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TRANSCRIPT OF PROCEEDINGS

O/N H-919874

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

9.30 AM, THURSDAY, 9 AUGUST 2018

Continued from 8.8.18

DAY 43

**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**

MR M.H. O'BRYAN QC appears with MR D. PRESTON for AustralianSuper

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

THE COMMISSIONER: Overnight, National Australia Bank made an application pursuant to the practice guidelines of the Commission and section 6D(3) of the Royal Commissions Act for a non-publication direction in respect of certain documents. The application seeks directions that seven documents be, in whole or in part, not available for publication beyond the staff and lawyers assisting the Commission and, of course, NAB. I consider that the application for non-publication direction should be refused. My reasons for doing so include, but are not limited to, the reasons that I gave in respect of the earlier application by NAB for a non-publication direction.

10 I add the following further considerations, which, in my view, support the conclusions that I have expressed. NAB seeks that part of four of seven documents not be published. It seeks that the whole of three documents not be published. One of the documents in respect of which the non-publication direction is sought is a document apparently from ASIC entitled Outline of Suspected Offending by the NAB Group. The non-publication direction that is sought concerns paragraphs 60 to 65 of that document entitled Further Reviews, and annexure A to the document entitled NAB Group Methodology For Further Reviews. The parts of the document for which the direction is sought concern ascertaining the extent of the charging of fees for no service and what approach should be adopted for compensating those who have been charged.

25 The other documents in respect of which non-publication directions are sought all relate, at least primarily, in some cases exclusively, to discussions about remediation proposals. Some of the documents are documents sent by ASIC to NAB; some of the documents are sent by NAB to ASIC. Although I suspect it does not greatly matter, I notice that not all of the documents from ASIC to NAB are expressed to be either confidential or without prejudice. The terms of reference of the Commission include terms requiring me to inquire into the effectiveness of mechanisms for address for consumers of financial services who suffer detriment as a result of misconduct by financial services entities. That is paragraph (e) of the terms of reference. They also require me to inquire into the effectiveness and ability of regulators of financial services entities to identify and address misconduct by those entities. That is paragraph (g) of the terms of reference.

35 The matters which are the subject of the sought non-publication direction are matters which go centrally to terms of reference (e) and (g). NAB emphasises that discussions with ASIC have not reached agreement and have not reached a conclusion. But as NAB says in its written submissions, the Commission is required to strike an appropriate balance between two interests. On the one hand, public interest in the open and transparent operation of a public inquiry into a matter of public interest, and on the other hand, the public interest in protecting the privacy of an individual, or the public interest in protecting private commercial interests.

45 In attempting to strike the balance that is to be drawn between those competing elements, it is to be noted that it would be in the interests of NAB to pay the least sum available by way of remediation. It would be in the interests of persons charged

fees, in circumstances where no service has been provided, to be provided with adequate compensation. It is in the public interest that there be an open and transparent inquiry about how both the regulator and the regulated deal with the issue of remediation. For these reasons, the application for non-publication direction is refused. Mr Hodge.

MR HODGE: Commissioner, before Ms Smith is recalled to the witness box, I need to say some things in response to some things that were said from the bar table yesterday and that might be taken to be an implicit criticism of the staff of the Royal Commission, and that also were premised upon a misunderstanding on the part of those giving instructions for the National Australia Bank as to the process of the Commission. You were told, Commissioner, that at 1.37 pm yesterday afternoon, the National Australia Bank was provided by email – or the solicitors for the National Australia Bank were provided by email with a list of 18 documents that it was desired to tender yesterday afternoon. And that is true. That was a departure from our usual process.

We do not, as a matter of course, and to put it beyond doubt, will never again provide in advance a list of the specific documents that we intend to tender in an afternoon session. We did that as a matter of courtesy and convenience to attempt to assist with dealing with the without prejudice claims that had already been made by the National Australia Bank with respect to the documents that they had produced to us. You were also told, Commissioner, in relation to the outline of contraventions from ASIC that I was taking Ms Smith to, that the National Australia Bank had not been notified that this document would be the subject of publication. That is incorrect. And I need to explain some matters about the way in which the process of clearing documents works, as is explained in the practice guidelines of the Commission.

