIONER: All right.

MS HARRIS: Have you got that document in front of you?---No.

We will get you a hard copy, because I want to ask you a question about it.

THE COMMISSIONER: We are finding a clean copy somewhere.

5 MS HARRIS: So just to check, Mr Dillon, have you got a document that bears in the top right-hand corner the notation NAB.134.007.9169?---I do.

10 You see that the bottom of that email chain is the email from your solicitor to Mr Bassett attaching the front page of the contract of sale?---I do.

And then you see the top email is one from Mr Bassett to Mr Moynahan – Ms Moynahan, I beg your pardon, a copy to her assistant Ms Chang, attaching the contract. And then he says:

15 *In my brief discussion with Ross he advised the following with respect to his initial plans with the funds.*

And you see what's there set out:

20 *Pay out 1.15 against the property.*

Which was your personal borrowing?---Yes.

25 200,000 into National Music?---Yes.

Continuing:

30 *Pay out credit cards and invest the rest into an annuity type investment identified bank shares and strong dividend yield to enable his drawing on National Music to reduce by \$50,000 per annum.*

Now, you see that that email is sent to Ms Moynahan not long after he has received the contract of sale?---I do.

35 Having read that email, do you recall the discussion with Mr Bassett shortly after the contract was signed?---No.

40 So assuming for present purposes that it correctly records what you told Mr Bassett on that occasion, you see there is nothing in there about buying another property?---No, that's correct.

45 Again, I need to put to you, Mr Dillon, that with the passage of time is it possible that you are mistaken in what you say you told Mr Bassett about needing the proceeds of sale to buy another property?---No, it is simply not possible. There are other documents which I am sure you will see in due course that prove my argument.

And what documents are you referring to, Mr Dillon?---I'm not able to show them to you, because I don't have them.

Who has them, Mr Dillon?---I couldn't tell you. I don't know the answer to that.

5

I see?---Perhaps other people have them.

Now, Mr Bassett then consulted with Ms Moynahan, and the evidence will be that she told him that all of the proceeds would need to be remitted to NAB to pay down debt?---I have read that.

10

And Mr Bassett then called you on 1 May, and this is the conversation that you deposed to in paragraph 27 of your statement?---It is.

And that's the one in which you say, your recollection is you said "What are we going to buy a house with"?---Exactly.

15

But having seen Mr Bassett's note of his discussion with you the day before which makes no mention of buying a house, you don't accept that you're misremembering - - -?---No.

20

- - - that that is something that you told Mr Bassett?---No.

Now, it was your unhappy conversation with Mr Bassett on 1 May that led to the meeting between you, Mr Bassett, Mr McMahon, Louise Buchanan on 4 May and you gave some evidence about that yesterday, although you said you didn't recall much of the meeting. Is that right?---That's correct.

25

Now, that meeting was summarised in a document to which you were taken yesterday. Can we bring it back up. It's NAB.134.009.2614.

30

THE COMMISSIONER: Exhibit 17 to Mr Dillon's statement, is it?

MS HARRIS: It may be. It's exhibit – tab 110 of Mr McNaughton's statement. Yes, it's the same document, Commissioner.

35

Now, we don't need to go through the whole of the email again. I need to ask you about your evidence about what appears under the words "Goanna Downs" and the email records:

40

An unconditional sale contract has been secured on Goanna Downs for 2.22 million to be settled mid-June 2015. Ross has indicated that he is willing to provide the following to NAB from the net funds – net settlement funds of 2.12 million.

45

Perhaps we should just bring up alongside 2615 so you can see the balance of that. Now, your evidence yesterday was that that was an inaccurate characterisation of what you had said at the meeting?---Correct.

5 I think yesterday you said, “We weren’t asked”?---Exactly. We were told. It was not that I was willing to do anything. We were told what we were doing.

10 So just so I’m clear, Mr Dillon, you say Ms Moynahan told you that you had to do what appears under the words Goanna Downs, that you had to provide funds for the net settlement proceeds against the five facilities that are there mentioned – four facilities that are there mentioned, with a total pay down of 1.598 million?---I don’t recall a specific mention of which funds. I just recall we were told that all the funds from the sale would be Used to apply to debt.

15 Yes. Well, so that - - -?---I can’t be – I can’t be specific about the exact individual things because that took two or three weeks to settle what was coming off what.

20 Well – so this is the reason for my question, Mr Dillon. Later in the email, she makes clear that all of the net proceeds are to be applied, but that is in an amount greater than what appears in that summary. In that summary, the total pay down is 1.958, not the total net settlement funds of 2.12 million. Do you see?---No, I don’t. Where are you looking? Which page?

25 Do you see underneath, when we go further down, why don’t you read from NAB facility secured by Goanna Downs on the second page, down to the bottom of the page and in particular, what appears immediately under Goanna Downs at the bottom of the page?---Yes, I see that. She is talking about a shortfall of 257,000.

30 I’m referring not just to that but the first sentence:

The proceeds of the Goanna Downs property sale are to be applied to the NAB facilities as detailed above.

35 And I realise that it’s confusing, but it’s a different proposal to the one that appears on the preceding page where only part of the funds were to be applied?---That doesn’t surprise me.

40 And so in her email she is doing two things: she is recording something she says you told her that you were willing to do, and then she is saying that doesn’t come up to scratch, and NABs position is that you are going to have to apply all of the proceeds?---Correct.

And so - - -?---Want to say something.

45 - - - again, there’s no criticism, Mr Dillon, with the passage of time and accepting, as I said yesterday, your memory of this meeting was not clear. I’m suggesting that you did, in fact, say to her at that meeting that you were willing to provide those funds as

set out under the first Goanna Downs heading?---I would say to you that we accepted that we were told we would apply all funds. I don't even accept that I said a number, because I didn't know what the balance would be. I also would like to say that I didn't understand this document, Michael McMahon didn't understand it, Louisa Buchanan didn't understand it, and our accountant couldn't make sense of it. None of it added up.

Can I take you to another document, NAB.134.006 .4199 which is tab 112 to Mr McNaughton's statement. Do you see this is a continuation of the same email chain. See at the bottom of the page, Ms Moynahan's email to you. And then your response. Can you read that to yourself, please?---Yes.

And you apologised for seeming a little aggressive and say you were taken by surprise and that up until Friday morning, which would be 1 May probably, when you spoke to Mr Bassett, you had been led to believe that all was on track and the injection of 200,000 would fix any issues the bank had. You say:

I fully accept your analysis of our situation.

And so on. Then you say in the third paragraph:

Thank you for your preparedness to disburse the sale proceeds as requested. I did try to show good faith by putting as much as possible into debt reduction.

Now, Mr Dillon, does that assist you to recall - - -?---I can put some context around that.

Might I finish the question and then please go ahead?---Go for your life.

Does that assist you to recall that it was, in fact, your request that 1.958 million of the 2.12 million sale proceeds were to be applied to NAB facilities to reduce debt?---We were told they would be applied. We were now in a situation where they had taken what security we had. We were extremely fearful that they would shut us down altogether, once they had their money. A decision was taken that the only way forward for us – because we had no option to go to another bank, because they had already sold the property, if we approached the bank to take over our finances with no Goanna Downs, only a business that was struggling – which was never in dispute – we would not find anybody. So we had to make a decision that whatever the bank wanted at that point in time, we would comply. I don't recall specific numbers in this thing. But all I knew was that they were taking the lot.

Mr Dillon, I have to draw your attention to the language that you have used.

Thank you for your preparedness to disburse the sale proceeds as requested.

That is requested by you?---I write a very polite letter when I can because we were trying to get along with the bank.

5 You've said a number of times that you were in shock after this meeting and I want to understand why that was so, Mr Dillon. You said earlier that Goanna Downs secured your personal borrowings of \$1.15 million, plus National Music's overdraft facility, trade finance facility, market rate facility, bank guarantee facility, and your business card facility. You knew that?---We did.

As at 4 May 2015, leaving aside your personal borrowings, National Music's facility secured by Goanna Downs stood at almost \$2 million. Do you accept that?---Yes.

10 And once the property – that security asset, had been sold, that security for those borrowings would disappear, would it not?---It would, but there are two additional points to that: (a) our facilities at no stage in the entire history of National Music have ever been anywhere near maxed out. They usually operated between 60 and 70 per cent of capacity, even though the bank treats it as 100 per cent. And the second
15 point has gone – get too angry.

At the time that this security asset was sold, you had nothing to replace it to security those facilities?---Well, no. Because the intent, strangely enough, was to use the house we bought in Melbourne as additional security.

20

But, Mr Dillon, there is not a word about that in any of the documents that I have shown you?---None in the ones you have shown me, I'm sure.

No. And I'm sure – Mr Dillon, if I was aware of such a document, I would be
25 required as a matter of fairness to show it to you. I could not put these questions if I was aware of such a document. I want you to understand that and, no doubt, Counsel Assisting would have put such a document to you. The only document of which I am aware in which you made such a statement was the one back in 2010. Now, Mr
30 Dillon, you said on a number of occasions that Ms Moynahan told you during this meeting, and the exchanges that you had at this time, that her problem was the lack of security. You said that yesterday in your evidence?---I knew that was her
problem.

35 And you've also said both in your statement and in your oral evidence that if NAB didn't continue to support you, no other bank would lend to you, because of the lack of that security?---Don't you think, if we knew the bank was going to do what it did, that I wouldn't have gone to my brother and got the half a million dollars he later put in, to stop losing our home? We had an expectation that we would have a home in Melbourne. Kevin Matthews, our first banker, knew it. Michael Swindell, our
40 second banker, knew it. Shaun Bassett knew it. Doesn't seem to matter.

Mr Dillon, let's move on to reduction in facility limits. You've said in your statement, and then again in your evidence, that NAB insisted that the limit of the trade finance facility must be drastically reduced and in fact reduced it by more than
45 half. You've said that in paragraph 34 of your statement?---Correct.

And you say in paragraph 36 that Ms Buchanan, who managed the finances of the business, calculated that you would need a minimum trade facility level of at least 50 per cent more than NAB was willing to provide?---Correct.

5 And you said yesterday to the Commission, at transcript 2836:

We were going to lose the home, but it was made clear at the 4 May meeting that they were going to also reduce our facilities not only to the level of the payout would allow, but even lower, and that was just disastrous.

10

Do you recall that?---I do.

And you say in your statement at paragraph 37 that there were other facilities which NAB could have reduced, which were not as vital to your business, being the asset finance facility and the debtor finance facility?---Yes.

15

You see that in paragraph 37?---The asset facility. Which is the asset facility? That's the car leases, okay.

20 Indeed?---And what was the second one?

The asset finance facility and the debtor facility. The asset finance facility – do you have your statement there, the exhibits to your statement there?---No.

25 We can – can Mr Dillon be provided with a copy of his – we can just bring it up on the screen NAB.005.342.1795. It looks like I've slowed the system down again, Mr Dillon, I'm sorry. We have a clean copy. It's a little one. Are you able to read that, Mr Dillon?---That's fine.

30 All right. Let's do that, it will speed things up a little bit.

THE COMMISSIONER: As to which, Ms Harris, how much longer do you expect to require?

35 MS HARRIS: No more than 10 minutes?---So what am I looking for in this?

Tab 5?---Tab 5, yes.

40 That's what you've identified in your statement as the asset finance facility?---Yes.

And that's the – as you say, was the facility that you used to acquire cars and so on, and that was an arrangement whereby, in effect, NAB acquired the car and then leased it back to you or loaned you the money to do it on security of the cars?---Yes.

45 And then the preceding tab is the debtor finance facility. And that was an arrangement under which you sold your trade debts to NAB at a discount to their

face value?---Well, they pay 80 per cent up front and then when the debt is paid, they pay the balance.

5 And so that was the thing that allowed you to offer credit terms to your customers; is that right?---Yes.

Yes. And neither of those facilities was secured by Goanna Downs, that's what you said - - -?---No, I think they're secured by mortgage over stock and debtors.

10 Indeed. And in paragraph 37 of your statement, you say that NAB could instead of reducing the balance – sorry, the limits on the trade finance facility, it could have reduced the limits on those facilities. Do you see that?---I do.

15 And you say and that wouldn't have done as much damage to the business?---Correct.

20 Now – and you say at paragraph 37 that NAB didn't understand the importance of the trade finance facility and that the reduction in the limits caused you to suffer those losses that you refer to in paragraph 38?---They certainly did.

25 Now, I need – again as a matter of fairness, Mr Dillon, I need to point out to you that the contemporaneous documents indicate that National Music decided how the limits in its facilities were to be reduced?---I am aware of the fact that Louisa and Nigel did the negotiating with Margaret. I'm also aware that the quantum of the amount that they were taking off the facilities, there was really no option but to take it off trade, because those facilities were not secured by Goanna Downs. So when you look at the range of facilities and the amount that had to come off, most of it had to come off trade. There was no option to – you might have fiddled 50,000 here or there, but that's basically – it was my understanding that because there was such a large amount coming off, the biggest figure in there is trade. That's where it had to come from. These were not included.

35 So let's pick that apart for a minute. You said that these two facilities, the asset finance facility and the debtor finance facility were not secured by Goanna Downs. So do you accept that reducing the limits of those facilities didn't solve the security problem that Ms Moynahan had raised with you?---It did.

40 How could it solve that security problem?---Well, if they hadn't reduced everything as much as they had, they would have had a house to use as alternative security plus the mortgage on stock and debtors. They always try and get double the cover they need. That's just the bank's process. But we were more than covered.

45 And, again – but again you accept that you hadn't proffered another property as substitute security?---Well, I didn't have another property.

Indeed?---Because we were trying to buy one and they had made it clear that we couldn't. Therefore, we couldn't offer it.

Mr Dillon, can I take you to a number of emails which follow the discussion that you had on 4 May. The first one is tab 114 of McNaughton and it's NAB.134.006.4829. This is an email from Ms Moynahan to you on 5 May and where she makes clear that the proceeds of Goanna Downs are to be applied to the NAB facilities. And then
5 towards the bottom of that second paragraph, she says:

There will be a shortfall. This will need to be rolled into the new facilities. The discretionary part of the settlement will be how the remaining facilities are structured and this will be something that you will discuss with Shaun.

10

So you were given a discretion around the structure of the facilities. Do you see that?---Yes, yes.

And then on 6 May, the next day, Mr Bassett wrote to you. It's at NAB
15 134.006.4834, tab 120. I'm sorry, 134.006.4834. Mr Bassett writes to you on 6 May:

Application of funds. Portfolio facility to be paid out. Balance of proceeds to be applied to a combination of the following facilities –

20

which were all the ones that were secured by Goanna Downs –

with facility limits –

25 his emphasis –

to be reduced by 970,000. Respective mix of limit reductions to be guided by National Music.

30 Do you see that?---I do.

And then you met – you've given evidence that you and Ms Buchanan and Mr McMahon met with Mr Bassett and Ms Moynahan on 1 May and then on the 12th she followed up with another email asking you how you wanted those limits to be
35 structured. Can I show you that email. It's NAB.134.009.2649, tab 122 of McNaughton. She says she has collated the account information in an Excel spreadsheet, we will come to that in a moment:

The remaining facility limit to allocate between the various National Music accounts will be close to 1.9 million.

40

Then she says:

If Louisa could please have a look at the remaining facilities and the accounts they are required to service and complete column D in the spreadsheet. This will enable us to get documentation and arrangements underway prior to settlement.

45

The spreadsheet is 134.009.2650. And you see in column D, the one that Louisa has been asked to complete, she has been asked to complete the column relating to the limits. That is, to suggest what the new limits should look like for those facilities. Do you accept that?---Yes.

5

And now I can – perhaps I can skip to document 134.006.4835. This is tab 127 to McNaughton. You see that’s an email from Mr Fischer. Perhaps we can bring up the second page of that 4836 as well, while we’re looking at it, and he says:

10 *On behalf of Ross Dillon and National Music the following facility reduction proposal is now provided.*

And he says of the broadly agreed 970,000 available funds from the sale of Goanna Downs, 20,000 be made available to Ross Dillon to reimburse for advertising costs.

15 Do you see that?---Yes, I do.

And after reduction of the \$20,000 advertising costs, 950 would be available for a reduction in the National Music facilities and then he sets out National Music’s proposal for how that is to occur. Trade finance facility limit of 650,000 reduction and a reduction in the overdraft of 200,000. No reduction in any of the other facilities in column D of the spreadsheet?---Where’s column D?

20

I beg your pardon, the one that we just saw. I can read them to you. The market rate facility, the business card facility, the bank guarantee facility?---Okay. The market rate facility they had requested monthly payments, so that was ignored.

25

But, Mr Dillon, that was ignored because you chose to ignore it. NAB left it to your discretion as to how to change the limits?---I would point out, you treat this like I was sitting in my office at National Music over this. I was filing down files at 4 o’clock in the morning and other people were handling this, not me.

30

I understand that?---However – however, having said that, if you do the maths, you are trying to apply \$950,000 to a limited range of the facilities. Can we go back to the previous document with the numbers on it.

35

The spreadsheet?---Yes.

That is NAB.134.009.2650.

40 THE COMMISSIONER: And I think it needs to be displayed, landscape rather than portrait, because there’s a further column.

MS HARRIS: Yes, that’s correct, Commissioner.

45 Mr Dillon, you wanted to make a point about this document?---Okay. If you look at the ones in brown in the middle, 5 to 11, the portfolio facility was limited – eliminated.

Indeed?---The business card facility, which is what our reps operate on when they travel around Australia – so you need something – it was cut in half. We took that down to 20,000. The overdraft facility, if you recall, we had just applied for a \$100,000 increase, because we were fully aware in the bump in the road with the
5 Allans Billy Hyde thing, until September. So we could hardly reduce that from 260 when we were in the middle of applying for an extra \$100,000, because that was our cash flow.

10 But you did do it?---That would make – sorry?

You did do that, Mr Dillon. You did?---Yes. But - - -

In the proposal I just showed you did do that?---But it went back up again.

15 Indeed?---Indeed.

By 100,000?---By \$100,000.

20 Until 30 September?---The bank guarantee facility cannot be altered, because it's a guarantee to the landlord of the premises that we were in. So even if you reduced the market rate facility, you still have to take off 956 – probably 650,000 off it.

25 Well, no, the trade finance facility was reduced by 650,000. So if you had instead deployed some of that reduction against the market rate facility you wouldn't have had to reduce the trade finance facility by that much. Do you accept that?---Well, I would accept that we didn't do it. I would have to ask Louisa - - -

30 Indeed?--- - - - the rationale behind it. But my understanding, it was not touched because there was an arrangement to pay it on a monthly basis and that was much simpler.

35 Mr Dillon just going back, this is the final document I need to take you to, I think is the one we had up, NAB.134.006.4835. And do you see that, in numbered paragraph 2, Mr Fischer proposes those reductions which amount to 950,000, and then in paragraph 3 he volunteers further non-cash reductions to National Music facilities, including the reduction of the business card facility?---He was requested that. That was not volunteered. They wanted further reductions.

40 Mr Dillon, those numbers were not dictated by NAB, were they?---The non – the reduction of the of those bottom figures?

Yes?---They weren't dictated by NAB, but we were told we had to find another \$300,000 in those facilities secured by the business.

45 And when were you told that?---God, I have no idea.

No. Mr Dillon, the proposal that's set out in this letter was accepted by NAB, was it not?---It looks accurate to me.

5 I can show you tab 131 of McNaughton, NAB.134.006.4845. See the bottom email from Ms Moynahan to Mr Fischer, copied to Ms Chang:

Hi Nigel, I refer to your proposal below and advise it has been approved –

10 etcetera?---Yes.

Then you see Mr Fischer's response:

Thank you for this email and the good news within it.

15 Do you see - - -?---I didn't write it.

No, I know. But it was good news wasn't it?---It was good news they weren't going to shut us down, because up until that point we thought they might pull the pin and just say, "Goodbye."

20

Mr Dillon, there isn't a word in any of the documents to which I have taken you to that effect. I'm going to put - - -?---And I imagine there never will be.

25 I'm going to put to you, Mr Dillon, that in fact NAB has supported National Music, through some pretty difficult times, including these ones and continues to do so?---I would agree NAB has been amazing before and after the arrival of Shaun Bassett and Margaret Moynahan.

30 I have no further questions, Commissioner.

THE COMMISSIONER: Thank you. Mr Tehan, do you have anything?

MR TEHAN: No, Commissioner.

35 THE COMMISSIONER: Ms Dias?

MS DIAS: No, Commissioner.

40 THE COMMISSIONER: Yes, Mr Dillon, you may step down and are excused?---Thank you.

<THE WITNESS WITHDREW

[11.04 am]

45

THE COMMISSIONER: Yes, Ms Dias.

MS DIAS: The next witness in this case study is Mr Shaun Bassett.

THE COMMISSIONER: Yes. Is Mr Bassett in the hearing room? Is it your witness, Ms Harris?

5

MS HARRIS: He is not, Commissioner. Mr Lippett is here on behalf of Mr Bassett.

MR LIPPETT: Mr Bassett was asked to remain out of the room during Mr Dillon's evidence.

10

THE COMMISSIONER: Yes. Well, can someone arrange to get him.

15 <SHAUN BASSETT, SWORN [11.06 am]

<EXAMINATION-IN-CHIEF BY MS DIAS [11.06 am]

20

THE COMMISSIONER: Thank you very much, Mr Bassett. Do sit down?---Thank you.

Yes, Ms Dias.

