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## **TRANSCRIPT OF PROCEEDINGS**

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O/N H-919872

**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**

**9.31 AM, TUESDAY, 7 AUGUST 2018**

**Continued from 6.8.18**

**DAY 41**

**MS R. ORR QC appears with MR M. HODGE QC, MR A. DINELLI and MS E. DIAS  
as Counsel Assisting with MR T. FARHALL  
MR N. YOUNG QC appears with MR D. THOMAS, MS M. ELLICOTT and MR M.  
SHERMAN for NAB**

THE COMMISSIONER: Yes, Mr Hodge. If, Mr Carter, you would come back into the box, please.

5 <PAUL ALEXANDER CARTER, ON FORMER OATH [9.30 am]

<CROSS-EXAMINATION BY MR HODGE

10

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner.

15 Mr Carter, I just want to return to one thing that we were talking about yesterday, which is in relation to the successor fund transfer and the grandfathered commissions. You will recall we spoke about a discussion with ASIC?---Yes.

20 Do you remember whether you attended the meeting with ASIC?---I did not. I do not believe I did.

25 All right. Let me show you a document and see just whether this helps you. Can we bring up ASIC.0516.0001.0167. So this is an email sent by Danielle Cutrupi. Who is she, do you know?---I don't recall, although I see that she was someone in Regulatory Affairs.

Okay. That's a separate section from you?---Yes, it is.

30 And she seems to be emailing Louise, who is presumably – looks like Louise Macaulay from ASIC. Can you see that?---Yes.

And she is arranging this meeting on 2 June at ASICs offices. And she says:

35 At this stage, attendees from NAB Wealth are anticipated to be Damien Murphy, Greg Miller, you, Andrew Taylor and by telephone Andrea Debenham. Just with those names, does that help you to remember the meeting?---I do not recall, but – but based on that – based on that email, I may well have been in – at the meeting.

40 All right. But you don't remember anything about the content of it?---I – no, not that particular meeting. I definitely recall, certainly as part of the preparation of this witness statement, what the intent of that overall engagement with ASIC was, though.

45 As part of the preparation for this witness statement?---As part of – as part of the preparation for this testimony, yes.

Okay. As part of the preparation for giving evidence - - -?---Yes.

- - - did you review some of the documents in relation to the successor fund transfer?---Yes.

5

And, from those documents, you have a recollection of what the purpose was of the engagement with ASIC?---Yes.

10 And what was the purpose?---The purpose was to be transparent and open with the regulator about the issue that was being considered by the business as part of the successor fund transfer.

15 If ASIC had said, “This is an outrageous exploitation of the loopholes in the grandfathering provisions. You cannot possibly keep going with commission”, what would the consequence have been?---I think the best way I could answer that is to say while the responsibility and the decision-making responsibility for this issue clearly rested with the trustees, the perspective – the view at the time was at least the perspective of the regulator on these matters was relevant, and that consideration is something that was a worthwhile thing to do.

20

I’m not sure that really answers my question. I will put it a little more simply. If ASIC had said, “We do not accept that it is possible to grandfather these commissions”, what would the consequence have been for the successor fund transfer?---I don’t know. Because, as I said, the – as I understand, the responsibility for the decision that was being put to the trustee was a trustee decision, and so I don’t know the technical answer to your question.

25

But you, as part of management, were making a recommendation to the trustee as to what the trustee should do?---Yes, we were.

30

So, presumably, you must have planned or considered what you would do if ASIC said no?---I can’t recall.

35 All right. I want to then move back to the issue of the plan service fees. And I want to make sure that we agree on some basic propositions. The first proposition is that in December of 2015 NAB had given a notice of significant breach to ASIC about one part of the plan service fees being charged to members with no linked adviser?---Yes.

40 And in terms of those plan service fees, the amounts of those plan service fees was something that was agreed between the adviser and the employer?---Yes.

45 And the amounts that were agreed between the adviser and the employer were for services that were to be provided by the adviser as agreed with the employer?---Yes.

And so you knew in the first half of 2015 – I’m sorry – the first half of 2016 that the trustee had been charging fees which were purportedly these plan service fees, but where there was no linked adviser?---By that stage, yes.

5 And the plan service fee was a fee agreed by the adviser with the employer for services provided by the adviser?---Yes.

So, if there was no adviser, it must follow that it was impossible for the services that had been agreed to be provided by the adviser could have been supplied?---Yes.

10

But, nevertheless, the trustee had been charging that money?---Yes.

For those services that hadn’t been provided?---Yes.

15 And it would seem to be obvious that, therefore, the trustee would have to refund that money to the customers. Do you agree?---After we did a thorough investigation of all the issues, that is absolutely the conclusion that we came to.

20 Now, I don’t really understand that. In the first half of 2016, you knew that the fee was for services that were to be provided by the adviser. You agree with that?---That was the intent of the fee, yes.

25 That was what the fee was. That’s what your own documents say. Do you agree?---What the documents say is that the fee were for – was for general advice services - - -

No, they don’t?---General advice and support services.

30 No. No. We looked at the documents yesterday. The documents say that the fee is a fee agreed between the adviser and the employer for services to be provided by the adviser. Do you agree?---I believe, Mr Hodge, that the documents in the PDS talk about general advice and support services.

35 To be provided by whom?---I do not believe it is clear in our documentation.

You don’t think it’s clear in your documentation who is going to provide the services?---No, and that was one of the issues.

40 Do you recall that yesterday we looked at the employer reference guide?---Yes.

Would it help you to look at that again and to reflect on your answer? I will just get the exhibit number for that. I’m sorry, Commissioner, I don’t have the exhibit number. I will give you the doc ID. It’s ASIC.0038.0003.8292.

45 THE COMMISSIONER: Exhibit 5.10.

MR HODGE: Thank you, Commissioner.

Do you recall we looked at this document yesterday?---I believe so.

This is the employer guide?---Yes.

5 This is – if we go to page 2, it’s a document you recall where the preparation date was 19 November 2012?---Yes.

And if we go to page 10. It’s the page ending .8035. Thank you. Do you recall we looked at the middle column where it says:

10

*There are a number of ways you can remunerate your plan adviser for the services they provide you and your employees.*

?---Yes.

15

And that’s what the plan service fee is for?---Yes.

Is there some ambiguity there as to whether the services will be provided by the adviser?---No.

20

All right. And then if we then bring up the reference guide provided to employees. We looked at this yesterday. It’s ASIC.0036.0001.2760. If we go to the page .2769. It’s page 10. This is the page setting out the new simplified and transparent fee structure. And you will see the value of advice:

25

*You may pay a plan service fee to your plan adviser. The fee applies if your employer has arranged for the adviser to provide financial advice services that are tailored to the needs of the employees in your company.*

30 ?---Yes.

Is there some ambiguity there as to who is going to provide the service?---No.

35 Where did the ambiguity arise from, Mr Carter?---Which ambiguity are you referring to, Mr Hodge, please?

40 Mr Carter, on your view, there was some ambiguity as to whether or not the services had to be provided by the adviser?---I think the best way to – to think about that is that as we were conducting our investigation on this remediation, we were looking at how those comments could be interpreted, and ultimately we conclude that this fee was not authorised and, therefore, the fee had to be refunded to members.

45 Can I put this to you very bluntly, and we will go through the documents. What you did was to systematically look for anyway to avoid having to refund all of the money to customers?---I disagree.

And that is why there is this idea that somehow you will find some other service that can be said to have been provided in exchange for the money?---I disagree.

All right. Can we bring up NAB dot - - -

5

THE COMMISSIONER: Just before you do, Mr Hodge. Mr Carter, at page 4255 of the transcript, line 38, you were asked the question:

*To be provided by whom?*

10

Your answer was:

*I do not believe it is clear in our documentation.*

15

At line 40 you were asked the question – this is this morning:

*You don't think it's clear in your documentation who is going to provide the services?*

20

Your answer was:

*No. And that was one of the issues.*

25

Do you recall being asked those questions?---Yes, I do, Commissioner.

Do you recall giving those answers?---Yes, I do.

Do you wish to say anything about the answers you gave?---Yes.

30

What?---At the time of the investigation, I know one of the questions that was asked is the term “plan adviser” – who was the plan adviser? Could the plan adviser in this sense been MLC or could have it – was it intended to be a link – I will call it external financial adviser. And so that is what I meant by the lack of clarity.

35

MR HODGE: I'm sorry. I think, to be fair, we better make sure we understand that. It's clear that the plan service fee has to be agreed between the adviser and the employer?---Yes.

40

And it's clear that the fee is for a service to be provided by the adviser as agreed with the employer?---Yes.

And so the ambiguity is what?---I would say in retrospect there should not have been ambiguity.

45

All right. Can we bring up NAB.076.047.5596, together with its attachment, which is NAB.076.047.5597. So these are documents that we looked at, I believe,

yesterday, Mr Carter. Who is Meredith Buchanan?---Meredith was a product manager in the business.

5 And do you recall having asked her to organise this meeting? I don't think you could yesterday?---That I could?

Yes. You couldn't?---No. I can't.

10 All right. Do you recall that from May you were engaged in the exercise of trying to figure out how NAB could keep the money, rather than refund it?---I recall at this time looking to make sure we thoroughly investigated the issue.

15 And – I'm sorry – I'm just trying to understand what is it that you were trying to thoroughly investigate?---Mr Hodge, when – at the time of – of this remediation, we knew it was a serious and important matter. It was incumbent on me as the person responsible for the business before making a final recommendation to the trustee on the issue and – and the remediation approach that all considerations were thought through. And I believe that that's what this work was reflective of.

20 And what are – again, just explain to the Commissioner as best you can, what are all of the considerations that need to be thought through?---To make sure that no – that the – that the issue was considered and the – and there were – there were differing views at the time on – on the issue. And we were just having to work through – work through to make sure we had thought through these carefully.

25 And what were the differing views?---I know one of – one of the questions that was asked – and I want to reinforce that ultimately we conclude that it was not a reasonable basis, that, given that the fee was disclosed as for general advice and support services, one of the questions asked was, well, given that those general  
30 advice support services could be provided by MLC – and in many cases we thought, well, they are being provided by MLC. We have relationship managers who oftentimes go out to clients and provide education support, we have various other channels that can provide those services. A question that was asked was is – was that  
35 a – was – are they the services being provided? And ultimately we conclude no, that was – even though those were – that question was asked, we conclude that that was not the intention of the fee, as an example.

40 Again, I just want to make sure we've understood that example. Do we agree on these propositions. The trustee had charged the money for one thing, which was a service to be provided by the adviser?---Yes, that was the intent.

45 And the exercise that NAB went through was to try to identify some other service that it could say it had provided in order to justify keeping the money?---We assessed that option.

And we will go through the documents, but I just want to understand. You don't see anything – I will start with this. You don't see anything unusual about taking money

for one thing, finding that you haven't provided it, and then trying to find a way to keep it on the basis of something else that you can say you provided?

5 MR YOUNG: Mr Commissioner, I do object to the language that is being used. My learned friend refers to NAB trying to do something. The witness has repeatedly said that a question was raised by certain people within NAB and then rejected after it had been considered by NAB itself. And a different position was put to the trustee. Therefore, the language used in the question is unfair and does not reflect the earlier evidence given by Mr Carter.

10 THE COMMISSIONER: What is the unfairness, Mr Young?

MR YOUNG: The unfairness is building into the question the assertion that NAB went through a process of trying to identify some service that it could say it had provided in order to justify keeping the money. The witness's evidence that he has given this morning is to the opposite effect. Certain people at a low level within the organisation raised questions to the effect that MLC might have provided the service. Mr Carter's evidence has consistently been that that question was considered within NAB Wealth and rejected. And a completely opposite proposition and recommendation was made to the trustee, which was accepted in due course by the trustee. So the insinuation that NAB was trying to do something is unfair, it's wrong, it does not reflect the earlier evidence.

25 THE COMMISSIONER: Are you finished, Mr Young?

MR YOUNG: I have finished.

THE COMMISSIONER: Thank you. Yes, Mr Hodge.

30 MR HODGE: Commissioner, I'm happy to come back to that question in about 20 documents' time.

THE COMMISSIONER: Yes.

35 MR HODGE: Can I make absolutely clear this. The evidence that has just been given by my friend from the bar table, which is that this was a low level decision – or issue raised by low level employees from NAB, is not evidence that has come from Mr Carter.

40 THE COMMISSIONER: Yes. Do go on.

MR HODGE: Mr Carter, do you want to adopt that and say that this issue was raised by low level employees at NAB?---I think it is a fair – the fair statement which I have said consistently is that the issues with the PSF were considered at multiple levels of the organisation.

45 THE COMMISSIONER: Sorry, at?---Multiple levels.

Yes?---And the email that you put to me was absolutely consistent with what Mr Young just said. It was more junior people that had put that to me. It – but I don't want to imply that that were not issue – that was not an issue that I also didn't turn my mind to.

5

MR HODGE: All right. So, just so we make sure we understand, Ms Buchanan is, obviously, lower in the hierarchy than you?---Yes.

And, as I understand it, you say you weren't the author of this attachment that Ms Buchanan has sent around?---No.

10

I think we looked at this yesterday, but do you recall having read the attachment?---I can't recall this particular attachment.

All right. Commissioner, I think that was tendered yesterday, so that it's not necessary to deal with it again. I'm told it's exhibit 5.14.

15

THE COMMISSIONER: Yes. Just on the question of tender, that email concerning the meeting of 2 June '16 between NULIS and ASIC, ASIC.0516.0001.0167, do you propose that that be tendered? That was the one that you went to earlier this morning.

20

MR HODGE: Yes, Commissioner.

THE COMMISSIONER: That will be exhibit 5.19, email concerning meeting 2 June '16 NULIS and ASIC, ASIC.0516.0001.0167.

25

**EXHIBIT #5.19 EMAIL CONCERNING MEETING 2 JUNE 2016  
(ASIC.0516.0001.0167)**

30

MR HODGE: All right. Can we now bring up NAB.162.011.1706. So this is a chain of internal emails. But, again, I think we looked at it very briefly yesterday and I just want to make sure we put in context. So you can see at the bottom of the page an email from you to two people within NAB. Can you just tell the Commissioner again who they are?---Lara Bourguignon and Stephen Sefton.

35

But what are their positions?---Lara was the general manager of corporate superannuation at the time, I believe, and Stephen Sefton was in the group insurance business.

40

All right. And did they each report to you?---Lara reported directly to me. Stephen would have reported through to someone else who reported to me.

45

All right. And, again, I think you agreed yesterday you said "having spoken to Nicole S", that would be Nicole Smith?---Yes.

That's the chair of NULIS, the trustee?---Yes, it is.

And at the bottom of the page you refer to the discussion that has come out of you and Ms Smith talking about the PSFs?---Yes.

5

And we talked about the idea yesterday of an enhanced control environment. Is it this type of change would now demand external legal assurance?---Yes.

And you spoke about what that means yesterday?---I believe so.

10

And you will see, though, what has been provided in response is a paper – and this is the attachment – I'm sorry. Just before we do that, can we actually go to the second page, .1707. And this is an email that you had sent on 19 June?---Yes.

15 It's not clear who it is sent to, but presumably the same people?---I think so.

And you say:

*As discussed, I reckon a two-pager that has the following chapters.*

20

That presumably means a two-page document?---I believe so, yes. Yes.

And you set out what you want in that document?---Yes.

25 And I'm just trying to understand in relation to the division of these two issues. There's one that is the M100 issue. Is that the issue that Mr Sefton was responsible for dealing with?---Yes.

30 And the other issue is the PSF issue. And that's the issue that Ms Bourguignon was responsible for dealing with?---Correct.

All right. And that's why you say in relation to root cause:

*Lara, let's discuss, but feels like combo of complex legal entity environment miss that people failed to recognise no trustee entitlement to fee.*

35

Do you recall what that means?---I believe that was simply referring to the fact that we conclude that there was never entitlement to charge this fee to members.

40 Again, to be fair to you, I just want to make sure we're understanding what you're saying. Do you – do you say that this reflects that you think by then, on 19 June, you had already recognised that there was no entitlement to the fee?---Well, if – I think in terms of the timing, that's what that email would imply. But I – but, Mr Hodge, I can't remember the full context of the email.

45

I understand. And then there's an attachment that has been prepared by Ms Bourguignon in response to your request. Can we go to .1708. It's

NAB.162.011.1708. Perhaps it has gone in as a separate document. That's fine. We will come back to that, if necessary. Can we bring up NAB.005.881.0232. This is a document titled Briefing Note, Plan Service Fee Events, Prepared by Service Provider Management. I think you've got a hardcopy there, Mr Carter?---Thank you.

5

Do you recall having seen this document before?---No.

And just so we understand this, do you recall at some stage a briefing note being prepared for you to provide to the trustee?---I don't recall ever a briefing note.

10 Absolutely what I recall was a management recommendation to the trustee. I believe the only engagement with the trustee was a management recommendation to the trustee on the plan service fee event. That is what I recall. I don't recall a briefing note.

15 You don't recall. Well, if we go to page .0232\_0016. It's page 16 of the document. Have you got page 16 there, Mr Carter?---Yes.

The apparent author of the paper is you?---Yes.

20 Do you agree?---Yes.

Do you recall having authored this paper?---It's clearly what it says. I don't recall the specifics of this paper, but it has got my name on it.

25 Do you recall that there were – and this is only the draft, obviously. Do you recall the circulation of various drafts of this paper? So you don't recall the paper at all? You just don't remember?---No.

30 All right. I want to, again, just in fairness to you, direct you to some things and see whether this helps you to remember. If you go to page 5 of the document, you will see paragraph 2.15. Can you see that there?---Yes.

And you see it says:

35 *Prior to SWiFT, MLC, issuer, deducted and retained the PSFs for unadvised members as permitted by the investment life policy. MLC administrator facilitated this process. It is noted, however, that there is a question on the ability of MLCL as the issuer to do this in relation to the employer service fee which is currently being contemplated by legal.*

40

And you will see there's a comment there explaining that from KH, who is presumably Karen Anne Herald?---I believe that would be right.

And she says:

45

*Legal analysis is required on whether the employer service fee was permitted under the life policy. I have included a sentence to allow for this.*

Can you see that there?---Yes.

5 Again, so that we understand your recollection, do you recall it ever being raised that MLC may not have had an entitlement to deduct the employer service fee pre-SWiFT?---Pre-SWiFT?

Yes. Well, there was no employer service fee after SWiFT, was there?---Yes, correct. So what was your question, please?

10 Do you recall it ever having been raised – do you recall a question ever having been raised as to whether MLC was actually entitled to deduct the employer service fee?---No.

15 All right. And do you recall we had a discussion yesterday about some comments that Ms Herald had made on something which was appendix 2? Do you remember we were looking - - -?---Yes.

20 - - - at an email? Can we go to page 18 of the document?---I think I've got it. It doesn't have a page number, but - - -

It doesn't have a page number at the bottom, but you can see appendix 2 - - -?---Yes.

25 - - - there. And this appears to have been an appendix setting out services that might have been said to have been provided by MLC to an unadvised – I'm sorry – to an adviser without a – to a member without a linked adviser in exchange for the plan service fee?---Yes.

And you will see there's a comment which is AW20?---Yes.

30 And can you tell us who AW is likely to be?---No, I can't.

35 All right. But you will recall when we looked at those emails yesterday that an issue that was being raised by Karen Anne Herald was that she had real doubts about how it could be said that these services were being provided in exchange for the plan service fee. Do you recall that?---I can't – I can't recall that specific conversation, but that – I can't recall that specific conversation we had.