The list of 18 documents that was provided yesterday afternoon to the National Australia Bank included documents that had been produced to the Commission by the National Australia Bank and documents that had been produced to the Commission by ASIC. All of the National Australia Bank documents had previously been notified to the National Australia Bank and cleared for confidentiality prior to the hearings. The National Australia Bank applied the redactions to its own documents and provided the Commission with those versions to be uploaded to the court book. All of the ASIC documents that were listed in that list of 18 yesterday afternoon had already been uploaded to the court book and they were accessible to all of the parties given leave to appear on a confidential basis.

In accordance with what has been the Commission's usual practice for the entire year in respect of every module, in respect of which the National Australia Bank has been given leave to appear in all of them, the ASIC documents were cleared for confidentiality with ASIC prior to being placed on the court book. And, in fact, in some cases, the Commission had slightly departed from its usual practice and also provided ASIC documents specifically to the National Australia Bank in order to ask them whether they wished to make any specific claim over those documents. One of those ASIC documents that NAB says or said to you yesterday it had not had any

notice of was, in fact, provided to the National Australia Bank in a tender list in advance of being placed on the court book. That is ASIC.0036.0003.0730.

5 When it was originally notified to the National Australia Bank, the National Australia Bank did not make any redactions to this document when it was cleared for confidentiality, but then claimed, as of last night, that it should be wholly redacted. The process for clearing documents for upload to the court book has been followed by the solicitors assisting and is consistent with the published guideline which is practice guideline 3. And it is the practice that has been adopted with all parties
10 granted leave to appear and access to the court book. Practice guideline 3 explains at paragraph 20 that:

Counsel assisting the Commission, subject to the Commissioner's control, will determine which and when documents are tendered.

15

Paragraph 21 provides:

Before the commencement of a public hearing, each person granted leave to appear at that hearing may be given confidential access to documents that are likely to be tendered as exhibits at the public hearing.

20

Paragraph 22 provides:

One purpose of providing this access is to enable a person to identify whether any application should be made for a suppression order in relation to a document or any part of a document. A copy of a document of this kind will not otherwise be provided to any person. Generally, a document of this kind will be subject to a direction made by the Commissioner that it not be published until the point at which it is tendered.

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Of the documents that were – of the ASIC documents that were listed in the list of 18 documents that were provided to the National Australia Bank yesterday afternoon, all but two of those documents were uploaded to the court book and accessible by the National Australia Bank on Sunday night. Two of those documents were uploaded
35 to the court book on Monday morning and accessible by the National Australia Bank from that point of time. It would have been open for the National Australia Bank, in accordance with the practice guideline, to make any confidentiality application with respect to those ASIC documents placed on the court book since Sunday from Sunday, and in respect of the two on Monday morning, since Monday morning.

40

The court book is designed to allow parties who are given leave to appear to access the court book on a confidential basis for the purpose of identifying whether any application should be made for a suppression order in relation to a document or any part of a document. I accept that it may be that the solicitors for the National
45 Australia Bank somehow did not realise that they had access to those documents, but I want to be absolutely clear that even if that is the case – I'm sorry – that on the basis that that is the case, that there was no fault on the part of the staff of the

Commission or the solicitors assisting the Commission, and that everything has occurred in accordance with the practice guidelines that have been published by you in February of this year.

5 Finally, I need to note one other matter in relation to this, which is that one of the events that may have brought us to this point is a particular way in which the National Australia Bank went about producing documents to us in response to notices to produce that you issued, Commissioner. In the course of the Commission's investigations, the Commission identified that one of the case studies
10 that it would pursue in relation – or one of the issues that it would pursue as part of the case study in relation to NULIS and the National Australia Bank related to fees for no service. And to that end, Commissioner, you issued a notice to NULIS to produce documents in relation to fees for no service issues that required those documents to be produced before 4 pm on 9 July 2018.