25

MS DIAS: Thank you, Commissioner.

Your name is Shaun Bassett?---Yes.

30 And you provided your address to the Commission?---Yes.

Mr Bassett, you have sworn a statutory declaration dated 18 May 2018 which you have provided to the Commission in relation to this case study?---Yes.

35 I tender the statutory declaration, Commissioner.

THE COMMISSIONER: That will be exhibit 3.137, statutory declaration of Mr Bassett.

40

EXHIBIT #3.137 STATUTORY DECLARATION OF MR BASSETT DATED 18/05/2018

45 MS DIAS: Mr Bassett, you worked at the NAB from September 2014 to August

THE COMMISSIONER: Is Mr Bassett here on a summons?

MS DIAS: Actually, that is true. Do you have your summons there, Mr Bassett?---Yes.

5

We will tender the summons as well, thank you for that.

THE COMMISSIONER: Exhibit 3.138 will be the summons to Mr Bassett.

10

EXHIBIT #3.138 SUMMONS TO MR BASSETT

THE COMMISSIONER: As I say, it's – to make quite plain he is here under
15 compulsion, and therefore entitled to the protections of the Act, not just mindless
form and solemnity. Yes.

MS DIAS: Quite.

20 Mr Bassett, you worked at the NAB from September 2014 to August 2016; is that
correct?---Yes.

And before that you had worked over 13 years in business banking?---Yes.

25 ANZ and Macquarie banks?---Yes.

And in February 2015 you were the senior business banking manager at the
NAB?---Yes.

30 And at that time you took over the relationship of the National Music facilities
file?---Yes.

And when you took over the file you would have familiarised yourself with the
file?---Yes.

35

And in your declaration, your statutory declaration, you say you're a very
experienced and capable banker?---Yes.

40 You arranged to meet with Mr Dillon, one of the directors of National Music, in
early March 2015?---Yes.

Now, you say you can't recall the date or the precise details of that
conversation?---Yes.

45 But you do recall part of the conversation related to the potential sale of Goanna
Downs?---Yes.

That was Mr Dillon's home?---Yes.

Were you present for Mr Dillon's evidence, Mr Bassett?---No.

5 But you are aware that he says that he recalls he discussed with you that he would use the surplus proceeds from the sale of his home to inject 200 to 300 K, or thousand, in capital or cash into the company and use the proceeds to buy a small home in Melbourne?---Yes, I'm aware of his evidence to that effect.

10 Now, you don't deny – and you can't deny, Mr Bassett – that Mr Dillon told you these things, because you can't recall the conversation?---Yes.

You are agreeing with that proposition?---I'm agreeing with I can't recall the exact details, so I can't say that he did not unequivocally.

15

Thank you. Now, Mr Dillon has also told the Commission that Goanna Downs went to auction on 22 April, but did not sell at the auction. Do you recall that?---Yes. Because I've seen that in his statement.

20 Yes. Thank you. And it was around 27 April that you referred National Music's facilities to the strategic business services, or SBS, division of the NAB?---Yes.

And the referral was due to National Music informing you that there would be a shortfall coming up in about the middle of 2015 and they needed to get an uplift in the facilities?---Yes.

25

And then the evidence is also that Goanna Downs sold after the auction and Mr Dillon emailed you to let you know about that?---Yes.

30 You received the contract and you forwarded it to the new SBS manager, or the impaired assets manager, assigned to the file. That was Margaret Moynahan?---Yes.

Now, Ms Moynahan sent you an email in response to your email, and that is at NAB.134.007.9166. This is on the same day that you received that contract, Mr Bassett. We will just bring that up, and you've got a screen there. It should be shown to you. Thank you. We might put the two pages side by side. 9166 and 9177. Mr Bassett, have you seen this email recently?---Yes.

35

Were you provided a copy of this by the legal team for the NAB?---Yes.

40

Now, at 9166, we see Ms Bassett's email to you in response to you sending the contract. - - -?---Ms Moynahan's.

Ms Moynahan, sorry, yes. She says:

45

We are currently funding cash flow through trade finance and invoice finance facilities, with majority of lending cat E and to have a further application for

200,000 to assist with cash flow. We should pay down our facilities from the sale of Goanna Downs and, therefore, will require all net funds to NAB. The reduction in debt should provide an ideal opportunity for the business to restructure and I recommend undertaking the business review.

5

And then we see further down that paragraph:

Our primary exit following the settlement of the property will be inventory and debtor recollections.

10

And you respond in response to her email:

Thank you Margaret. How would you like below communicated to client? Further, do we have an outcome on the short-term funding request, or is this contingent on your review of figures below? Ross is located interstate, so it is likely a phone call is required to ensure not too much time is lost in communicating below.

15

Now, this email exchange makes it clear, does it not Mr Bassett, that neither nor anyone else at the NAB had communicated this to Mr Dillon before?---Yes.

20

Now, after that, you received an email from Mr Ross Dillon in which he saw that he had asked for the discharge authority, and he saw this and was suspicious; is that correct?---Yes.

25

You forwarded that email to Margaret Moynahan; is that correct?---Yes.

I want to take that to you, that is exhibit 108 to Mr McNaughton's statement, that is NAB 134.007.9183. We might just put the first two pages up, 9183 and 1984.

30

Thank you. So the first email we have just referred to that is Mr Dillon's email to you saying he is very suspicious of the NAB, its motives, and then you forwarded that to Margaret on 30 April at 6.18 pm:

Hello Margaret. Refer below. I will not respond to the email below until you direct me. However, given nature of email, it is clear we will have to respond shortly to Ross that they are clear what we are proposing. Regards, Shaun.

35

Margaret has been written back to you:

It would be good to understand what arrangements were discussed with the customer regarding the sale of the property. What expectations were communicated to the customer regarding the utilisation of the proceeds of sale? Were the customers aware of the facilities secured against the property? If you can provide the background of your conversations with the customer, it may make it easier to understand his comments.

40

45

Now, were you shown this recently, Mr Bassett?---Yes.

Thank you. Now, you responded to that in an email the next day, which is exhibit 109 to Mr McNaughton's statement. That's NAB.134.007.9186. Thank you. Do you respond – this is the next day, Mr Bassett:

5 *Hello Margaret. I certainly have never communicated what bank's expectation would be upon sale of Goanna Downs. Ross has told us before that upon sale of the property, he intended on putting 200,000 in funds into the National Music, but at that time we did not talk about debt reduction. Not at any stage have I discussed what the bank will require as debt reduction and what*
10 *facilities the property secures. The property was on the market before I actually met or had my first discussion with Ross, I do not know what conversations were had prior to my looking after this connection, and I was only handed the relationship in February of this year. Hopefully this helps.*

15 Now, I want to put to you that you didn't communicate what the bank's expectations would be, because you had no idea yourself, is that correct?---Yes. Because it's not within my discretion to determine what the proceeds – how the proceeds are ultimately be dealt with in debt reductions.

20 Yes, you refer to that in your statutory declaration as well. You say you wouldn't have given Mr Dillon assurances about use of the funds as he claims, or as you say he claims?---Correct.

25 Because you are an experienced banker and you would not have indicated any approval of any sort without credit approval by a credit executive; that's correct?---Correct.

30 Now, you had a telephone discussion with Mr Dillon on 1 May. Do you recall that discussion?---No.

35 Mr Dillon has given evidence that he reacted to your telephone discussion. It was anger, but you're saying you don't recall that?---No.

40 I want to show you another email. This is an email from Ms Moynahan to you dated 4 May and the doc ID is NAB.141.001.5774. Thank you. So at this time do you remember there had been a meeting and Margaret Moynahan said the facility limits had to be decreased for the National Music trade and other facilities?---Yes.

45 Now, this is a draft of an email which Ms Moynahan sent to you which was ultimately finalised and sent to National Music the next day. Have you seen this before?---Yes.

Has it been provided to you by the NAB legal team recently?---Yes.

45 Ms Moynahan has inserted some comments in red further below on this page, and there are other comments on the next page which we will come to. Actually, if we

could have both pages put up, that would be helpful. The first comment is under the heading Key Metrics. It's in red:

5 *If we look at the repayment table below then the calculation is existing facilities.*

And there's a figure there:

10 *Plus shortfall on facilities from sale of property. NAB security is debtors plus inventory. I don't know what percentage we would apply to this number as being a realistic recovery.*

Then on the next page, Ms Moynahan says to you:

15 *Shaun, my initial thoughts were to advance the 100 K –*

and I interpose there that is what was being requested, except that it was a figure of 200 that was being requested; is that correct?---Yes.

20 Yes?---I understand that, yes.

Yes:

25 *Based on their cash flow forecast and deliver the news that all funds from the sale will come to NAB. However, if my numbers are right – and if you wouldn't mind sense checking them – then we don't have sufficient security for the facilities required and should consider advising the customer of reducing limits. Can you please read the above, sense check it, and make any amendments in red and any suggestions you have. Thanks very much, we should be able to send this off to them tomorrow am.*

30

Now, again this confirms this was all news to you, Mr Bassett?---Yes.

35 Now, you respond to this in an email that is at NAB.141.001.5878.

40 *Hi Margaret, all of the below makes sense. Your numbers look correct, so yes, rationale to have limits reduced is reasonable. However, we probably have to balance this with them being able to continue to trade utilising working capital facilities. I would support advancing the 100 K assistance through to September. Regards Shaun.*

45 Now, is it fair to say that you realised that the businesses needed the trade facilities and you are trying to make sure, with this email, that the limits are going to be reduced in a way that allows the company to continue to trade?---Yes.

So I just want to recap on your evidence, Mr Bassett. It's correct to say that you did not tell Mr Dillon that the NAB would take all or nearly all of the proceeds from the

sale of Goanna Downs because you didn't know of that plan before Ms Moynahan informed you of it?---Yes. However, I was aware that the bank had had discussions previously that proceeds would come from sale of the property for both business and

5

But you didn't know how much or the amounts?---But I did not know how much, no, correct.

10 And it's also correct to say that you didn't tell Mr Dillon what would happen to the facilities after the sale, the National Music facilities?---Correct.

Thank you. No further questions, Commissioner.

15 THE COMMISSIONER: Yes. Ms Harris.

<CROSS-EXAMINATION BY MS HARRIS

[11.21 am]

20 MS HARRIS: Mr Bassett, just one question. Can we bring up NAB.005.376.1199. Do you see this is a close monitoring action plan, dated 19 March 2015, on the National Music file. Can you just take a moment to read it, in particular what appears under – from Comments Details to the end?---Yes.

25 What is that document?---That's a close monitoring action plan. So something that, as a front line banker, we – I would put together to perhaps recommend or recommend a close monitoring plan with a client.

30 And in the first line under Comments Details, there's a reference to:

SBBM has subsequently met with the client –

etcetera. Who is SBBM?---That's myself, senior business bank manager, yes.

35 Thank you. And under the heading Additional?---Yes.

Can you see a couple of lines in there's a sentence that starts:

SBBM has met with Ross.

40

?---Yes.

Can you read from there to the bottom of the paragraph, please?---SBBM has - - -

45 No, just to yourself, if you don't mind. I beg your pardon?---Yes. You will probably read it yourself.

Where did you obtain that information from?---I imagine that was in a conversation with the client at some point in time.

Thank you. No questions.

5

MR LIPPETT: I have no questions, Commissioner.

THE COMMISSIONER: Ms Dias.

10 MS DIAS: No further questions of Mr Bassett.

THE COMMISSIONER: Yes. Thank you very much, Mr Bassett, you may step down, and you are excused?---Thank you.

15

<THE WITNESS WITHDREW [11.24 am]

THE COMMISSIONER: Yes.

20

MR HODGE: Commissioner, is that a convenient time to take a 15 minute break? And the next witness will be Mr McNaughton.

25 THE COMMISSIONER: How are we travelling for time? 15 minutes is more than, I think - - -

MR HODGE: I would be content with 10.

30 THE COMMISSIONER: You can have five, Mr Hodge. I will be back at 11.30. I'm very worried about our time today.

ADJOURNED [11.25 am]

35

RESUMED [11.32 am]

THE COMMISSIONER: Yes, Mr Hodge.

40

MR HODGE: Commissioner, the next witness is Ross McNaughton.

<ROSS HUGH McNAUGHTON, AFFIRMED [11.33 am]

45

<EXAMINATION-IN-CHIEF BY MS HARRIS

THE COMMISSIONER: Do sit down. Yes, Ms Harris.

MS HARRIS: Mr McNaughton, your full name is Ross Hugh McNaughton?---That's correct.

5

And your business address is 500 Bourke Street, Melbourne?---Yes, it is.

And you're general manager of strategic business services at the National Australia Bank Limited?---I am.

10

And have you received a summons to attend today and give evidence?---I have, yes.

I tender that summons.

15

THE COMMISSIONER: Exhibit 3.139 summons to Mr McNaughton.

EXHIBIT #3.139 SUMMONS TO MR MCNAUGHTON

20

MS HARRIS: And in response to the Commission's rubric 3-19, have you made a statement dated 22 May 2018?---I have, yes.

Do you have a copy of that statement with you in the witness box?---Yes, I do.

25

And do you wish to make some corrections to a number of the figures which appear in that statement?---Yes, correct.

And have you made those amendments already in hand on the statement?---Yes, I have.

30

Mr McNaughton, I'm going to draw your attention to a number of paragraphs where those corrections appear, and as we go through them, would you initial, please, the places where you have made those handwritten corrections before I tender the statement. The first paragraph is paragraph 93. Do you see the balance of the trade facility was 707,000-odd and do you wish to change that to a figure of \$343,812.05?---I do, yes.

35

Please initial that. And then the total balance of the facilities which was formerly 3 million and 72 thousand-odd, do you wish to change that figure to \$2,618,797.62?---Yes, I do.

40

Could you please initial that. Paragraph 107, the balance of the trade finance facility there appearing as \$917,000-odd, do you wish to change that to \$963,362.60?---Yes, I do.

45

- Please initial it. And do you wish to change the balance total from 3.428 million to \$3,474,666.10?---Yes, I do.
- 5 Please initial that. Paragraph 138, again the trade finance facility, do you wish to correct the limit of that facility changing it from 1.5 million to 1.3 million?---Yes, I do.
- And do you wish to change the balance of that facility from 1.187 million to \$1,155,721.58?---Yes, I do.
- 10 Please initial both those changes. Do you wish to change the limit of the overdraft as at 18 February 2015 from 60,000 to 260,000?---Yes, I do.
- 15 Please initial that. And then the balance of all facilities, do you wish to change that from 4-odd million to 3,973,076.04?---Yes, I do.
- Please initial that. Paragraph 142, the limit of the trade finance facility, do you wish to correct that from 1.5 million to 1.3 million?---Yes.
- 20 And do you wish to balance from 1-odd million to 1,299,391.86?---Yes, I do.
- Please initial both those changes. Do you wish to correct the limit of the overdraft from \$60,000 to \$260,000?---I do.
- 25 Please initial that. And then the balance of all the facilities from 3.67 million to \$3,919,664.18?---Yes, I do.
- Please initial those changes. Paragraph 164, do you wish to change the limit of the trade finance facility from 1.5 million to 1.3 million?---Yes.
- 30 And the balance of that facility from 1-odd million to \$1,262,304.47?---Yes, I do.
- Please initial those changes. Do you wish to change the overdraft limit from 60,000 to 260,000?---Yes, I do.
- 35 Please change – please initial that change. And do you wish to change the total balance of the facilities from 3.59-odd million to 3,829,576.68?---Yes, I do.
- 40 Could you please initial those changes. Paragraph 209, do you wish to change the balance of the trade finance facility from 676 – hundred – thousand-odd to \$563,560.21?---Yes, I do.
- 45 Could you please initial that. And as to the balance of the facilities do you wish to change that from 2-odd million to \$1,912,503.94?---Yes, I do.
- Please initial that change. And then finally, paragraph 212, do you wish to change the balance of the trade finance facility to \$645,105.24?---Yes, I do.

Please initial that. And do you wish to change the total balance to \$1,956,325.61?---Yes, I do.

Please initial that. I tender the statement, Commissioner.

5

THE COMMISSIONER: Exhibit 3.140, statement of Mr McNaughton as amended.

No further questions. I - - -

10 THE COMMISSIONER: With its accompanying exhibits.

**EXHIBIT #3.140 STATEMENT OF MR MCNAUGHTON AS AMENDED
WITH ACCOMPANYING EXHIBITS**

15

MS HARRIS: Thank you, Commissioner.

THE COMMISSIONER: Yes. Yes, Mr Hodge.

20

<CROSS-EXAMINATION BY MR HODGE

[11.39 am]

25 MR HODGE: Thank you, Commissioner.

Sorry. You – I will just give you a moment, Mr McNaughton. Are you all right?---Yes.

30 Thank you. Mr McNaughton, you are the general manager – general manager of the strategic business services division in Australia of the NAB?---Yes, that's correct.

And you've held that position since May 2017?---Yes, that's right.

35 And the strategic business services division is sometimes abbreviated, I assume often abbreviated, as SBS?---Yes, it is.

And the SBS division deals with what you refer to as stressed or defaulted loans; is that right?---Yes, that's right.

40

And that may not necessarily mean that the customer is in default; it may simply be that there are warning signs that suggest the customer is under financial stress?---Yes, that's correct.

45 And before you took up your position as general manager of SBS, you had – you were already working for NAB in the UK; is that right?---Yes, that's right.

Before you were working for NAB in the UK you had been a banker since 1988; is that right?---Yes.

5 All right. And you having only come into your current position of May 2017, you weren't involved directly in Mr Dillon's file, or National Music's file?---No, I wasn't.

10 And you've been presented as the witness by NAB, though, to respond to Mr Dillon's evidence?---Yes, that's correct.

And in the course of preparing to give evidence you've reviewed Mr Dillon and National Music's file?---Yes, I have.

15 And does that extend only to the documents within the SBS file or is that all documents across – that are held by NAB, or are they the same thing?---I have seen additional documents beyond those that would normally be held by SBS.

20 All right. And have you exhibited all of the relevant documents to your statement?---Yes, I have.

All right. Now, I want to start by understanding your view about the securities. Is it your understanding that Goanna Downs secured the borrowings of National Music?---Via supporting the guarantee that Mr Dillon had given, yes.

25 Now, that – now, we need to be very clear about this don't we, Mr McNaughton, as I think you know. There is a difference between a mortgage securing a guarantee and a mortgage securing the borrowings of a third party?---It didn't directly support – didn't secure the debts of National Music.

30 And when did you realise that, Mr McNaughton?---During the process of reviewing my – the documents here and preparing my statement.

35 In the course of preparing your statement you came to understand that, in fact, there wasn't a security that the NAB held over Goanna Downs in respect of National Music's borrowings; is that right?---Yes, that's correct.

40 You came to understand that the only security that NAB held over Goanna Downs was to support liabilities of Mr Dillon and his wife personally; is that right?---Yes, that's correct.

And the guarantee could conceivably give rise to one of those personal liabilities?---Yes.

45 But, in this case, that is at the time in 2015, there was no personal liability under the guarantee, was there?---That's correct.

So, in fact, is it fair to say you now understand that NAB had no lawful entitlement to insist on the full proceeds of Goanna Downs being used to pay down the debts of National Music?---That's correct.

5 And you discovered that in the course of preparing to give evidence?---Yes, I did, because I didn't have awareness of this prior to it.

When you initially started preparing to give evidence, you thought that there was a lawful entitlement on the part of NAB to use the full sale proceeds from Goanna
10 Downs to pay down the debts of National Music?---No, only in default.

Sorry, you thought only in default?---Only – yes.

Now, I just – I need to understand that. You know that in this case a draft of your
15 statement was provided by the NAB to the Royal Commission?---Yes, I'm aware of that.

And I want to understand: did you initially believe that NAB had a right to apply the
20 proceeds of sale from Goanna Downs to National Music's facilities because of the personal guarantee and indemnity provided by Mr and Mrs Billion?---Yes. That's correct, I did initially believe that.

All right. So the answer that you gave a moment ago, which was that – I understood
25 to be that you had never thought that, from the moment you started preparing, you had never understood that NAB had a lawful entitlement to insist on all of the proceeds being used. That answer was incorrect?---Yes. Sorry, yes. That's right.

Initially when you started preparing you understood that, by virtue of the guarantees,
30 NAB had a lawful entitlement to insist on all of the proceeds being used to pay down National Music's debts?---Yes.

And then at some point somebody explained to you that that's not how the
guarantees and indemnities worked?---Correct.

35 And then you then subsequently changed or approved a change to your draft statement in order to no longer make that claim?---Yes.

And where, when you changed your statement, did you identify that you now
40 understood that NAB did not have a lawful entitlement to pay down the National Music facilities from the proceeds of Goanna Downs?---When I reviewed the guarantee.

No, no?---Sorry.

45 Where, in your statement - - -?---Yes.

- - - do you explain your new understanding?---I – I corrected the statement.

You corrected the statement - - -?---Yes.

- - - to no longer positively assert?---Yes. I didn't then explain - - -

5 Let me – just let me finish my question. You corrected your statement to no longer positively assert that National Music had a lawful entitlement pursuant to the – I'm sorry, that NAB had a lawful entitlement pursuant to the guarantees and indemnities to require all of the proceeds of sale to be used to discharge NABs debts owed by National Music. You removed that positive assertion?---Yes.