All right. I tender that document, Commissioner.

40 THE COMMISSIONER: Briefing note concerning PSF events prepared by service provider management, NAB.005.881.0232, exhibit 5.20.

45 **EXHIBIT #5.20 BRIEFING NOTE CONCERNING PSF EVENTS PREPARED BY SERVICE PROVIDER MANAGEMENT (NAB.005.881.0232)**

MR HODGE: Now, can we bring up then NAB.155.027.5585. So this is a chain of emails, Mr Carter. You can see the most recent email in time is to Camille Price. Who is Ms Price?---I believe Camille was the executive assistant to Ken Christie, the CFO of NAB Wealth.

5

All right. And you see it's referring to a PSF management paper to trustee?---Yes.

Do you recall what that paper is?---I'm assuming this is the management paper that we – we put to the trustee regarding the remediation of the PSF events.

10

All right. And if you go – if we go to the third page in that document, which is .5587. So at the bottom of the page – I suspect you've got a blue-highlighted version. Is that right?---Yes.

15

And so they've redacted your email address, but we can see it's an email from you at the bottom of the page?---Yes.

And you're emailing some other people within NAB, including Mr Murphy, who is – he wasn't the general counsel, was he? He was the chief risk officer?---Correct.

20

Right. And Mr Jones, who is the general counsel in relation to Capital?---I think he – he was in legal.

Okay. And then if we go over the page, this seems to be you setting out what you want to have go into a management paper to go up to Nicole, who is Nicole Smith, and Brian – who would Brian be?---Brian. The office of the trustee, Brian Marriott.

25

I see. Mr Marriott. So you're setting out what it is that you want to have go into the paper?---Yes.

30

All right. And, again, do you have some recollection about the process of drafting this?---Not specific knowledge of the drafting of this paper.

All right?---I know – what I know very clearly is what the recommendation is, ultimately.

35

Yes. Ultimately, you get to the point where you have to say to the trustee, "You will have to refund the money"?---Yes.

40

And that's what you're very clear on?---Yes.

All right. I tender this document, Commissioner.

THE COMMISSIONER: Emails to and from Carter and others, PSF management paper to trustee, August 2016, NAB.155.027.5585, exhibit 5.21.

45

**EXHIBIT #5.21 EMAILS TO AND FROM CARTER AND OTHERS, PSF  
MANAGEMENT PAPER TO TRUSTEE, AUGUST 2016 (NAB.155.027.5585)**

5 MR HODGE: Actually, Commissioner, just before we leave that, can we go back to the third page. You will see you sent an email on 19 August at 6.25 pm?---Yes.

And you're informing some other people that you've spoken to, Brian, Brian Marriott; and Nicole, Nicole Smith?---Yes.

10

And you say you've made a couple of updates to the management paper?---Yes.

And so, whatever the document is that's being prepared, you are certainly intimately involved, can I suggest, in preparing it?---I would certainly be across the document, yes.

15

And you – you are changing it; you are updating it?---Yes.

20 All right. And then if we then go to page 2. And we can see you're congratulating the team on the paper and saying:

*It pulls together very well.*

25 And you're setting out some further things that you want to have changed or fixed up in the paper?---Yes.

30 All right. And then if we go to NAB.076.048.8133. So we see an email that – I think we looked at it yesterday, as well. It's part of a branch of emails. But if you have a look at the bottom of the page – I'm sorry. If you look at the subject, do you see the subject is PSF Management Briefing Paper?---Yes.

35 And can I suggest, then, this must be the same paper that you were referring to and making some changes to in the previous email?---I'm not 100 per cent sure, but I think that would be right.

35

And at this stage what's still being contemplated is this proposition that it is possible to say that there were other services of value provided by MLC to members without a linked adviser and, therefore, that it's possible to retain the PSFs. Do you agree with that?---That – that continues to be one of the questions being – being looked at.

40

And so bearing in mind we've – we're now at the end of August of 2016. You will recall we saw you were at least looking at this from May of 2016. So a roughly – at least three months has elapsed. And you have been considering this. You agree? You've been thinking about this issue?---Yes.

45

You've had a paper being drafted?---Yes.

Presumably, at some point in time, you went back and you looked at the reference guide or the SEN?---Yes.

5 And did you think that there was some ambiguity as to who was going to be providing the service that was being paid for by the plan service fee?---Mr Hodge, what I can say at the time it certainly was one of the questions that was – that was asked. And there were many, many different people involved in this – in this process. And I know that that was just one of the questions that was being asked, and that is what is reflected in these emails.

10 And, again, just so I understand, you recall the evidence that was attempted to be given from the bar table was that it was lower level employees that were asking these questions?

15 MR YOUNG: I do object to that - - -

THE COMMISSIONER: It's a perfectly accurate characterisation of what happened, Mr Young. I think – what do you wish to say?

20 MR YOUNG: I was referring specifically to the email from a person that Mr Carter did not recognise.

THE COMMISSIONER: Very well.

25 MR YOUNG: and that was the very subject of the questions that I directed my comments to.

THE COMMISSIONER: Very well.

30 MR HODGE: All right. Do we agree that it is not simply lower level employees who are asking these questions?---Certainly I had to consider these questions as well, yes.

35 Would you say that you were pushing the question of whether it was possible to retain the plan service fee on the basis that MLC had provided some other services to the members?---No.

You don't think you were pushing it?---No, I was not.

40 Ms Herald, she's a more junior employee than you?---She's in our second line risk team.

All right. She's in a separate part - - -?---Yes.

45 - - - of the situation. She's part of – is that the second line of the three lines of defence?---Correct.

- All right. And is that – in NAB, is the second line internal audit?---No.
- It's a different separation? How does it work?---You've got first line management assurance, you've got a second line risk team. The third line is internal audit.
- 5 All right. So the – Ms Herald and the risk team, do you recall that she was one of the employees pushing back on this idea that NAB could keep this money on the premise that it had provided some other services to the members?---Yes.
- 10 All right. Now, just so we understand your recollection, when do you think you came to the conclusion that it was not possible to retain the money?---What I – what I can say with confidence is that when we finally put a final paper – a management paper to the trustee on this issue, we had settled on a position and recommended full remediation and repayment of the customers' money.
- 15 All right. So it was – by the time the final recommendation was made, that was the conclusion that had been come to – that had been arrived at?---Correct.
- 20 All right. Now, at some point, in addition to dealing with the trustee, you started dealing with Mr Hagger about this?---Yes.
- Did you report to Mr Hagger?---Yes.
- 25 All right. And can I show you a document, which is NAB.076.048.3666. Commissioner, I have a version of this document without those LPP claims in them. I can accept that there are three lines that might legitimately be said to be subject to LPP. I do not accept that that large box with privileged LPP could on any legitimate basis be said to be the subject of legal professional privilege.
- 30 THE COMMISSIONER: Mr Young.
- MR YOUNG: This issue has not been raised with us before this moment, Mr Commissioner. Had it been raised, I could have taken some instructions about the response. I don't know whether it's - - -
- 35 THE COMMISSIONER: Perhaps if you take your instructions, Mr Young. Just a moment, Mr Hodge. Mr Young is taking instructions.
- MR YOUNG: I only have the obscured page. I don't have what lies beneath. And we don't know whether - - -
- 40 THE COMMISSIONER: Get some instructions, Mr Young.
- MR YOUNG: All right. We maintain the claim for privilege. This is a summary of advice provided by senior counsel to MLC.
- 45

THE COMMISSIONER: Very well. I will – if the document can be handed to me, I will examine it and rule on the point. Well, where are we at, counsel? You press the point, do you, Mr Hodge?

5 MR HODGE: Yes, Commissioner.

THE COMMISSIONER: And do you press your point, Mr Young?

MR YOUNG: Yes, Commissioner.

10 THE COMMISSIONER: Then can the document be provided to me and I will leave the bench and consider it.

MR HODGE: Thank you, Commissioner.

15 THE COMMISSIONER: Can I have the document, please.

MR HODGE: We will need to find a copy, Commissioner. If we can – my copy is marked up - - -

20 THE COMMISSIONER: Right.

MR HODGE: - - - and I don't think I should hand that to you.

25 THE COMMISSIONER: It can be sent to me in chambers.

MR HODGE: Thank you, Commissioner.

30 THE COMMISSIONER: I will return when I've considered the point. Adjourn the Commission.

**ADJOURNED**

**[10.26 am]**

35

**RESUMED**

**[11.00 am]**

MR HODGE: Commissioner - - -

40

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: - - - Mr Young and I have resolved the issue of the LPP claim over that document. So, as I understand it, the NAB no longer presses part of its claim and we accept part of the claim. Rather than trying to revise the document, I will just read out the part that is agreed not to be the subject of LPP, if that's convenient to Mr Young?

45

MR YOUNG: Yes.

THE COMMISSIONER: Very well.

5 MR HODGE: Thank you. Could we bring back up NAB.076.048.3666. So, Mr Carter, I should just note the bit that is no longer privileged. Do you see that halfway down the page there is a sentence which is:

10 *Andrew has received over the weekend three artefacts to support this discussion: Jackman advice, Minters advice and latest version of the management briefing paper.*

?---Yes.

15 And then I hope – you may not be able to see this on your version, but the next sentence which is agreed not to be privileged is:

20 *These papers provide useful background on the legal issues associated with investment policy versus trust expense. And the management paper also lays out the implications for compensation approach.*

You probably can't see that - - -?---No, I can't.

25 - - - on any version you have?---No, I can't.

In any event, that's what the sentence says?---Yes.

30 Now, you may now have had time during the break to have a look at that document. Is what was happening in the middle of September that you were arranging to have a – or give a presentation to Mr Hagger about the PSF remediation issue?---I don't know whether there was a presentation, but certainly we would have been keeping Andrew Hagger updated throughout the entire investigation.

35 All right. If you look at your email on 19 September 2016 sent at 4.28 pm, you see you say:

*We are providing Andrew H –*

40 That's presumably Mr Hagger?---Yes.

Continuing:

45 *...a briefing on PSF on Wednesday between 10 to 12.30 pm (Lara, you are being invited to this, and Meera/Liz we will have you on standby.*

?---Yes.

And it refers to three documents then having being provided to Mr Hagger. Two of those documents are legal advices and the third document is the latest version of the management briefing paper?---Yes.

5 And the management briefing paper, can I suggest, is the document that we've now seen being prepared over the last few months?---I believe that is true.

All right. You're not sure, though, exactly what it is anymore?---There were many -- there were many drafts. I believe that's -- that is, that your statement is correct.

10

All right. And you see at the bottom of the page point number 2 is:

*Discussion of allowable services under PSF definition.*

15 ?---Yes.

And this is explaining some of the -- what you describe as the current thinking of eligible services. Can you see that? See you say -- --?---Yes.

20 Continuing:

*I understand current thinking of eligible services are additional general advice services such as on site visits, employee seminars, monitoring, insurance arrangements for company employees, assisting employees with services such as completing beneficiary nominations and ensuring TFNs --*

25

Which is tax file numbers --

*provided --*

30

?---Yes.

And then, over the page, we see:

*Lara will provide an overview of where and how these eligible services are provided, most obviously through our platinum service clients, but also assess where MKBS members have been invited to member town halls and education seminars. Lara will also provide initial quantification of the employer and member reach of these services including applicable PSF coverage.*

40

?---Yes.

45 And this, I want to suggest to you, is consistent with the attitude that was demonstrated by your team over this now four and a half months, which was to attempt to find some service that could be said to justify keeping the plan service fees?---Again, I would say that what we were doing is making sure there was a full understanding of the issue and contemplating all the questions that I might get asked

about the issue. And so this was one of the areas that we were looking into. That is correct.

5 And the fundamental question would be that you were contemplating being asked would be, “Do we actually have to repay all of this money”?---We were understanding the nature of the issue to then inform what the appropriate remediation approach would be. Correct.

10 Did you ever say to any of the people below you who were reporting to you, “This is the wrong way to think about the situation”?---I don’t recall saying that.

15 Did you ever think to yourself, “This is the wrong way to think about the situation, to be trying to identify services that we can say justify keeping the plan service fees”?---No.

And, to be fair to you, is it your view that that wasn’t actually what you were doing; you weren’t really just trying to find services that could justify keeping the money?---Yes.

20 You say you were doing something else when you were trying to identify these eligible services?---Yes.

25 And what was it that you were trying to do?---No. Actually, I will re-state my question. What we were trying to understand – my response – is we were trying to understand what actually was the nature of the issue, make sure that we have considered this from every – every – all factors were considered to come to a conclusion, Mr Hodge. What is also absolutely a fair statement that in retrospect I wish that the investigation we had moved more quickly through the investigation, with the benefit of hindsight. But what I am also very pleased to say is that where  
30 we ultimately land is, I believe, the right spot, where we recommend to the trustee that the full remediation of the members is the right thing to do.

I tender that document, Commissioner.

35 THE COMMISSIONER: Exhibit 5.22, email 19 September ’16, Stimson to Carter, plan for PSF meeting with Hagger, NAB.076.048.3666.

40 **EXHIBIT #5.22 EMAIL, STIMSON TO CARTER, PLAN FOR PSF MEETING WITH HAGGER DATED 19/09/2016 (NAB.076.048.3666)**

45 MR HODGE: Now, in preparation for the presentation to Mr Hagger, there were some revisions that continued to be made to the paper – or there were some issues that continued to be considered. Can we bring up NAB.162.015.3380. So this is another chain of emails between you and Ms Bourguignon. And Ms Bourguignon

explains in the evening of 19 September that she is unwell. And then you reply at 9.48 that night and say:

*Get better soon.*

5

And then you identify some of the further things that need to be done in preparation for presenting or dealing with this issue with Mr Hagger?---Yes.

10 And you're trying to get documented three things. The first is the specific language used in the PDS to describe the plan service fee?---Yes.

And you say:

*By the way, I looked and couldn't find this tonight.*

15

?---Yes.

20 I'm curious about that. Does that mean that the first time you looked at the PDS to see what the plan service fee was actually for was on the evening of 20 September 2016?---No, I don't believe that's what that was saying.

So you had looked at it some earlier time?---I believe I absolutely would have.

25 And identified what it was for?---Yes.

25

And you would have identified it's a fee agreed between an employer and adviser for services to be provided by the adviser?---Yes.

30 Because there's nothing else that you can see in the PDS?---Yes.

30

35 And I'm struggling, then, to understand, when you say you wished in hindsight that this had been concluded earlier, what is it that you wish had been done more quickly?---I think over these months, Mr Hodge, what – what is very relevant – there were multiple people involved in this investigation. And there were multiple issues that were being considered that ultimately management and, as you can see, at multiple levels, were at some stages grappling with. But – and that is why, with the benefit of hindsight, I absolutely wish, with all these questions that were being asked, that we had clarity sooner. Absolutely. But what I can say is we – the work was done and the paper – the only paper that was ever taken to a trustee board which had  
40 my name on it I believe had the right management recommendation.

Now, to be fair to you, let me make clear, I'm not suggesting that you are solely responsible for this - - ?---Yes.

45 - - - or that you are the most senior person responsible for this. There are many people involved in what occurred over this six months. That's the point – one of the points you're trying to make?---Yes.

It wasn't just you?---No, there were many people involved.

5 And the issue that was being confronted all the time was, "Who do we have to remediate and how much is going to cost?" Do you agree?---That would be an outcome, yes.

10 But all of the questions that are being asked, all of the questions about investment policy versus trust expense, "Are there eligible services that we can say were provided?", all of those questions are only relevant to one issue, which is, "Who do we have to remediate and how much is it going to cost"?---I don't believe that's the case.

15 Why? What is the issue of trust – of investment policy versus trust expense relevant to other than remediation?---That – what I can say on that is I know that there were different legal arguments that were made at the time on what was described as trust expense versus investment policy. If anything, I just hope that that goes to show the complexity of the issues, that in the benefit of hindsight, I do agree – well, it just shows that there were different issues that were – that management were grappling with at the time. I don't believe that those legal issues were to do with remediation.  
20 I believe that those issues were to do with the underlying issue itself. That is how I understand that.

25 Let's take two issues. The first is investment policy versus trust expense. What outcome does that question affect?---I believe – no. I know that if – as I understand, the outcome of that question could have – would have – could have determined or had impact on the remediation approach.

30 Yes. Is there anything else that you can identify – any other outcome that you can identify to which that question is relevant?---As I said earlier, I believe the primary basis for that whole legal analysis was in the context of understanding the nature and character of the fee. That's why that – as I understand, that's why that legal work was done, not to – that's why that legal work was done, to understand the nature of that fee, as I best understand.

35 Can I suggest when you say "to understand the nature of the fee", it was to understand whether there was an argument available that would mean that it was not necessary to fully remediate all the plan service fees collected from members who did not have a linked adviser?---Yes.

40 And on the issue of eligible services - - -?---Sorry – can I – can I – can you please repeat your question there, Mr Hodge?

45 Yes. There was – the question that was being considered by NAB was whether it was necessary to remediate the PSFs for all members who did not have a linked adviser. That was a question that you were dealing with?---That was a question.

That was, obviously - - -?---Yes. Yes.

And that is a question that goes to, “Who do we have to remediate and how much is that remediation going to cost?”---Yes. Yes.

5 And when you talk about this issue of, “How do we characterise the plan service fee?”, what that question is relevant to is, “Do we have to remediate everybody who is a member” - - -?---I – yes. I believe that’s true, yes.

Was it relevant to anything else?---I can’t answer that question.

10 All right?---I know it’s a legal question. I know it’s an important legal question that was posed at the time.

15 And on the eligible services issue, which is, “Are there services that NAB can say MLC, or some MLC-related company, provided to members who did not have a linked adviser?” What outcome was that question relevant to?---It would be the same.

20 That is, “Who do we have to remediate and how much is it going to cost?” Do you agree?---Yes.

And - - -?---In – yes.

25 And in point number 2 on this email that you’re sending to Ms Carter?---Ms Bourguignon.

I’m sorry. You’re Mr Carter. Ms Bourguignon. You are asking for there to be some sort of table that outlines what might be considered eligible or ineligible services?---Yes.

30 That’s what you’re doing in point 2. And then in point 3 you’re asking, based on an analysis of these eligible or ineligible services, provide a breakdown of how many of the 220,000 unadvised members may have had access to these eligible services, plus implications for PSF?---Yes.

35 And the implications, can I suggest, is, “What do we have to remediate”?---That would be one of the implications of this work.

40 All right. Were there other implications?---I believe this is also just making sure we understood there was full understanding of what the nature of that fee and service was in the first place.

I tender that document, Commissioner.

45 THE COMMISSIONER: Exhibit 5.23, emails 20 September ’16 between Bourguignon and Carter, NAB.162.015.3380.

**EXHIBIT #5.23 EMAILS BETWEEN BOURGUIGNON AND CARTER  
DATED 20/09/2016 (NAB.162.015.3380)**

5 MR HODGE: Can we bring up NAB.162.007.0252. Do you recall that you then gave a presentation to Mr Hagger?---I don't recall the presentation.

All right. Have you seen this document before?---It has got my name on it. It has got my name as one of the presenters.

10

Yes. Do you recall this document, though?---Not off the top of my head now, no.

All right. And you will see it's dated 20 September 2016?---Yes.

15 And if you turn over the page to Agenda, you see there's three presenters who are listed, Paul. That's you?---Yes.

Damien. That's Damien Murphy, the chief risk officer. Lara. Is that Lara Bourguignon?---Yes, it would be.