15 The lawyers acting for the National Australia Bank and NULIS did produce documents on 9 July 2018. They produced 31 documents on that date in relation to the fees for no service – I'm sorry, 31 documents in response to the notice. On 20 July, the first set of documents regarding the fees for no service category was
20 produced. After that date, the National Australia Bank produced in excess of three and a half thousand documents regarding the fees for no service issue, of which in excess of 3000 were produced to the Commission last week. On 2 August, that is, Thursday of last week, the National Australia Bank apparently withheld documents from the production to the Commission on the basis of without prejudice privilege,
25 and then on the late afternoon of 3 August, that is, Friday afternoon, the National Australia Bank wrote to the solicitor assisting and said:

*In order to facilitate the timely progression of the Commission's inquiries, NULIS and NAB no longer intend to withhold those documents from production
30 on the basis of without prejudice claims, and will instead seek a non-publication direction if the Commission determines that it wishes to publish any of the information or documents in question.*

In respect of the ASIC documents that were on that list, Commissioner, some of
35 those documents – I'm sorry – of the seven documents produced by ASIC to the Commission that were on the list of 18, four of those documents were produced by the National Australia Bank to the Commission on the afternoon of 3 August 2018, and three of them have never been produced by the National Australia Bank to the Commission. It may be that, unfortunately, that particular manner of responding to
40 your compulsory notice has contributed to some of the difficulties that the National Australia Bank has faced in dealing with these confidentiality claims. Commissioner, I don't know whether Mr Young wants to say anything in response to that.

45 THE COMMISSIONER: Yes.

MR YOUNG: We would like to say several things, Commissioner. First and generally, we will need to take instructions about some aspects of the statement made by Mr Hodge. Secondly, I wish to emphasise that we have endeavoured, at every point of time, to ensure that so far as possible, matters concerning confidentiality claims were dealt with and progressed outside of the hearing process so as not to interrupt the processes of the Commission. That is why we requested notification as to what documents were going to be tendered so that we could consider our position in relation to a confidentiality claim. Thirdly, our learned friend said that it may be that my instructing solicitors misapprehended the position concerning access to the ASIC labelled documents uploaded to the court book.

There's no equivocation about that, Commissioner. My solicitors did not appreciate that they could, on Sunday or yesterday, obtain access to the ASIC designated documents. Now, that was the position as of yesterday lunchtime when we received the email concerning the 18 additional documents. Now, that may have been a fault on the part of, or at least a mistake on the part of my instructing solicitors. But I want to ensure the Commission that that was the genuine position as of yesterday. And I don't think that that is questioned by Mr Hodge.

MR HODGE: I don't question that.

THE COMMISSIONER: Simply draw attention to paragraphs 21 and following of the practice guideline 3 that I published on 8 February last. Go on.

MR YOUNG: Now, Commissioner, as I said, there are some matters we wish to take instruction on. There is one document my learned friend specifically mentioned that we had made the subject of a confidentiality application prior to yesterday, but we will consider the position in all respects in relation to what Mr Hodge has said.

THE COMMISSIONER: Thank you, Mr Young.

MR YOUNG: Beyond that, I don't want to say anything, Commissioner.

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

MR HODGE: Commissioner, could Ms Smith be recalled, please.

THE COMMISSIONER: Ms Smith, please. Is Ms Smith in the hearing room?

MR YOUNG: She's outside the courtroom, Commissioner.

THE COMMISSIONER: Yes. If you could arrange for her to be brought in, please. Ms Smith, good morning. Would you be good enough to return to the witness box, please.

45

<NICOLE SUSAN SMITH, ON FORMER AFFIRMATION [9.52 am]

<CROSS-EXAMINATION BY MR HODGE

5 THE COMMISSIONER: Just one moment, Mr Hodge. Let Ms Smith settle. Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner.

10 Could we bring back up ASIC.0036.0002.2531. Ms Smith, this is the document that we were looking at yesterday afternoon, you recall?---Yes.

And this is a document that you had seen before at about the time that it was produced by ASIC?---Yes.