10 But you didn't explain that you now understood that, in fact, NAB didn't have a lawful entitlement to require the balance proceeds to be used to discharge National Music's debts?---No.

15 And why was that?---I – I didn't feel that I had to, because I had corrected my statement.

Let me take you to some paragraphs of your statement. Can we bring up paragraph 65 of Mr Dillon's statement. This is - - -

20 THE COMMISSIONER: Mr Dillon's statement or - - -

MR HODGE: I'm sorry, Mr McNaughton statement. It's WIT.0001.0046.0001. You see in paragraph 65 of your statement you still say:

25 *The rural property known as Goanna Downs was a specialised brood mare property provided by Mr Dillon and his wife as security for a number of facilities held in their own names and by National Music.*

30 ?---Yes, I do.

Do you agree that that statement is incorrect?---Yes, it wasn't – it is not direct security, or wasn't direct for the National Music facilities.

35 Yes. It's not security for the facilities of National Music?---Not direct security, no.

Not what sorry?---Direct.

It's security for any obligation of Mr Dillon and Mrs Dillon?---Yes.

40 And they had given guarantees and indemnities?---Yes.

45 All right. And then you see in paragraph 74, which is over the page. This paragraph, I gather you would say that is partially correct. That is, the first sentence is correct in that the guarantee is a security for the facilities?---Yes.

But insofar as the second sentence appears to suggest that Goanna Downs secured repayment of the sum of \$2,085,000 and any additional amount as defined incurred by National Music, that's not correct?---Yes, that's correct. It's – it wasn't direct security for National Music.

5

What the guarantees and indemnities did was, in the event of default by National Music, they then created a liability on the part of Mr and Mrs Dillon; is that right?---Yes.

10 And Mr and Mrs Dillon had offered up Goanna Downs as securities for their liabilities?---Correct.

And so that paragraph, should we take it – or should the Commissioner take it that what that is meant to mean is that under the guarantees and liabilities – I'm sorry, 15 under the guarantees and indemnities, if there was a default and it was necessary for National Music to repay \$2.085 million, then in that case there would be a liability of the – of Mr and Mrs Dillon and they had offered security for that liability?---Yes.

And then can we then go to paragraph 134 of Mr McNaughton's statement. That is 20 on page 33. Can we bring up – it carries over the page, it has a number of subparagraphs. So perhaps we can pop it all out. It may not be possible to pop it all out. What you relate in paragraph 134 is that on 3 May 2018 you had a discussion with Mr Bassett?---Yes, that's correct.

25 And that was in preparation for giving evidence?---Yes, it was.

And if we blow up subparagraph (b), what Mr Bassett said at that time was:

30 *The way in which proceeds of sale are to be applied following the sale of a security asset by a business customer requires credit approval.*

?---Yes.

And he also said to you:

35

While employed at NAB, credit approval was usually assessed and given by Mr Bassett's credit executive, who was a DCA holder.

?---Yes.

40

Now, just taking that first proposition, in this case – in the case of Goanna Downs – that's incorrect, isn't it. The proceeds of sale, once the personal mortgage of Mr and Mrs Dillon were discharged, didn't require credit approval?---No, it would have 45 done.

It would have required credit approval?---Yes.

Why is that?---Because the property was held in support of Mr and Mrs Dillon's obligations.

5 Now, I just want to understand that. Does that mean that your understanding is that the mortgage over Goanna Downs secured any obligations of Mr and Mrs Dillon; that's the first proposition?---They had acknowledged that it would support – it was held in support of the personal obligations, but then also in support of the guarantee.

10 But there were no – there were no obligations under – I'm sorry, there were no debts or liabilities under the guarantee at that time when the property was sold?---There was no – there was no default.

15 So there were no liabilities or debts owed by Mr and Mrs Dillon under the guarantee at the time that Goanna Downs was sold?---But the property was held in support of the guarantee, so release of the property would have required some form of replacement security, because the facilities of National Music had been provided on the basis that a guarantee had been provided by Mr and Mrs Dillon, and the Goanna Downs property was held as part of those obligations.

20 Now, I think – you tell me if I'm wrong – I think you are making a different point from the one that is being made at 134(b). The point that you were making is that because the mortgage secured the guarantee and indemnity, therefore it was a matter for NAB whether or not it released the mortgage given that it secured the guarantee and indemnity. That's your point?---Yes.

25 That's a different point, isn't it, from whether or not the proceeds of sale, that is the balance proceeds of sale, are something that requires credit approval, or do you see them as the same thing?---I see it as the same thing.

30 That is because NAB had the mortgage to support the guarantee and indemnity, it might therefore simply say, "We refuse to release the mortgage unless you do what we want with the proceeds of sale"?---It would certainly be looking for some form of replacement security if this security had been held and had been a consideration for providing facilities to National Music.

35 All right. When you spoke to Mr Bassett, did you discuss with him whether he understood that NAB didn't have a lawful entitlement to insist on all of the moneys coming to it?---No, I didn't.

40 And why was that?---Because I didn't see the need to discuss that with him.

45 You understand, from your review of the documents, that the way in which NAB dealt with Mr Dillon was to represent that NAB required all of the moneys to come to it?---Well, from – from what I read, it was a voluntary sale, and as a result of the voluntary sale I would have expected the proposal to have been made by Mr Dillon as to how that security would be replaced.

You haven't answered my question. I will ask it again. You understood, from the documents that you had read, that NAB represented to Mr Dillon that it required that all of the moneys from the sale be paid to it?---That was the proposal that NAB made to Mr Dillon.

5

No, no. Please listen?---I would on it as a – I don't look on it as it was a requirement it was a – it was a proposal that NAB made.

10 All right. Do you regard it as relevant to the making of that proposal that NAB did not have a lawful entitlement to insist on all of the moneys being used to pay down the debts of NAB?---Sorry. Can you ask me the question again, sorry.

15 Do you regard it as relevant to the making of what you term a proposal by NAB, that NAB did not have a lawful entitlement to require all of those moneys to be used to pay down the debts of NAB?---No, I don't.

Irrelevant, from your perspective?---Yes.

20 You don't think it's necessary for NAB to articulate to the borrower what securities and rights it has under those securities?---I – yes, I think Mr Dillon was aware of that, that Goanna Downs supported the guarantee held in security of the obligations, as obligations to National Music.

25 As – did you listen to Mr Dillon's evidence?---No, I haven't.

I see. Take it from me, because your senior counsel was very careful to have Mr Dillon agree with this: Mr Dillon understood – believed, apparently, that the facilities of National Music were secured by Goanna Downs?---Okay.

30 If that was his understanding, that was incorrect; you agree?

35 MS HARRIS: Commissioner, I object to that. I put to Mr Dillon what appeared in Mr Dillon's statement and I didn't make a distinction. I accept I didn't make a distinction between direct or indirect security, but I put to Mr Dillon what Mr Dillon had said.

THE COMMISSIONER: Mr Hodge.

40 MR HODGE: Yes, let me rephrase the question.

If Mr Dillon understood that Goanna Downs secured the debts or the facilities of National Music with NAB, that understanding was incorrect?---If that's what he assumed, yes.

45 Now, I want to then ask you some questions about the course of communications between Mr Dillon and NAB. You've exhibited a document which is a 2010 credit submission. I will bring it up?---Please.

Can we bring up NAB.005.342.0021. This is a document exhibited to your statement, Mr McNaughton?---Yes.

You've seen it before and reviewed it?---I have, yes.

5

Can we go to page .0024. You see the internal note is:

Our security property known as Goanna Downs is on the market for sale by expressions of interest.

10

And you can read the remainder of what's in that paragraph?---Yes.

And I want to particularly draw your attention to the sentence:

15

Principals will retain about \$800,000 to \$1 million to purchase another –

and PPR is principal place of residence; Is that right?---Yes. That's right.

With the balance of funds to be applied to debt reduction?---Yes.

20

And this will see the PPCK – that's effectively the personal security facility; is that right?---Yes, that's right.

Cleared in full and a significant reduction in the trade refinance facility?---Yes.

25

Do you accept that in 2010 – and this is early 2010, April 2010, that Mr Dillon had communicated to your bank an intention that upon the sale of the property he would use 800,000 to a million dollars to purchase another place of residence?---Yes. That's – that's what it says.

30

And so that I understand your view as to how National Bank should communicate with its customers, what would you have expected the response of a banker to be to that statement?---I think – it depends whether – how serious that interest is, and how serious the intent of Mr Dillon in this case was to actually follow that through, but there's – I would – I would have expected the banker to have at least acknowledged it in some – I wouldn't have expected them to do much beyond trying to find out what his intentions were.

35

All right. And then can we bring up NAB.005.342.0128. Now, as I understand it, you haven't exhibited this document to your witness statement; is that right, Mr McNaughton?---Sorry. That I haven't?

40

You haven't?---Yes, I – yes, I don't recognise that document.

45

All right. Have you looked at it in the course of preparing to give evidence today?---No, I haven't.

All right. You see this is the same type of document as the one we just looked at; you agree?---Yes.

And you see the date of this submission is 25 March 2013?---Yes.

5

And you see it's in relation to National Music, we see aggregation group?---Yes.

And then if we go to page .0133 and you see this sets out National Music and then Mr Dillon is the customer?---Yes, I can.

10

And you see, if you look over on the right-hand column under banker's comments:

Waiver of revaluation of the Scone property is sought on the following basis –

15 and then there's a series of dashes?---Yes.

You see:

From the sale proceeds he client will look to pay out the portfolio facility P4.1.

20

Just pausing on that. P4.1 that is the personal facility of - - -?---It is, yes.

- - - Mr Dillon; is that right?---It is, yes. Yes.

25 And lease, P5.1. You know what the lease is?---I understand it was for some motor vehicles.

And it was – we may as well just confirm this, if we go back to page .0130, and you will see at the bottom of the page there's Borrower, and it's the Dillons trading as Goanna Downs, and there's a lease there?---Yes.

30

Of approximately \$42,000 is the limit?---Yes.

All right. So then if we go back to page .0133, so what's being proposed in 2013 is that the client, who is Mr Dillon, will look to pay out the portfolio facility, which is the \$1.15 million personal facility; do you agree with that?---Yes.

35

And the lease, which is the – approximately \$42,000 lease facility?---Yes.

40 Owed by them personally. That is by the Dillons personally, a personal loan to the Dillons?---Yes. Sorry, yes.

Then \$200,000 will be put back into the business?---Yes.

45 And the balance of funds to go towards purchasing another property with a small mortgage?---Yes.

And just to tie this off we see in the dash preceding the point:

Client has placed the property back on the market with a revised sale range of 2.2 to \$2.3 million.

5

?---Yes.

Now, as we understand it, this is consistent with the proposal that Mr Dillon says he was also talking about in 2015. Do you regard it as consistent?---Yes, I do.

10

And then it says:

Note: no commitment given re funding.

15

?---Yes, I see that.

But that seems to be no commitment given re funding in relation to the small mortgage that's being referred to. Do you agree?---I don't know that, I'm sorry.

20

You don't know?---No.

You haven't looked at this document before?---Sorry, I don't.

25

No one gave it to you in the course of preparing for this?---No, they haven't.

And then if we then go - - -

THE COMMISSIONER: Are you putting that in evidence - - -

30

MR HODGE: I'm sorry, I tender that document, Commissioner.

THE COMMISSIONER: - - - Mr Hodge? Business memorandum of increase, 25 March '13, NAB.005.342.0128, exhibit 3.141.

35

EXHIBIT #3.141 BUSINESS MEMORANDUM OF INCREASE DATED 25/03/2013 (NAB.005.342.1428)

40

MR HODGE: Thank you, Commissioner.

And can we then bring up tab 105 of Mr McNaughton's statement. This is NAB.134.007.9166. You see this is a chain of emails – you've obviously looked at it before – between Mr Bassett and Ms Moynahan?---Yes, I have.

45

And do you see in the email from Ms Moynahan to Mr Bassett on 30 April 2015, in the second paragraph, the second sentence is:

We should pay down our facilities from the sale of Goanna Downs and therefore will require all net funds to NAB.

?---Yes, I see that.

5

And I want to then – I will take you through a few documents so that you can see them and then I want to ask you some questions. Then we go to NAB.134.006.4961, which is tab 106, and this is an email that we have looked at already in the course of the evidence, though you may not have looked at, which is an email from Mr Dillon to Mr Bassett on 30 April 2015?---Yes.

10

And you see in the fourth paragraph of his email, he says:

Our intentions have always been to do the right thing by clearing the mortgage, clearing the redraw facility, inject the requested \$200,000 into National Music and we will clear the lease on the Ranger and probably said sell the Mazda Ranger, and clear the lease on that as well. All this reduces the bank's exposure by over 1.4 million. I would have thought a good outcome for NAB.

15

?---Yes, I see that.

20

And you understand the property had sold for about \$2.22 million?---Yes.

And there had been about \$100,000 in sale costs?---Yes.

25

And so roughly then, this is leaving Mr Dillon with approximately \$700,000, if he's providing \$1.4 million to pay down the exposure of NAB?---Yes, it would have been.

And it would seem – and I am interested in understanding your view about this – that this is again consistent with the position that Mr Dillon had expressed in 2010, and in 2013, and now seemingly in 2015, that he was going to retain a proportion of the funds from the sale of the property. Do you agree with that?---Yes. I agree that it's consistent that he was going to retain a portion of funds, albeit the purchase – the sales price or intended sales price in circumstances looked different.

30

35

Yes. In 2010 it looked like it might be \$3 million. By 2013 it looked like it might be \$2.2 million or \$2.3 million. It turned out to be \$2.22 million?---Yes.

And what I want to understand from your perspective is what you would regard as the right approach to communicating to the customer in these circumstances, where the customer is selling a property and expresses an intention as to how it is that he is going to use the funds before and during the sale process. Do you have a view about that?---Yes. I think it's difficult where a property is held as direct security and then also as support for other obligations. I think it's difficult for the bank in this instance to continually communicate what we expect from the customer should they sell the property. We had seen in this case a number of instances where Mr Dillon intended

40

45

to sell the property, and I think it would be difficult to proactively communicate what we expected in a proposal from Mr Dillon.

5 I just want to understand that because, as you know, Mr Bassett's evidence – which is given both in his statutory declaration and also which he discussed with you in his telephone conversation with you – was that when Mr Dillon said whatever it is that he said about what he wanted to do with the money, that he wouldn't have said anything in response to that, because he couldn't do it without credit approval. That's your understanding of what Mr Bassett says?---Yes.

10 And do you regard that as an appropriate response from a banker of NAB to a customer in those circumstances?---I do, to the extent of not giving any commitment.

15 Well, ought the banker say anything about, "That might not be happen, we might insist on all of it"?---I mean, I wouldn't have expected a banker in those circumstances to make a commitment or a statement to that effect.

20 You would expect the banker to just stay silent?---No. I would have expected them to be inquisitive as to what the motives behind the sale were and what the customer thought or expected to happen.

25 Would you expect the banker to communicate that what was done with the proceeds would depend entirely on the agreement of the National Australia Bank?---I think that would have been – I think that would have been certainly an acceptable thing for a banker to have done would be to – to remind the customer of their – their obligations, and what we regarded the property as security or support for.

30 Would you have expected the banker to say, "What you're proposing may not be something that NAB will agree to"?---I think that could happen. But it would depend on the individual circumstances.

35 You understand, and you can see what happens in this case, which is that when it is then revealed that NAB has a different position, that takes the customer by surprise?---Yes. I – I realised from reviewing the evidence that Mr Dillon said he was surprised and shocked by it.

40 But it's obvious, isn't it, that if a customer – forget about Mr Dillon, if any customer says to a banker, "I'm going to sell my property and I'm going to use the proceeds in this way," if the banker then says three months later, "We are not going to let you do it that way we are going to do it in some other way," that that's going to come as a surprise to the customer?---But in this – but in – generally, if the property is held in support of obligations, then I would have expected the customer to make an alternative proposal as to how that security or support for obligations would be replaced.

45 I'm not sure you're answering my question. It is obvious, isn't it, that if a borrower says to a banker at a point in time, "I intend to use the proceeds from the sale of my

property in this way,” and the banker apparently says nothing, and then a month or two months or three months later says, “The proceeds are going to be used in a different way” that that is going to take the borrower by surprise?---Yes, that would be right.

5

And it’s bad communication, isn’t it?---Yes. I think the communication – in those circumstances, that communication could be better.

10 And do you accept that the communication in this case was poor?---I think the communication could have been better here, yes.

Do you accept that it was poor?---No, I wouldn’t say it was poor.

15 All right. You don’t think there was anything unfair about the communication that was used?---No, I - - -

MS HARRIS: I’m sorry to rise at this point.

20 THE COMMISSIONER: Just a moment.

MS HARRIS: In my submission, the questions that are being posed by my learned friend assume a state of affairs which is not necessarily accepted by NAB, namely that Mr Dillon told Mr Bassett at the meeting of 2 March what he proposed to do with the money. I’m perfectly happy for the question to be asked if it’s put on that basis; that is, “If it be accepted that Mr Dillon did do that, what do you say?”

25

THE COMMISSIONER: Mr Hodge, what do you say?

30 MR HODGE: I propose to deal with it in a slightly different way, Commissioner.

THE COMMISSIONER: Yes.

35 MR HODGE: Can we bring up document 107, which is NAB .134.007.9172 – I’m sorry, actually I – before we do that. Let’s just stay on this document. I need to point out one other thing to you, Mr McNaughton. You see that Mr Dillon says at the start of the email:

40 *I would like to know why these things are being requested by yourself. Is this normal? I’m sorry, but I’m very suspicious of NAB and its motives ever since I felt we were badly treated a few years ago.*

?---Yes.

45 All right. And so then, having noted that, can we now go to NAB.134.007.9172. You see Mr Bassett’s email to Ms Moynahan says:

I will not respond to the email below until you direct me, however given the nature of email it is clear we will have to respond shortly to Ross so that they are clear what we are proposing.

5 ?---Yes.

All right. And then if we then go to 108 which is NAB.134.007.9183 and Ms Moynahan responds and says:

10 *Hi Shaun. It would be good to understand what arrangements were discussed with the customer regarding the sale of the property. What expectations were communicated to the customer regarding the utilisation of the proceeds of sale? Were the customers aware of the facilities secured against the property?*

15 ?---Yes.

Now, pausing on that for a moment, it appears that Ms Moynahan had also misunderstood the nature of the security interests that NAB had with respect to the Goanna Downs property, doesn't it?---I don't know that, sorry.

20

Have you looked into it?---I didn't specifically ask.

You spoke to Ms Moynahan?---I did, yes.

25 Did you ask her what her understanding was of the security interest that NAB had over the property?---No, I didn't.

And then if we go to 109, which is NAB.134.007.9186 you see Mr Bassett's reply on 1 May is:

30

Hello, Margaret. I certainly have never communicated what the bank's expectations would be upon sale of Goanna Downs. Ross has told us before that upon sale of the property he intended on putting \$200,000 in funds into National Music, but at that time we did not talk about debt reduction. Not at any stage have I discussed what the bank will require as debt reduction and what facilities the property secures.

35

?---Yes, I see that.

40 Now, having looked through these emails to see what NAB has recorded internally as to what was discussed with Mr Dillon, I'm going to suggest to you that we can take it from these emails – and this is the only information you have to go on – that what had been communicated by Mr Dillon to Mr Bassett was that he was only expecting to put \$200,000 into National Music. Do you agree with that?---Yes.

45

And that there hadn't been a discussion between Mr Bassett and Mr Dillon about debt reduction?---It doesn't look as though there was.

And Mr Bassett's position is that he has never actually discussed with Mr Dillon what the bank will require as debt reduction and what facilities the property secures?---Yes, that's correct.

5 Taking those things – assume that those are the case, is it your view that nevertheless the communications between Mr Dillon and Mr Bassett were okay?---Yes, I think they were.

10 All right. You don't see or identify any problem in Mr Dillon having expressed an intention as to what is to happen with the proceeds of sale and Mr Bassett not discussing with him that the bank may want to use it for debt reduction, that the bank may insist that the moneys be used for debt reduction?---No. And I think that where a number – over the years, as you've pointed out there were a number of proposals from Mr Dillon, some of which talked about alternative properties, presumably with replacement security. So I – no, I don't think the communications were poor.

15 All right. Can we bring up NAB.141.001.5774. I want to just complete the chain of what happens internally. I don't think you've exhibited this document to your statement, Mr McNaughton?---No, I haven't.

20 All right. This is – although at the top it looks like it's an email addressed to Mr Dillon and the other people who work in the National Music business, it's actually the draft email that Ms Moynahan is sending to Mr Bassett; is that right? Or you just haven't looked at this document at all?---Yes, I saw it yesterday.

25 All right. Commissioner, I won't worry about that document, and I won't worry about tendering it either.

30 THE COMMISSIONER: Yes.

MR HODGE: Can we go then to document 110 of the exhibits to your statement. Now, this is an email sent by Ms Moynahan. I'm sorry, it's NAB.134.009.2614. I'm sorry, that is – that's the right email. I apologise, Mr McNaughton. This is an email that's sent by Ms Moynahan to – this time to Mr Dillon and to his business associates?---Yes.

35 And it's sent on 5 May 2015 and referring to a discussion or a meeting that has occurred between Mr Bassett, Ms Moynahan, and Mr Dillon, and his business associates?---Yes.

40 And is it your understanding that at that meeting what was communicated by Ms Moynahan was that NAB required all of the proceeds of sale to be used to pay down its debt?---Absent any other proposal, yes.