20

And you will see that she is presenting on item 2 allowable services under PSF definition?---Yes.

25 And you will recall in one of the earlier emails that we looked at that you were telling her that she would be attending the presentation with Mr Hagger in order to present on this issue?---Yes.

30 And this, then, was a presentation, I would suggest, but you may say you just don't remember it, in which you were bringing Mr Hagger up to speed on what was going on with the PSFs?---Yes.

And if we go to the page which is .0260, you will see this is a slide headed An Analysis of the Services Provided by MLC Representatives?---Yes.

35 And there's then some principles that are set out in relation to the examination of services?---Yes.

And there's a table set out identifying various services?---Yes.

40 And this, I would suggest – and you may just not recall – is the type of table that you were requesting in the previous email we were looking at, a table setting out the eligible and ineligible services?---I believe that's correct.

45 And you see the first principle is:

*Services that are covered by the administration agreement or member advice services deed are unlikely to be able to justify charging the PSF to members*

*who do not have an adviser linked to their account, as the fee structure under these agreements would apply to the provision of those services.*

See the first bullet point?---Yes.

5

And the second bullet point is:

*No other services have been identified outside the services listed below that may be eligible to justify charging the PSF to members who do not have an adviser linked to their account.*

10

?---Yes.

Now, I just want you to reflect and think, as best you can, did you ever push back on the search for services that might justify retaining the PSF for members who do not have an adviser linked to their account?---I can't recall. I know I would have absolutely looked – taken a – a thoughtful – what I would have intended to do is taken a thoughtful, considered view to those questions.

15

Well, I just want to understand whether, as you recall it, this search for services was a search that originated out of people below you or was a search that you were yourself driving?---No, I don't believe it was a search for – well, it – I don't know the answer to your question, but what I can say is the context of this was it – was it a – the question which we discussed earlier is was it a viable alternative to consider that MLC was the one providing the general advice services in this context. That's what the question that was being assessed here. And you can see in this – you can see the conclusion of this report is that – what we conclude is even if MLC is providing those services, that is still not a basis for charging the fee – the plan service fee.

25

30

Sorry. You're saying you can see that conclusion here?---That is the conclusion we come to - - -

I see?--- - - - on this line of inquiry.

35

Ultimately, it's accepted that it's an impossible argument. That's your point. At some point in time, it's impossible to argue that the PSF could be retained on the basis of these services being provided by MLC?---That is – that is the conclusion we come to.

40

All right. And that's what you're referring to?---Yes.

Okay. I tender that document, Commissioner.

45 THE COMMISSIONER: Plan service fee update 20 September '16, NAB.162.007.0252 exhibit 5.24.

**EXHIBIT #5.24 PLAN SERVICE FEE UPDATE DATED 20/09/2016  
(NAB.162.007.0252)**

5 MR HODGE: Now, could we bring up then NAB.076.018.9311 – sorry. I will say it again. NAB.076.018.9311. Now, if we go over to the page – the second page which is .9312. See at the bottom of the page is an email from Anne Wong. I think I asked you this yesterday, but who is Ms Wong?---I can't recall Anne's role.

10 All right. She's sending an email to you and Mr Murphy, the chief risk officer?---Yes.

Paul and Damien?---Yes.

15 And she says:

*Please find attached the PSF management paper now as a letter from NWMSL to the trustee for the opt-in compensation methodology.*

20 ?---Yes.

Do you recall that the management paper that we've seen being drafted over some months was converted into a letter to be sent to the trustee?---I believe that is correct.

25 And NWMSL, could you just explain to the Commissioner where that sits?---They are the administrator to the trustee.

THE COMMISSIONER: Sorry. What's the abbreviation NW What?---National Wealth Management Services Limited.

30

NWSL.

MR HODGE: So this is a letter that's going to be – in draft that's going to be sent from the administrator to the trustee?---Yes.

35

And the management paper has become that letter?---I believe that's correct.

And Ms Wong is saying that you – that is, you and Mr Murphy – now hold the pen on the master?---Yes.

40

And there's an email in the middle from Ms Bourguignon. And then at the top of the page there's an email from you?---Yes.

45 And you will see there's a reference to Tudj or Tudj. How do you pronounce that? Is that Tudj? Stephen Tudjman?---Yes.

Tudjman. He's in legal, I take it?---Yes. He's another one of the lawyers involved.

All right. And you will see you say:

I would like some clarity on –

5 And then there's something that's subject to LPP. And then you say, about two points or three points down:

10 *One challenge we don't fully run to ground under opt-in logic is contained in appendix relating to fact that administrator agreed not to charge for MLC Direct/gateway. Tadj, how material is this in concluding opt-in as a viable option, a knock-out blow or otherwise?*

Do you recall what that issue was?---Let me read again.

15 Yes. Do you see – it's the sixth - - -?---I think I'm referring to.

Go on?---Well, let me read. Clearly, I'm asking a question and seeking Stephen Tadjman's guidance on this question. That is the best I can recall.

20 All right. Do you recall what the opt-in option was?---Yes.

25 And what was that?---That was a compensation methodology for members that would require members to voluntarily – or accept – so if MLC wrote to members and say would you like to have the fee refunded, it would require a member to opt-in to the compensation approach.

30 And do you recall that you were pushing the opt-in compensation approach?---I think over the course of these months – I don't think I was pushing. No. I wasn't pushing any – any of these options. What I believe was happening is that we were assessing the issues and the consequences.

The opt-in compensation approach would mean that NAB needed to remediate less money to members. Do you agree?---That would be a likely outcome, yes.

35 And if we return to the question I was asking earlier about whether ultimately all of this assessment is about remediation, can I ask you to consider the following things. The management paper that has been drafted for some months has now been turned into a letter from National Wealth Management Services Limited to MLC. That's the first thing to consider. And the second thing to consider is that what the letter is  
40 concerned with, as is apparent from this email, is what compensation methodology is going to be used?---Yes.

45 And that is because, ultimately, all of this thought that was occurring within NAB about the correct characterisation of the plan service fee was to do with how much needs to be remediated to customers?---That was one of the considerations.

All right. And then if we go to the first page of the email. We see there's an email back from Ms Bourguignon to you saying:

5 *I thought we discounted this option given the trustee was explicitly told it would not be charged additional fees for member advice services (via the member services agreement) and that all other services were included in the admin agreement (and hence admin fee).*

10 Now, do you know what that option is that's being referred to?---I'm not exactly sure what Lara is referring to with respect to that option.

It seems a bit odd, because she seems to be referring to something that you have said - - -?---Yes.

15 Some option that you have suggested?---If I read the entire – that entire line, I believe what this is saying is the same conclusion that you referred to earlier, that while there was an assessment done on whether other services provided by MLC directly would constitute a basis for the plan service fee, I believe what Lara is referring to here is that that was not a reasonable basis. I believe that's what she is  
20 saying.

Yes, because presumably – and perhaps this is for some inexplicable reason the subject of an LPP claim over something you have said, you have somewhere raised as an option this possibility of saying that the services justified the fee?---What I can  
25 say absolutely over that period, that question was being – that was one of the questions that were – that was being assessed. That is absolutely true.

I tender that document, Commissioner.

30 THE COMMISSIONER: Emails Bourguignon, Carter and others, October '16, PSF Management Paper Opt-in Compensation, NAB.076.018.9311, exhibit 5.25.

35 **EXHIBIT #5.25 EMAILS BOURGUIGNON, CARTER AND OTHERS, OCTOBER '16, PSF MANAGEMENT PAPER OPT-IN COMPENSATION (NAB.076.018.9311)**

40 MR HODGE: And then if we can bring up NAB.047.007.7156. So we see at the bottom of the page an email from you, and it's sent to a number of people?---Yes.

And you're explaining that you've updated that NWMSL management letter?---Yes.

45 And you say:

*Ultimately, this version recommends the option 2 opt-in approach to trustee.*

?---Yes.

Continuing:

5        *Per my email last night, for me a key tenant for this argument is the ability to say the PSF in case of non-linked members is for general advice services provided by MLC Direct and member town halls.*

?---Yes.

10

*I acknowledge there is uncertainty on this, given contractual arrangements with MLC.*

?---Yes.

15

And you then forward that email, together with the attachment, to Mr Hagger?---Yes.

And you explain:

20

*This paper recommends an opt-in remediation approach.*

?---Yes.

But also says:

25

*This version is awaiting final legal and feedback from Damien.*

?---Yes.

30

And Damien is Mr Murphy?---Yes.

So it's awaiting two things. The first is a final legal review and the second is final feedback from the chief risk officer?---Yes.

35

So the view that you draft and send to Mr Hagger to go to the trustee is one that advocates for the opt-in approach?---As I did say, that there were multiple people involved throughout this process, but that is – that is right. At that point in time, that is what this management paper says.

40

And can we bring up the attachment. Commissioner, this was subject to a claim for a non-publication direction on the basis of without prejudice privilege.

THE COMMISSIONER: Well, before it's brought up, then, what's the document? Some of the documents which I think – well, what is this document?

45

MR HODGE: Commissioner, this is, as referred to in the email - - -

THE COMMISSIONER: The draft letter?

MR HODGE: - - - the draft letter from NWMSL to NULIS.

5 THE COMMISSIONER: Yes.

MR HODGE: In relation to the PSFs.

10 THE COMMISSIONER: Yes. Mr Young, why should I make an NPD in respect of this?

MR YOUNG: Could I have a moment just to locate the letter, your Honour.

15 THE COMMISSIONER: Very well.

MR YOUNG: It's – I just want to make sure I've got the right document. If I can, through you, Mr Commissioner, ask my learned friend is the letter a NAB letter of 14 October 2016?

20 MR HODGE: Yes.

THE COMMISSIONER: The draft, as I understand the attachment.

MR HODGE: It's – yes, you can see that it's a draft.

25 THE COMMISSIONER: The draft letter supplied within the NAB organisation, and the claim for, as I understood it, for non-publication direction was that somehow without prejudice applied to this, Mr Young. That's as I understood the written submissions supplied.

30 MR YOUNG: Yes. We made a submission for confidentiality on the basis that the document, as – even as a draft – records a set of positions, including concessions, that it was anticipated would be presented to ASIC in relation to remediation plan. It was intended that the letter would go to ASIC under a without prejudice heading.

35 THE COMMISSIONER: Be it so, the internal musings of NAB about what it might send to ASIC attract without prejudice principles, Mr Young? What is the dispute within NAB to which without prejudice might attach?

40 MR YOUNG: Mr Commissioner, I have articulated the basis as being simply that this document recorded concessions that it was proposed to advance on a without prejudice basis. Now, we've made that submission. I don't want to add further to it, Commissioner. It's a question for you to judge where the appropriate balance lies.

45 THE COMMISSIONER: Yes. There will be no non-publication direction in respect of this document.

MR HODGE: Thank you, Commissioner. Commissioner, I understand that there should be available in the staging area an un-redacted version – sorry – there is some privilege material which is redacted.

5 THE COMMISSIONER: Have we got a doc ID for it, Mr Hodge?

MR HODGE: Yes. I'm sorry, Commissioner. It's NAB.047.007.7157, but the version that will need to be brought up is the one that is redacted only for privilege and sitting in the staging area.

10

So this, can I suggest, Mr Carter, is the draft letter that you were sending to Mr Hagger?---It's the first time I've seen – I'm seeing this, so I will assume that is correct.

15 When you say it's the first time you're seeing this, you mean - - -?---Today. So - - -  
- - - you haven't seen it recently? You haven't looked at it recently?---From having not seen this recently, no.

20 All right. And, consistent with what you see in the email, if you go to the page 13 of that document?---Yes.

Now, I suspect that to have another moment of tension, Commissioner. If we go to page 13 of that document, I have two versions with different LPP claims made in respect of those versions. I will just have a moment to speak to my friend.

25

MR YOUNG: Commissioner, could I have a moment to take instructions. Again, this had not been raised.

30 THE COMMISSIONER: Well, it's your claims, Mr Young.

MR YOUNG: We don't press the claim for privilege in respect of the first section on page 13, Commissioner, but we do maintain the privilege in paragraph 7.2(b).

35 MR HODGE: I'm content with that, Commissioner.

THE COMMISSIONER: Very well. Have we got a document, then, that is capable of display?

40 MR HODGE: No, Commissioner, but I can – the relevant part I can summarise. I don't know if there's – if there's an un-redacted version, that could be provided to Mr Carter.

45 THE COMMISSIONER: It is to be regretted that there is not an appropriately redacted copy available.

MR HODGE: That's all right, Commissioner. I will deal with this in a different way while we attempt to find that document.

5 Mr Carter, let me tell you what the large box is redacting, which is a table, table 5, described as:

*Summary of factors considered in determining a recommendation for remediation.*

10 And it sets out two options. Option 1 is:

*Return all PSF paid by members without a named plan adviser plus interest.*

Option 2 is:

15 *Refund post-SWiFT members without a linked plan adviser and write to pre-SWiFT members without a named plan adviser asking if they want a refund.*

20 So that is – you will see what's un-redacted there is:

*In summary, National Wealth Management Services Limited recommends option 2.*

25 You see that there?---Yes. Well - - -

And option 2 is:

*Refund post-SWiFT members without a linked plan adviser and write to pre-SWiFT members without a named plan adviser asking if they want a refund.*

30 ?---I don't think I can - - -

You can't see that, but I'm telling you that's what it is?---Yes.

35 And that's consistent with what you saw in your earlier email, which is you saying, "I'm recommending option 2"?---Yes.

And option 2 is what's referred to as the opt-in option?---Yes.

40 And then you will see what's set out in paragraph 7.2 are the justifications that have been arrived at by NWMSL for this preferred remediation approach?---Yes.

And you will see in subparagraph (d):

45 *In the case of PSF, services consistent with the PDS were made available to members as detailed in appendix 3.*

And then there's a reference to general advice service – I'm sorry – access to general advice services?---Yes.

5 And this, again, links back with the email of yours we were looking at earlier, which is you were comfortable with recommending option 2 on the basis of this justification about there being an ability to say the PSF in case of non-linked members is for general advice services provided by MLC Direct?---Yes, but what is also true, per that earlier email, or in that email that we discussed previously, is that ultimately we conclude that that was not a basis for the fee.

10 I'm sorry. Could you say that again?---What we – what that discussion was earlier is that the general advice services, ultimately we conclude that that was not the – that was not the basis for charging the fee.

15 So you think it was concluded that the access to general advice services was not a basis for charging the fee?---That is ultimately where we land, yes.

20 But when you send your draft letter to Mr Hagger, you're saying – you're not saying that that's an impossible argument, are you?---Not at this time. And – but I – but I – what I also – Mr Hodge, I'm not able to know exactly the sequencing in which these things were determined.

25 But we've looked at the sequence. You've been looking at this since May of 2016. On 16 October 2016 you send this draft letter to Mr Hagger?---Sorry. What date was this?

The letter is dated 14 October, and the email that you sent to Mr Hagger is sent on 16 October?---Yes.

30 This is the draft. You understand?---Yes.

I tender that document, Commissioner.

35 THE COMMISSIONER: And the email that covered it, Mr Hodge? I think they should be separate tenders.

MR HODGE: Yes, Commissioner.

40 THE COMMISSIONER: Email Carter, Hagger and others, October '16, concerning PSF letter, NAB.047.007.7156 is exhibit 5.26.

45 **EXHIBIT #5.26 EMAIL CARTER, HAGGER AND OTHERS, OCTOBER '16, CONCERNING PSF LETTER (NAB.047.007.7156)**

THE COMMISSIONER: Exhibit 5.27, draft letter of MWMS Limited to NULIS, 14 October '16, NAB.047.007.7157, is exhibit 5.27.

5 **EXHIBIT #5.27 DRAFT LETTER OF MWMS LIMITED TO NULIS DATED 14/10/2016 (NAB.047.007.7157)**

10 MR HODGE: And then the next document is NAB.047.007.7190. I'm told this might need to be handed around in hardcopy, because the redactions of personal email addresses have not yet been completed. I'm sorry. That's our fault. I gather this document hasn't been asked to be cleared yet, although it looks like there's a copy here. I will just get this – can that document be handed over to Mr Carter?---Thank you.

15

So you will see this is Mr Hagger's reply to you?---Yes.

On the evening of 16 October?---Yes.

20 And he says:

*Thank you. While I will edit this to some extent, I think it provides a very good basis for the letter I wish to submit. Thanks for your work on this and I look forward to our conversation tomorrow.*

25

?---Yes.

I tender that.

30 THE COMMISSIONER: Exhibit 5.28, email Hagger to Carter, 16 October '16, NAB.047.007.7190.

35 **EXHIBIT #5.28 EMAIL HAGGER TO CARTER DATED 16/10/2016 (NAB.047.007.7190)**

MR HODGE: Do you recall the conversation that you then had with Mr Hagger the next day?---No.

40

All right. Can we then bring up NAB.042.003.1456.

THE COMMISSIONER: The screens are not deeply encouraging, Mr Hodge.

45 MR HODGE: Commissioner, I can give a different part of a document ID which is NAB.04 - - -

THE COMMISSIONER: Yes. I just wonder if there's something wrong with the feed more generally.

MR HODGE: I see.

5

THE COMMISSIONER: If you look at the display.

MR HODGE: That looks like bad news, Commissioner.

10 THE COMMISSIONER: It doesn't look good news, anyway.

MR HODGE: We're going again.

THE COMMISSIONER: The wonders of modern science.

15

MR HODGE: So this is – I just want to put this in temporal context for you, Commissioner. This is an extract from the minutes of The Group Risk Return Management Committee. They've been provided as a single document for – over the course of a lengthy period of time. And the minutes we're looking at are of the meeting of 19 October 2016. And so it may be in as an extract, which is NAB.042.003.1456\_E. I'm sure that will come up eventually. You will see – there we go – you will see, Mr Carter, the first page of this document, because it's the first page of the full bundle of minutes, is of a risk return management committee meeting on 20 January 2016. We're interested in the Group Risk Return Management Committee meeting on 19 October 2016, which is over the page. I mean extract is over the page. I understand you would not have attended this type of committee meeting?---No.

20

25

30 And where does the Group Risk Return Management Committee sit? There's – who is – who does it comprise?---The group executive of the National Australia Bank.

All right. And if you go, then, to the page which is .1523, you will see what's recorded is:

35

*In response to a question from the committee, Mr Hagger updated the committee on the Wealth Plan service fees incorrectly charged for SWiFT, Encompass and TERP totalling \$34.3 million.*

?---Yes.

40

Continuing:

*Mr Hagger advised the committee that the breach related to the administrator deducting and retaining plan service fees from member accounts which did not have a named financial adviser linked to their account.*

45

?---Yes.

Continuing:

5 *Mr Hagger noted that Wealth had self-disclosed the breach to ASIC and that the quantum of compensation, ranging from 15 million to \$40 million, was being discussed with the trustee and counsel.*

?---Yes.

10 And then the committee expressed disappointment that customers had not been remediated earlier, given the matter originated in 2012, and that consequence management had not been implemented earlier, given key stakeholders have now left the business.

?---Yes.

15 And you, obviously, weren't there at that meeting, but on 19 October, what's set out here, factually, accurately reflects your understanding at the time?---Yes.

20 That is, the total amount of the plan service fees that had been identified as having been incorrectly charged was \$34.3 million?---Yes.

But there was a discussion occurring as to the quantum of compensation?---Yes, per – per the earlier emails, yes.