15 And if we go to page 11 of that document. Now, this concerns – at the top of paragraph 45, you will see that ASIC was raising a concern that the National Australia Bank had contravened section 912A(1)(a) of the Corporations Act in relation to the no adviser PSF conduct?---Yes.

20 And that was the conduct that remediation had been agreed to be made for, the no – you understand the - - -?---Yes.

The no adviser PSF - - -?---Yes.

25 - - - conduct is the - - -?---Yes.

- - - taking of PSFs?---Yes.

30 All right. And then in relation to the next section down, you see that this then deals with a separate issue, which is what's referred to by ASIC as the No Obligation PSF Conduct?---Yes.

35 And the No Obligation PSF conduct, as you understood it, is concerned with the MKPS members continuing to be charged PSFs after they've joined the MKPS product?---Yes.

40 And was this the first time that a concern had been raised with you as to whether or not there was a proper basis for deducting the PSFs from any MKPS member, or you're not sure?---There could have been earlier – it could have been raised earlier, but certainly this was the first formal correspondence from ASIC outlining their concerns.

45 All right. And then if we go over the page to page 12, and you see about halfway down the page there's the heading Remediation of Fees for No Service Conduct?---Yes.

And you see in paragraph 58, this is addressing some specific matters or specific events in relation to fees for no service conduct?---Yes.

5 And those events, as we understand it, are ones that are referred to in your statement?---I would – I would need to check my statement for the event numbers. I recognise one of the event numbers but not all of them.

10 All right. In any event, you were aware that there were specific notifications that had been given to ASIC in relation to fees for no service?---For the trustee, yes.

15 Yes. And also that more generally, the National Australia Bank, in respect of its Wealth division, had given notifications to ASIC about fees for no service, for specific issues?---I – I was not aware of the specific breaches or events that the advice business would have provided to ASIC in respect of fees for no service.

15 All right?---But I did understand that there were inquiries going on between ASIC and the advice business.

20 And then you see in paragraph 60 of that document the statement:

ASIC has engaged in extensive discussion and negotiation with NAB over the past two years regarding the methodology to be used by NAB, Apogee, Godfrey Pembroke –

25 and then if we go over the page:

...GWM, JBWere and Meritum to assess whether there are additional fees for no service breaches or failures in the period between 1 January 2009 and 31 December 2015, beyond those breaches reported to ASIC.

30 ?---Yes.

35 Now, I just want to understand the state of your knowledge before you received this document. This is referring to discussions that have been ongoing between ASIC and the National Australia Bank about the methodology to be used in respect of NAB and its advice licensees to determine whether there are other fees for no service breaches. That's what you understood from the paragraph?---Yes.

40 And you understood that NAB Financial Planning and these licensees would have been receiving adviser service fees in respect of members of the superannuation trusts?---Yes.

45 And so you, as trustee, or as the chair of the trustee – I'm sorry; I withdraw that. The trustee of which you were the chair would have been making payments to these financial advice licensees in respect of the trustee's members?---Yes.

5 And was this the first time that you became aware that there had been two years of discussions between ASIC and NAB about a methodology to be used to determine whether there were further fees for no service breaches?---The two-year period – I would expect the answer to that is “yes”. But I was aware, and the board was aware for some time, that there had been ongoing discussions with the regulator regarding the provision of advice services.

10 And did you know what the nature of those discussions were?---Not – no, to be specific.

15 Were you aware of a disagreement between the regulator and the National Australia Bank about the methodology to be used to determine whether there are additional breaches or failures?---Well, this letter points out that ASIC are not comfortable with the proposals put forward. So at this point, I would have been aware.

20 I’m just wondering whether before you received this document you were aware of that?---I – I – I wouldn’t – I wouldn’t know formally before if I had been aware that there had been disagreement.

25 All right?---I did know that there was ongoing correspondence with the regulator and the advice licensee and the business.

30 And then if we look at paragraph 62 of the document, you see what is explained is that:

ASIC disagrees with NABs view that it should test whether there was a customer-adviser interaction rather than whether NAB delivered on the express commitments it gave to its customers.

35 ?---Yes.