45 Unless they made some other proposal – I'm sorry, I am not sure I quite understand that. You're saying that what you think Ms Moynahan communicated was that,

absent some other proposal, all of the proceeds would be required to pay down the debt?---Yes.

5 All right. And why do you believe there's the condition of absent some other proposal?---Well, the property secured the obligations of Mr and Mrs Dillon for National Music and, absent that, then I would have – I would have expected Ms Moynahan to have sought replacement security or – in order for the bank to release the charge over the property, then the full proceeds would have been – would have been used to pay down the debt.

10

You see at the bottom of the page, it said:

Ross has indicated that he is willing to provide the following to NAB from the net settlement funds of \$2.12 million.

15

?---I do, yes.

20 And I'm just trying to understand your – when you've gone back and looked at the documents what you inferred from this, is it that Ms Moynahan has gone in and said, "We require all of it" and that the counterproposal from Mr Dillon is, "I will give you almost all of it"?---Yes.

25 All right. Then can we go to tab 112, which is NAB.134.006.4919. This is an email where Mr Dillon says to Ms Moynahan:

I am sorry if I seemed a little aggressive yesterday, but in my defence I was very much taken by surprise by the whole turn of events. Up until Friday morning I had been led to believe all was on track and the injection of \$200,000 would fix any issues the bank had.

30

?---Yes, I see that.

35 And again that's consistent with what Mr Bassett has noted as to what he has been told? That is that Mr Dillon is anticipating he will just have to put \$200,000 into National Music?---Yes.

And you will note his observation that he was surprised by that turn of events?---Yes.

40 Does that trouble you, when you go back and look at the file that Mr Dillon, your customer, would be surprised to discover that he was going to have to put all of the money in?---Yes. I think it – it's certainly not ideal that Mr Dillon was taken by surprise and shocked at that.

45 And then if we go to tab 114, this is an email back from Ms Moynahan to Mr Dillon on 5 May 2015?---Yes.

And do you see, about two-thirds of the way through the large paragraph, you advise:

There will be \$2.122 million available from the sale and the NAB expects to collect all of these funds to reduce the secured facilities.

?---Yes, I do.

5

All right. And anywhere in these documents or emails or communications that you've reviewed, do we see an explanation from Ms Moynahan to Mr Dillon that the facilities of National Music are not secured by Goanna Downs?---No, I don't.

10 And in fact we see the opposite, don't we? If you look further on this email:

The NAB facility secured by Goanna Downs are as follows.

?---Yes, I see that.

15

Do you regard it as problematic that that representation was made by Ms Moynahan to Mr Dillon?---I think the communication isn't clear, and I think what Ms Moynahan was relaying there was, practically, what would occur absent any other proposal from Mr Dillon.

20

I'm sorry, can you say that again. You think she was relaying - - -?---I think she was - - -

25

- - - what by this?---Yes, I think what she was saying was, practically, what would occur for the bank to release its charge absent any other proposal from Mr Dillon, given that Goanna Downs supported the obligations of the Dillons towards National Music.

30

And I want to understand this position – that is, the position you're now adopting – and that is NAB – let's work this through. NAB held a mortgage over Goanna Downs that secured the personal liabilities of Mr Dillon and Mrs Dillon; yes?---Yes.

35

The only liability that existed as at state or as at the time when the when the property was sold was the personal liabilities that they had. That was the only thing that could be paid out from the proceeds; is that right?---Yes.

40

But nevertheless, the mortgage also secured the liability that they had – the contingent liability under the guarantee in the event that the guarantee was called on in the future?---Yes. And that's the basis on which the funding had been partly made available to National Music.

45

And so what – I understand. So what might occur is that NAB might say, "We are not prepared to release our mortgage because we need some other security for the guarantee and indemnity"?---If there had been no proposal to have offered alternative security to – in support of the National Music facilities.

And do you think that that is something that ought to have been communicated to Mr Dillon at some earlier point in time than now, or in fact never – it was never communicated to him. Do you think that it ought to have been communicated to him?---It was Mr Dillon that had initiated the sale. And even going back to 2010, had said his intention was to pay down debt, so I think the communication during that had – had been what I would probably expect.

THE COMMISSIONER: And could Mr – and could the NAB have precluded Mr Dillon from selling the property under the terms of its guarantee and indemnity?---No, it couldn't have.

MR HODGE: Can we bring up NAB.141.001.5898. This is an email that doesn't seem to be exhibited to your statement. Have you seen it before, Mr McNaughton?---I saw it yesterday.

You saw it yesterday?---Yes.

All right. And you see it's an internal email from Ms Moynahan to Mr Bassett?---Yes.

And Ms Moynahan is saying to Mr Bassett:

I've spoken with Ross regarding the interpretation and his understanding of the email. After discussion, he accepts that the repayment of facilities is what is required.

?---Yes.

And again can I suggest we don't see anything in this email that communicates the apparently more nuanced position that you now suggest the bank takes, which is that it could somehow refuse to release its mortgage unless Mr Dillon did what it wanted him to do?---Sorry, can you say that again.

Let me put it different way: what is clear, can I suggest, from this email is what Ms Moynahan communicated to Mr Bassett was that all of the – all of the proceeds of sale were required to be applied to discharge the facilities of National Music?---Absent any other proposal.

No, no. It doesn't say that, does it?---No, it doesn't.

It says:

After discussion, he accepts that the repayment of facilities is what is required.

?---Yes.

That was what was communicated?---Yes.

There's no evidence of any written communication of this idea of, "There might be some other proposal that you could make to us", that you've seen?---No, I haven't.

5 All right. And do you accept that this statement carries with it the idea that it was a legal requirement that the proceeds of sale be used to discharge the facilities that NAB had in respect of National Music?---No. Sorry, I don't know that.

No, no. When you look at this statement - - -?---Yes.

10 - - - you don't accept it or you just don't know whether it carries with it that implication?---I don't know whether it – it carries that intent.

All right. I tender that document, Commissioner.

15 THE COMMISSIONER: Email Moynahan to Bassett, 5 May '15, exhibit – NAB.141.001.5898 is exhibit 3.142.

20 **EXHIBIT #3.142 EMAIL MOYNAHAN TO BASSETT DATED 05/05/2015 (NAB.141.001.5898)**

25 MR HODGE: All right. Now I want to ask you, Mr McNaughton, about the SBS governing principles?---Sure.

Can we bring that up, which is exhibit 19, NAB.005.223.0960. Now, this is a document dated August 2017?---Yes.

30 And was there something like this, as far as you know, that existed before August 2017?---Yes, there was.

All right. Was it in similar terms?---It was, yes.

35 All right. Did it exist as at 2015?---I understand it was in October 2015.

Do these principles, though, nevertheless, reflect how NAB would expect the SBS to conduct itself?---Yes.

40 Now, what I want to particularly ask you about or point out to you is you see in bold:

We won't avoid difficult conversations with our customers and will clearly articulate the bank's position and the basis of our decisions.

45 ?---Yes, I do.

Is it your view that, just taking the documents that you've exhibited and the statements they make as to what occurred, that the way in which NAB behaved was

to clearly articulate the bank's position and the basis of its decisions?---I think it could have been clearer.

5 Do you think it's something that ought to have been done earlier and it was?---I think it would have been difficult to have occurred prior to the sale of – of Goanna Downs.

10 I'm sorry, I don't quite understand that. Why is that?---Because we weren't – I don't think from what I've read that we were aware that the property was still being actively marketed.

I'm not really sure I understand that?---Yes.

15 You're saying you don't think that you understood that the property was still for sale; is that the point?---Yes, the – the property. I'm not sure that, from what I've read, that we were aware the property was still being exposed from sale, directly from 2010 all the way through to 2015. So I'm not sure how we could have had the conversation earlier.

20 Well, we know that in 2010 there was a discussion about the property being for sale?---Yes.

We know that in with 2013 there was a discussion about the property being for sale?---I've seen that now, yes.

25 We know that in 2015 Mr Bassett went and spoke to Mr Dillon to discuss the fact that the property was for sale?---Yes.

30 So I'm just trying to understand the point that you're making. Why was it not possible to communicate earlier what the bank's intentions were?---Because I don't think the bank was involved in the – in the sales process.

And then you see under Respect for People:

35 *We always act with integrity and treat our customers and staff with dignity, respect and courtesy.*

?---Yes.

40 Do you regard the treatment of Mr Dillon in this case as acting with integrity?---Yes, I do.

Do you regard the treatment of Mr Dillon as being done with respect and courtesy?---Yes, I do.

45 And the fact that it wasn't communicated in at an earlier time doesn't change that?---No, it doesn't.

Do you regard the fact that you didn't explain in your statement that you had identified that the facilities of National Music were not secured directly by Goanna Downs as acting with integrity?---Yes, I do.

5 And again, to just return to that, do you accept that it's a matter of some significance in considering this case, that National Bank – that the National Australia Bank did not have its National Music facilities directly secured by Goanna Downs?---Sorry, can you say that again.

10 Do you accept that, in considering what occurred in the communications that occurred between NAB and Mr Dillon, that a matter of significance in assessing those communications is that NAB did not have securities over Goanna Downs that directly secured the borrowings of National Music?---No, I don't.

15 You don't think that was of significance?---No.

All right. And I should just make sure: your view is the way in which National Australia Bank communicated with Mr Dillon was honest; is that right?---Yes.

20 And that it was done in good faith?---Yes.

All right. I don't have any further questions for this witness.

THE COMMISSIONER: Mr Hodge. Yes, Ms Harris.

25

<RE-EXAMINATION BY MS HARRIS

[12.41 pm]

30 MS HARRIS: Just one question you were asked just now by Mr Hodge: "Do you accept that, in considering what occurred in the communications between NAB and Mr Dillon, that a matter of significance in assessing those communications is that NAB did not have securities over Goanna Downs that directly secured the borrowings of National Music?" You don't think that was of significance and you
35 said "No". Would you explain to the Commissioner why that is, please?---I'm sorry, I –

Let's take it step by step?---Yes, thanks.

40 You were asked some questions about direct and indirect security?---Yes.

And this was a theme that Mr Hodge developed with you during the course of his questions. And then in the question that I've just read to you, he asked you why you didn't think that that distinction between direct and indirect was a matter of
45 significance in assessing the communications, satisfactory nature or otherwise of the communications between NAB and its customer in this case. You said, "No". Can you explain to the Commissioner why?---Sure. I – I think, from what I've read, that

the customer understood that facilities of National Music had been made available because of the guarantee supported by the charge over the property. So therefore I didn't think that making that distinction in conversations would be relevant or required.

5

Just excuse me, Commissioner.

And you were asked a question by Mr Hodge about paragraph 134(b) of your statement. Do you have that there?---Yes, I do.

10

And that says – that refers to the fact that Mr Bassett's view was the way in which the proceeds of sale are to be applied following the sale of a security asset by a business customer requires credit approval. And you were asked by Mr Hodge whether you agreed with that statement and you said, "Yes". And you were asked by Mr Hodge, in effect, whether it made a difference that that security asset was held as a direct or indirect - - -?---Yes.

15

- - - security and you said "No". Why was that?---Because I think that, again, the distinction in this case for the customer was they knew the facilities of National Music had been made available because of the guarantee, and also the security that was held in support of the guarantee, and that without the reference back to the credit authority, then the risk profile of National Music facilities would materially change.

20

Thank you. No further questions.

25

THE COMMISSIONER: Before you sit down. Do you accept that this was not a sale of a security by a business customer?---Yes, I do, Commissioner.

Ms Harris, anything arising out of that?

30

MS HARRIS: No, Commissioner.

THE COMMISSIONER: Thank you very much.

35

MR HODGE: Nothing further, Commissioner. Could the witness be excused.

THE COMMISSIONER: Yes, thank you very much. You may step down, you are excused from further attendance.

40

<THE WITNESS WITHDREW

[12.45 pm]

THE COMMISSIONER: Yes, Mr Hodge.

45

MR HODGE: Commissioner, I propose that we adjourn at this point for the hour lunch, so that we come back at 1.45 to then start the next witness, if that is convenient to you.

5 THE COMMISSIONER: Yes. Where do we – we will do that, but where are we going from here?

MR HODGE: So the next witness is Ms Bligh from the ABA and then there will be a few other witnesses after her this afternoon.

10

THE COMMISSIONER: Yes. So if we adjourn now until 1.45.

MR HODGE: Thank you, Commissioner.

15

ADJOURNED

[12.46 pm]

RESUMED

[1.45 pm]

20

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, the next witness is Ms Bligh.

25

<ANNA MARIA BLIGH, AFFIRMED

[1.45 pm]

<EXAMINATION-IN-CHIEF BY MR SILVER

30

THE COMMISSIONER: Thank you very much, Ms Bligh. Do sit down. When I said sit down, I thought the chair wasn't about to collapse under you?---It's just a long way down.

35

Yes, Mr Silver.

MR SILVER: Ms Bligh, could you tell the Royal Commission your full name please?---Anna Maria Bligh.

40

And your address?---6 O'Connell Street, Sydney.

And what is your present position?---CEO of the Australian Banking Association.

45

It's correct that you received a summons to be here today and produce a witness statement?---That's correct.

And do you have a copy of that summons with you?---Yes, I do.

I tender that summons.

5 THE COMMISSIONER: The summons to Ms Bligh will be exhibit 3.143.

EXHIBIT #3.143 SUMMONS TO MS BLIGH

10

MR SILVER: And you have also signed a witness statement concerning rubric 3-20, dated 17 May 2018?---That's correct.

Do you have a correction to make in that regard?---Yes, I do.

15

Could I invite you to turn to page 22 of your statement?---Yes.

In particular paragraph 105(e) (iii) A?---Yes, the sentence reads:

20

Only qualified practitioners would be appointed who are who are

so we need to eliminate one set of "who are". Then it says member banks. It should just say "members". So member should have an s added to it and the word banks removed.

25

THE COMMISSIONER: Do you mind making the necessary amendments in handwriting and initialling them, please?---Mmm.

30

MR SILVER: Now that has been done do you confirm the contents of your statement are true and correct to the best of your knowledge?---Yes.

THE COMMISSIONER: Exhibit 3.144 will be the statement of Ms Bligh - - -

35

MR SILVER: Together with a bundle of exhibit.

THE COMMISSIONER: - - - with its exhibits. Yes.

40

EXHIBIT #3.144 STATEMENT OF MS BLIGH WITH ITS EXHIBITS

THE COMMISSIONER: Yes, Mr Hodge.

45

<CROSS-EXAMINATION BY MR HODGE

[1.48 pm]

MR HODGE: Thank you, Commissioner.

Ms Bligh you were appointed in February 2017 as the CEO of the Australian Banking Association?---Yes. But I took the position up on 3 April.

5

All right. And that organisation used to be known as the Australian Bankers Association?---That's correct.

And the ABA has 24 member banks?---That's correct.

10

At present. And those members include the Commonwealth Bank of Australia?---Yes.

Westpac?---Yes.

15

NAB?---Yes.

ANZ?---Correct.

20 Bank of Queensland?---Yes.

And Suncorp?---Yes.

25 And one of the things that the ABA does, or perhaps the principal thing the ABA does, is to provide analysis, advice, and advocacy for its member banks?---That's correct.

And the ABA has, or has published, for many years a Code of Banking Practice?---Correct.

30

And the first version of the code was published in 1993?---Yes.

And the current code was published in 2013?---Yes.

35 And there has been various iterations of it over the years?---Yes.

And at present the code is voluntary; is that right?---Yes.

40 If a member bank adopts it, the terms and conditions for that bank, for all banking services and guarantees, will incorporate the relevant provisions of the code?---That's right.

And the ABA was given the responsibility of keeping the code up to date?---Yes.

45 And it undertakes various reviews for that purpose?---Yes.

And one of the reviews it undertook in 2016 was that done by Mr Khoury?---That's correct.

He was appointed to undertake the independent review at that time?---Yes.

5

That was done as part of what I think is referred to as the banking reform program; is that right?---Yes.

Can you just explain to the Commissioner what the nature of that program was, as you understand it?---The banking reform program?

10

Yes?---As you will understand, I was not in the position at the time that the program was developed, but my understanding of the program is that it was a set of initiatives designed by the industry – the banking industry – to take up issues that had been expressed of community concern, by customers, by commentators, and in some cases elected representatives. It had a number of initiatives. The decision to review the code was one of those and that decision brought forward the normal review of the code by about two years. It also included a review by Stephen Sedgwick of remuneration and incentives and how that might be improved. It had a number of other elements, the introduction of customer advocates in banks, the revision of the whistleblower guidelines. and a number of other commitments that were all designed to rebuild trust in Australian banking.

15

20

Now, Mr Khoury completed his review in January?---Yes.

25

And that was just – well, it was before you started up your current role?---That's correct. And I should say I think the final report of Mr Khoury was provided, I think, on 7 February.

Yes?---But around that time.

30

And what Mr Khoury proposed were a number of provisions to the code and in fact a complete rewriting of the language of the code?---Yes.

And following his recommendations the ABA went about preparing a revised version of the code?---Yes.

35

What is, I think it's to fair to say, a complete rewriting of the code as it was?---Yes.

And you have exhibited that – the current proposed version of the code to your statement?---Yes.

40

And that has also now recently been published on the ABA's website?---Yes.

And the ABA is seeking the approval of ASIC for the code?---Yes.

45

And, as we understand it, the ABA hasn't previously sought ASIC approval for the code?---That's correct.

5 And do you know why the decision has been made now to seek approval of the code?---As I indicated, I wasn't there at the time this decision was made, but the documents indicate that the industry was giving consideration to submitting the code for ASIC approval over a number of months during and after Mr Khoury's report, and that the considerations were that providing the code or submitting it to a body outside of the industry, in this case a regulator, may well add public reassurance that
10 this code was a code that would be of benefit to customers, that it had been assessed, and that it had been developed in accordance with the appropriate regulatory guidelines.

15 And, as we understand it, then the code was rewritten and submitted to ASIC in December of last year?---That's correct.

And there has been some communications between the ABA and ASIC over the drafting of the code since then?---Yes.

20 And there's a revised, revised version of the code that you've also exhibited to your statement from, I think, April of 2018?---Yes.

25 All right. And what I would like to do is to go through some of the parts of the code – there are really five issues that I want to take you through – to understand the position of the ABA at this point in time on those issues. So the first one is the definition of small business, and if we bring up exhibit 4, which is ABA.001.008.434. If you want to work off your paper copy, Ms Bligh?---No, I'm happy to.

30 So this is that April 2018 version that we were referring to a moment ago, and this is a track changes version which just shows the changes that have been made as between this version and the original version at the end of 2017. Can we go to page .0443 and so we see what the - - -?---I'm sorry, Mr Hodge, I think I will need to look at the documents.

35 That's fine?---You don't know what tab that is at, do you?

Yes. It's tab 4, Ms Bligh?---And we are on page?

40 Page 5?---Yes.

45 So this is the current proposed definition that is proposed by the ABA, and there's a few aspects of it that I want to ask you about, but I think we might start with the monetary limit, which is you will see subparagraph (c), so a business is a small business if, at the time it obtains the banking service, it has less than \$3 million total debt to all credit providers. That's what the ABA is currently proposing?---Yes.

And, as you know, the recommendation that had been made by Mr Khoury was that the definition of small business extend to \$3 million – I’m sorry, extend to \$5 million, not \$5 million of total debt but \$5 million in relation to the particular loan; that’s what you understand - - -?---That’s correct.

5

- - - to be his recommendation. And as we understand it, this is a – this debate over the definition of small business remains a point of contention between the ABA and ASIC; is that right?---That’s correct.

10 And just so we can understand, can I get you to help the Commissioner to understand the issues that the ABA and its member banks see with a definition that extends, say, all the way to Mr Khoury’s definition of \$5 million for the loan itself?---Thank you. It is – it is the case that this is an issue that has been very carefully deliberated on by banks over the last 12 months and has been the subject of extensive discussions with
15 a number of stakeholders and those discussions continue now with ASIC. This part of the definition is the threshold that must be met for small businesses or businesses to gain the protections and entitlements of a new section of the code that goes to new arrangements for small businesses, particularly in relation to simpler standard contracts and the use or otherwise of certain non-monetary defaults. So I think,
20 regardless of who the stakeholders are in this, there is – including in the industry – there is agreement that there are a category of small businesses who by the nature of their size, generally very small businesses, are more appropriately dealt with as – almost as retail customers, if you like. And that there are, conversely, a group of businesses that are large, capable, successful commercially, you know, capable and would be generally referred to as sophisticated borrowers. This is an effort to find –
25 I mean everyone, I think, accepts the two ends. This is an effort to find where is the appropriate middle? Where is the line to be drawn that defines an unsophisticated borrower from a sophisticated borrower? Banks are very – they’re cautious and wary about extending these provisions beyond the current unfair contract laws, which generally these provisions are tackled in contracts – sorry, not contracts, loans of 1
30 million or less. This will extend it to 3 million. Banks, in making a determination about managing their loan book, have to take on more risk in taking on a small business loan and they feel – they feel – they still feel a little uncomfortable, I would say, at the 3 million. But they are willing to go to that. They feel distinctly
35 uncomfortable at the 5 million, and that is more true of some of the non-major banks, or banks that are smaller regional Australian banks, who have smaller loan books, who feel that not only will they be exposed to a high degree of risk with such contracts, but that because of the size of their loan book that will put them and the nature of their loan book – will put them at a competitive disadvantage against the
40 four major banks. So what we are trying to do here is find a minimum standard that suits all of the industry regardless of the nature of their business and the size of their loan book, but there is a debate – there are a number of stakeholders who obviously, I think understandably, want to extend these protections as far as they can, and banks erring on the side of caution and conservatism. You will probably also have seen
45 in the papers that the banks have indicated to ASIC that part of their conservatism on this is that, frankly, we are in uncharted waters. They haven’t made loans of this size in these circumstances before. And they would be open to a two-year – put it at

3 million, try that for two years, have a review supervised by ASIC with a view to raising it to five, if some of their concerns are not realised.