25 I tender that document, Commissioner.

THE COMMISSIONER: Extract from minutes of Group Risk Return Management Committee Meeting, 19 October '16, NAB.042.003.1456\_E, exhibit 5.29.

30

**EXHIBIT #5.29 EXTRACT FROM MINUTES OF GROUP RISK RETURN MANAGEMENT COMMITTEE MEETING DATED 19/10/2016 (NAB.042.003.1456\_E)**

35

MR HODGE: Now, do you recall that by late October of 2016 ASIC was about to – ASIC had indicated that it was about to publish its report on fees for no service?---Yes.

40 And ASIC contacted, presumably all of the banks, but in particular it contacted the National Australia Bank to give NAB a heads-up on the fact that the report was going to be published?---Yes.

45 And I want to then show you a document which is NAB.162.017.2128. So this is a chain of emails. You will see the email starting at the – about a third of the way down the page is from Chris Owens. Who is Mr Owens?---Chris Owens was – was in our Corporate Affairs team, communications team.

All right. That's one of the things corporate affairs would do is manage, what, media engagement and things like that?---Yes.

5 Also consumer engagement, or would that be a different team?---That would typically be a different team.

All right. So corporate affairs sends an email on 20 October 2016. And you will see that the people it is sent to include Mr Hagger and Mr Murphy and you?---Yes.

10 And it's copied to a number of other people?---Yes.

And it's setting out a communications strategy in relation to the ASIC report that's about to come out?---Yes.

15 And you see that it says:

20 *Given that ASIC plans to announce the TERP plan service fee event as part of its public report into ongoing advice service fees next week, corporate affairs has considered a number of media options to minimise reputation risk for the group.*

?---Yes.

25 And then you see about two thirds of the way down the page:

30 *In making these recommendations we have assumed National Wealth Management Services Limited and the trustees will accept management's recommendation to remediate in full the TERP, Encompass and SWiFT events with approximately \$34 million in remediation provided to 220,000 members. Numbers are still subject to assurance.*

?---Yes.

35 And then:

*All recommendations will be subject to negotiation with regulators. We would not recommend proceeding with any of the below recommendations without the support of regulators.*

40 ?---Yes.

And then you see option 1, the preferred option, is:

45 *Our preferred option would see NAB proactively announce all aspects of the PSF issue, including customer numbers and the total remediation amount. Corporate affairs also recommends that we should flag our intention to conduct an assurance review.*

?---Yes.

And then, if you go over the page, you will see there are some alternative options that are set out in order of preference. Number 2 is a proactive statement following  
5 ASIC report release that includes all PSF events and dollar figure, but no mention of the assurance review.

Number 3 is proactive statement following ASIC report release that includes all PSF events, but no dollar figure.  
10

Number 4 is a reactive statement to detail in ASIC report only?---Yes.

And then you see then forward that email to Ms Bourguignon and say:

15 *Do you agree with this?*

?---Yes.

Do you remember what you thought about this proposal from Corporate Affairs?---In  
20 the context of preparing for this testimony, I have been reminded of the circumstances surrounding this email.

All right. What are the circumstances surrounding this email?---ASIC were in the process of releasing what was a periodic report on issues in the advice industry.  
25 And, notwithstanding this email from Corporate Affairs, ultimately, the management decision was not to go with this recommended approach from Corporate Affairs for one primary reason, is that at the time of the ASIC report the relevant boards were yet to formally consider and determine the ultimate compensation and remediation approach for these events. And so it was deemed proper process to – to allow the  
30 board process and approvals to happen first. Now, the second relevant consideration is, given this dilemma, what I'm also aware is that Andrew Hagger proactively contacted ASIC on this issue to make sure there could be no view that we were trying to hide the issue. It wanted to make sure that, given the report was at a point in time, we were – we were – what we were submitting were the events that were  
35 known and agreed to at the time by our boards, but wanted to let ASIC know that there are other events under investigation and that, subject to board determination, they would be included in futures ASIC reports. So was that the context.

All right. I tender that document, Commissioner.  
40

THE COMMISSIONER: Emails Carter, Hagger and others, 20 October '18, NAB.162.017.2128, exhibit 5.30.

45 **EXHIBIT #5.30 EMAILS CARTER, HAGGER AND OTHERS DATED 20/10/2018 (NAB.162.017.2128)**

MR HODGE: And then can we bring up NAB.158.006.5028. So this is an email from Louise Macaulay of ASIC to some people within the NAB?---Yes.

And it's attaching the draft report?---Yes.

5

And have you looked through the draft report?---No.

Did you look through it at the time?---Yes, I would have.

10 Okay. And can we just – to understand that, can we bring that up – can we bring up NAB.158.006.5030, which is the attachment. And if we go to NAB.158.006.5051. We see there table 2 is Compensation Outcomes as at 31 August 2016 and Future Projections?---Yes.

15 And it sets out NAB, but blanks out the other entities?---Yes.

And – so this is the draft report. It's just telling you what the figures are for you?---Yes.

20 And then if we go over the page to the page .5052, we then see a compensation progress report which again identifies some of the NAB entities?---Yes.

All right. I tender that document, Commissioner.

25 THE COMMISSIONER: Separately from the email?

MR HODGE: No, I will tender the email and the document attachment together.

30 THE COMMISSIONER: Yes. Exhibit 5.31 will be email Macaulay of ASIC to NAB concerning confidential draft report, NAB.158.006.5028.

**EXHIBIT #5.31 EMAIL MACAULAY OF ASIC TO NAB CONCERNING  
CONFIDENTIAL DRAFT REPORT (NAB.158.006.5028)**

35

THE COMMISSIONER: And exhibit 5.31, draft ASIC report financial advice fees for no service, NAB.158.006.5030, exhibit 5.31.

40 MR HODGE: Then on the – I will show you another document which you may not have seen. This is NAB.158.005.5109. And there's an attachment to this which we might bring up as well, which is NAB.005.893.0006.

45 THE COMMISSIONER: Before we come to this, while it is coming up, Mr Hodge, the last exhibit should be 5.32, not 5.31. The draft ASIC report is exhibit 5.32.

**EXHIBIT #5.32 DRAFT ASIC REPORT FINANCIAL ADVICE FEES FOR NO SERVICE (NAB.158.006.5030)**

5 MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: I can't count beyond 31 apparently, Mr Hodge.

10 MR HODGE: Now, Mr Carter, this is an email back from Ms Debenham, who is the head of Regulatory Affairs within NAB – back to ASIC with some suggested changes to the draft report?---Yes.

15 And I will just note a couple. The first is that NAB disagrees with the characterisation of the issues as being systemic?---Yes.

The second is that there's some updates to the table in relation to the amounts of compensation?---Yes.

20 If we then come over the page to the page .0007, we see in item 6, again, some updates to the amount of compensation and affected customers?---Yes.

And it's asked that the words:

25 *And members did not receive the general advice services they paid for –*  
Be deleted?---Yes.

And the explanation from NAB is:

30 *Some services were provided, but they were not provided by a plan adviser.*  
*Member disclosure was incorrect.*

?---Yes.

35 And, again – so, even at this point, what's being maintained is that there were services being provided for the plan service fees; it's just that the disclosure was inaccurate?---I think what I believe – I believe the intent of this amendment would be to distinguish from other – the – what was unique about the circumstance was that members, in many cases, would have been provided general advice or support  
40 services, unlike – and the report was entitled Fee For No Service. So it was, I believe, a view that while services of – general advice services may have been provided, I want to be very clear that we do agree that the fee should not have been charged.

45 I understand this is a position that NAB and NULIS have adopted and continue to adopt, which is there is some difference between what happened with the PSFs, and

what happened with other fees for no services cases. That's the point you're making?---Yes.

5 Can you just explain that point again?---That the PDS said this was – fee was for general advice and support services. General advice and support services may have been getting provided to these members.

10 Now, we know – we've gone through this a number of times – what members were told was the plan service fee is for services that are to be provided by the adviser as agreed with the employer. Do you agree with that?---Yes.

General advice services may well have been provided by MLC, but every member, whether they were paying a PSF or not, had access to those general services?---Yes.

15 It had absolutely nothing to do with the PSF, those general services that were provided to everyone?---Yes, and that is the conclusion we reach.

20 So I'm just struggling to understand the rationale for saying, "This is different from a fees for no service issue". Is it just this, that you say, "Well, look, the plan service fee was only going to have general advice services, we think, so, therefore, if we provided some other general advice services, they got general advice services"?---Many of these members would have been receiving general advice services.

25 They would have been receiving them anyway, regardless of whether they were paying the PSF or not?---That is correct.

The general advice services provided by MLC had nothing to do with the PSF?---And that is why the fee needed to be refunded.

30

The PSF was for services provided for the adviser which were not supplied?---By that adviser, yes.

35 Well, they could only be supplied by the adviser. They were specific services agreed between the employer and the adviser. If the adviser was gone, they couldn't be supplied, could they?---That's – that's correct, from that adviser.

Is that not charging a fee for a service that is not provided?---Mr Hodge, I'm doing my best to explain as best I can why this particular amendment was sought.

40

45 THE COMMISSIONER: Well, come away from this particular amendment. Do you accept that NAB charged fees for no service?---Commissioner, in this particular instance, as distinguished from the advice service fees, the view was that services were being – general advice and support services were being provided, but, notwithstanding that, the PSF should be refunded.

MR HODGE: I tender that document, Commissioner – or those two documents together.

5 THE COMMISSIONER: Exhibit 5.33 will be email NAB to Macaulay of 21 October '16, NAB.158.005.5109.

10 **EXHIBIT #5.33 EMAIL NAB TO MACAULAY DATED 21/10/2016  
(NAB.158.005.5109)**

THE COMMISSIONER: Exhibit 5.34 will be the table attached to the email exhibit 5.33, NAB.005.893.0006.

15 **EXHIBIT #5.34 THE TABLE ATTACHED TO THE EMAIL EXHIBIT 5.33  
(NAB.005.893.0006)**

20 MR HODGE: Can we then bring up NAB.044.011.0387, together with its attachment NAB.044.011.0388.

25 THE COMMISSIONER: Can I just check the numbers again, Mr Hodge. 044.011.0387. Is that the number you gave?

MR HODGE: 044.011.0387. Yes, Commissioner.

THE COMMISSIONER: Yes.

30 MR HODGE: I'm just going to speak to Mr Young for a moment. Commissioner, could I just ask you to stand down for two minutes so I can just check what's going on with this document.

35 THE COMMISSIONER: If I come back at 25 past?  
MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: Yes, I will adjourn until then.

40 **ADJOURNED** [12.21 pm]

45 **RESUMED** [12.25 pm]

MR HODGE: Commissioner, we've got slightly different doc IDs that we can use. Can we use NAB.044.010.7681, together with the attachment, which is NAB.044.010.7682. Thank you.

5 So what we've seen, Mr Carter, is that on 21 October there were some amendments that were emailed by NAB to ASIC in relation to the report?---Yes.

And then you will see there's an attachment on the right-hand side of the screen which is Project Rio Issue Summary, 21 October 2016?---Yes.

10 And that's an attachment to a document that's being emailed by a Mr Goonan, who is the executive general manager for corporate affairs, to Mr Thorburn?---Yes.

And if we then look at the document on the right-hand side, we see this is setting out the current roughing out of the strategy in relation to dealing with the ASIC report?---Yes. Yes.

15 Now, is this a document that you've seen before?---No, I don't believe so.

20 All right. Well, I will just ask you whether some of the things in it reflect your understanding at the time. The first is that the NAB had been named as having a total exposure of compensation of \$16.2 million to 120,000 customers, or approximately 120,000 customers?---Yes.

25 That's an accurate reflection of what was set out in the draft report?---I believe that is correct.

We looked at that before, if that would help to bring that up. Why don't we put on the right-hand side of the screen that Project Rio Document, and on the left-hand side of the screen bring up the draft report, which is already tendered, but it's NAB.158.006.5030. And if we go to the page .5051. And so you can see, consistent between the two documents, NABs total amount of estimated compensation is 16.2 million. The total expected compensation for each of the five groups is 80 to \$86 million?---Yes.

35 And it's then said in the Project Rio document:

*While we can't see the other bank's compensation details, this probably means that NAB is middle of the pack when it comes to compensation.*

40 ?---Yes.

And do you recall, having thought about that at the time, that is, in late October 2016, about the fact that NAB would be depicted as being middle of the pack?---No, I don't recall.

45

Okay. And then you see there's then a section of the paper which is Background to the PSF Issue?---Yes.

And the third-last bullet point is:

5

*Remediation has not begun for PSF, as we have been attempting to resolve legal differences of opinion. The most likely remediation will be to approximately 220,000 members for approximately \$34 million across TERP, PSF, SWiFT and Encompass?---Yes.*

10

And then the next bullet point down says:

*This remediation option goes to National Wealth Service –*

15 I think it should be –

*National Wealth Management Services Limited and NULIS for approval on Monday and Wednesday, respectively.*

20 ?---Yes.

And so that meant it was going to be approved by Services Limited on Monday, which was 24 October 2016?---Yes.

25 And then the Wednesday would presumably be 26 October 2016?---Yes.

And it then says in the last bullet point there:

30 *ASIC has been notified of all three PSF issues, but only has awareness of the customer impact for TERP (which is approximately 100,000 customers and \$100,000 in compensation).*

?---Yes.

35 And then you see at the bottom of the page is the heading Next Steps:

*ASIC has invited feedback on the draft report by 10 am Monday. The relevant executives for the PSF issue (Andrew Hagger and Paul Carter) are considering this feedback. There are two possible outcomes of NABs feedback to ASIC.*

40

Now, before we look at the outcomes, this seems to suggest that you and Mr Hagger were considering what feedback was to be given on the draft report. Is that your recollection?---I think what this says is – is as the accountable executives for the business we were ultimately accountable. That is what I'm sure that means.

45

Were you involved in the decision as to what feedback was to be provided to ASIC?---I am sure that ultimately I would have – there would have been some sign-off from me consistent with this email.

5 Who was ultimately responsible for what feedback would be provided to ASIC?---Andrew Hagger.

And it's then explained that there are two possible outcomes of NABs feedback to ASIC. The first outcome is:

10

*ASICs report is published next week in largely the same form that it is now.*

And the outcome is identified as being:

15

*This would mean NAB is seen as just one of the banks tied up in the –*

And then something seems to have been left off, but presumably tied up in the fees for no service issue. Do you see that?---Yes.

20 And then the second point is:

*ASICs report is adjusted and/or delayed to include NABs expanded PSF numbers (making NAB the “worst” of the banks in the report). If this occurs, NAB would also most likely announce that it will commission the Assurance Review.*

25

?---Yes.

30 Do you remember having been involved in any discussion about whether the full expectation of the amount of compensation for the PSF issue should be disclosed to ASIC at that time?---I believe this relates to the – to the discussion we had earlier. And I've been reminded of this context in the last week, that there were two important considerations. First, as you point out, the relevant boards at the time that this feedback was required to ASIC were yet to discuss and conclude on the  
35 remediation approach. But, in light of the sensitivity and wanting to make sure that we were being transparent, that was the basis of a phone call from Andrew Hagger directly to ASIC, to make sure that the regulator was clear that on the circumstance, while it may – we may miss this particular report deadline, we wanted to be transparent.

40

I tender those two documents, Commissioner. Sorry. It's not the report. The draft report is already tendered.

45 THE COMMISSIONER: Email Thorburn to Hagger and others, 22 October '16, NAB.044.010.7681 is exhibit 5.35.

**EXHIBIT #5.35 EMAIL THORBURN TO HAGGER AND OTHERS DATED  
22/10/2016 (NAB.044.010.7681)**

5 THE COMMISSIONER: Project Rio Issue Summary attached to email exhibit 5.35,  
NAB.044.010.7682, is exhibit 5.36.

10 **EXHIBIT #5.36 PROJECT RIO ISSUE SUMMARY ATTACHED TO EMAIL  
EXHIBIT 5.35**

MR HODGE: Can we then bring up NAB.047.001.1728. Now, this is an email  
15 from Mr Hagger to a number of NAB employees, including you?---Yes.

Sent on 24 October 2016 at 10.56 am?---Yes.

And it's setting out a conversation that Mr Hagger had had with Mr Tanzer of  
20 ASIC?---Yes.

And is this the conversation that you're referring to where Mr Hagger called up and  
was transparent with ASIC about what was going on?---That was the intent.

To reveal to ASIC the relevant situation?---To make sure, given the sequencing  
25 challenge of an ASIC report that was about to be released and the fact that while our  
information provided was certainly intended to be accurate as of that date, to make  
sure that ASIC was aware that there were additional events that were under  
investigation yet to be discussed and agreed at the relevant boards, and to make sure  
that ASIC was aware of that context.

30 Now, I just want to make sure I've fairly understood the point. The report sets out  
the estimated future compensation for different entities. Do you recall that?---Yes.

And it uses those words, "estimated future compensation". Yes?---Yes.

35 And we know that on 19 October 2016 the report that was made to the committee on  
which Mr Thorburn and Mr Hagger sit was that the amount of the plan service fees  
was totalling \$34.3 million, but the quantum of compensation was being discussed  
between the trustee and counsel. Do you recall that? You looked at that document  
40 earlier?---Yes.

And we know that Corporate Affairs, by 20 October 2016, understood that  
management's recommendation was that there would be \$34 million in remediation  
provided to 220,000 members?---That – that may be – yes, that was the Corporate  
45 Affairs' perspective.

But they understood that that was management's recommendation?---It was management's recommendation, yes.

5 And that all that remained to happen was for NWMSL and the trustees to accept that recommendation?---Yes, to discuss, consider, and ultimately approve.

And 34 – or approximately \$34 million in remediation is full remediation. Do you agree with that?---Yes.

10 The – a lesser amount would be if they had adopted the opt-in approach?---Yes.

And on 24 October 2016 National Wealth Management Services Limited did, in a formal sense, give up on the idea of an opt-in approach?---National Wealth Management Services recommended the full compensation approach – or agreed full  
15 compensation approach as the best approach to compensating members.

And just if we can move that document to one side and bring up on the other side NAB.155.027.3782. So this is the letter sent from National Wealth Management Services Limited to NULIS, the trustee?---Yes.

20 And it's dated 24 October 2016?---Yes.

And if we go to the second page of the document, we see what's set out is, at paragraph 5, the two alternative approaches, the opt-in approach and the trust  
25 expense alternative approach?---Yes.

And the trust expense alternative approach is the full compensation approach?---Yes.

30 And the recommendation now being made in this final letter is that the full compensation approach be adopted, that is, the trust expense alternative?---Yes.

And National Wealth Management Services Limited will take on legal liability for that?---Yes.

35 And the only thing, then, that remains to be done is for the NULIS as trustee to formally accept that?---Yes. So there was a – so this was the management letter. This, obviously, had to be approved with – I can't remember the exact sequencing. The sequencing was National Wealth Management Services had to endorse and then  
40 it would go to the NULIS board.

Yes. But on 24 October it's endorsed and signed by Mr Hagger as the chair of the board?---Okay. Yes.

45 You can see that, can't you?---Yes.

And so what's being said to the trustee is we will – “we, National Wealth Management Services Limited, will take on liability for this compensation. And what we propose is full compensation”?---Yes.

5 Was it thought that there was some possibility that the trustee would say no?---We would – we went into that meeting with the expectation that that full compensation approach would absolutely be – be accepted by the trustee.