5 What I would like to do is just take a few of those points in turn so that the
Commissioner can get a better sense of what the issues are. Can I start with the idea
that the code creates a higher risk for the banks in respect of the loan. Can you just
explain that further to the Commissioner. What is the additional risk that it imposes
for the bank?---Small business loans, when it comes to banks doing their credit risk
10 assessments, small business loans under APRA guidelines attract a higher risk
assessment than a mortgage, for example. And for banks that have high exposures to
small businesses or particularly to certain sectors, they have to manage that risk on
their loan book. They – particularly the non-major banks feel that there’s already a
hurdle there in moving into business lending, simply because of the fact that the risk
15 rating is higher for their banks than for non – than for the four large banks. I might
need to unpack that for you. I’m not sure whether there has been a discussion about
standardised credit risk or - - -

No. I think that would be helpful if you can – you - - -?---Okay.

20 What you want to unpack is the issue about the way in which APRA risk weighs
particular rates?---Yes.

Is that right?---Yes.

25 I think that would be helpful?---Okay. So there are two ways that APRA provides
for risk weights to be calculated. One is through what’s called a standardised method
and the other is through an internal rating method. And the standardised – sorry, so
the internal rating is known as IRB. For a bank to qualify to use an internal risk
rating and become an IRB bank they need the approval of APRA, and APRA will
30 only give that approval where the bank is able to demonstrate a very deep capability
and sophisticated assessment of risk in their lending practice. The four major banks
are IRB banks. Macquarie Bank recently was approved, and ING will start in July as
an IRB bank. All of the other lending banks in Australia are required to use the
standardised method. So using the standardised method, banks are required to
35 allocate 100 per cent risk to a small business loan. If you are an IRB bank you can
look at the loans in much more granular detail, because of the capability that you
have and you can risk rate them accordingly. And what you will find is most – on
average, the IRB banks, their risk rating on most – on small business loans averages
somewhere around 50 to 60 per cent. So that means that there’s quite a gap in the
40 risk rating between the IRB and the standardised banks. So that’s one issue. For
some of the banks in the industry that do not have large lending books there is not a
lot, if any, lending to business that they do beyond 5 million. They might have one
or two loans beyond 5 million, but for some of the smaller regional banks, their loan
book gets – 5 million takes them very close to their total business lending book, and
45 they are very concerned about the prospect of having almost an entire loan book in
their business lending that has significantly lower controls, as proposed in the code,

than they currently have in their business book. So they feel they have almost two hurdles now – that they would in this circumstance have two hurdles.

Sorry. Did you want - - -?---No, that's - - -

5

I have some questions that I just want to use to try to break this down. So I think we understand the idea that APRA uses two – depending on the bank, there are two different available methods in relation to the – in relation to the risk weighting that it attracts, or attaches to a small business loan. And, as I understand what you were saying, the point you were making is for an IRB bank – of which there will, by July, be six in Australia – those six banks are able to allocate a risk rating for should be loans that depends on their internal analytics in relation to the risks that attach to the particular loans. That's the first point you are making?---Yes.

15 And the second point that you are making for all other banks or ADIs that are operating in Australia, when they come to allocate a risk weighting to any loan, they have to do so according to whatever are the standardised ratings that APRA sets in its guidance?---Yes.

20 And you made the point in relation to a small business loan that the risk weighting under the APRA standard guidance is 100 per cent; that's right?---That's right.

But there's a slight – there's a bit more detail, isn't there, about that, which is as we understand it, if the small business loan is secured by a residence and it's treated in the same way as a residential mortgage; is that right?---It depends a little on the nature of the security, but yes, I should have indicated that more in the unsecured area that 100 per cent applies.

30 And if it's – sorry, unsecured, not secured on a residence, it might – for example, if it's secured over commercial property then there might be a particular risk weighting that applies in relation to that different from what would happen if it was secured over a residential mortgage?---Yes. But I think the important thing here is that there would be very few – or the banks' view is there would be very few small businesses that are truly small businesses that would have residential property to the value of \$5 million.

35 I understand. And then is there a difference at the moment in how APRA applies a risk rating to a loan for a business under – to a loan of under \$5 million to a business as distinct to a loan of more than \$5 million for a business?---No, not my understanding.

40 So the monetary threshold as it stands makes no difference to what the risk weighting is that APRA applies to a business loan?---No. That's right.

45 All right. So then the point that you're making, I think, must have a further step, which is some concern that if the code comes into effect in the form that it presently is, but with a cap of \$5 million, that that might have some effect on the standardised

risk weighting?---No. Maybe if I can be a bit clearer. Those banks that are subject to the standardised risk rating already feel at some competitive disadvantage, and given that they have smaller loan books, in most cases where taking it to 5 million would take it very close to 98 or 99 per cent of their business lending book, that means that almost their entire book would be subject to significantly less control of the loan than is currently the case. So they feel they would have a double competitive disadvantage in the small business lending area. So I don't mean to conflate the two. It's more that they are – they're two different things but together they present a competitive disadvantage to standardised banks, partly because of the fact they are standardised and partly because of the fact that they are – their lending books are smaller and slightly different.

I understand. I think – let me say it back to you to make sure that we have nailed it down for the purposes of the evidence. For banks that are not one of the IRB banks, which is every bank except for the major four plus Macquarie, now soon to be ING. So for every bank other than those six, they already have a view, which is they are presently under a competitive disadvantage when compared to the IRB banks because they are required to have a higher risk rating on any business loan unsecured by a residence when compared with an IRB bank; is that right?---Yes – yes.

So there already exists, independent of whatever form the code is in, that disadvantage?---Yes.

And the concern is that the disadvantage that they might be under will be further compounded if the code comes into effect and applies to loans of up to \$5 million - - -?---That's correct.

- - - for small business, and the reason that it might be further compounded is because, for those non-IRB banks, many of them have business portfolios that are largely comprised of loans of \$5 million or less?---That's correct.

So that they expect that the effect of the code will be felt on a higher proportion of their business loans when compared to the proportion of business loans that it will affect for the major banks?---That's correct. And that, in turn, affects their risk appetite when looked across the whole book.

Yes, sorry?---No. That's all right. No, I'm sure we will get to it.

All right. And so then, when it comes to the way in which it would affect them, the point is that it would impose what you described as significantly lower controls on the loans; is that right?---Yes.

And can you explain to the Commissioner what you mean by that, why it is that the code would impose significantly lower controls?---Yes. So previous versions of the code have not expressly applied to small businesses. There have been one or two provisions that a small business has been able to access some entitlement or – or protection, but this is the first time that the code has taken on an entire small business

chapter, and provides a number of new protections to small business. And it's – they're protections that if you go back to my earlier comment about the spectrum of – from unsophisticated to sophisticated, they're protections that will make small business contracts look a little more like an unsecured personal loan, for example.

5 So, for example, it limits non-monetary – the code provisions will limit – for these small businesses, however defined, will limit non-monetary defaults to those that go really to the lawful operation of the business. It will not apply financial indicators other than in the case of property development and specialised lending. It will – it will not have material adverse circumstances or material adverse change as a default

10 trigger. It will have it – it may be in a standard contract as a review trigger for a business where the bank believes that there's difficulties arising, but it will remove material adverse change as a general default trigger. So the protections, I think – while there's – what this does is shift some of the risk from the customer to the bank. And that's in recognition that in small businesses, as I said, we're looking at trying to

15 identify which or how do you define those customers that – who are truly in the unsophisticated category. Banks are of the view – and their view is based on their experience of their lending – that once a business gets into the four and 5 million dollar category, they become – one, if they're in the business of borrowing that sort of money then they're more likely to be of a more sophisticated nature and able to

20 access both commercial and legal advice.

So – and again we might just try to take this in steps. When you are talking about the significantly lower controls, it sounded to me like the types of controls you are talking about are limitations on the ability of banks to enforce or take default-based

25 action, are those the types of controls you are talking about?---Yes. So mindful that these are on business loans that are not secured. So – or not fully secured, where you would want – where banks are seeking to make sure they have some ability to intervene when there is evidence that the business is not doing well, either to work with the business to restructure or, where nothing else will work, to intervene to end

30 the loan if the bank is of the view that doing so is the only way to stop the business from going further downhill.

And I think that's effectively a yes to my question. What I'm concerned to distinguish between is there are certain obligations that apply in relation to the

35 making of a loan in the first place, the diligent and prudent banker standard?---Yes.

So that's about the start of the loan. And then there are parts of the code that deal with what can happen at the end of the loan or the potential end of the loan and the limitations on the ability of a bank to take default-based action. So those are two

40 separate things?---Correct.

Both of them might be described as a control on what it is that the bank can do, but I understand the type of control that you are referring to are the controls at the end of the loan. That is, the ability to take default behaved action, the ability to appoint IAs,

45 the ability to perhaps appointed receivers and managers and restrictions on whether you can use the same person, that type of thing?---Yes. But I wouldn't say there's a complete distinction between the beginning and the end. When banks are making a

decision about making a lending decision, they have obligations to ensure that there are sufficient provisions in the contract to allow them to – it’s a risk assessment. Is there enough provisions in this contract for me to make this loan and know that there is an opportunity to manage that loan if needs be.

5

And just on that – which is an interesting point, and I would like to just focus on it for a moment, is it fair to say the point you’re making is if a bank has to act as a diligent and prudent banker, then one of the things it has to take into consideration in determining whether or not to make a loan are what are the risk mitigation controls or powers that it would have in the event that there was a drop in the value of a security or some change in circumstances?---Yes.

10

And so that, on the one hand, it might seem beneficial to a borrower to have this particular contractual standard, which is that the banker has to act or the bank has to act as a prudent and diligent banker in making a loan. But on the other hand, because the controls available to a bank governed by the code will be less, that might make it less likely that the bank will be prepared to extend credit?---Yes. There is a policy tension between those two.

15

I understand. If we then move back to this issue of the distinction between three and \$5 million, taking your point about the competitive disadvantage for smaller banks, on this premise, presumably the smaller banks are going to be competitively disadvantaged for loans under \$3 million; is that right?---I’m sorry, could you just repeat that.

20

Well, if the premise is that for any loan that is governed by the code, a bank that is not an IRB bank will be at a competitive disadvantage, or a further competitive disadvantage, that would mean that under the current draft, if it applies to loans of \$3 million or less, those non-IRB banks will be at a competitive disadvantage in relation to those loans?---That’s correct.

25

And?---And they’re seeking to contain that.

They’re seeking to have it not extend up to loans of \$3 million - - -?---Yes.

30

- - - or more, but also there’s another quirk here, which is it’s not actually – it’s not actually even following the form of the recommendation that was made by Khoury, which is that you judge it based on the size of the loan. Instead, it’s being judged based on the size of the total debt to all credit providers; you agree with that?---Yes.

35

So that the consequence is that for any loan where that particular borrower has total debt to whatever other credit providers there might be, that particular loan won’t be covered by the code; that’s how it works?---That’s right. That’s correct.

40

And so that may make it even more difficult to figure out the extent of the competitive disadvantage to the smaller banks, but your fundamental point is that to whatever loans the code applies the small banks – that is non-IRB banks – will be at

45

a competitive disadvantage in relation to those loans?---That is one of the concerns. That is informing the industry's position, yes, correct.

5 So that what might – assuming that was – that proved to be accurate, and assuming that those non-IRB banks didn't want to be at a competitive disadvantage, their only option would be to leave the ABA; is that right?---That could be – yes, that could be one option.

10 And at the moment, for those non-IRB banks, have they given an indication to you of what proportion of their business loan book is – falls into the \$3 million or less category?---Yes. And there is a document among all of this, but it varies from bank to bank, but somewhere between 93 per cent up to 98 per cent across each – across the entire industry.

15 And that includes both the IRB and the non-IRB banks?---Yes.

20 And that would mean, assuming it was at a minimum 93 per cent, that on this thesis of competitive disadvantage the non-IRB banks are in any event going to be competitively disadvantaged in relation to 93 per cent of business loans; is that right?---Yes. But I think it's important to understand that the vast majority of small business loans are well below a million dollars. Most recent RBA data, I think, indicates that some 90 per cent of business loans are under \$500,000. So when a – when a standard bank, a standard risk assessment bank, is making a judgment on the risk of a \$100,000 or a \$200,000 loan, whether the question of the amount of either security and/or control mechanisms or risk management mechanisms is a vastly different decision than one that relates to a loan of 3 million, 4 million or 5 million. And it goes directly to the question of risk appetite.

30 We might – we will come to that in a moment. I just – I want to make sure that we fully understand – understood the ABAs point about competitive disadvantage. The code will apply to whoever is a member of the ABA; that's right, isn't it?---The code – when – when a bank signs up to the code it applies to them completely. Any non-signatory banks, if there was a dispute that came before the Ombudsman, the Ombudsman would use the code as the benchmark for best practice in determining a matter. So whether or not a bank is a signatory or whether or not they're a member of the ABA, the code still sets the industry standard and is used by the financial Ombudsman to determine the benchmark against a matter should be – against which a matter should be considered.

40 All right?---So it may not be strictly enforceable in a court, if they are not a signatory, but in the Ombudsman service, where most disputes are resolved, it would – it does apply.

45 I thought – perhaps I misunderstood – that the ABA was going to require any member bank to sign up to the new code once it came into effect?---Yes.

So - - -?---But non-member banks, who are not signatories – or going back to your hypothesis about a bank that left, it would not necessarily absolve them of the responsibility.

5 So if we just sort of work through this idea of competitive disadvantage, any – any member bank of the ABA will have to sign up to the code; that’s right?---Yes.

And - - -?---Sorry, any member bank who provides retitle services to which the code applies.

10

Yes. Will have to sign up to the code, yes. And that – the application of the code doesn’t depend on whether you are an IRB bank or a non-IRB bank?---No.

15 So that the disadvantage that any bank experiences in relation to a loan to which the code applies is the same regardless of what bank it is, insofar - - -?---Yes.

- - - as the disadvantage arises from the code?---Yes.

20 So that it seems like any disadvantage that the non-IRB banks might suffer, when compared to the IRB banks, isn’t connected to the code; it’s just connected to the APRA risk weighting?---No. For those – as I said, these two things are not totally connected. It’s more that one compounds the other, so it’s – if you are a non-IRB bank, it’s largely because you are not as big, not as – your – your risk – credit risk assessment capability is not yet as deep and as granular, but – virtue of that – you are almost likely – you are going to be a smaller bank with a smaller loan book and your risk appetite is going to be generally lower than banks that are significantly larger.
25 So - - -

30 Maybe if I – I’m sorry to interrupt you, but just if I try to cut to what I think is the issue that we’re trying to get at here. Is the issue that if a bank has a greater percentage of its loans, of its business loans, falling within the ambit of the code, that that might somehow how create - - -?---Yes.

35 - - - a disadvantage as compared to a bank that has less of its loans falling within the ambit of the code?---Yes.

40 And why does that create a disadvantage?---Because each bank will have to make a determination on each loan about the provisions in that contract for managing the risk that is – that comes with that form of lending. And if that makes up almost all of your loan book, then your appetite for taking on very significant loans of three and a half, 4, 5 million for, again, the customers we’re trying to protect here is going to be significantly lower than if you have a very extended loan book and those loans that are riskier – because they have less risk controls in them – they form, you know, a significantly lower part of your book.

45

I might just move to a slightly related issue, which is you made a point about the sophistication of borrowers, and that the banks believe that if the total debt is greater

than \$3 million that the borrowers are likely to be of a different level of sophistication to borrowers of a debt of less than \$3 million. That is what I understood your point to be; is that right?---They're more likely to be more complex businesses; they are less likely to be secured by residential or other property, simply because of the size of the loan; they are – in the experience – and banks have advised me that their experience is once they start getting into that territory they are dealing with more complex and – and more mature businesses. This is not to say that there aren't some unsophisticated borrowers in that category. As I said earlier, what banks are trying to do here is find a definitional threshold which in the first instance, given that this is actually quite uncharted water, is careful, cautious, and conservative.

Is there some data analysis that the banks have done to come to the view that \$3 million of total debt represents roughly the point when you expect more sophisticated borrowers to be on the other side of that marker?---Banks have – they've come to this position by talking to the people within their own banks about those people who run their lending books about the nature of small businesses that are in this sort of lending category. But I don't want to overstate that, it is precisely because there isn't a lot of data on this. There isn't – it's not so much data, it's actually a lot of experience, at managing covenant-light contracts and what that might do in the longer term to risk appetite, to access to credit, and to the cost of credit. It is likely that – you know, banks are concerned that they – the lighter the covenants, the more likely they are to have to price in the cost of that increased risk they're taking, or be less likely to want to take on the loan. Now, nobody can absolutely predict exactly what will happen, but it's precisely – it's that concern that is driving them to the more cautious end of the spectrum in the first instance, with a view that they are open to going to a higher level within a two-year period if their data, if they can have a look at actual data with the experience of running those contracts, and whether it has actually, in the end, played out in a way that put risk appetite or made risk appetite play out in a way that made access to credit tighter.

You know, I'm sure, that the assessment that Mr Khoury made was that \$5 million was about the right level and that was based on his experience with having previously reviewed the FOS system and looking at the complexity of loans that were being dealt with by FOS. That's your understanding of his approach?---Yes. I have looked at the reference to that FOS review. There is one line that refers to having seen evidence of businesses over 5 million seeking to use FOS services, and that that didn't seem appropriate. That was a review done to determine what is the appropriate way to define a small business in terms of their eligibility to receive external resolution dispute services. One of the concerns the banks have is that that threshold – that is, what is the hurdle you have to jump to get X – access to external dispute resolution, is being transferred to credit risk assessment and lending practice without any real science under it.

I understand. And the way in which Mr Khoury has approached or approached it in the FOS case and then approached it carrying over to his review of the code, was based on his observations. He thought \$5 million represented a rough threshold for

when the complexity of the loan, and therefore the potential dispute, increased beyond something that could be expected to be dealt with in a simple way. That was – it was about the complexity of the loan and therefore the dispute, I think it's fair to say?---Yes.

5

And is the ABAs concern or the member banks' concern that you shouldn't consider the complexity of the loan and, therefore, the possibility of the complexity of the dispute: you should judge it based on something else to do with the borrower?---Not entirely. The views of the banks have consistently been that the more you go up the lending ladder, the more – as a general rule – there will always be exceptions, but as a general rule, the more complex the business, and the more complex the nature of the loan, and the more complex the contractual arrangements become. And their view is that, in the first instance, it would be prudent in extending, in effect, the unfair contracts legislation from 1 million. It would be more prudent and cautious, based on their experience of the lending judgments they make, for the threshold to be 3 million. Beyond that, in their view, you start entering some quite complex territory.

Can I throw out an idea, and see whether you want to adopt it or not: is it possible that what the banks are concerned about is the sophistication of the borrower, as distinct from the complexity of the loan arrangement, or the possible dispute that would arise from the loan arrangement?---To the contrary. I think they're worried – those two things are related. You know, generally when you're into – a complex business, it's unlikely to be your first foray into – into – into that field.

25

Let me put it again, and you don't have to adopt it, but it's possible that you might well have a situation where, if you're borrowing a total amount of money of greater than \$3 million, you are a sophisticated borrower even though the particular loan contracts that you are using are going to be standardised – what appear to be relatively simple loan contracts. That is, there is a significant distinction between or possible distinction between the sophistication of the borrower and the complexity of the loan arrangement?---I'm sorry, I'm still not quite clear what it is you are putting to me.

That's all right. I was just trying to offer an idea, an argument that I thought help the ABA, but can I move on to - - -?---I can read it in the transcript.

Can I move on to the next topic I want to ask about, which is guarantees. Can we bring up ABA.001.008.0460. I think I've gone too far, can we go back to 0458. What I'm interested in exploring with you is this second issue, Ms Bligh, is in relation to clause 99 of the proposed code, which is guarantee documents, which sets out the documents that the member bank is agreeing to give to the guarantor in relation to the borrower. And what I'm interested in, and this may – this doesn't seem to have been a point of dispute with ASIC, so it may be that it's not something that you are able to assist us with. What I'm interested in understanding is the banks' view about the adequacy of this information in assisting a guarantor to make a determination as to whether they ought to give a guarantee?---Clearly, all of the

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provisions of the code represent the standard that banks can agree by consensus is a reasonable standard.

I suppose the - - -?---I should say it is a minimum standard, as well.

5

Of course, it's a minimum standard. It may be that I'm – this might be something I will take up with ASIC tomorrow and then they can decide whether they want to then take it up with you in your ongoing negotiations. Can I move then to the third issue that I want to talk about, which is non-monetary defaults. Can we go to 0455. So this begins a series of clauses whereby the banks are making certain commitments in relation to the circumstances in which they will take enforcement action based on non-monetary defaults?---Correct.

10

And this is the particular – as I understood it, one of the principal areas of concern in terms of imposing greater controls on the banks that they might otherwise not be subject to?---Correct

15

And one of the complaints that Mr Khoury made about the drafting of clause 80 is that what he was trying to suggest was the bank ought to be very specific about the exact circumstances in which it will exercise non – or take default-based action for non-monetary defaults. And that this drafting, as it is, doesn't achieve that aim, and that instead what happens is clause 80 says, “We won't do it unless”, and then there are a whole series, 12 exceptions to the circumstances in which they won't do it. And then there's just the further qualification of clause 83, which is the material impact clause. And I'm interested in understanding the banks' view about the adequacy or otherwise of these controls?---Clearly, there are many reasons why a small business or any business may get into financial problems and they – the list, given the vast diversity of the kinds of businesses that are the subject of bank lending, if – I think you're suggesting Mr Khoury indicates it would have been preferable to have a list of the circumstances in which it would happen.

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25

30

Yes?---I think you will find that would list would go to several hundred pages, if you think about all of the things that might happen. What is being indicated here is that there are only – if you look at those 12, they really do go largely to the lawful operation of the business, that financial indicators such as using LVR will not be a trigger for default, except as I said in relation to property development. So if you're insolvent – and they're very clear, I think.

35

And it must follow, from the things you were saying earlier, that the banks regard this as a – these clauses as significantly constraining their rights; is that right?---I think it would be a judgment for each bank about the significance that these might – it's more that there less less – there are less now, significantly less, than there were in previous contracts, and they are restricted to those things that go to the lawful operation of the business, and with a provision that it has to be material. And, in the absence of some of the previous mechanisms, this is what has been called a covenant-light contract.

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5 The reason I say it must be that they're regarded generally as significant is because, if the premise of the objection to the cap being extended to \$5 million is that the bank will then – I think to use your term – have significantly lower controls in respect of any loans to which the code applies, it must follow that this significantly reduces the controls that they might otherwise have?---Yes.

10 All right. And can you just explain to the Commissioner: is the reason for that the combination of both the fact that there are now only certain circumstances, the 12 listed, in which the default based action can be taken and also because of the requirement in 83 that there be a material impact?---Yes. Previously, these contracts could include as a default trigger a clause – a generalised clause along the lines of “any material adverse change”. That now cannot be used as a default trigger for these contracts. And when I said to you before the sorts of multiplicity of things that might be caught in a material adverse change clause, you know, all kinds of things about what might happen to your business that is not possible to predict. That no longer exists. So that's a risk that the bank is taking, that there may be – outside of these 12, there may be something that is material. It is adverse, and it puts the business at risk, and the bank does not have a direct entitlement to take action for that reason. So that is a transfer of the risk to the bank from the customer to the bank.

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20 There are – also, clause 85, the only financial indicator covenants, and these are covenants which go to the use of LVR, for example, they can only be used in the case of property development lending, or loans for specialised lending transactions, such as margin lending, self-managed super funds, and other such instruments. So those financial indicators were also something that banks have, in the past, relied upon and they will no longer be part of a standard small business contract, except in those limited circumstances. So again that is a transfer of risk to the bank.

30 Is it really, though – if we think about some of the case studies that we've seen where there have been issues about default, they have tended to – or non-monetary default – they have tended to involve either a failure to provide financial information in accordance with whatever the contractual clauses are, or a failure to comply with whatever the particular financial indicator covenants are. Now, it may be that there's a raft of cases where there's just a generalised exercise of material adverse change clauses, but if we set that possibility aside for one moment, the financial information carve out remains in 80 subparagraph (h)?---Yes.

35

40 So that if the bank puts in a clause that requires quarterly statements to be provided, then that is something upon which it can take default based action, subject to 83?---Well, only if it's not provided as part of the contract and if it's – if the failure to provide it is demonstrably material.

And the – but the financial indicator covenants are removed for specialised loans?---That's right. And property development lending.

45 And is that really the more significant point? That there's – the removal of financial indicator covenants will at least restrict the circumstances in which, say, a business that has borrowed – on the basis that it's buying a – sorry, a person that has borrowed

money in order to buy a going concern business will, in theory, not be subject to this possibility?---That's the intention of clause 85, is that financial indicator covenants will not form part of standard form loans.

5 All right. I want to move then to another topic, which is RCD.9999.0043.0010, which is the relevant regulatory guide?---Is this RG183?

Yes, that's right?---I don't believe I have a hard copy, but that's okay.

10 I will – I just wanted to – if we – that's definitely not the right one. It's RCD.9999.0043.0010. I mean, I say that. Actually, I don't – whether Suncorp is now publishing ASICs regulatory guide. I assume not. There we go. Can we go to .0026. So what I'm interested in is: the regulatory guide sets out a minimum in
15 relation to remedies for code breaches, and (a) is compensation for any direct financial loss or damage caused to an individual by the breach – by the breach of the code, and (b) is the ability to make non-monetary orders obliging the subscriber to take a particular course of action to resolve the breach. If we then go back to the draft code and bring up ABA.001.008.0464. We might to bring up page 36 and also
20 page 35. So this is the section of the draft code that is setting out the powers and roles and responsibilities of the BCCC?---It is.

And the BCCC is to replace the CCMC?---That's correct.

25 And clause 214 provides for certain powers or sanctions of the BCCC. What I'm – and it does provide for certain powers that the BCCC has to apply sanctions in the event of a breach of the code, if the breach is serious or systemic. What I'm interested in understanding is how does the ABA see the requirement under the regulatory guide of the provision for compensation for any direct financial loss or damage, caused by a breach of the code, being addressed within the code?---Okay. I
30 think it's important to distinguish here between the BCCC, which is not a complaint handling body. It is charged with the responsibility of monitoring bank compliance with the code. The code itself is – establishes – requires member banks to be members and to fund an external resolution procedure that is – was FOS, will be AFCA, and it is that body which establishes a customer's right to remedy,
35 compensation, and other – and the relevant provisions of RG183.

I understand. So the position of the ABA is that requirement of the regulatory guide is met by the requirement that the bank be, effectively - - -?---Yes.

40 - - - a member or a subscriber to an external dispute resolution service?---Yes.

Which, as we know, was FOS; it's going to be AFCA. AFCA has the power to order compensation for a breach, and therefore that ought to address the requirements of the regulatory guide; is that right?---That's correct.

45

All right. And then the last thing that I wanted to ask you about was the situation in relation to ASIC and the negotiation. Does it remain the priority of the ABA to achieve approval of the code by ASIC?---Yes.

5 All right. And in terms of resolving this issue about the \$5 million or \$3 million cap, ASICs position has been that it ought to be \$5 million, in the past?---Correct.

And how does the ABA see that as being an issue that can be resolved with ASIC, in order to get approval of the code?---In, I think it was mid-April, the – a number of
10 banks representing particularly the major – the banks – mostly involved, those banks that have business lending books, met with ASIC and took them through their concerns about the thresholds. They then resolved to escalate that to the chair of ASIC, with a letter that outlined in writing the concerns of the industry, and that letter has been provided. The – ASIC has not – well, they have acknowledged the
15 letter, but they have not yet formally responded to the issues that have been raised in it, and I would expect that – sorry, and ASIC has indicated to the ABA and the industry that they believed it was appropriate to delay further consideration of this issue until after the small business hearings had been conducted on the view that there may well be issues raised in these hearings that should be considered by both
20 parties before finalising any provisions on the code, whether it's the three to five or anything else. And also, out of general caution that this – these are matters on which both parties would be required potentially to give evidence. So once these hearings are concluded I would expect that there will be further meetings. I have a meeting with ASIC next week, but I would expect it will be escalated at some point to the chairs of the respective organisations. I should clarify that the discussions with
25 ASIC have been held at officer level and with the – one of the – deputy commissioner – with the deputy commissioner. ASIC itself, as a commission, have yet to formally resolve their position. These have all been matters appropriately in line with RG183 that ASIC, after speaking to stakeholders, have put back to the
30 industry for some consideration or reconsideration in the interests of trying to get the best code. There is this one issue that is yet to be resolved, and I look forward to those discussions in the next couple of weeks.

Commissioner, I don't have any further questions of Ms Bligh.
35

THE COMMISSIONER: Thank you, Mr Hodge. Does any party having leave to appear seek to cross-examine Ms Bligh? No. Mr Silver, have you anything arising? Ms Bligh, thank you for your evidence and your attendance?---Thank you.

40 You may step down and you are excused?---Thank you.

<THE WITNESS WITHDREW

[2.52 pm]

45

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, you might recall the threat or promise that I made yesterday afternoon that I would tender a succession of further statements. Could I just tell you what those statements are.

5 THE COMMISSIONER: Yes.

MR HODGE: These are what are referred to as part C statements, so they respond to parts of a rubric that dealt with the ways in which banks went about meeting their obligations or went about addressing their contracts to bring them into compliance with the unfair contract terms regime. I'm going to tender the statements from five of the relevant banks. So the first is the statement of Brian Zacharias, dated 15 May 2018, prepared in response to part C of rubric 3-6. Mr Zacharias is from the Bank of Queensland. The document ID is BOQ.0001.0088.0001.

15 THE COMMISSIONER: That's exhibit 3.145.

**EXHIBIT #3.145 STATEMENT OF BRIAN ZACHARIAS PREPARED IN
RESPONSE TO PART C OF RUBRIC 3-6 DATED 15/05/2018
(BOQ.0001.0088.0001)**

MR HODGE: The next is statement of Sean Cash, dated 16 May 2018, prepared in response to part C of rubric 3-4. I think that Mr Cash is from Westpac. No, he can't be from Westpac. In any event, he is from NAB and the document ID is WIT.0001.0050.0001.

THE COMMISSIONER: Exhibit 3.146.

**EXHIBIT #3.146 STATEMENT OF SEAN CASH PREPARED IN RESPONSE
TO PART C OF RUBRIC 3-4 DATED 16/05/2018 (WIT.0001.0050.0001)**

MR HODGE: The next one is the statement of Chris Williams from CBA, dated 16 May 2018, prepared in response to part C of rubric 3-1. The document ID is CBA.9000.0044.0001.

THE COMMISSIONER: 3.147.

**EXHIBIT #3.147 STATEMENT OF CHRIS WILLIAMS PREPARED IN
RESPONSE TO PART C OF RUBRIC 3-1 DATED 16/05/2018
(CBA.9000.0044.0001)**

MR HODGE: The next is the statement of Kate Gibson, dated 17 May 2018, prepared in response to part C of rubric 3-2, and the document ID is ANZ.999.010.0001.

5 THE COMMISSIONER: Exhibit 3.148.

10 **EXHIBIT #3.148 STATEMENT OF KATE GIBSON PREPARED IN RESPONSE TO PART C OF RUBRIC 3-2 DATED 17/05/2018 (ANZ.999.010.0001)**

15 MR HODGE: And the last one is a statement of Ivan Mardjetko, also of NAB, dated 16 May 2016, prepared in response to part C of rubric 3-4 and the document ID is WIT.0001.00510001.

THE COMMISSIONER: Exhibit 3.149.

20 **EXHIBIT #3.149 STATEMENT OF IVAN MARDJETKO PREPARED IN RESPONSE TO PART C OF RUBRIC 3-4 DATED 16/05/2016 (WIT.0001.00510001)**

25 MR HODGE: And then, Commissioner, the next witness is a Westpac witness, Ms O'Donoghue.

THE COMMISSIONER: Yes.

30

<KIRSTEN O'DONOGHUE, SWORN [2.54 pm]

35 **<EXAMINATION-IN-CHIEF BY MR DARKE**

THE COMMISSIONER: Do sit down. Yes, Mr Darke.

40 MR DARKE: Thank you, Commissioner.

Ms O'Donoghue, could I ask you to tell the Commission your full name?---Kirsten Marnie O'Donoghue.

45 And you are the chief risk officer for the Westpac Group's business bank; is that right?---That's correct.

And your business address is 200 Barangaroo Avenue, Barangaroo, New South Wales; is that correct?---That's correct.

5 You've received a summons to appear at the Commission today?---Yes, I have.

Commissioner, I tender that summons.

THE COMMISSIONER: Exhibit 3.150 is the summons to Ms O'Donoghue.

10

EXHIBIT #3.150 SUMMONS TO MS O'DONOGHUE

15 MR DARKE: And you have also made a statement, I understand, in relation to part C of rubric 3-3; is that right?---Yes, I have.

Do you have a copy of that statement with you?---Yes, I do.

20 And are its contents true and correct?---Yes, they are.

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

THE COMMISSIONER: Statement of Ms O'Donoghue and its exhibits, exhibit 3.151.

25

EXHIBIT #3.151 STATEMENT OF MS O'DONOGHUE AND EXHIBITS

30 MR DARKE: May it please the Commission.

THE COMMISSIONER: Thank you. Yes, Mr Hodge.

35 <CROSS-EXAMINATION BY MR HODGE

[2.56 pm]

MR HODGE: Thank you, Commissioner.

40 Ms O'Donoghue, we won't be very long. I just want to run through a few documents with you. That was a promise to both you, Commissioner, and also Ms O'Donoghue. You've been the chief risk officer of Westpac since January 2016?---That's correct.

45 And in that role you're responsible for overseeing compliance with regulatory change?---Yes, I am.

- And you've made a statement to the Commission, and one of the topics that it addresses is the changes that Westpac made to its small business standard form contracts since the amendment of the ASIC Act to extend the application of the UCT regime to small businesses?---That's correct, yes.
- 5 And you've also, in your statement, told the Commission about some communications that have taken place between Westpac and ASIC since January 2016 in relation to those contracts?---Yes.
- 10 What I want to do is just, in addition to what you've dealt with in your statement, ask you to address or confirm a handful of other documents. Can I first bring up WBC.104.002.2610?---Perhaps would it be helpful - - -
- I'm afraid it's not in your statement?---Okay.
- 15 Do you want me to read that number out again. Thank you. It might be easier if you have a look on that screen closer to you?---I think I will, yes.
- 20 This is an email from Sarah Brooks. Could you just tell the Commissioner who Sarah Brooks is?---Sarah Brooks works in our regulatory response team within the risk group.
- And so does she report to you ultimately?---No.
- 25 Is she not – are you within the same group or in a different - - -?---Yes, we're in the – within the risk family, but in separate lines, if you like.
- Right. I understand. All right. And what this email records is that you and Ms Brooks had a discussion with ASIC about the unfair contract terms regime?---Yes, that's correct.
- 30 And have you reviewed or had the chance to have a look at this email in the course of preparing to give evidence?---Yes, I have.
- 35 And does what is set out in this email, although it's written by Ms Brooks, reflect your recollection of what occurred during that meeting?---Yes, it does.
- I tender that document.
- 40 THE COMMISSIONER: Exhibit 3.152 will be email Brooks to Lindberg and others 13 April 17, WBC.104.002.2610.
- 45 **EXHIBIT #3.152 EMAIL BROOKS TO LINDBERG AND OTHERS DATED 13/04/2017 (WBC.104.002.2610.)**

MR HODGE: And then you say in your statement that on 10 May 2017 you participated in what I think you describe as a round table event with ASIC and the Australian Business – Australian Small Business and Family Enterprise Ombudsman, and some other major banks?---That's correct, yes.

5

And can we bring up WBC.104.0002.2539.

THE COMMISSIONER: 104.002?

10 MR HODGE: WBC.104.002.2539.

THE COMMISSIONER: Yes.

MR HODGE: Did you attend that round table along with Mr Moyes?---Yes, I did.

15

All right. And he set out an email which contains a detailed note of what occurred at that meeting. Have you had the opportunity to review this document in the course of preparing to give evidence?---Yes, I have.

20 And does his note of what he sets out there reflect your recollection of what occurred during the meeting?---Yes, it does.

All right. I tender that document Commissioner.

25 THE COMMISSIONER: Exhibit 3.153, email from Moyes and others, 10 May '17, WBC.104.002.2539.

30 **EXHIBIT #3.153 EMAIL FROM MOYES AND OTHERS DATED 10/05/2017 (WBC.104.002.2539)**

MR HODGE: And then you also, as we understand it, attended a further meeting with ASIC on 19 June 2017?---Yes.

35

And can we bring up WBC.107.001.6563. This is the agenda for that meeting. Have you reviewed this document in the course of preparing to give evidence?---Yes, I have.

40 And do you recall whether the items set out in the agenda were all discussed during the course of that meeting?---Yes.

I tender that document, Commissioner.

45 THE COMMISSIONER: Agenda of meeting, 19 June '17 small business loans unfair contract terms, WBC.107.001.6563, exhibit 3.154.

**EXHIBIT #3.154 AGENDA OF MEETING: SMALL BUSINESS LOANS
UNFAIR CONTRACT TERMS DATED 19/06/2017**

5 MR HODGE: And finally, can we bring up WBC.414.002.0409. It is a bit difficult to read, but this is a chain of emails. The email at the bottom is an email from Chris Green of ASIC being sent to, amongst other people, Ms Brooks, and then she has then forwarded that email on to you with some commentary?---Yes.

10 I tender that document, Commissioner.

THE COMMISSIONER: What's its date, Mr Hodge?

MR HODGE: 7 March – it's the - - -

15

THE COMMISSIONER: 7 March - - -

MR HODGE: 6 and 7 March 2018.

20 THE COMMISSIONER: - - - '18 is it?

MR HODGE: Yes.

THE COMMISSIONER: Yes.

25

MR HODGE: Now - - -

THE COMMISSIONER: Emails between Brooks, Green and others 6 and 7 March 2018, WBC.414.002.0409, exhibit 3.415.

30

**EXHIBIT #3.415 EMAILS BETWEEN BROOKS, GREEN AND OTHERS
DATED 07/03/2018**

35

MR HODGE: Thank you, Commissioner.

The only other thing I wanted to ask you about was this issue that is being raised in this last chain of emails is an issue about cross-default clauses?---Yes.

40

And as we understand it there was a difference – there was at least a difference of view between ASIC and Westpac about the use of cross-default clauses and the intersection between those cross-clauses and the UCT?---Yes.

45 And has that difference now been resolved? Has there been an agreement reached between ASIC and Westpac about that?---Yes, there has.

And what is the resolution of it?---The resolution is the – as was outlined in report 565, which is the cross-default clauses will extend only to the defaults listed within – the non-monetary defaults agreed, and enforcement proceedings.

5 Thank you, Commissioner, I don't have any further questions of Ms O'Donoghue.

THE COMMISSIONER: Mr Darke?

MR DARKE: No, thank you.

10

THE COMMISSIONER: Thank you very much, Ms O'Donoghue, you may step down and be excused from further attendance.

15 **<THE WITNESS WITHDREW** **[3.05 pm]**

MR HODGE: Commissioner, could we adjourn for five minutes while we change around the counsel.

20

THE COMMISSIONER: Yes. I will return in five minutes time, somewhere between 10 and quarter past.

MR HODGE: Thank you.

25

ADJOURNED **[3.05 pm]**

30 **RESUMED** **[3.11 pm]**

THE COMMISSIONER: Yes, Ms Dias.

35 MS DIAS: Commissioner, the next witness is Mr Steven Kluss from Suncorp.

THE COMMISSIONER: Yes.

40 **<STEVEN JOHN KLUSS, AFFIRMED** **[3.11 pm]**

<EXAMINATION-IN-CHIEF BY MR KIRK

45

THE COMMISSIONER: Do sit down?---Thank you.

MR KIRK: Thank you, Commissioner.

Your name is Steven John Kluss; correct?---Correct.

5 Your professional address is 266 George Street, Brisbane?---That's correct, yes.

Your position is you are the general manager lending at Suncorp Group?---That's correct, yes.

10 You have been summonsed to give evidence in this hearing of the Royal Commission?---Yes.

Do you have a copy or the original of the summons there with you?---I do.

15 I tender that summons, Commissioner.

THE COMMISSIONER: Exhibit 3.156 will be the summons to Mr Kluss.

20 **EXHIBIT #3.156 SUMMONS TO MR KLUSS**

MR KIRK: Mr Kluss, at the request of the Commission, you have prepared a statement for this case study?---That's correct.

25

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, it is.

I tender that statement.

30

THE COMMISSIONER: Exhibit 3.157 is the statement of Mr Kluss.

EXHIBIT #3.157 STATEMENT OF MR KLUSS

35

MR KIRK: Please the Commission.

THE COMMISSIONER: Yes, thank you. Yes, Ms Dias.

40

<CROSS-EXAMINATION BY MS DIAS

[3.13 pm]

45 MS DIAS: Thank you, Commissioner.

Mr Kluss, you are the executive general manager of lending at Suncorp Group; is that correct?---Yes.

5 And you have held that role since December 2016?---That's correct, yes.

And you are responsible for pricing, products and process of all lending issued by Suncorp, including business lending?---Yes.

10 You've been put forward to give evidence today and your witness statement about Suncorp's response to the extension of the unfair contracts terms legislation to small business lending contracts?---Yes, yes.

I will refer to that as the UCT?---Yes. That would be great, thank you.

15 Now, Suncorp defiance small business lending to mean lending to customers where they have a total business related exposure of less than 1 million; is that correct?---Yes.

20 Now, you are aware that on 12 November 2015 legislation was passed which amended the ASIC Act to extend the UCT provisions to small businesses?---Yes.

And you are aware that the legislation had effect – had the effect of providing a 12 month transition period, Mr Kluss?---Yes, yes.