10 And that was known on 24 October 2016 when you were dealing with ASIC?---Yes.

But nobody said to ASIC, “We’re expecting an additional \$34.3 million in compensation that we will have to pay”?---But that, I believe, was the exact intent of why Andrew Hagger reached out to ASIC – the Commissioner of ASIC to exactly discuss that issue.

15

Not the figure. Is that right?---I don't know exactly what was discussed between Andrew Hagger and Greg Tanzer, but - - -

20 All right. You weren't told that the figure had been discussed?---I do not know whether exact numbers were discussed. I certainly know the intent of Andrew's discussion with Mr Tanzer.

25 And so you know that intent because Mr Hagger told you? Is that right? Or you've inferred it from the document?---No, I know that that was the intent of the discussion with Mr Tanzer, to make sure, given the sequencing issue that we had, and that the ASIC report was point in time. And, as I understand, as reflected in the email that Andrew Hagger writes off the back of his phone call, that ASIC is (1) appreciative of the call, and secondly acknowledges that these reports are periodic; they are at point  
30 in time. And then I would say by inference that when relevant board approvals are made, then the next round of compensation from NULIS would be released. And that's, I believe, exactly what happened.

35 Sorry, you believe what is exactly what happened?---I believe – I understand that in the next periodic report from ASIC on this subject, that information would have been updated. That's what I would have understood.

40 Can we just make sure we're clear about this. This is not – what's being discussed in October of 2016 is not just one of a number of periodic reports; it is the first report?---It's the first report. I believe – I understood that the intent of ASIC is this would be something that would be periodically updated.

That they would, in the future, provide updates as to further - - -?---Correct.

45 - - - amounts of compensation. All right. And, again, so that I can understand this, do you recall having participated in any discussion as to whether NAB should tell ASIC before the report was released that its present estimate was \$34.3 million for

the PSF issue?---I don't recall the specifics, Mr Hodge, but I certainly remember that was the intent of Andrew Hagger's discussion with ASIC.

5 All right. Sorry. Not – you don't – you remember that the intent was to tell ASIC that there was another \$34.3 million - - -?---I don't remember whether - - -

Okay?--- - - - the intent was on figures. I certainly remember the intent was about being transparent on the issue.

10 All right. Can we tender each of those documents, Commissioner.

THE COMMISSIONER: Email Hagger to Debenham, 24 October '16, NAB.047.001.1728, exhibit 5.37.

15

**EXHIBIT #5.37 EMAIL HAGGER TO DEBENHAM DATED 24/10/2016 (NAB.047.001.1728)**

20 THE COMMISSIONER: Letter NWMSL to NULIS, 24 October '16, NAB.155.027.3782, exhibit 5.38.

25 **EXHIBIT #5.38 LETTER NWMSL TO NULIS DATED 24/10/2016 (NAB.155.027.3782)**

MR HODGE: And as you say, I think, on 26 October 2016, then, the board of NULIS met?---I believe that's correct.

30

All right. And can we bring that up, which is NAB.005.562.4422. And this is the resolution of the NULIS board to approve the characterisation of the PSF as a trust expense and the proposed remediation outlined in the paper?---Yes.

35 So that occurred on 26 October?---Correct.

And we can see from this that you had already prepared a paper dated 21 October 2016 setting out the proposal in relation to remediation. See that:

40 *The directors noted and discussed Mr Paul Carter's paper dated 21 October 2016.*

?---Yes.

45 And if we go over the page to 2.4423, this is then the start of the paper that you did?---Yes.

And we see, if we go over to page .4425, we see the Table 1 setting out the total PSFs charged of \$33.7 million?---Yes.

5 The amount for ex-TERP members, we can see, has already been validated internally by KPMG?---Yes.

And that's \$12.4 million?---Yes.

10 And then there's an additional amount – additional amounts of \$21.3 million that are estimated, but are still going through internal validation?---Correct.

And it's – and then ultimately, as you pointed out a number of times, what you recommend is going to be the full compensation?---That is correct.

15 And then if we go over the page, .4426, see at the bottom of the page some recommendations about engagement with ASIC?---Yes.

20 And then over the page on .4427, we see one of the things that's noted is a draft letter from National Wealth Management Services Limited. So, presumably, the final letter that was signed on 24 October had already been provided in draft by the time you completed your paper on 21 October?---I believe that's correct.

All right. And – I tender that document, Commissioner.

25 THE COMMISSIONER: Minute of resolution of NULIS board, 26 October '16, and accompanying paper by Carter, remediation plan service fee events, NAB.005.562.4422\_E, exhibit 5.39.

30 **EXHIBIT #5.39 MINUTE OF RESOLUTION OF NULIS BOARD AND ACCOMPANYING PAPER BY CARTER, REMEDIATION PLAN SERVICE FEE EVENTS DATED 26/10/2016 (NAB.005.562.4422\_E)**

35 MR HODGE: And then can we then bring up NAB.182.002.5774. You see at the bottom of the page an email from Ms Hopwood. I'm not sure that you're copied into that email, but attaching the final report that has just been issued by ASIC. I'm sorry. You are copied in. Yes. You're on the second-last line before the cc's?---Yes.

40

So on Thursday morning, Thursday 27 October, there's an email sent to you saying the final report has just been issued by ASIC?---Yes.

And there's a comment which is:

45

*Of particular note is that the compensation numbers have increased markedly since the draft was issued on Friday. For example, CBA has \$105 million to pay.*

5 ?---Yes.

Now, between when the report was published on 27 October and when the NULIS board met on 26 October, did anyone contact ASIC to say, “We’ve actually now got the approval for remediating what we expect to be 30 something million  
10 dollars”?---I’m not aware.

All right. I tender that document, Commissioner.

15 THE COMMISSIONER: Email Hopwood to Carter and others, 27 October ’16, NAB.182.002.5774, exhibit 5.40.

20 **EXHIBIT #5.40 EMAIL HOPWOOD TO CARTER AND OTHERS DATED 27/10/2016 (NAB.182.002.5774)**

MR HODGE: I want to just ask you your reflections on a couple of things. When you look back at the engagement with ASIC in October of 2016, are you satisfied that the approach that was adopted was the right one?---Yes.

25 Okay. And that’s because you did contact ASIC before Mr Hagger contacted ASIC before the report was published, and said, “We might have a further update to give you. And if you could wait a couple of weeks, then maybe we could tell you something else”?---I think it goes beyond that, as well, Mr Hodge, in the sense that  
30 there – I think on multiple levels there had been engagement with ASIC on the issue. There was, obviously, breach reports that predate this issue. That, I believe, ASIC would have been aware of. And so I do think the final engagement that Andrew Hagger had with ASIC was just to make sure that we were being fully transparent in the way in which the regulator understood this issue.

35 It might be thought that a way of being fully transparent would be to say to ASIC, “We expect in the next two days to formally approve something that is already recommended by management which will result in compensation of more than \$30 million – or additional compensation of more than \$30 million”. Do you have a view  
40 about that?---Sorry, what – sorry – what was your question?

Yes. What I’m putting to you is it might be thought by the Commissioner, when he’s considering this issue, that an entity being fully transparent with ASIC, in the position of NAB, would say to ASIC on 24 October, “We expect within the next two  
45 days to formally approve something that has already been recommended by management, which is an additional \$30 plus million of compensation”?---I believe that broadly was the intent of Andrew Hagger’s proactive content to the

Commissioner of ASIC, who I then understand in turn discussed that exact conversation with his team.

5 All right. So the – your understanding is that the figure was disclosed to ASIC?---I don't know specifically whether a figure was discussed.

Do you think the figure is important?---I believe that's – it would – yes.

10 Would it be problematic from your point of view if the figure was not communicated?---Mr Hodge, what I'm trying to say is I know that the proactive contact from Mr Hagger was intended to be transparent about the issues.

15 And the reason that – can I suggest the reasons things had reached the point where in October 2016 you're still trying to finalise the remediation approach was because for the preceding five or six months the bank had been looking for ways to justify not making full compensation?---I disagree.

20 So you think that the process that we've now looked through from May of 2016 through to October of 2016 was not about trying to reduce the amount of compensation?---I do believe that what we were doing, and what my responsibility was as the executive of this business, was to make sure that the issues were fully thought through and worked through. In retrospect, I absolutely wish that that process had been done more quickly, and we had got to clarity faster. What I can say is that there were many different issues that had to be considered. And, ultimately, 25 what I am most pleased about is I do believe the right answer was made, that full compensation was given to customers.

30 And that, of course, was in October of 2016 that that decision was finally made to fully compensate customers who did not have an adviser linked to them in relation to plan service fees?---Yes.

35 And, as far as you can recall, there wasn't consideration of whether it was also necessary to compensate customers who had paid the employer service fees pre-SWiFT if they didn't have an adviser linked to their account?---Sorry. Can you repeat the question.

40 Yes. As far as you can recall, there was no consideration given to whether or not it was necessary to compensate members who had been paying the employer service fee where they did not have an adviser linked to their account?---Yes. That's – yes.

You can't recall that being considered?---I cannot recall.

45 And, as far as you're aware, there wasn't consideration of whether or not the adviser contribution fees needed to be refunded back to customers?---Correct.

Actually, to be fair to you, that's probably not quite correct, is it? There was – your view was it was commission. And I think you said there was a legal advice that you saw that suggested it was commission?---Correct, but that's the basis of my - - -

5 So there was that consideration?---That was the basis of my statement.

All right. And then, in terms of the charging of plan service fees in general, it has ultimately been announced by the bank in July of this year that it will refund all plan service fees that were deducted from MKPS members. You're aware of that?---Yes.

10

And do you have a view – and I understand you left in February of 2017 – left that division – why it took a further period of almost two years to come to that view?---No, I do not.

15 All right. Was it something that was under consideration, as you can recall it, when you were the EGM?---Not that I'm aware.

And, in relation to MKBS members, do you know whether the PSFs are to be refunded to them?---I do not believe that they are.

20

All right. And do you know why that is?---No.

Can you see any difference between the position of an MKBS member and an MKPS member, if the justification for needing to refund the money is that the product disclosure statements did not explain that a member could simply turn off the PSFs?---Mr Hodge, I'm sorry. This is – this is a part of investigation that I was not close to, and I have been not part of this division for 18 months. But I do know that those issues have been carefully thought through by the management team.

25

30 Commissioner, I don't have any further questions for Mr Carter.

THE COMMISSIONER: Yes. Well, how long would you expect to be in re-examination, Mr Young?

35 MR YOUNG: Roughly five minutes. I've got one matter.

THE COMMISSIONER: Is it the more convenient course to deal with it now or to adjourn? What's more convenient?

40 MR YOUNG: We can deal with it now, Commissioner.

THE COMMISSIONER: Go on.

45 <RE-EXAMINATION BY MR YOUNG

[1.02 pm]

MR YOUNG: Mr Carter, you were asked a number of questions relating to a board meeting of National Wealth Management Services Limited on 24 October 2016?---Yes.

5 Can we have brought up the following document, NAB.057.002.5664.  
Commissioner, I can provide you - - -

THE COMMISSIONER: I think the answer to your question is no, Mr Young, we can't bring it up.

10 MR YOUNG: No. Commissioner, I can provide a hardcopy and I can identify what the document is. It's - - -

15 THE COMMISSIONER: We've just got the number. 057.002.5664. Is that the number?

MR YOUNG: Yes.

20 THE COMMISSIONER: Yes. Well, perhaps if the witness is shown the - - -

MR YOUNG: The witness has one.

THE COMMISSIONER: He has?

25 MR YOUNG: There's one coming to you, Commissioner.

THE COMMISSIONER: Yes.

30 MR YOUNG: And one to my learned friend.

THE WITNESS: Thank you.

35 MR YOUNG: Mr Carter, do you recognise this as a set of minutes of a meeting of the board of directors of National Wealth Management Services Limited that you attended on 24 October 2016?---Yes.

Can I draw your attention to one item of business addressed in the minutes. It's at page 5666 – is the last four digits?---Yes.

40 And you will see in the first section there's a reference to an appendix, being a proposed letter to NULIS concerning a remediation of plan service events?---Yes.

And can I draw your attention to the resolutions by directors towards the bottom of the page. Resolution 3 recommended:

45 *Approval of the compensation methodology.*

?---Yes.

And item 6 approved the proposed letter to NULIS which has been tendered in the course of your evidence as exhibit 5.38. Now, Mr Carter, to your understanding,  
5 after this set of board approvals, did the approved letter get sent to NULIS and its directors for its consideration?---Yes.

Commissioner, I tender the minutes.

10 THE COMMISSIONER: Yes. Minutes of meeting 24 October 2016 at 8 am, NWMS Limited, NAB.057.002.5664, exhibit 5.41.

15 **EXHIBIT #5.41 MINUTES OF MEETING AT 8 AM, NWMS LIMITED  
DATED 24/10/2016 (NAB.057.002.5664)**

MR YOUNG: I have nothing further, Commissioner.

20 THE COMMISSIONER: Yes. Thank you.

MR YOUNG: Can Mr Carter be excused.

25 THE COMMISSIONER: Well, just a moment. Is there anything arising out of that, Mr Hodge?

MR HODGE: No, thank you, Commissioner.

30 THE COMMISSIONER: No. You may step down. And you are – is there any reason not to excuse Mr Carter?

MR HODGE: No, Commissioner.

35 THE COMMISSIONER: You're excused from further attendance.

**<THE WITNESS WITHDREW [1.06 pm]**

40 THE COMMISSIONER: If we come back at 2.15.

MR HODGE: Thank you, Commissioner.

45 THE COMMISSIONER: 2.15.

**ADJOURNED [1.06 pm]**

**RESUMED**

**[2.15 pm]**

5 THE COMMISSIONER: Yes, Mr Hodge.

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

10 <NICOLE SUSAN SMITH, AFFIRMED

**[2.15 pm]**

<EXAMINATION-IN-CHIEF BY MR YOUNG

15 THE COMMISSIONER: Thank you very much, Ms Smith. Do sit down. Yes, Mr Young.

MR YOUNG: Ms Smith, is your full name Nicole Susan Smith?---It is.

20 Is your business address 105 to 153 Miller Street, North Sydney in New South Wales?---Yes.

And is your current occupation that of a non-executive director?---Yes.

25 And were you a director of NULIS from 1 October 2009 to 30 June 2018?---Yes.

And were you, in fact, chairman of the board of directors of NULIS from 1 January 2013 to 30 June 2018?---Yes.

30 Have you received a summons to appear at this round of hearings of the Commission?---I have.

And is that summons dated 30 July 2018?---Yes.

35 And do you have the original with you in the witness box?---Yes.

I tender the summons, Commissioner.

40 THE COMMISSIONER: Exhibit 5.42, the summons to Ms Smith.

**EXHIBIT #5.42 SUMMONS TO MS SMITH DATED 30/07/2018**

45 MR YOUNG: Ms Smith, have you prepared two witness statements for this round of the hearings of the Commission?---I have.

Is the first of those statements dated 1 August and it relates to Rubric 5-40?---Correct.

Do you have the original of that statement with you?---I do.

5

I understand there's one correction you wish to make to a date that appears in paragraph 41 of that statement?---Yes.

In paragraph 41, it commences by referring to:

10

*On 8 August 2016 –*

Is the correction that the date should be 1 September 2016?---Yes.

15 And have you corrected that date in your own handwriting?---I have.

Can you, please, initial the change in the margin. And, with that change, are the contents of that statement true and correct?---Yes.

20 Commissioner, I tender that first statement.

THE COMMISSIONER: Exhibit 5.43, the statement of Ms Smith of 1 August '18 relating to Rubric 5-40.

25

**EXHIBIT #5.43 STATEMENT OF MS SMITH RELATING TO RUBRIC 5-40 DATED 01/08/2018**

30 MR YOUNG: And, Ms Smith, does your second statement relate to Rubric 5-77 and is it dated 3 August 2018?---Yes.

Do you have the original of that statement with you?---I do.

35 Are the contents of that statement true and correct?---Yes.

Commissioner, I tender that statement and its exhibit.

40 THE COMMISSIONER: The statement of Ms Smith of 3 August '18 in relation to Rubric 5-77 and its exhibit, exhibit 5.44.

**EXHIBIT #5.44 STATEMENT OF MS SMITH IN RELATION TO RUBRIC 5-77 AND ITS EXHIBIT DATED 03/08/2018**

45

MR YOUNG: Thank you.

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

**<CROSS-EXAMINATION BY MR HODGE**

**[2.19 pm]**

5

MR HODGE: Thank you, Commissioner.

10 Ms Smith, as you've already indicated, you've been a director of NULIS I think since October of 2009. Is that right?---Yes.

And you've been the chair of NULIS since – is it 2013?---Yes, that's correct.

15 The chair since 2013? And, in addition, you've been a director of some of the other trustees within the NAB Group. Is that right?---Yes, commencing in 2006.

All right. So from 2006 you were a director of – is it MLC Nominees? Is that right?---Yes.

20 And also of PFS?---Yes.

So I assume it was just a single set of directors that were the directors of each of the RSE licensees. Is that right?---Yes.

25 Each RSE licensee had the same board of directors?---No, not initially.

I see?---I can't recall the exact date that we merged the trustee to have all of the same directors, but when I first started on the board MLC Nominees and PFS Nominees had different sets of directors.

30

All right.

THE COMMISSIONER: I'm sorry, Ms Smith, you're going to have to keep your voice up a bit more?---Sorry. I'm generally quiet by nature, so - - -

35

I won't respond, Ms Smith.

MR HODGE: Now, as you've already indicated, you've given two statements. The first statement, in response to Rubric 5-40, deals with two separate issues. One issue is the PSFs, or plan service fees?---Yes.

40

And the other issue is the ASFs, or adviser service fees?---Yes.

45 And in relation to the plan service fees, you've exhibited a document or an email, I think, from Mr Cook from August of 2015?---Yes.

And that's an email which I think you identified as the starting point from when it was identified that there was this PSF issue?---Yes.

5 And you wouldn't have been – you, obviously, weren't copied on to that chain of emails?---No.

10 And in your role as the director of the trustee you're ultimately dependent on what information management comes and provides to you about these types of issues?---Yes.

15 And the process that NAB had was that breach reporting was considered by another committee outside of the trustee?---No. So the trustee has a series of policies and processes in place to govern the event management process and the breach review committee. And also has representatives from the trustee in the form of the Office of the Trustee involved in that process.

The breach review committee is not within the trustee?---Correct.

20 It's a breach review committee for – is it all of the National Australia Bank?---For all of the Wealth – no, just for the wealth entities.

All right. And so the breach review committee for Wealth will consider whether or not there is a reportable breach?---Yes.

25 And then, if it determines that there is a reportable breach, it will, presumably, give notice to ASIC?---Yes.

30 As you know, quite often not on time, in the case of the National Australia Bank?---I – I think from the trustee's perspective, we had probably poor performance on-time delivery to ASIC up until around 2015 where we had an independent review from PricewaterhouseCoopers on the breach review committee process. And I think from that date we've shown improvement in our timing. And I think there has only been very few amount of breach review committee notices that have gone past the 10 day requirement by about – I believe up to one to two days.

35 All right. The requirement is as soon as possible, but, in any event, within 10 days. Is that right?---Yes.

40 All right. And the number of breach reports that have been submitted on behalf of the trustee in excess of that 10 day period has decreased?---Yes.

All right. And, now, in the last two or three years, there has not been as many that are more than two days late?---Yes.