25 So that is entities like Suncorp had 12 months, before the amendments came into effect, to bring their contracts into compliance?---That's correct, yes.

30 And the new protections apply to standard form small business contracts where the up-front price payable under the contract does not exceed \$300,000 or \$1 million if the contract is for more than 12 months?---Or – yes, that's - - -

You understand that?---Yes, I do.

35 And where a contract is automatically renewed, on or after 12 November 2016, you understand that the protections apply from the date of the renewal?---Yes.

40 Now, broadly speaking do you understand that the legislation provides that a term is unfair if, for instance, it would cause a significant imbalance in the parties' rights and obligations under the contract; the term is not reasonably necessary to protect legitimate interests of the party - - -?---Yes.

- - - that would benefit from its inclusion?---Yes.

45 And the term would cause financial or other detriment, such as delay, to a small business if it was applied or relied on?---Yes.

Now in February 2016, Mr Kluss, ASIC released an information sheet which provided guidance around the UCT laws. I will bring that up, so as to see that – you can have a look at that. That’s ASIC.0900.0002.0041. Now, I don’t think this is an exhibit to your – -?---Okay.

5

- - - statement, Mr Kluss, sorry. We will have to wait for it to come on the screen. Thank you. Have you seen this before, Mr Kluss?---No. I haven’t, no.

But Suncorp keeps – monitors ASIC publications - - -?---That’s right.

10

- - - to keep abreast of ones that might affect Suncorp’s business - - -?---Yes.

- - - such as small business lending?---Yes.

15 Okay. And you can see there that it says in the second paragraph:

Before the law comes into effect –

and that is reference to the UCT provisions –

20

ASIC expects businesses to review their standard form small business contracts to remove any terms that could be considered to be unfair to ensure compliance by 12 November 2016.

25 Do you see that, Mr Kluss?---I do, yes.

Now, you’re aware that some of the terms that ASIC told banks, including Suncorp, that would be considered unfair, include terms that give lenders a very broad discretion to vary unilaterally their terms?---Yes – yes.

30

And terms that provide for a default of a loan which is a non-monetary default in a very broad range of circumstances, rather than where the borrower is materially default on their financial obligations. You’re aware of that?---Yes.

35 And terms that too broadly indemnify the lender, such as Suncorp, against losses, costs, liabilities, expenses?---That’s correct.

You are aware of that?---Yes.

40 Now, you have exhibited some correspondence between Suncorp and ASIC to your statement, Mr Kluss?---Yes.

45 Between September 2016 and April 2017. Now, from about that time, the start of that period, ASIC told Suncorp that it wanted to ensure that Suncorp’s contracts did not contain any unfair terms; that’s correct?---That’s correct, yes.

And ASIC sought copies of some of those contracts; is that correct?---They did. They asked on the 7th, yes.

5 Now you exhibit one of the requests to your statement. That's exhibit 13, Mr Kluss. That's SUN.1101.0002.0766?---Sorry, what was the number again?

Now, there's an email at the front?---Yes.

10 Which is from an ASIC representative then there's a letter attached to that email, Mr Kluss and that is SUN.1101.0002.0766. Do you see that?---I've got that.

Thank you. I will just call that doc ID again. It's SUN.1101.0002.0766. Sorry. If it can't be brought up, Mr Kluss, I will take you through it?---Yes, okay.

15 Now, that's a letter dated 7 September 2016?---Yes.

You can see that?---Yes.

20 And there's a paragraph there, thank you, in the middle where it says:

ASIC has been working with industry and businesses and has released guidelines to help them understand the new protections and how they may be impacted by them. ASIC has conveyed its expectations to industry that industry start reviewing standard form contracts before the commencement date.

25 And then there's a list of some of the terms that ASIC has concerned about. You can see that there?---Yes.

30 Down the bottom of the letter – sorry, I should have said this:

To this end, we request that you provide us with a copy of your standard form lending agreement.

35 And you exhibit the response that was made to that request on 14 September 2016. That's exhibit 14, and that is SUN.1101.0002.0558, 19 October?---Yes. Got that.

14 September - - ?---Yes.

40 - - - sorry, where Mr Turner says from Suncorp to the ASIC representative:

Please find attached.

?---That's right.

45 Yes. And then ASIC then wrote back to Suncorp on the 19th, seeking further information. There's a letter attached to that exhibit, Mr Kluss, and that's dated 19 October. Can you see that, SUN.101.0002.0561?---Yes, I can see that.

So you can see in that letter, I will read that because it may not come up on the screen, that ASIC has identified a number of terms they want to examine a bit more closely, to get a better understanding, and they've asked for a detailed explanation from Suncorp of those terms?---That's – that's correct, yes.

5

Now, Suncorp requested a bit of an extension to provide that explanation; is that right? And ASIC also in the interim requested further information, and that's the next exhibit, Mr Kluss?---Yes, sorry, can you repeat that.

10 Suncorp requested an extension to provide that information and in the meantime ASIC requested further information from Suncorp?---That's correct, yes.

And then ASIC pressed for further information about the contracts. And I will take you to some of that further explanation. That's at SUN.1101.0002.0567?---What tab, sorry?

15

Tab 16?---Yes, this is our response.

Yes. And this is in respect of – and we might just put the next page up. It's a landscape page. And that's 0568. So ASIC had requested clarification about this clause and the credit contract term loan and Suncorp responded that:

20

Whilst there is arguably potential for this term to cause an imbalance of the rights and obligations of the parties, and to cause detriment to the borrower if it were applied or relied on, Suncorp considers this term is reasonably necessary to protect its interests:

25

And then just a bit further down, Suncorp has written:

The bank would always act reasonably in its assessment of what constitutes a material adverse change in any particular circumstance.

30

?---Mmm.

Now, with those clauses, Mr Kluss, some of those still exist in some of the present contracts; is that correct? You have now changed the credit contract, but there are other contracts that still contain that sort of clause without the word "reasonable"?---There may be, yes.

35

Yes. I just wanted to clarify with you about how you think customers understand those clauses, and whether they do comprehend them in the way Suncorp anticipates, that they will not necessarily know that Suncorp is intending to exercise its rights only in an event that it considers reasonable. That's not clear on the face of the clause. Do you agree?---I don't – I don't necessarily agree. I don't believe it's – I don't believe a customer would – would think that. It's a – it's not necessarily unfair, I believe.

40
45

But you did make changes to that credit contract, did you not?---We did, yes. Yes. We – we saw the opportunity there to improve the clause.

5 Are you saying that you didn't think it was noncompliant even though ASIC had said that it was?---I believe ASIC gave us guidance, and I think it was up to us to make our judgment on the – on the Act.

10 Mr Kluss, I will take you to another letter that ASIC sent through, or that Suncorp sent through in response to a request for information, and that's at tab 18 of your statement. And that's SUN.1101.0002.0742. This is a letter from 10 February 2017 and it's 0743, that's where we see ASIC is expressed the view that is set out in the first column that in ASICs view it would be desirable for that clause to be amended to include that reasonable requirement and Suncorp expresses the view that it will consider the proposed change and engage with relevant stakeholders. So who did
15 Suncorp engage with? Who were the relevant stakeholders?---So, that would be our – the working group. We would have also engaged with our risk team and our compliance team, would have – would have reviewed this.

20 And do you agree they came to the conclusion that ASICs suggestion is correct? That, to comply, those words need to be incorporated?---Yes, they – yes, they did yes.

25 And when were those changes made, Mr Kluss?---They were made – they started being made on the general security agreements. So that was in May 2017. And then there was further changes to the credit contract, and the continuous credit facility, and they were both made in August 2017.

30 So that's over a year, and in some instances a year and a half, after ASIC had told Suncorp and other entities that they should be changing their contracts?---That's correct.

35 And can you explain the delay to the Commission?---Yes. Well, firstly, it's – I need to explain, probably, the timeline here. So yes, we had a working group that started – started on this – on this – on this project, on this journey, and that started back in February 2016. And there was a number of documents that had to be reviewed at that time. So there was a lot of deposit products. And also too, there was the small business lending contracts, but some of those will already been updated in the consumer UCT in 2010. So that's – that's how the piece of work started. We were well on our way to reviewing all those contracts, etcetera, and then we got to this
40 period here, in September 2016 through to April 2017, where we were taking guidance and we had correspondence with ASIC. And it did – it did provide the opportunity to us to review, to see – to see where we could, you know, improve some of the clauses that we already had in our contracts.

45 Mr Kluss, the legislation came into effect in November or was passed in November 2015. So you had from that time. That's over two years - - -?---Yes.

- - - to implement these changes. And the contracts that you've exhibited to your statement occupy maybe two folders worth, and you're saying that it too that long to complete that review, which is still yet to be completed?---Yes. And – yes, and our view is that these contracts are fair and the clauses – and the clauses within them, while there's opportunities for us to improve those clauses, they provide a balance and clarity for our customers. I think there was a bit of complexity here. When we – when we moved through that December through to May, where there was other things changing in the – in the industry. So we had the Carnell inquiry. We also had the Code of Banking Practice, with the ABA announcing they were looking at that. So that – there was times there where we had to consider other things that were happening to ensure that we were in – we were taking in all the information that was happening in the market.

And how is it that you say that the Carnell inquiry or the banking code would have impacted on your ability to review the contracts?---Well, I think they provided, you know, more information for us to digest.

But you were still in a position to review these contracts, were you not?---Yes. And we were.

And make these changes?---And we were reviewing them. But in saying that too, I do agree that our process, our process to review contracts to make – to make recommendations internally, and to have those approved and put into production, were too long. I certainly agree with that.

I see. Mr Kluss, I will just take you through some – you mentioned that working group, I will take you through to that some of that – what has been exhibited to your statement from the working group and their documents. Now, one of those is at exhibit 22 and that's SUN.1101.0001.0766. Commissioner, I might pause there and ask the media release that I had called up before be tendered. That's ASIC.0900.0002.0041 – information sheet, I apologise.

THE COMMISSIONER: Exhibit 3.158 is UCT contract term protections information sheet, ASIC.0900.0002.0041.

EXHIBIT #3.158 CT CONTRACT TERM PROTECTIONS INFORMATION SHEET (ASIC.0900.0002.0041)

MS DIAS: Thank you, Commissioner.

Now, Mr Kluss you've seen this before. You exhibited it to your statement. Are you a member of the committee, the banking and wealth operational risk committee?---Yes. Yes, I am.

So this is dated 24 April 2017. We will see if we can pull that up on the screen, it's SUN.1101.0002.0766. You can see that document, can you, Mr Kluss?---Yes. I've got that here, 0766.

5 Thank you. I will just commence reading it, and we will wait for it to come on the screen. So you can there under the title Facts, there's the words:

10 *UCT work is continuing with the review of remaining documents including equipment, financing agreements, the letter of offer, and our mortgage covenants. These will be reviewed in light of the changes made to the credit contracts as a result of ASICs review to ensure consistency with the credit contracts. When the mortgage covenants are finalised the GSA also need to be revisited.*

15 And then further down:

Given this additional security by ASIC and as some of our security documents including the GSA –

20 the general security agreement, is that correct, Mr Kluss?---General security agreement, yes.

25 Yes:

...and mortgage covenants have not yet been reviewed in relation to non-monetary defaults. It is recommended that a procedure for collections/recoveries be introduced where consultation with legal is required prior to non-monetary default clauses being relied on.

30 Now, is this procedure still adopted for contracts that haven't yet been reviewed, Mr Kluss?---Yes.

35 Is it formal procedure? Is it something that staff are trained to adopt?---Yes, that's correct, we have trained our people.

40 And are there documents of this procedure?---There – there is a – a communication that steps that out. But this team is a very small team, the team that deals with this. So it's – it's – it's – the team are very aware of the responsibility here, the process.

And by team do you mean - - -?---The recovery team, the recoveries team.

The recoveries team, I see?---Yes. Who deal with all these matters.

45 I see. Are customers told of this. Are customers told on the website?---No.

And in PDSs?---No.

So as far as the customer knows they look at a contract, and they look at the clause, and they think that that's the way the bank will exercise its rights?---That might be the case, yes.

5 So, in effect, Suncorp is content to remain noncompliant with the UCT provisions in these respects.

MR KIRK: I object. That question presupposes a legal conclusion. First, this witness is not a lawyer. Secondly, ultimately that conclusion is one only capable of
10 being reached by a court. And thirdly, it has not been established that in his opinion any of these provisions are contrary to the UCT provisions.

MS DIAS: I can rephrase, Commissioner.

15 THE COMMISSIONER: Sorry.

MS DIAS: Do you agree, Mr Kluss, that what is said in this committee minute or a memo is that Suncorp is conceding that it must adopt this process of consulting with its lawyers before acting on a non-monetary default clause because it is potentially
20 going to be in breach of the UCT legislation if the clause was unfair?---No. We believe our contracts are fair, and while there's conditions that may exist that can be improved, we believe that they are fair also. What we did here was make sure that the fact that we hadn't updated some of our contracts that we want to ensure that our customers had protection and that when, if there was any chance of us considering a
25 – executing or enforcing a non-monetary default, that our legal team would review that, and that was for a number of reasons. One was to ensure that the legal team – not just taking in the UCT, but also they were taking into consideration any changes that were going on in the market at the moment. For instance, now, they would be considering form 565 from ASIC, their guidance, when they're making any
30 decisions. They would also be considering the Carnell inquiry and some of their recommendations, and also to any code of practice work. So it did allow us to provide a broader view to what was going on. And I can say, over this period and right back until 1 November 2016, Suncorp has not enforced a non-monetary default on any small business customer under \$1 million.

35 And so is it your position, just to recap on what you said there, that Suncorp believes these terms are fair?---Yes. Our – our current contracts are fair.

Okay. And compliant with the legislation is that what you are saying?---And
40 compliant, but acknowledging the fact that there may be opportunities for us – which we've shown with the contracts that we have reviewed and put in production – that there's an opportunity for us to improve the wording, provide more clarity with those, and – and make sure that we have the right balance between the parties.

45 Okay. Well, we will just go to the next page of that document at 0767, Mr Kluss. SUN.1101.0001.0767, and I will read it out, you have it there, do you, under the words Customer Consideration?---Yes.

Continuing:

5 *Introducing a procedure for recoveries and collections to consult legal where there is a non-monetary default, other than insolvency scenario, will reduce the risk of us relying on a clause that would – could be unfair – could be unfair. Recoveries, collections teams, generally consult with legal even now for such defaults. However, having it formalised will ensure compliance and consistency in treatment.*

10 ?---Yes.

And then further below:

15 *We run the risk that certain clauses in our documents are at risk of being unfair until we finalise our review.*

Now, that's a clear statement of the position as Suncorp understood it; is that correct?---Yes. I – yes.

20 That these clauses do run the risk of being unfair?---They may. But, as I said, a lot of this is postpone to opinion and interpretation and this is here – this is us just making sure that we're being prudent.

25 I see. Now, Mr Kluss, I will just take you to another one of those committee reports and that's at SUN.1101.0001.0743, and that's just behind where you were, Mr Kluss?---Yes, I've got that.

Can you see that one, it's the 30 October 2017?---Yes.

30 And you've seen this one before as well?---Yes, I have.

This is one of the reports that you were a member of the committee as well?---I am, yes.

35 And under the heading Second Line of Defence Commentary, there's the comment:

40 *Where there is a heightened risk that our documents still contain terms which are unfair this risk will continue until we finalise our review. We endorse the working group that will consider the code of banking practice and Carnell requirements and provide a recommended position. Review of the remaining documents for compliance with UTC must also be given priority to ensure risk is managed.*

45 So doesn't this contain an acknowledgement, Mr Kluss, that there is a recognition there's a heightened risk these contracts contain unfair terms, and they haven't been reviewed or amended?---Yes. But, again, it's not saying that they are unfair. They're – they're making sure that we're aware that there may be a heightened risk,

because of the amount of changes that have gone on in the industry. But, you know, to my knowledge, these are – these are not unfair, but they can be improved.

5 But if the review is not conducted, you can't reach that conclusion as to whether they're fair or not?---Yes. But we have - - -

10 Do you agree with that, Mr Kluss?---No, I don't. We've had these contracts in place for many years. There's – we haven't had any – any legal challenge in relation to those – those contracts, to my knowledge. And again, this is – this is down to interpretation. But I'm not a lawyer, and I'm sure there may be different arguments there, but that's my interpretation.

15 But you've been – you know that ASIC has told Suncorp that it considers many of these clauses to be unfair and has requested changes, but changes have not yet been made; is that correct, Mr Kluss?---We haven't made the change to the 13G, which is the event of default cause through all of our – all of our – all of our contracts, no. But, again, we agreed to do that and the opportunity is – and our intention is to make those changes. But it's not to say that the existing clause that's there is unfair.

20 Well, I want to take you to a 2016 document, Mr Kluss. This is exhibit 22 to your statement. SUN.1101.0009.7870?---Sorry, what tab is that?

Sorry, that's tab 22?---Is it – is - - -

25 There's a little bundle there, you will have to rifle through, I'm sorry. It's about in the middle of it. It's SUN.1101.0009.7080. My apologies, tab 20, Mr Kluss?---Okay, yes.

30 I think that's right. No, I was right the first time, Mr Kluss. It's 22, sorry. It has got the title – it's dated 9 November 2016. Does that help?---9 November 2016.

It's on the screen as well, Mr Kluss?---Yes, I can see that.

35 Thank you. Now you can see there are some facts stated under the heading Facts. And it says there:

Effective 12 November 2016, Suncorp is required to ensure all new contracts comply with the requirements of UTC for small business.

40 And there are – there's the contracts it applies to. And further below:

Suncorp is required to review all standard small business contracts.

45 Now, these two requirements have not been met; is that correct, Mr Kluss? Suncorp has not reviewed all standard small business contracts, has it?---No.

And we see there the requirement to remove all UTCs or justify the basis, and that hasn't been done yet, has it, Mr Kluss?---I will just read this for a second, if it's okay. Yes, we've done that on some of our contracts, but - - -

5 Some of them but not all of them?---Not all of them, no.

No. And the next bullet point:

Ensure only revised contracts are in place.

10 That has not been done to date; is that correct?---No.

And:

15 *Ensure variations to contracts incorporate UTC obligations.*

That has not been done to date?---What was that, sorry?

20 The next one down, Mr Kluss.?---No, that's correct. And can I provide some context here?

Yes?---Yes. So this period is when we're -- we are moving forward with our -- with our -- with our review of our contracts but we're also at the same time -- we're communicating with ASIC over this period.

25 Well, I'm talking about today, Mr Kluss. These things have not been done today, they were set down in November 2016 by Suncorp, and they haven't been achieved today; is that correct?---That's correct, yes.

30 And the next bullet point:

Ensure staff are trained and understand how to deal with complaints or challenges to the terms or conditions of any standard form contracts.

35 Has that taken place, Mr Kluss?---I can't confirm if that has or not, sorry.

40 I see. Okay. And on the next page we see -- or, apologies, the final page we see some timelines for the amendment of contracts. That's 0783. Thank you. Now, we see there, there's -- these are the contracts that were meant to be amended and reviewed by the end of November 2016; is that right, Mr Kluss?---Yes. That was the plan and they were to be reviewed and amended if required.

45 Yes. Now, the letter of offer, memorandum of common provisions for mortgage. and trade finance agreements, these have not been changed to date?---No, they haven't.

That's correct?---Just to clarify that, with the letter of offer, the letter of offer does have the general security agreement, which has been updated in May '17. Is -- is

attached to a letter of offer when it's – when it's provided. And most of the conditions, non-monetary conditions, are housed in the general security agreement.

5 And some of those contracts that haven't been updated will contain clauses that may fall foul of the UTC legislation; is that correct, Mr Kluss?---They may. But, as I said, we believe those – those – those conditions are – are fair, but can be improved.

10 Well, can be improved, or must be rendered compliant with the UTC laws as ASIC has instructed you to do; is that correct?---So the – my take on that is that – to improve – to improve the balance and the clarity of those. To say that they are – they are unfair – unfair, I don't know if that's the case or not.

No further questions, Mr Kluss.

15 THE COMMISSIONER: Yes, Mr Kirk.

MR KIRK: No re-examination, Commissioner.

20 THE COMMISSIONER: Thank you, Mr Kluss, you may step down, you are excused. Yes, Mr Hodge.

<THE WITNESS WITHDREW [3.46 pm]

25 MR HODGE: The last witness is Mr Gregson from the ACCC. Would it be convenient to adjourn for three minutes so we can rotate the counsel around?

30 THE COMMISSIONER: I will come back at 10 to.

MR HODGE: Thank you.