45 All right. And, to come back to the Mike Cooke email, I just was interested in knowing whether you've seen before another email of Mr Cooke's. Can we bring up NAB.076.077.9069. This is an email of Mr Cooke's sent on 21 December 2015, but

it contains an earlier set of emails sent by him on 18 December 2015. You presumably would not have seen this email at the time it was sent?---No.

5 Have you seen this email in the course of preparing to give evidence before the Commission?---I may have seen this email through the course of documents I've reviewed.

All right. If we go to page .9071?---Yes.

10 Now, you will see there's a numbered item, number 1, which is outline of TERP?---Yes.

And Mr Cooke is explaining the TERP issue, which is at May 2013 trade-up:

15 *TERP was a 21 year old book of standard employer sponsor business where only 15 per cent of employers were regularly contributing for the 250,000 members whose median account size was \$2000.*

?---Yes.

20 And the trade-up that he's referring to you know, I assume, is a trade-up of members of TERP being moved on to the MKPS or MKBS product?---Yes.

25 Presumably MKPS, you would think?---If they are actively contributing with – with their – and employed they would be in MKBS.

All right?---If they have left their employer, they would be transferred to – or they would be going to MKPS.

30 All right. And then you see the next paragraph is:

35 *Over 35 per cent of TERP members had under \$1000 in their account. No members had personal financial planners attached to their accounts. But plan advisers who did exist and receive trail commission were required by MLC Limited's Commission schedule to provide annual written advice to each person in order to qualify to continue receiving this asset-based commission.*

That matter there, the fact that's set out in that sentence, is that something that you were aware of back in 2015?---No.

40 All right. It wasn't something that was reported up to the directors?---The – the requirement to provide annual written - - -

Yes?--- - - - advice? No.

45 All right. Were you aware that none of the TERP members had personal financial planners attached to their accounts?---No.

Were you aware that over 35 per cent of TERP members had under \$1000 in their account?---No, I was not aware of that.

And then you see the next paragraph says:

5

*MLC Limited elected not to police the requirements of its commission schedule, largely because no sane person would expect plan advisers to service such small account holders in such a basic product.*

10 Was that a matter that you were aware of in 2015?---No.

All right. You in fact weren't even aware that the commission schedule required the adviser to provide annual written advice?---No, I was not.

15 All right. Were you aware of deficiencies in the processes that MLC had in place for policing whether plan advisers – forget about TERP – just plan advisers generally were providing services to members?---No.

20 All right. Were you aware of any processes that were in place to police whether services were provided. That is, in 2015 were you aware?---Not specifically as it relates to the trustee, no.

All right. And were you aware of, again in 2015, deficiencies in MLC policing whether advisers who were receiving adviser service fees were providing  
25 advice?---No.

All right. At some point in time, presumably, you became aware that there was an issue about advisers providing advice in exchange for adviser service fees, because there was a breach notice given about that?---From the trustee?  
30

Yes, there was a breach notice given about advisers not providing advice where the payments for the advice were coming out of the trust funds?---Yes.

All right. And so at some point in time you, presumably, then became aware of an issue about whether advisers were providing advice?---Yes. I think probably also as it became aware across the industry as a matter of concern.  
35

All right. I tender that document, Commissioner.

40 THE COMMISSIONER: Email Cooke to Herald December '15 – email Cooke to Herald and others December '15, Planned Service Fee ..... Wider Discovery, NAB.076.077.9069, exhibit 5.45.

45 **EXHIBIT #5.45 EMAIL COOKE TO HERALD AND OTHERS DECEMBER '15, PLANNED SERVICE FEE ..... WIDER DISCOVERY (NAB.076.077.9069)**

MR HODGE: I just want to make sure the Commissioner has an accurate understanding of how the trustee has operated during the period that you've been the chair of the board. There's an Office of the Trustee that provides support to the board. Is that right?---Yes.

5

And many of the services – or indeed all the services of operating the trustee are, effectively, subcontracted out to other NAB-related entities?---Yes.

10 And the trustee then is dependent upon reporting back to it as to how those related entities are providing services?---Yes.

15 And the Office of the Trustee, to what extent is it able to monitor whether the related party service providers are properly providing those services?---Well, I think the trustee has monitoring in place at a – at a hands-on level through the Office of the Trustee, and then also through reports and requirements specifically into the board and the board subcommittees to determine that services are being provided appropriately and in accordance with contracts.

20 All right. And in your time as the chair of the board, were you satisfied with the adequacy of those processes?---Yes.

Were there any concerns you had about adequate resourcing being provided to the Office of the Trustee?---To the Office of the Trustee?

25 Yes?---I think resourcing is always – goes up and down depending on the workload, both from a legislative perspective, what the organisation is trying to do at points in time. The Office of the Trustee reports directly to the board and specifically to me, so when the Office of the Trustee doesn't have appropriate resources, we would look to put in place, through either external recruitment or through seconding staff into the  
30 Office of the Trustee, to ensure that they have appropriate resources to undertake the workload that's expected of them.

35 If we just go back to my question. During the time that you were the chair of the board, from 2012 – is that right?---13.

2013. I'm sorry – were there any times when you had a concern about whether the Office of the Trustee was being adequately resourced?---Not that I can recall, but I'm sure that there are times where we've discussed resources during the last five years.

40 Okay. Now, you were on the board of MLC Nominees when it approved the change to the fees in relation to MKBS and MKPS?---Known As Project SWiFT, yes.

All right. And that was in 2012?---Yes.

45 Can we have a look at the management paper that was provided to the board. The document ID is NAB.005.788.0496. So this front sheet is the – effectively, the

noting out of what occurred at the board meeting. Is that right?---It appears to be. It's a little bit far away for me on the screen.

Perhaps – there's actually a screen just - - -

5

THE COMMISSIONER: You've got a screen next to you.

MR HODGE: - - - next to you, Ms Smith?---Thank you. Thanks. Yes.

10 And so we can see there was an agenda item, which was number 10, on 19 April 2012?---Thank you. Yes.

It was a combined board meeting of the directors of all three of the RSE licensees?---Yes.

15

And we see that there was a discussion of a paper which is referred to as the SWiFT Proposal?---Yes.

And that's what you referred to before, the SWiFT Proposal?---Yes.

20

And the SWiFT Proposal is noted. And then we see that the board resolved to approve the integrated package of SWiFT changes as described in this paper, including specific items that are noted there?---Yes.

25 And if we go over the page to .0498. We see one of the specific changes was the proposed changes to adviser payments under the trust deed?---Yes.

As detailed in section 6 – I'm sorry – section 7 of this paper?---Yes.

30 And I assume in the course of preparing to give evidence you've gone back and reviewed this document?---I have.

And I assume, at various times over the course of the last few years, as issues have arisen with respect to the fees charged as a consequence of the SWiFT Proposal, you've gone back to look at this paper?---I – I have more – in the last 12 months, yes.

35

All right. Do you recall that the reason – the motivation for SWiFT was connected with the introduction of FOFA and MySuper?---The trustee's motivation for Project SWiFT – SWiFT stood for – I forget the acronym, but, essentially, it was fees with transparency. So the trustee's motivation for project SWiFT was, essentially, motivated around making fees open and transparent to our members, so they could see what they were paying advisers, and so that they had control over those fees and were able to negotiate those fees with their adviser for services that they were receiving.

45

When you speak about the trustee's motivation for SWiFT, do you recall it having been initiated at a trustee level, rather than at an administrator level?---No. I believe it was initially initiated at a administrator level.

5 All right. And when you speak about the trustee's intention, does that mean your understanding of what you and your fellow directors intended?---My recollection of my – or the trustee's intention with Project SWiFT at the time.

I just want to be clear. When we talk about the trustee's intention - - -?---Yes.  
10 - - - we're speaking about the directors as the mind of the trustee?---Yes, that's right.

Is that right? All right. And, as I understood what you said, the intention of the trustee was, first, to make fees transparent?---Yes.

15 And, second, did I understand this correctly, to allow the member to have control over their fees?---Yes.

All right. And do you recall that another issue that was looming was FOFA?---Yes.

20 And was part of – I'm not saying the only motivation – but was part of the purpose of this proposal to come up with a FOFA-compliant product?---I – I don't recall that being a primary consideration for the trustee at the time. I think we were more considered – or our considerations really related to our corporate superannuation products, of which we had three, and MySuper that was coming in in the not too distant future, as well, and trying to put in place a product set that would enable us to comply with MySuper.

25 Well, do you recall that at the time that you were considering the SWiFT proposal, you knew that FOFA was imminent?---I only know that it was imminent because I've gone back and looked at dates. I don't recall FOFA being a part of the discussion around the trustee boardroom table for kind of our motivation and the trustee's motivation to implement Project SWiFT.

35 All right. If we go to page 3 of the presentation that forms part of the board papers. That's at NAB.055.788.0502?---Yes.

You see this is what's described as the MLC Business Super Roadmap?---Yes.

40 And you see it said:

*SWiFT is a key component of the MLC Business Super Roadmap.*

?---Yes.

45 And you can see in the middle of the page:

*SWiFT move MKBS/PS to simplified explicit fee structure.*

?---Yes.

5 Can I – it’s NAB.005.788.0502.

THE WITNESS: Not me.

MR HODGE: I’m sorry. That wasn’t directed at you, Ms Smith. There we go.  
10 You’ve got a hardcopy, I think, Ms Smith?---I do.

You’re lucky. You will see that SWiFT on the diagram then leads over into:

*Make FOFA and MySuper compliant.*

15

?---Yes.

Do you recall whether there was something else that needed to be done in order to  
make the SWiFT changes FOFA compliant?---Sorry. I’m not quite sure I  
20 understand.

Well, perhaps if we look at it in a different way. You understood that under FOFA it  
was no longer possible to pay commissions?---Yes.

25 Do you recall whether part – not all, but part of the purpose of SWiFT was to remove  
commissions and replace them with explicit fees?---Yes.

All right. And then, if we go over the page to page 4, which is .0503?---Yes.

30 You will see this is the SWiFT recap. And this is consistent with the points you’re  
making:

*A simple and transparent fee structure. The administration fee will be  
unbundled from the unit price and made explicit to members.*

35

The second point:

*Commission will be removed from the administration fee.*

40 ?---Yes.

And then, if we go over the page to page 5, we see the approvals sought. And one of  
the approvals, the last one,:

45 *The proposed changes to adviser payments.*

?---Yes.

Which is slide 35. Right. And then, if we go over to page 16, which is .0515, do you see Simplifying the Fee Structure. And there's various changes that are going to be made to the fees?---Yes.

5 And I will just direct your attention to two. One is:

*Adviser contribution fee, new name for contribution fee.*

?---Yes.

10

The next is:

*Plan service fee will replace the current employer service fee and servicing rebate and the current implicit adviser trail commission (currently built into the unit price), includes cost of GST.*

15

?---Yes.

20 And then, if we go through to page 19, which is NAB.005.788.0518. See it's titled MKBS, Existing Employer Plans, Current Versus Proposed Administration Fees?---Yes.

And then you will see at the bottom of the page the words:

25 *All existing adviser remuneration for existing members will continue. It will be funded by additional explicit fees for advice, including GST.*

?---Yes.

30 And, just to pause on that, was it your understanding that amounts that had been paid to advisers as commission would now be wrapped up in a single fee for service?---Yes.

35 And the difference, then, and important difference, would be that, whereas with commission it wasn't necessary to provide a service in order to receive the revenue, for a fee for service you would have to provide a service?---Yes.

40 And that was your intention – first, just yourself as a director – that if advisers were to receive these fees, they would provide a service?---Yes.

And you understood that was the intention of the trustee?---Yes.

45 And the fee that they would be paid – I'm sorry – I will withdraw that. You understood that they would agree on what service was to be provided before they were paid the fee?---Yes.

And they would be paid a fee if they provided the service they had agreed to provide?---Yes.

5 You didn't think if somebody else provides some other service, then the fee will still be charged?---Who else sets an adviser service fee?

Well, that's for an adviser service fee. This isn't just - - -?---It's a fee paid to an adviser in respect of general advice services.

10 Yes. Well, that's the plan service fee?---Yes.

Is that also your understanding of the adviser contribution fee?---No.

15 What did you think the adviser contribution fee was?---A commission that would stop with FOFA. I don't recall thinking about the contribution fee at the time.

Right. We might come back to that. Let's just focus for a moment on the plan service fees?---Yes.

20 What you are saying is you understood a service would be agreed to be provided by the adviser?---Yes.

And a fee would be agreed for that service?---Yes.

25 And if that service was provided, the fee would be charged by the trustee and paid to the adviser?---Yes.

And if that service that had been agreed wasn't provided, the fee wouldn't be charged and wouldn't be paid to the adviser?---Yes.

30 And you weren't anticipating that, for example, MLC would provide some different service and then claim the fee for itself?---No.

All right. And then can we go to page 35 of that document?---Yes.

35 This is a more detailed breakdown of the proposed changes to adviser payments?---Yes.

40 Sorry. It's .0534?---Yes.

It's not you we're waiting for, Ms Smith. Don't worry.

45 THE COMMISSIONER: We're not waiting on the operator either. We're waiting on the system. I have the benefit of looking at the screen grow grey.

MR HODGE: I feel like the system is less afraid of you, Commissioner, than the rest of us are. All right.

THE COMMISSIONER: ..... deafness is a very useful tool, Mr Hodge. Go on.

MR HODGE: You will see there is now a slide up there which is Proposed Changes to Adviser Payments?---Yes.

5

And the point being made there is:

10 *The trust deed allows the trustee to debit agreed adviser payments from a member's account as "fund expenses". And, as such, these should be approved by the trustee, rather than fees or charges to be imposed unilaterally by MLC under the life policy.*

?---Yes.

15 And it's then explained that there will need to be an amendment made to the MLC licensee remuneration agreement and schedule of commission if the trustee is now going to make the payments?---Yes.

20 Or that's the effect of what's there. And then it sets out certain payments, the first of which is the contribution fee?---Yes.

And it explains that has been:

25 *Renamed as the adviser contribution fee –*

?---Yes.

Continuing:

30 *and will be made explicit, rather than paid by MLC Limited from group revenue.*

?---Yes.

35 And:

*The amount paid as adviser remuneration (including GST where applicable) will exactly equal the adviser contribution fee charged.*

40 ?---Yes.

45 I'm just trying to understand why, having regard to what's written here, the contribution fee is different in some way from the plan service fee? You, obviously, think they are different or thought they were different. I'm just trying to understand it?---To be honest, I haven't actually considered the legal constructs of the contribution fee, as to whether it's a fee for service or whether it's a commission that

has been grandfathered. I don't recall from 2012 what my consideration was in respect of the contribution fee.

5 Do you recall it ever being raised at a director level whether the contribution – I'm sorry – the adviser contribution fees would need to be repaid if there was no adviser linked to the account?---The adviser contribution fee?

Yes?---I don't – not in 2012, no.

10 All right?---I'm - - -

I'm sorry. Not in 2012, but, obviously, this issue arises in late 2015 and into 2016?---Yes.

15 When the issue arises in relation to plan service fees, do you recall an issue also being raised about adviser contribution fees?---No.

20 All right. It's not something that you can recall having yourself turned your attention to?---No, I don't believe I have.

But that's, can I suggest, as the director, not necessarily the type of thing you would be expected to think about of your own volition. You would expect that to be brought to you by management, if there was an issue?---Yes.

25 All right. And management didn't come to you, as far as you can recall, and say, "There may also be an issue about the adviser contribution fee"?---No, not that I can recall.

30 And you know that in terms of the amounts that have been agreed to be remediated by NAB to members of the various funds of which you've been a trustee, that there has not been an agreement or commitment to remediate for adviser contribution fees?---No, there hasn't.

35 All right. And, as far as you can tell, it hasn't been raised with you?---No, it hasn't.

All right. And then the asset-based commission and commission on the employer service fee is to become the plan service fee?---Yes.

40 And, again, that's an amount that you understood would be paid in exchange for a service?---Yes.

But it's also an amount that the member could choose to simply reduce to zero?---Yes.

45 And could do that whether they were an MKBS member or an MKPS member?---Yes.

All right. And one of the issues that has since arisen is that the PDSs that were produced for members and the significant event notices that were produced to members did not reveal that they could simply turn off the plan service fee if they wished?---Not explicitly.

5 No. Well, in fact - - -?---No.

- - - what they said was, “This is something that you can negotiate with your adviser”?---Yes.

10 It was, can I suggest, something that is positively misleading, if in fact they can just call up and turn it off?---I – I’ve thought long and hard about whether or not it’s misleading. I, essentially, believe that’s what has led us to the second round of – or triggering the second round of remediation for the plan service fee.

15 All right?---That in – in hindsight, it should have – it should have said “you can turn it off”.

In hindsight as the – in your role as director of the trustee, you concluded that it was misleading?---I concluded that we should have said to members that they could turn it off, yes.

20 And should you have said that to both MKPS and MKBS members?---Was not the – it wasn’t the same – they couldn’t turn it off in MKBS. They could go to their employer and they could, through their employer, change the fee in – if they felt they weren’t getting services. For MKPS, I believe we should have told members they could turn it off.

25 Is that what you’ve been told by the National Australia Bank, that if you’re an MKBS member you couldn’t - - -?---I believe it says it in the PDS.

30 - - - call up and turn it off?---I believe it says it in the PDS.

It says what in the PDS?---That you go to your employer to negotiate.

35 You think in the PDS it says you have to go to your employer to negotiate?---Yes, I believe so.

40 Just for the moment assume this. Assume that if a member of the MKBS called up the relevant MLC call line and said they wanted to switch off all of their fees and commissions - - -?---Yes.

- - - that the PSF would be switched off. Assume that that’s the case. If that’s the case, does that mean that the PDS for MKBS was also misleading?---I haven’t turned my mind to that or not.

45

Well, turn your mind to it now. Is there a distinction, if that's the case, between the MKPS and MKBS?---So I would have to go and reread the MKBS PDS to see exactly what it says.

5 ..... I can help. We can – we can look at that now. Why don't we bring up – Commissioner, could we – I will tender that document and come back to it.

10 THE COMMISSIONER: Extract of minutes MLC Nominees NULIS and PFS Nominees, 19 April 2012, and accompanying document, NAB.005.788.0496, exhibit 5.46.

15 **EXHIBIT #5.46 EXTRACT OF MINUTES MLC NOMINEES NULIS AND PFS NOMINEES AND ACCOMPANYING DOCUMENT DATED 19/04/2012 (NAB.005.788.0496)**

MR HODGE: Thank you, Commissioner.

20 Can we bring up, first, ASIC.0036.0001.2760. So this is – it's described as the reference guide for the MKBS plan. And you will see its preparation date is 1 June 2012?---Yes.

25 You will probably need to look on that version, I think?---Thank you.

Now, we understand this is, effectively, the significant event notice. Does that seem right to you, or do you think there would be another document?---Well, there would have been multiple documents that related to the significant event notice, a letter, a guide, as well as the PDS.

30 All right. And I just want to see if I've understood this. If you go to page 10 of that document, which is .2769, you see on the right-hand side there's Plan Service Fee. And it refers to what the fee is. It says:

35 *It is deducted monthly from your account and paid to your plan adviser.*

?---Yes.

And it says:

40 *It's the asset-based commission plus the employer service fee.*

?---Yes.

45 And it doesn't seem to deal there with negotiation of the fee?---It's only one page of a multiple page document.

I understand?---So the document – it would be referenced in other parts of either the PDS, this document, or this document.

5 Right. What is it that you are expecting to see in this document? Something that says that only the employer can agree on what the plan service fee is?---The employer does agree the plan service fee with the adviser - - -

10 Yes?--- - - - and puts that process in place. The – whether it's this document or the PDS itself, does describe that process. It also describes when the member can negotiate it.

It describes when they can negotiate it?---Yes.

15 And, again, I'm – I think we're just trying to find the document that you're talking about. It's a document that says that only the employer can change the plan service fee or you're not sure?---I would have to go to the PDS and re-review it.

20 Okay. I'm just trying to understand your – your recollection as to the distinction between the MKBS and the MKPS?---Essentially, I'm not – you need – I would need you to be more specific about what you want me to – to actually go into in respect of the difference.

25 Well, you know, don't you, that what the bank has agreed to refund is plan service fees charged to MKPS members?---Yes.

And it has agreed to turn off plan service fees for both MKBS and MKPS members from September of this year?---Yes.

30 And is it also your understanding that the bank hasn't agreed to refund plan service fees for MKBS members?---Correct.

35 And what I want to understand, then, is what the difference is between the MKPS members, who are to have their plan service fee refunded, and the MKBS members, who won't have it refunded?---I see two distinctions. The first that when the plan service fee is set up in MKBS, it's determined between the employer and the adviser. And the employer is also determining the services that will be provided by the adviser for the plan, and monitoring the provision of those services. The second part, I think – I'm sure we will get into some more conversation on MKPS, but it would be too simple to say it's about disclosure. Essentially, the MKPS member has the fee  
40 – applied to their account in a default manner. And there's a series of things that are different about the MKPS member at the point that the fee is being charged to them than when someone is in the MKBS and part of an employer plan.

45 Is one of those things that it's not possible for the trustee to be genuinely satisfied that services were provided to an MKPS member in exchange for the plan service fee?---Yes.

And is it your understanding that that is one of the reasons why the bank has now agreed to refund the PSFs to all MKPS members?---Yes.

5 And so you know that the way in which this has been presented is that this was just a problem with disclosure?---No.

You don't think so?---No.

10 Okay. You think that it has been presented as also a problem with whether or not the services were actually provided?---I – so depending on who you think it is being presented to is - - -

15 The public. In the public statements that have been made which you've given a statement about?---I think we've made – yes, I have. I think it – the point of the public statement is not to go into the entirety of the rationale for why we've determined we have an error. It's to – the point of that public disclosure was to ensure that our members were aware of information that was going into the hands of advisers so that they knew at the same time that an error had occurred, and that we would be refunding a particular category of members. There was a – I don't – I wasn't involved in the drafting of that. I don't know how the words were chosen or why the words were chosen, but primarily the – the starting point for the PSF event actually was concern from ASIC with the disclosures that we had made.

25 All right. Let me just show you another document, which is exhibit 5.12. It's NAB.005.871.0022. You just need to look over on the screen. Have you seen that document before, Ms Smith?---I don't recall. I may have seen it as part of my witness statement preparation, but that would be the only time. I have reviewed - - -

30 All right?--- - - - a lot of documents in the last few days, so - - -

I understand. And you see it's a document titled Removing an Adviser/Turning off Commissions, MKBS /MKPS?---Yes.

35 And you see in item 3:

*What action will we take if a member requests us to turn off commissions or stop paying their plan adviser?*

40 ?---Yes.

And you see:

*When a member directly requests us to turn off commissions, we will perform the following.*

45

And the first thing is:

*Remove plan service fee.*

?---Yes.

5 And the second thing is:

*Remove adviser contribution fee.*

?---Yes.

10

And it doesn't distinguish between whether that member is a MKPS or MKBS member?---No.

15 So if you assume that that is the process that was adopted by MLC, does that change your view as to whether there is a difference between the MKPS and MKBS in terms of having to refund the plan service fees?---I think – I would still go back to the response I provided earlier, in the difference to services being provided and the ability of the trustee to determine that service had actually been provided.

20 I understand. There's still a difference, which is that in relation to MKPS the trustee can't be satisfied that services have been provided in exchange for the plan service fee?---Correct.

25 And how does the trustee satisfy itself that services have been provided for MKBS members in exchange for the plan service fee?---There's a series of controls, but, really, the primary control would be between – the relationship between the employer and the plan – and the plan adviser, and the establishment – who established the fee, and then the monitoring of that service that's provided to the employer plan.

30

Sorry? Who monitors the service?---The employer.

The - - ?---The employer of the members of the fund.

35 So the assumption, if I understand it, is that the employer will monitor whether or not the adviser has provided the services to the employee?---Yes.

40 All right. And if the employer determined that those services weren't being provided, what would you, in your role as trustee, expect to happen then?---I would expect that the employer would determine to take the adviser off the account and that the services would – the fees would be stopped.

45 All right. And if the member didn't think that they were having services provided, what would you, as the trustee, expect the member to do?---If the member determined they weren't receiving appropriate service, that they would call us and ask us to turn the fee off.

Yes. If they were the MKBS member, as well?---Yes.

5 And you would do it?---I don't know the administrative process that's in place and whether or not we do it immediately or they go back to the employer or how that's actually processed. So I think the answer is I'm not sure of the administrative process in place.

10 Does the employee, who is signed up under – to the MKBS, have to agree to have amounts deducted for the PSF from their account?---Essentially, they agree by remaining in the plan and they're advised of what the fees are when they join the plan.

So it's via the PDS?---Yes.

15 All right. So, again, then this gives rise to this same issue of potentially misleading the MKBS members, because they may or may not understand that they can simply turn off the PSFs?---I wouldn't – I think – I haven't turned my mind to MKBS members, the actual disclosure and whether or not the – between the process and the disclosure is misleading. So I can't answer that question.

20

Can we go back to NAB.005.788.0496?---Yes.

And we were looking at page 35, which is .0534. And can you then look for me at the fourth box down, which is RITC Change?---Yes.

25

And does RITC – is that recipient input tax credit – the reduced input tax credit, I'm sorry, Commissioner. The solicitor from the Tax Office is just correcting me on that?---Yes.

30 And you see it says there:

35 *Given that the plan service fee and adviser contribution fee will represent services provided by an adviser to a member for GST purposes, MLC limited will lose its entitlement to recover a reduced input tax credit from the Australian Taxation Office on the payments.*

?---Yes.

Continuing:

40

*This has been factored into the proposed new arrangements.*

45 Reflecting on the answer you gave earlier, does this change your view as to whether at the time you understood that the adviser contribution fee would or would not be provided for a service?---No.

You still think, notwithstanding this, that there is – it wasn't being provided for a service?---No. I said I couldn't recall - - -

5 I see?---I couldn't recall whether or not I considered the contribution fee at the time. And I'm – I'm not a lawyer by training.

10 I understand?---I'm an accountant. And so I haven't, in the context of the contribution fee, considered the legal construct of – of that. And I would be – I think it would – I would be giving you an accountant's answer – and without going back to read the legal advice or to actually understand. It could be nothing to do – it could be the way the fee is proposed to be charged through the trust. I don't know. There are questions I would ask. So I don't recall the conversation at the time. I don't recall my thinking of it at the time around the contribution fee.

15 All right. Now, again, though, thinking about the issues that have occurred, if the adviser contribution fee is a fee for service provided by an adviser and the member doesn't have an adviser linked to the member's account, can you think of a reason why the adviser contribution fee ought not be refunded to the member?---If it is a fee for service and there is no adviser linked to the account?

20 Yes?---No, I cannot.

All right. But that's not something that you've had to consider before now?---No.

25 Is that right? It hasn't been something that management has raised with you?---No.

All right. And you see, then, in the last box on that page:

30 *The cap on the combined adviser service fee and employer service fee of two per cent of the member's account balance or \$2200, whichever is the greater, will be removed.*

?---Yes.

35 And do you have any recollection of the making of that decision to remove the cap?---So I think it was based on aligning to other products where we did not have an adviser service fee cap at the time.

40 See, it says in the box:

*It is considered that the removal of the cap will facilitate member engagement in the negotiation of adviser fees.*

45 Are you able to explain to the Commissioner what that means?---Well, the way I look at that is sometimes the cost of – particularly for members with potentially smaller balances, the cost of advice in – in terms of personal advice specifically,

might be larger than – than the cap would allow. And so it's actually – it's to enable the member to negotiate the fee with the – with the adviser.

By removing the cap?---Yes.

5

I just want to make sure I've understood the logic. Presumably with a cap, the member could still negotiate the fee - - -?---Up to the cap.

- - - with the adviser. Up to the cap. So in this way, then, the member could negotiate for an even higher fee?---Well - - -

10

Is that the point?---Yes.

And then if we go to page 38, which is .0537. You see this is the set of key messages from – as part of the SWiFT process?---Yes.

15

And you see the audience-specific messaging. And for advisers there's a heading which is Awareness. And the first dot point is:

20 *Moving MKBS to a commission-free product with changes to the fee structure to ensure FOFA readiness.*

?---Yes.

25 And when you read that, does that have any effect on your view as to whether or not the adviser contribution fee was a commission?---No. I just read it as a message to go to advisers. I mean, the trustee's responsibility was not engagement of advisers; it was engagement of members. So - - -

30 I'm not sure it's quite as easy to slip away from that, because what's happening in this process is that the trustee is going to enter into an agreement to pay the advisers?---Yes.

35 And the trustee is going to exercise its right under the trust deed to deduct from the member's account the fund expenses. That's right?---Yes.

And so the trustee is in the relationship with the adviser. Do you agree?---Yes.

40 And the message that is to be conveyed to the adviser is that the MKBS product is being moved to a commission-free product?---Yes.

And what I'm trying to understand is is there some reason to doubt that this is true?---No, only you're asking me to make a legal analysis in respect of a fee.

45 No, I'm trying – I'm sorry, go on?---And I would have to sit down with more thought and more understanding to be able to answer definitively yes or no. I would be speculating based on simple words in a PowerPoint slide.

5 All right. And then – if we go then to NAB.005.788.0561. That’s a page further on in that document. And you see section 6 – so this is the management paper that’s put forward in support. I think you should be able to see that in your version, if you go to page 4 of the paper, which is NAB.005.788.0555?---0555, sorry. No, I’m on the right page. 0561 at the top.

Sorry. If you just go back. I just want to show you that this is the management paper?---Yes.

10 If you go back to .0555?---Yes.

You see this is the paper for the directors of MLC Nominees prepared by Mr Daly and Mr Mulholland?---Yes.

15 All right. And then when we go over to .0561, this is page 10 of that paper?---Yes.

And this is where it’s setting out the changes to fee structure?---Yes.

20 And it explains that what was the contribution fee will be renamed the adviser contribution fee?---Yes.

Two dot points down:

25 *Asset-based commission will be discontinued. Existing asset-based commission arrangements will be aggregated with existing employee service fee arrangements and made explicit. The new fee type will be called the plan service fee.*

?---Yes.

30

And then, another two dot points down:

*The plan service fee in MKBS will be capped at 1.5 per cent and will be inclusive of GST.*

35

?---Yes.

Now, another thing I would just like to understand is there was an employer service fee which was up to 1.1 per cent?---Yes.

40

And there was now going to be a plan service fee which was up to 1.5 per cent?---Yes.

45 And the reason it was going up to 1.5 per cent was because asset-based commission would now be discontinued and they would be aggregated together into this up to 1.5 per cent?---Yes.

Was it expected by the trustee that there would be some change in the services being provided, depending upon whether it was an employer service fee of up to 1.1 per cent or a plan service fee of up to 1.5 per cent?---I don't recall specifically thinking about it like that.

5

Do you recall that the purpose was to just maintain the same amount of remuneration going to advisers?---I think that there were two points, or – or the consideration that I can recall was that advisers received an array of remuneration in the form of commission and – and the employer service fee. And it was this package of remuneration that they were receiving in respect of the services they were providing members when they were part of the employer sponsored plan, as well as when they moved into the MKPS part of the plan. And so it was really the package of remuneration for delivery of the service.

10  
15 For delivery of whatever was the employer service fee. Is that right?---Yes, and then the – the member general advice services.

All right. And then if we go – I'm sorry?---So, if it wasn't clear, what I was trying to say is we didn't individually pick out bits of the fee and think about this bit was for this service. It was a package of remuneration for the delivery of service.

20

And then if we go over to .0565, which is section 7, Changes to Adviser Payments?---Yes.

25 So this, again, seems to be consistent with what we've already seen in the PowerPoint presentation. First:

*The trust deed allows the trustee to debit agreed adviser payments from a member's account as fund expenses.*

30

?---Yes.

So now the trustee is in a relationship with both the adviser and the member?---Yes.

35 And the trustee is debiting from the member's account in order to pay the adviser for the services that the adviser will pay – will provide to the member?---Yes.

And this explains in the first dot point:

40

*The contribution fee will be renamed the adviser contribution fee.*

And it won't be paid by MLC limited from group revenue?---Yes.

45 And that's consistent with the idea that it's now the trustee, which is MLC Nominees, that will be paying the adviser?---Yes.

All right. And then, another two dot points down:

*Asset-based commission and commission on the ESF will be discontinued and replaced with a single PSF.*

?---Yes.

5

All right. And I tender that document, Commissioner, if I haven't done so already. I think I've done it.

THE COMMISSIONER: I thought we had it in already.

10

MR HODGE: I thought we had. My DS is questioning us, Commissioner, but on this one occasion I think we're right.

THE COMMISSIONER: Take it while you may, Mr Hodge.

15

MR HODGE: I beg your pardon, Commissioner?

THE COMMISSIONER: I said take it while you may.

20

MR HODGE: Yes.

Now, the trustee is then informed in – at the end of 2015 that – and for the moment I will use the term “the business”, that is, the Wealth business and the trustee together. We will come back to the specifics of that in a moment. But the business has been deducting PSFs from members' accounts even where there's no linked adviser?---Yes.

25

And it would seem obvious that in those circumstances those members would need to be refunded. Do you agree?---I would agree that where there's no adviser, no service can be provided and the fee shouldn't be charged.

30

And was that obvious to you when you were first informed that these fees had been deducted where there was no linked adviser?---I don't recall if my reaction was obvious or – or not – or whether I thought it was obvious or not.

35

All right. As you know, although the trustee was told about this on the – in 2015, it wasn't until the end of October 2016 that a final decision was made about remediation?---Yes.

40

And I'm curious to understand your view as to the lapsing of that period of time?---So at the point that the TERP event was found and reported to the regulator as a significant breach, there was also a – a commitment given to the regulator that we would undertake a review into potential other errors of similar nature. And that's when the – the second stage of the PSF review commenced for the SWiFT trade-up – SWiFT changes and the Encompass trade-up. And we were awaiting the outcome of that review. Essentially, if we have a – an error that goes across multiple – multiple

45

different categories of members, we really look to remediate once, so that we make sure that we get it right.

5 Is it your understanding that the reason for delay was because it was trying to be determined by somebody within the business whether there were other affected members other than the TERP members?---Yes.

And is it your understanding that that was the only reason for the delay?---Yes.

10 Were you aware of questions being raised within the Wealth business as to whether or not there was actually an obligation to refund the money?---In respect of TERP members?

15 In respect of all of the affected members?---Not – I was aware that there was a review going on at a very high level, but not whether or not we were deciding whether – I wasn't in – I didn't know the specifics of what the proposed remediation program was going to be until it came to the board – boardroom.

20 Were you aware of questions being raised as to whether it could be said that general advice services provided by MLC Nominees, such as answering telephone calls and giving telephone assistance, could justify retaining the plan service fees?---At a very high level, yes.

25 And do you recall when you became aware of those questions?---No.

Do you recall whether you were concerned that those sorts of questions were being asked?---So my engagement was really at – at any level through the Office of the Trustee and some very ad hoc conversations between – between the management team at a very high level. And I – I just – my response to that is I – okay. In answer  
30 – specific answer to your question, at the time I was not concerned.

And can I suggest to you for you to consider one reason why, as the trustee, you might be concerned about this is because, as the trustee, you have deducted money from members' accounts in order to pay for a service that has not been provided to the members, and now this related Wealth entity is trying to find a reason to keep the money?---So I wasn't concerned for two primary reasons. First of all, at this point in time the Office of the Trustee was highly engaged in the review process and the discussion around what – the events. And the Office of the Trustee is there listening to and speaking and thinking for – for the trustee. Through experience over my –  
40 starting as a director on the board in 2006, as well as through my chair, my relationship with the COO of the OTT, I would expect and know that he will raise anything with me that he would be worried about and needed either the trustee or me to have – you know, be involved in – be involved in. So, really, Office of the Trustee involved in the process as an independent voice. And, secondly, the trustee  
45 had, through the Office of the Trustee, sought independent legal advice in respect of the matter. And so I believed that the organisation needed to go through due process

and consider the matter, and that the trustee had a voice and an independent voice as part of that process.

I'm sorry. Just so I understand who we're talking about, is that Mr Marriott?---It is.

5

Mr Marriott was the chief operating officer for the OTT?---That's his title, yes.

All right. And your point is he was involved in this process?---He and his – and members of his team.

10

All right. And the process that we're talking about is what I'm just trying to understand. The process seems to have been to look at whether retaining the PSFs could be justified on the basis that MLC Nominees or MLC Direct had provided some sort of general advice services to the members, or had made available general advice services. Is that the process that you're referring to?---Well, essentially, my recollection and my understanding of the matter at the time were there were two pieces of legal advice that had different – differing – differing views. And that was being looked at as to what the – what had – what the error actually was.

15

All right. You didn't feel like at the time, in 2016, that the trustee needed to say to the NAB Wealth business, "We just have to get on with this and pay back this money to members"?---I believe that the management team needed to go through due process and bring the outcome of that to the board.

20

All right. Can we bring up ASIC.0036.0001.2898. Commissioner, this, I suspect, is a document that you're going to need to rule on in terms of without prejudice privilege. It's a letter of 22 July 2016. Mr – I am not sure whether every claim is still pressed or not.

25

THE COMMISSIONER: The claim is for a non-publication direction, I think, is it?

30

MR YOUNG: It is, Commissioner.

THE COMMISSIONER: Can I have the document then, please, because if it's an NPD there is no reason for me not to have it.

35

MR YOUNG: I can provide a copy.

THE COMMISSIONER: Yes. Thank you. Yes.

40

MR YOUNG: We made a submission, Commissioner, to the effect - - -

THE COMMISSIONER: Yes, I read that, Mr Young. Can I, perhaps, focus debate a little. The documents have been produced. Is that right?

45

MR YOUNG: Yes.

THE COMMISSIONER: The documents have been produced un-redacted to the Commission.

MR YOUNG: Yes, accompanied by the confidentiality application.

5

THE COMMISSIONER: The claim is a claim for a non-publication direction, that is, it is a claim under 6D(3), is it not, of the Act, I think – yes 6D(3). The contents of the document produced under a notice not be published. Is that right?

10 MR YOUNG: Yes.

THE COMMISSIONER: Yes.

15 MR YOUNG: There's no objection to the Commission using the document in its deliberations, but the document records without prejudice proposals exchanged with ASIC. Without prejudice privilege is a common law right that continues. We say that the – there's no reason why the confidentiality and privilege that attached to this communication should be lost. The Commission can make use of the document in its deliberations without publishing the document. And, in our submission, the balance  
20 lies in favour of preserving the confidentiality that attaches to it.

THE COMMISSIONER: I understand the nature of the question I've got to answer, because unless we get the question right, the answer will be wrong. The question is one of balancing between the interests of confidential negotiation with ASIC and the  
25 needs of a public inquiry. Is that right?

MR YOUNG: Yes.