ADJOURNED [3.46 pm]

35

RESUMED [3.50 pm]

40 THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, the last witness for today is Mr Gregson of the ACCC.

45 **<SCOTT PETER GREGSON, AFFIRMED [3.50 pm]**

<EXAMINATION-IN-CHIEF BY DR BIGOS

- 5 THE COMMISSIONER: Do sit down, Mr Gregson. Yes, Dr Bigos.
- DR BIGOS: Mr Gregson, could you please state your full name?---Scott Peter Gregson.
- 10 And you're the executive general manager of the enforcement division of the ACCC?---That's correct.
- Your business address is 23 Marcus Clarke Street, Acton, Canberra, ACT?---Correct.
- 15 And you received a summons to give evidence from the Commission?---I have.
- Do you have a copy of that?---I do.
- I tender that.
- 20 THE COMMISSIONER: Exhibit 3.159 will be the summons to Mr Gregson.
- DR BIGOS: You've made a witness statement dated 23 May 2018 in response to rubric 3-23?---That's correct.
- 25 Do you have a copy of that statement with you?---I do.
- In fact, you've got the original with you?---I do.
- 30 And do you wish to make two corrections to paragraph 7.9 of your statement?---I do, Dr Bigos, if I could.
- 35 And they are to 7.9(d)?---That's correct. Apologies to the Commission, there's two errors in 7.9. The first one at (d) where we say "franchising" – where I say "franchising, four businesses". That should be seven businesses.
- Yes?---And at (e) where I say "independent contractors, four businesses", that should be three businesses.
- 40 And could you correct that with a pen on the original?---Would you like me to initial that as well?
- Yes, please. Are there any other corrections you wish to make to the statement?---No.
- 45 Are the contents of the statement true and correct?---They are.
- THE COMMISSIONER: Exhibit 3.160 is the witness statement of Mr Gregson.

EXHIBIT #3.160 WITNESS STATEMENT OF MR GREGSON

THE COMMISSIONER: Yes, Mr Hodge.

5

MR HODGE: Thank you, Commissioner.

Mr Gregson, you have held the role of general manager of the enforcement division of the ACCC since October 2017?---That's correct.

10

And before you were the executive general manager of consumer enforcement at the ACCC?---That's correct.

And you held that position as executive general manager of consumer enforcement since August 2014?---Also correct.

15

And in those roles your duties included, and include, the oversight and management of the ACCCs enforcement investigations and proceedings in relation to the consumer provisions of the ACL?---That's right.

20

And when we refer to the ACL we're talking about the Australian Consumer Law?---Correct.

And the Australian consume law is schedule 2 to the Competition and Consumer Act?---That's right.

25

And that contains, or the ACL contains, unfair contract terms provisions?---It does.

And part of your responsibility in relation to enforcement then relates to unfair contract terms?---Yes.

30

And just so that it's clear what the – how these things break up, there are actually unfair contract terms regimes in both the ASIC Act and also the Australian Consumer Law?---That's right.

35

And the unfair contract terms regime in the ASIC Act relates to financial services?---Correct.

And the unfair contract terms regime in the ACL refers or deals with, effectively, every other aspect of the economy?---It does.

40

And, in your statement, you tell us that in January and February 2014 the ACCC worked with Treasury and the department of finance and regulation to prepare a new policy proposal submission to obtain funding in relation to the extension of the UCT provisions to small businesses?---That's correct.

45

And that was, as we understand it, before the legislation that was going to extend the unfair contract terms regime to small business had actually come before Parliament; is that right?---Yes, that's correct.

5 All right. So the ACCC had begun already, at that stage, working with Treasury to obtain funding, what, in 2014; is that right?---Yes, that's right. January and February '14.

10 And as a result of that submission, in the 2014 to '15 budget, the ACCC was allocation and additional \$1 million of funding over three years?---That's right.

And that was to undertake compliance and education activities in relation to the extension of the UCT to small business?---Correct.

15 All right. And we are going to come to some of your activities in a moment, and I will return at the end to the question about how the funding affected those activities. There was some additional funding that you obtained in the 2017/2018 budget?---And continuing.

20 And what is that funding?---That was effectively the final year of the three year funding rolled over an ongoing basis.

So that's \$417,000 a year?---That's correct.

25 All right. And the amendment Act, which extended the unfair contract terms regime to small business contracts, received royal assent on 12 November 2015?---That's right.

30 And you tell us in your statement that, before royal assent, the Commission had begun developing an education and compliance strategy in relation to the anticipated new laws?---Yes, we had.

35 And I just wanted to understand, though, that presumably doesn't fall within your section of the ACCC; is that right?---No, it doesn't. So we have different divisions, as you would imagine. That was through our compliance and small business division, but I work quite closely with them, particularly in relation to matters that might ultimately have an enforcement angle.

40 And in this case, when you say ultimately have an enforcement angle, that's to indicate ultimately once the – is it the compliance section, is that what it is called?---Indeed.

45 It might move – matters might move away from the compliance section and start being enforcement matters?---Or a parallel track where you are both doing compliance work and also enforcing the law.

5 All right. And you tell us in your statement at paragraph 4.1 that the ACCC adopted what you have referred to as a two-stage approach in relation to the introduction of the UCT provisions for small business contracts. Could you just – perhaps if we take each stage in turn, could you explain to the Commissioner what the first stage of the approach was?---Certainly. So the first stage was particularly focused on that 12 months between royal assent and when the laws would come into effect. We took the approach there of educating, working with business in outreach activities to build both awareness in the community of businesses that had contracts with small businesses, but also small businesses so they could be attuned to the type of issues to look for.

10 And when you say prior to the legislation taking effect, that was what, 12 November 2016; is that right?---That’s correct.

15 So there was a one year period from royal assent on 12 November 2015 to 12 November 2016 when your first stage was in operation?---That’s correct.

20 And then what was the second stage of the approach?---The second stage was moving towards more of an enforcement focus, while we would still have outreach, communication, education activity ongoing. We would be looking at matters that were drawn to your attention through our normal enforcement investigation lens.

And that would commence from 12 November 2016?---That’s right.

25 All right. And I think one of the things you explain at paragraph 4.1(b) of your statement is that the ACCCs view was that once the legislation came into force, the Commission would move swiftly to an enforcement approach?---That’s right, Mr Hodge.

30 And could you explain what the rationale was for moving swiftly to that enforcement approach?---We had the benefit, Mr Hodge, of the consumer UCT provisions coming into force in 2010, 2011. We took a similar approach of dealing with education and outreach there. The lessons we learnt from that exercise was the engagement, the outreach, the working with businesses, could be drawn out in this area, and that we’re better to move quickly. So we were very conscious of having a much cleaner, tighter handover when it came to business to business UCT, and that was the approach here of 12 months of that engagement then moving files into an enforcement lens.

40 And I want to then just run through some of the things that the ACCC did in that period from 12 November 2015 to 12 November 2016. There was an education campaign that the Commission undertook?---That’s right.

45 And what was the nature of that?---It was multifaceted. We engaged with social media, so getting the message out through social media activities. We published guidelines. The guidelines were available from November 2015. We undertook a joint Webinar with ASIC, where we provided a discussion – a capacity to have with

business community. And that was taken up well. We prepared videos, there was two animated videos in particular that were useful in getting the message across. And we continued to use our network of stakeholders. So we have a number of consultative committees that we are able to share information with and get that
5 information through. What's not named in that statement is we also a newsletter that goes out to small business, and that was also used to make sure we got the message through.

10 And, in addition, commissioners and senior staff members were giving speeches about this issue?---That's right. So either ones that particularly focused on unfair contract terms business to business, or those that included it as a component. You have prompted me to mention that media releases were also issued quite regularly through that 12 months period putting industry on notice.

15 And then there was another aspect of what the ACCC did pre 12 November 2016, which was a contract review?---Yes. An industry review of contracts.

20 Could you explain to the Commissioner what was that?---Yes. This was again based on your experience with the consume UCT, it was designed to look at some of the contracts in the industries that we thought might be of concern based on past
25 complaints or intelligence that we had. The purpose was that we could get a head start in terms of looking at contracts, improving those, but also to use it as an example of identifying problematic clauses, getting the public message out about our issues. So we looked at six industries when it came to business to business. We identified companies that we might want to approach. Received their contracts,
30 reviewed them, and started to engage with those businesses about some of the problematic terms.

35 If I can just take you through some aspects of that. Why did the Commission select the particular six industries that it looked into?---Yes. So the six are named there in the statement. They included ones where we had a number of complaints. Now, it's a bit tricky in the sense that before the law came into effect complaints weren't directly saying UCT, but we could glean from complaints the types of issues that
40 might be there. We also had fairly good connections through our small business stakeholders groups about the types of matters that come to our attention – that might come to our attention, and so those industries were selected based on that intelligence as well.

45 And so then, having selected those industries, the Commission would approach participants in those industries?---That's right. And they were based on size and profile in the industry.

And they – it was voluntary as to whether they participated or not?---Correct.

45 And in the end, I think with that recount, it ended up being about 28 that you approached, does that sound - - -?---Well, if I could be pedantic - - -

25 participated, I think?---Yes. So we approached 27, a further party put their hand up to join, which was good of them, and ultimately we had 25 that fully participated. The three exclusions being two that chose not to and one that perhaps didn't participate all the way through the process.

5

All right. And the initial approaches that the ACCC made to these industries was when?---Those were about March 2016.

I think you – might – if it would assist, we will bring up paragraph 7.2 of your statement, where you say between 31 March 2016 and 27 June 2016 the ACCC approached the businesses operating in those selected industries?---Correct.

10

And you've then – in paragraph 7.11 of your statement, you've listed some of the businesses that participated. That's page 10 of the statement?---7.11, that's correct.

15

I'm sorry, 7.11. I might just – so the Commissioner can see what those are, so we see the bottom of 7.11, there's five of the companies, Google, Facebook, NewsCorp, Optus. Then if we go over the page, Vodafone, Centre, Vicinity, Bakers Delight, Australia Post, Coca-Cola and Uber. And that's 12, so that's a little less than half the companies that participated?---Correct.

20

And then I think you explain at paragraph 8.1(d) that the process that the Commission went through in order to conduct this review, so could you just take the Commissioner through that?---The reference, particularly at 8 - - -

25

I'm sorry. In paragraph 8.1, you explain the process that you through?---Certainly. So we received the responses to those first approaches, which provided us with contracts. We reviewed those, we analysed to determine whether there were concerns there, and then from July to September of '16 we undertook that assessment about whether we had concerns about UCT provisions and ultimately wrote to the companies that we had ongoing concerns with.

30

In that period, July to September 2016?---Correct.

35

And we can bring up – if we bring up exhibit SG-13, SPG.0001.0001.0013. So this is the template letter that you were – that the ACCC was sending out?---That's right.

Right. And if we go over the page to page 2, you see one of the things that's said in the template letter under the heading Enforcement is:

40

The small business unfair contract terms law will come into effect on 12 November 2016. The ACCC will be moving to an enforcement approach from this date.

45

And that's consistent with what you have said already about that two stage approach?---It is.

And you then, or the ACCC then published a report on unfair contract terms provisions and small business contracts?---That's right.

5 And do you recall when that was published?---That would have been November of '16, just as the law came into effect.

All right. And if we bring up SG-12, SPG.0001.0001.0012, this is the report that the ACCC published into the six industries?---That's right.

10 And just so the Commissioner can get some sense of it, if we go over to – sorry, I said six – seven industries. If we go over to page 3 of the document, which is .0012. That's not very helpful. Page 5 in the top corner. So this is setting out the summary of what it is that the ACCC does and has been doing, and then there's an example. If we go to page 7, this is the beginning of the section on one industry where the ACCC runs through types of clauses in relation to that industry?---That's right.

All right. And then again, if we go to page – I'm going to say page 6 of that document. We see again this point under Enforcing the Law:

20 *This report marks the conclusion of the ACCCs voluntary compliance and education industry review. As noted above the small business unfair contract terms law comes into effect on 12 November 2016. From this date, the ACCC will transition to a more focused enforcement approach and will now be targeting business that supply standard form contracts to small businesses containing unfair terms.*

25 Is that what occurred? Did you switch over to an enforcement approach from 12 November 2016?---Yes, we did.

30 And once it comes to enforcement of the UCT, that must be a little bit different from enforcing contravention provisions of the ACL?---For the ACCC, that's right. It's quite a different model.

35 And perhaps if you just help the Commissioner to understand the difference between those two ideas?---So many of the provisions in the Australian Consumer Law are contraventions of the law, if you engage in that conduct with unfair contract terms, it's a voidable provision but not actually a contravention of the law. That changes our enforcement approach a little, in the sense that if we are engaging with a business and contracts are changed, that impacts, I guess, on the type of enforcement action we can take after that event.

40 And if we just break down a couple of elements of that. If you've got a contravention provision, one of the remedies that you can obtain from a court is a pecuniary penalty?---That's right.

45

Whereas if a business is found to have an unfair contract term in its contract, there's no pecuniary penalty that the ACCC can obtain?---Not on first instance. If it's declared unfair, yet continue to be enforced, then that might bring in penalties.

5 And so in the first instance, what the ACCC – the limit of what the ACCC could achieve with enforcement proceedings would be a declaration that the clause is unfair?---That's right. And potentially injunctive relief that it not be enforced.

10 And once it's declared to be unfair then it's void in call contracts in which this is present?---Well, that would be subject to, I think, the specific instances - - -

Sorry - - -?--- - - - and how we proceed with the matter.

15 All right. Well, whether you declared it void in relation to the contract with one particular consumer, or you approach it on a wider basis?---Indeed.

20 And – but if – once out of got that declaration and it's declared void, then if the entity was to continue to rely on the clause then it would be possible for you to seek some sort of pecuniary penalty?---That's correct.

And – whereas if you've got a contravention then, of course, whatever happens you can get a pecuniary penalty if there's a contravention found?---That's right. So even if the contract is changed, for past behaviour they can seek that – that relief.

25 And does it make a difference to the information gathering powers that the ACCC has?---It does, by similar exercise. Given it's not a contravention in its first instance, the compulsory information gathering powers aren't invoked.

30 And so, notwithstanding those limitations, in the 16 months since the UCT provisions in the ACL were extended to small businesses, has the ACCC undertaken enforcement action in relation to small business unfair contract terms?---Yes, we have.

35 And could you perhaps just run us through the types of enforcement action you've taken?---So part of the shift from that education compliance was to move the focus and the lens in which we look at matters. So matters were then pursued by enforcement teams that sit under my control. That's a more inquisitorial process than – than an engagement strategy. Through that we have obtained a number of administrative resolutions. That's where issues are raised, concerns are raised, and
40 businesses change their conduct, and I think the majority of matters have gone down that path. But we have also had two matters resolved through the provision of court enforceable undertakings to the ACCC. Two matters which have led to litigation, seeking those declarations you've referred to. And we have a number of matters still under investigation.

45 And in relation to the two matters that have gone to litigation, one of those was against JJ Richards; is that right?---That's right, in waste collection.

And that has been – that has gone to conclusion; is that right?---It has.

And the ACCC obtained a declaration?---We did.

5 And in relation to the other matter, is that still ongoing?---It's still continuing before the Federal Court.

The last topic I would like to ask you - - -

10 THE COMMISSIONER: Before you depart from that, take for example the JJ Richards case. What period of time are we speaking of, if we try to get some measure of inception to conclusion – how you define inception will be one thing, conclusion I can understand but can you give me some measure of time?---Commissioner, are you referring to the investigation?

15 Well, I suspect you started investigation and go through to final orders. But if you can give me some indication of elapsed times?---It can take some time in the investigation phase. Even the basics of getting access to the contracts in question, ascertaining whether they were in the period particularly in that transition between
20 pre and post November 2016. From memory, Commissioner, that matter was fairly early on in the piece. And it might have been – my recollection is about six months through that investigation phase. Once we did commence proceedings, it was resolved remarkably quickly. Almost in record time, parties consented and the matter was presented to the court quite quickly.

25 Thank you.

MR HODGE: Did you want to ask anything more about that, Commissioner?

30 THE COMMISSIONER: No.

MR HODGE: Thank you. If I can just confirm one aspect of that, Mr Gregson. When you spoke about the difficulty in getting access to the contracts, does that reflect that point you were making before, which is you can't actually exercise your
35 coercive information gathering powers in relation to a potential UCT, failure to comply with the UCT?---That certainly complicates and can extend the investigations.

40 And then the last thing I wanted to talk to you about was the approach – I'm sorry, the second last thing I wanted to talk to you about actually was the funding, which I said I would return to. So we identified at the outset that the ACCC obtained this initial funding of \$1 million and then it now has additional rolling funding of \$417,000 per year in relation to UCT compliance for small businesses. Can you give
45 the Commissioner some indication of what effect it would have had if that funding hadn't been obtained or the things that the ACCC has done that we have identified?---Yes. There's no doubt that when new functions are given to regulators, the – absent of new funding, can challenge us as to how we undertake those new

functions. Though everything in the public service and as a regulator, no doubt other businesses – about setting priorities. So when we do get new functions, we try and deliver resources to them whether or not we have been given new funding. Certainly to have that 1 million over the first three years greatly assisted with the extent of
5 outreach and engagement that we undertook and is providing ongoing assistance to our investigations.

This may be an impossible question to answer but if you take, say, the industry review that was done in 2016, is it likely that that would have occurred absent the funding?---Yes, I think so. We felt that was a fairly fundamental part of our
10 engagement strategy. We may not have engaged to the same extent, and we may have had to cut a few more corners, but I think we probably would have engaged in that activity regardless.

15 And in terms of the enforcement action that you've taken since 12 November 2016, is it likely that the absence of that funding would have had an effect on the enforcement action?---We would have had to make further individual choices about which matters we could afford to investigate and then ultimately pursue. But, again, these matters go through a priority mix as they are now. They have to fight against
20 other consumer law matters that we take on for that priority. I think it's a very high likelihood we would have continued with those matters through the enforcement phase. What you see, though, if you do need to make those decisions, is other matters may not get pursued in the broader consumer law or other – our regulatory responsibilities.

25 And the last topic that I wanted to ask you about was an issue that we raised specifically in the rubric, which was the issue of engagement compared to enforcement. And perhaps if I just ask the question generally, so that you can start by explaining to the Commissioner, what is the ACCCs attitude to how it should
30 decide between should it engage with industries or should it be commencing or undertaking enforcement action?---Well, certainly when new laws come into effect, particularly if they're significant changes such as the introduction of unfair contract terms, first with consumer and then with business to business, we do think that prevention is better than cure. Providing that education and outreach is an important
35 part of getting that awareness and change that you want. The ACCC does, however, have a model and a belief, though, that deterrence through enforcement and leveraging off that is one of its effective tools to ensure broader compliance in the industry. So we will invariably move at some point, even with new laws, to an enforcement approach.

40 And in that enforcement approach there might be different things that are thought of in enforcement. One is court proceedings, which is what you have referred to. There are other tools available, like infringement notices and enforceable undertakings. Does the ACCC regard those as being part of enforcement?---Yes, very much. And
45 even short of infringement notices and undertakings, which we treat as our more formal resolutions, those administrative resolutions where we have investigated, we get results. Whether we refer to those publicly or not, they are still part of the

investigation enforcement phase, and hopefully a leverage to have greater compliance.

5 And does the ACCC have a view as to how it should strike a balance between using infringement notices or enforceable undertakings in litigation?---We do. We – each year, issue our compliance and enforcement policy which sets out not only our priorities for the year ahead but the way in which we treat those different enforcement remedies. That sort of sets out that we will take the most serious of matters, the greatest detriment matters, through to litigation and prepared to resolve
10 the less serious matters through undertakings and infringement notices. That’s a relative exercise. When I say less serious, they are still often quite serious matters.

15 And what is the value of court proceedings in the Commission’s view?---Court proceedings are the only way to get penalties. So outside the UCT context. And so we think that penalties are an important part of the deterrence message for greater compliance. They also bring a greater sanction, the concept of going to court, establishing a case and having findings of the court assist in demonstrating how the law applies and the deterrence impact it needs to have.

20 Commissioner, do you have further questions about that?

THE COMMISSIONER: Could I just go back to the compliance and enforcement policy. Did you say that’s reviewed annually?---That’s correct.

25 May I ask why it’s seen as something that is appropriate to look at each year? What are the drivers that make it an annual thing to look at, rather than once for a period?---Thank you, Commissioner. The primary reason is it also sets our priorities for the year, and that changes year by year. We get a strategic review process of analysing the type of matters that we should look at. But we do also review some of
30 those more policy issues about when we might take enforcement action and the different types of enforcement action. We do think that’s a living document, because part of the purpose of that document is to communicate with the regulated community, and if we are adjusting our approach we would like to refine that in our policy.

35 Yes.

40 MR HODGE: There is one other thing I ought to ask. Does the size of the invite that you are dealing with make a difference as to whether you are going to use any particular enforcement mechanism against them?---Well, it does on a couple of fronts. If we are to provide deterrence, obviously, larger companies may need a higher deterrence and that might mean that we go to court. The footprint of larger companies also say something about the harm that we are trying to address. If a
45 large company has a greater impact on the marketplace with its behaviour, that might be something that adds to the seriousness of the conduct. We are also the national regulator. We tend to focus in on the big end of town more than the lower end of

town. We work closely with our state fair trading colleagues who we rely on to assist with the smaller end.

Thank you. Commissioner, I don't have any more questions of Mr Gregson.

5

THE COMMISSIONER: Yes. Thank you. Does any party seek leave to examine Mr Gregson? No. Anything in – you wish to take up?

DR BIGOS: No, Commissioner.

10

THE COMMISSIONER: No.

MR HODGE: Could Mr Gregson be excused.

15

THE COMMISSIONER: Thank you, Mr Gregson, you may step down. You are excused attendance.

<THE WITNESS WITHDREW

[4.22 pm]

20

THE COMMISSIONER: Now, Mr Hodge, at what time do we need to begin tomorrow?

25

MR HODGE: Commissioner, it would be my preference to begin at 9.30 if that's not inconvenient to you.

THE COMMISSIONER: 9.30 it is, Mr Hodge. Adjourn until 9.30 tomorrow morning.

30

MATTER ADJOURNED at 4.22 pm UNTIL FRIDAY, 1 JUNE 2018

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