THE COMMISSIONER: Is that the balance to be struck?

30

MR YOUNG: More specifically as to the second limb, Commissioner, it's not simply the interests of a public inquiry, it's whether the interests of that inquiry mandate or require the publication of this document to enable the Commission to engage in its work.

35

THE COMMISSIONER: I think there's an inversion there, Mr Young, in the sense that the inquiry is a public inquiry. That's the premise from which we begin, is it not?

40 MR YOUNG: But, Commissioner, when confidential records arise and are provided, and they were brought into existence in the context of without prejudice privilege, the mere fact that it's a Commission which conducts its operations largely in public does not mean that there's no ability to weigh in the balance the genuine interests that we seek to preserve by a non-confidentiality order.

45

THE COMMISSIONER: And what is the interest that you seek to have preserved by my giving a non-publication direction in respect of this document?

MR YOUNG: It's our interest in precluding public disclosure of communications that we made with ASIC in a particular negotiation and potential contravention context.

5 THE COMMISSIONER: Exactly. Now, negotiation of what – of what dispute? Can I just tease it out to know. Without prejudice privilege attaches to compromise of a dispute. Is that right?

MR YOUNG: Yes.

10

THE COMMISSIONER: What is the dispute that is - - -

MR YOUNG: The back - - -

15 THE COMMISSIONER: - - - sought to be compromised here.

MR YOUNG: The backdrop to this is that a significant breach notice had been given in late 2015.

20 THE COMMISSIONER: That is, there was compliance with the law obliging reporting.

MR YOUNG: Yes. But - - -

25 THE COMMISSIONER: Yes.

MR YOUNG: - - - the reporting was in respect of a potential breach of legal obligations.

30 THE COMMISSIONER: Yes.

MR YOUNG: Now, that was the backdrop to this communication. The communication with ASIC concerned various proposals for the resolution of outstanding issues associated with that breach notice.

35

THE COMMISSIONER: It's the - - -

MR YOUNG: Including remediation.

40 THE COMMISSIONER: No. No. Just - - -

MR YOUNG: Yes.

45 THE COMMISSIONER: You say outstanding issues. What is the dispute you have reported in accordance with law? There are or there are not, according to a determination of a court later, legal consequences which may or may not attach to what has been reported.

MR YOUNG: Well, there - - -

THE COMMISSIONER: What is the dispute that is, you say, the subject of debate with ASIC?

5

MR YOUNG: ASIC was conducting an ongoing investigation as to the way in which that significant potential breach could be addressed and remediated in such a way that ASIC would take no further action in respect of that notified breach. It's the same context that arises in any situation where there is an apprehended breach. There is discussion with ASIC of potential enforcement action, and a range of solutions or remedies are the subject of without prejudice discussions with ASIC, including such things as enforceable undertakings or the like.

10  
15 THE COMMISSIONER: Is it part of my inquiry to look at the response that NAB makes to the circumstances that are revealed by the 912D notice that NAB has given?

MR YOUNG: Yes.

20 THE COMMISSIONER: Is it part of my inquiry to inquire into the response that ASIC makes to the 912D notice that NAB has given?

MR YOUNG: Yes.

25 THE COMMISSIONER: We've agreed, I think, have we not, that I have to strike a balance, a balance between the interests that NAB would have in keeping confidential what it says to ASIC and the interests of my effecting the execution of my terms of reference, including to inquire into, among other things, the responses that NAB have made, is making, and the responses that ASIC has made, is making to the events described. Am I right so far?

30

MR YOUNG: Yes. That follows from my earlier answers.

35 THE COMMISSIONER: What is it then that makes the balance tip in favour of saying "no disclosure"?

MR YOUNG: The – it's not in dispute that these matters are within the scope of the Commission's inquiry. The question is whether these matters ought to be addressed confidentially or in open session, publishing this document at large. This document contains different proposals exchanged between ASIC and entities within NAB concerning proposed methods of resolution of the investigation that was underway by ASIC. Now, we know the ultimate outcome of that exercise. So, in our submission, it doesn't amount to a matter that requires public disclosure to see at one snapshot in time, as per this document, what the state of – what the state of affairs were in terms of what proposals and counter-proposals were being mooted at this point in time.

45

Also, there is a wider consideration. That is to say, corporations in discussions with ASIC about potential enforcement matters engage in such discussions commonly without prejudice and in circumstances where the anticipation is both the government regulator and the private party will preserve the confidentiality that attaches to the without prejudice communications. So there is a wider public interest in preserving these communications, not just for this case, but for other cases.

So it's our submission that, by all means, the Commission has this document, it can utilise it, but the potential detriment that would flow to my client if this were to be published at large and the potential detriment to the public interest in ensuring that negotiations and discussions of this kind are conducted frankly and fairly with the ongoing benefit of without prejudice protections, are factors that need to be brought into the balance. And, in our submission, there has been no reason identified as to why this document has to be published to enable this Commission to fully perform its functions.

THE COMMISSIONER: You've spoken of two kinds of detriment, detriment to your client and detriment to the wider public interest. I want to be entirely sure that I have fully understood what you say is encompassed by each. Please list in summary form the detriments to your client and then please list in summary form the detriments to the wider public interest.

MR YOUNG: The detriment to our client is that there would be unnecessary public revelation of the various concessions and compromises that my client was prepared to put forward in July 2016 in the context of this issue that had arisen with ASIC.

Conversely, ASICs position at that stage of discussions is also described in this document. The damage to the wider public interest is that the ability of organisations, ASIC and corporations, to engage in discussions with a view to agreeing upon appropriate enforcement steps may be hindered if parties can't engage in those negotiations with the benefit of without prejudice privilege, that is maintainable in the face of various public bodies that might call for the production of documents. That's the wider public interest.

THE COMMISSIONER: Yes. Anything you desire to add?

MR YOUNG: Nothing further, Commissioner.

THE COMMISSIONER: Counsel Assisting seeks to put to the witness a letter dated 22 July 2016 from NAB to ASIC that is entitled "without prejudice". NAB has separately and previously sought a direction from me that the content of that document not be published to any person beyond the lawyers assisting the Commission and those who are representing NAB.

The premise for the application is, of course, that the letter of 22 July '16 was produced to the Commission under a Notice to Produce issued pursuant to section 2 subsection (3)(a) of the Royal Commissions Act 1902 of the Commonwealth.

Counsel for NAB accepts, rightly, if I may say so, that the question needs to be determined as one depending upon where a balance is to be struck between the maintenance of NABs interests and the interests of others dealing with the regulator in having negotiations with the regulator in confidence, with the needs of the  
5 Commission to conduct its ordinary business in hearings in public.

Counsel for NAB identified the detriment to his client as centring upon the unnecessary public revelation and consequent controversy concerning the positions which his client adopted in the course of its negotiations with ASIC in July 2016.  
10 Further, he pointed to the fact that the position adopted by ASIC at that time either is expressed or can be discerned from the content of the letter.

Counsel further pointed to what he identified as being the wider public interest which underpins without prejudice negotiations generally and, more particularly, without  
15 prejudice negotiations between a member of the regulated community and the regulator. He identified that wider public interest as the ability for a member of the regulated community and the regulator to conduct discussions about the consequences that may attach to events that had occurred which may raise issues about compliance with legislation administered by the regulator in confidence and to  
20 conduct those discussions with a view towards ultimate agreement about what enforcement steps can or might be taken.

He pointed, in effect, to the fact that to publicise what was said at this time may, somehow, inhibit or chill negotiations that take place between members of the  
25 regulated community and the regulator in circumstances generally similar to those which yielded the letter of 22 July '16.

The oral hearings of this Commission are being conducted in aid of execution of the terms of reference as they are established by the Letters Patent of 14 December 2017.  
30 Those terms of reference require me to inquire into whether any conduct by financial service entities might have amounted to misconduct and whether any conduct, practices, behaviour or business activities by financial services entities fall below community standards and expectations.

35 The events which gave rise to the discussions between ASIC and NAB and are the subject of the letter of 22 July '16 are events of a kind that may – I do not say do – constitute conduct of a kind that falls within either of the two paragraphs of the terms of reference to which I have alluded.

40 But it is also important to recognise, I think, that the responses, both by ASIC and by NAB, to the events which were the subject of the section 912D breach report which lies behind the discussions which yielded the letter of 22 July '16 are matters that are themselves central to the inquiries I am charged with making. In particular, the response which NAB and ASIC make, and I think, therefore, the positions adopted  
45 both by ASIC and NAB in the course of whatever negotiations there were with respect to the matters that stem from the giving of the breach notice, are matters that

may raise questions central to the execution of the terms of reference. In the circumstances, I think there should be no non-publication direction. Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner.

5

Could we bring up ASIC.0036.0001.2898. That document will be in the staging area. You've got that letter, Ms Smith?---I do. I do.

10

That's a letter dated 22 July 2016 to Mr Tanzer, a commissioner at ASIC?---Yes.

And whilst it's coming up, if you go to page .2904, page 7?---Yes.

You're one of the signatories to that letter, along with Mr Hagger?---I am.

15

And do you recall the circumstances in which this letter came to be prepared?---Yes.

20

And what were they?---Essentially, this was to do with the TERP event, and as well as another – a number of other events, one relating to TERP, but then some others relating to other parts of the NAB Wealth business, where ASIC have raised concerns with NAB Wealth. And I had attended a meeting with Mr Hagger and ASIC for them to express their concerns to us and for us to put in place a response to those concerns.

25

Was this letter provided at that meeting?---I had two meetings with ASIC. I can't recall whether we provided this – this could have been provided at the actual second meeting, but I can't – can't exactly recall.

30

All right. In any event, you remember having attended two meetings in 2016 -- -?---Yes.

-- - about this issue?---Yes.

35

And you remember, if we go to the first page, you see the first paragraph of the letter says:

*Thank you for meeting on 24 June 2016 - - -*

?---Yes, I - - -

40

Continuing:

*...with Andrew Hagger, David Gall and Damien Murphy.*

45

?---Yes.

It doesn't seem to refer to you, so that probably suggests you weren't at the meeting in June?---I was not at the 24 June meeting.

But you recall someone came and explained to you that there were concerns that had been raised by ASIC?---I had been at a meeting prior to 24 June.

I see. With ASIC?---With ASIC.

5

And ASIC had raised concerns?---Yes.

And the question was what was NULIS, the trustee, prepared to do in response to those concerns?---Yes.

10

And this letter outlined those proposals?---Yes.

And was this a letter prepared in consultation with you, or were you just brought a draft and asked to sign it on behalf of NULIS?---In the ordinary course of business, it would go through process with the management team, together with the OTT being part of that process, and I would be provided with a – a complete letter for me to review and approve prior to submission to ASIC.

15

Is it something, though, where you would be consulted about exactly what the response was that the trustee was going to make on behalf – or was going to make to ASIC?---At a high level, yes.

20

All right. And was one of the issues being raised by ASIC that it wanted an enforceable undertaking from NULIS?---Yes.

25

And NULIS didn't want to provide an enforceable undertaking?---No.

And why was that?---Essentially – and this was a view held by me, but also across the organisation – that we had, from about 2014, I would say, substantively improved our control environment across a number of – you know, through a number of different measures and matters. And at the point that the errors occurred, which was prior to the uplift in our control environment, we – we felt we were a different organisation at the 22 July 2016 that we were in 2012 or '13 when the errors first occurred.

30

35

I see. And, therefore, didn't think that an enforceable undertaking was warranted?---Yes. And so we were more than happy to obtain an external review and independent review and provide that to ASIC, but we felt that an enforceable undertaking wasn't necessary for us to be able to do that and demonstrate to the regulator that our – you know, our control environment at 22 July was not as it was when the errors occurred.

40

And I'm just trying to understand some aspects of the way NULIS approached a request for enforceable undertaking. As I understand it, an enforceable undertaking would be proposed because ASIC believes that there may have been a contravention of the law. Is that right?---I don't know what – when ASIC decides they want - - -

45

You don't know why they want enforceable undertakings?---Well, they wanted one because they were concerned – they had concerns with our risk and control environment, but I don't know how they decide, you know, when they're going to require an enforceable undertaking or not.

5

All right. If we go to page 2 of that document, we see paragraph 1.9, which explains the TERP trade-up?---Yes.

And see subparagraph (b) says:

10

*We were not clear to members on the nature and how plan service fees would apply to members who did not have a named financial planner linked to their account.*

15

?---Yes.

I'm trying to understand whether that explanation there reflects your view as to the reason why plan service fees should not have been charged to members with a non-linked adviser?---No.

20

It doesn't reflect your view?---No.

All right. And to be clear about that, that's because your view was that NULIS had no entitlement to charge fees to members for plan service fees where the member did not have a linked adviser?---Yes.

25

And do you remember querying this statement in paragraph 1.9(b) - - -?---No.

- - - at the time you signed the letter?---No.

30

Were you aware that this was the way in which the Wealth business was seeking to position the issue as being not about whether NULIS had charged fees for services that had not been provided, but whether the representations to members were unclear?---No.

35

I'm trying to understand that, though, because when you look at paragraph 1.9, isn't that – isn't that positioning what's being identified here, what is happening in 1.9(b)?---Sorry. Can you expand on your question just to say what you think is being positioned here?

40

Isn't the positioning occurring in 1.9(b) to suggest that the problem with the plan service fees was that NULIS was unclear with members about whether it would charge plan service fees if there was no adviser linked to the member's account?---On a today reading of that, yes.

45

Just so I understand what you mean, when you say "a today reading", you're not suggesting you read the words differently back in 2016?---So I would suggest that,

you know, it's a seven-page letter with attachments. Some of the concern at the time was around disclosure, but certainly not my intent – or not my understanding of the TERP matter at that time – at the time this letter was put together.

5 And then in paragraph 1.10:

*We identified and reported these flaws and we are fixing them.*

You see that?---Yes.

10

Again, I'm trying to understand, if the authors of this letter have identified the wrong problem, then was it not an issue for you as the trustee that they were, therefore, not fixing the right thing?---Well, at this point for TERP, that was not the matter. And it was – it was clear to me that the – TERP members had no adviser, and – linked to their account, and – and that it was an error. So this letter is written at a time where I had only had visibility of the TERP review.

15

Yes. But the TERP issue is the same, isn't it, whether – who – TERP are simply members who have been moved over into the MKBS/MKPS product?---Yes.

20

And the issue with them, as for every member who is in the MKBS/MKPS product, was where a plan service fee was charged, but there was no linked adviser?---Yes.

And your view is there was no entitlement to charge the fee in that circumstance?---Yes.

25

And that was the view you held at the time?---Yes.

And this is a letter written to ASIC signed by you suggesting that the problem was not that the trustee charge money when it should not have charged it, but that the trustee was not clear to members as to how the plan service fees work?---Yes.

30

And then, in paragraph 1.10, it says:

35

*We identified and reported these flaws and we are fixing them.*

?---Yes.

So it identifies the wrong flaw?---1.9(b) would not be a full view of how I considered TERP at the time. So I would need to go and read the entirety of the letter for me to comment about whether or not there are other things in here that reflect my opinion about TERP at the time. But I was very clear on – in my mind at the point we were in discussion with ASIC that TERP members did not have an adviser linked to their account and they should not have been charged the fee.

40

45

So you – I may have misheard something you just said. Did you say you were very clear to ASIC that that was the case?---I was very clear in my mind.

I see. You were very clear in your own mind as to what the problem was at the time that you were meeting with ASIC?---TERP members. Yes.

5 All right. Did you communicate to ASIC what you thought the problem was?---We had discussions about how – that I felt it was an error.

I think you will get the opportunity to look at this document overnight. Can I ask you about some other parts of it. Can you go to page 4 of the document?---Yes.

10 And you see what is paragraph 2.12(c), Compensation Methodology?---Yes.

Continuing:

15 *Compensation methodology. Are considering the right compensation methodology for these members. This methodology should appropriately reflect any potential legal liability position, which we are working through at the moment, and also be practical to implement.*

20 ?---Yes.

Can you recall what the legal liability issue was that you were working through?---No.

25 Can I suggest to you that it was the suggestion from the Wealth business that they could retain the plan service fees even though there was no linked adviser, because there were other types of general advice available through, for example, MLC Direct?---That was not put to me at this as this letter was being written, and nor formally put to me as a proposal for compensation for the plan service fee matter.

30 All right. Can you recall alternatives being put to you as to the proposed remediation?---No.

35 You can only recall one possibility for remediation being - - -?---That came to the board, yes.

And did you know at the time you signed this letter what the issue was about potential legal liability of NULIS?---No.

40 Do you know whether the Office of the Trustee knew?---At 22 July, no, I don't.

Was that something that when you signed this letter you were curious about, "Why are we not able to make compensation yet, because we're trying to figure out a potential legal liability"?---I don't recall – I don't recall questioning that paragraph at the time.

45 And then, if we go down to section 3 at the bottom of the page, you see 3.1:

*We believe that enforceable undertakings are not necessary to ensure that we fully implement our commitments.*

?---Yes.

5

And then it's explained in 3.2:

*We have a very strong organisational culture focused on our members and doing the right thing.*

10

?---Yes.

Continuing:

15

*We have a strong track record of faithfully remediating via negotiated commitments.*

?---Yes.

20

Continuing:

*We believe that negotiated commitments would deliver faster remediation and compensation outcomes to members at less expense to the public purse.*

25

?---Yes.

Why is that?---Well, my experience as a director with the organisation has been we don't always get it right and we do make mistakes, but there has never been a question that I've seen or a matter where I've seen the organisation not look to put customers back in the position they should have been had the error not been made.

30

I'm sorry. The error?---Had the error not been made. So my experience of the culture of the organisation was we might be a bit slow at it, but we will do the right thing by our customers.

35

And, so that I understand and so that we can focus the examination tomorrow, do you say that was your experience as at July 2016 or that, in addition, in the subsequent two years, that has also been your experience?---I would say both.

40

Now, we will come back to this in the morning, but you know, don't you, about the resistance that NULIS, through the Wealth division, has put up to remediation in various respects?---I would not say that NULIS has ever put up resistance to remediation. So you're talking about the trustee now?

45

Yes?---So, no, I would not agree with that.

I see. So you don't agree - - -?---And - - -

- - - that with the trustee. What about the bank?---And I'm not part of all of the management conversations. I'm not part of the debate that goes on in the management team. And, necessarily, I don't have the detail of those conversations. I do believe it is for the PSF matters – and I am sure we will discuss this tomorrow as well – that it has taken us too long to get to the remediation point on – in two instances. But we have got to the point where we are remediating and putting customers back in the position they would have been had the errors not occurred.

Why do you think it has taken too long?---I don't really know the answer to that. Part – partly I would say that as soon as you have a large problem and a large error, by its very nature, it can be technical and complicated to work out how many members, who it affects, the quantum, the size, and wanting to appropriately have an investigation to understand that. But I – I would say that in both instances it has taken us too long. I haven't been part of the management process to be able to assess that. I'm only making a subjective view from the outside.

Commissioner, is that a convenient time?

THE COMMISSIONER: Yes. How are we travelling for time, Mr Hodge?

MR HODGE: Commissioner, we're behind, but - - -

THE COMMISSIONER: I won't ask how far.

MR HODGE: That's certainly - - -

THE COMMISSIONER: 9.30 tomorrow?

MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: Yes. Very well. Adjourn to 9.30.

<THE WITNESS WITHDREW

[4.15 pm]

**MATTER ADJOURNED at 4.15 pm UNTIL WEDNESDAY, 8 AUGUST 2018**

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