40 Do you recall whether you were aware before receiving this document of the National Australia Bank taking a position that it would test whether there was a customer-adviser interaction, rather than whether it had actually provided the services that it had contracted to provide in exchange for the fees?---No.

45 But you became aware upon receiving this document?---Yes, but I’m not sure I actually understood what it meant on reading the words. I’ve had to read them a couple of times and for you to make the statement for me to actually get the point of what that means.

I see. You – until this moment, you hadn’t understood what that issue was?---What that actually meant.

45 All right. Do you recall whether you inquired of anybody at the National Australia Bank as to what this issue concerned?---I did not.

Had you realised that the National Australia Bank was taking the position that it would test whether there was a customer-adviser interaction rather than whether it had supplied the services that it had contracted to supply in exchange for the fees that it had received, what would your position have been?---You're asking me to speculate on what I might have thought had I understood that at the time. I can tell you what I thought at the time, rather than speculating on what I might have – what I might think - - -

Well, I am going to ask you to speculate, but you tell us what you thought at the time?---At the time, I believed that the advice licensee was in discussion with the regulator, the regulator understood and was privy to whatever they thought the issues were with the advice licensee, and that an appropriate customer outcome would be achieved in terms of the advice licensee entering into a review program or a remediation program if they had not provided advice to customers.

I see. And I just want to test that. As the trustee, the view you took was resolving this issue of whether the advice licensees had received fees for no service was a matter between the advice licensees and ASIC?---To some – yes.

Now, the difficulty, can I suggest, with that position is that you are the chair of the trustee. The trustee has been deducting money from members' accounts and paying it to these advice licensees. You agree?---Yes.

And what I'm trying to understand is, given the trustee's duty to act in the best interests of the members, how you would think that it could say, "This is a matter to be resolved between the advice licensees and ASIC"?---So it's not the only thing the trustee did or thought at the time.

I'm sorry, is that – did you want to say something more?---Well, I – I was just saying it's not the only thing that the trustee did or thought at the time in respect of - - -

In relation to this issue?--- - - - this issue.

And what were the other things the trustee did or thought?---So from – I would say December – I – would be the first recollection I would have, the – the advice licensee and the NAB had introduced a program they called the customer advocate review program, which was about reviewing the – how advice was given to – to customers, and that involved putting in place an external independent review process through what they called a customer advocate program to review the – the quality and the types of advice that were given to customers of the advice licensee. The trustee sought to understand, first of all, what that program was, and the results of that program as it related to superannuation members. And so from 2015, the independent expert, who was known as the customer advocate, was presenting to the board the methodology and the program of review that was being undertaken, and the results of that review. And that was regularly reported through to the trustee board. So the board was looking to understand the extent of issues in advice being given by the related party financial planners. Also, in 2015 the trustee board started

really trying to get a better understanding and better knowledge in respect of the advice risk it was exposed to, and from 2015, the board asked for and required a second line risk review in respect of advice risk that the trustee was exposed to, including issues and controls. In 2016, the board asked for and required a line 3
5 internal audit review over adviser service fee control environment. In 2016, the board asked for and required a second line review over FOFA controls. In 2017, the board asked for and required a second line review over adviser service fee controls. The board was actively seeking to understand its risks as it related to the payment of adviser service fees for members.

10 None of those things that you've spoken about have anything to do with this issue, which is whether in the period between 1 January 2009 and 31 December 2015 the advice licensees were taking fees without providing services to your members. Do you agree?---No, the customer advocate role was absolutely about reviewing the
15 provision of advice by the advice licensees, and the trustee was trying to understand – that was the first independent review or the first time there was independent analysis of the types of advice that were being provided by the – by the advice licensees. The trustee was trying to understand the – the scope of that work and the impact of any findings as it related to superannuation fund members.

20 Let's focus on the issue here and see if we can tease this out. You understand that the issue that's being addressed by ASIC in this document is whether between the period of 1 January 2009 and 31 December 2015 the National Australia Bank advice licensees have been charging fees for no service?---Yes.

25 And you understand – and I'm sorry. I should say and you understood that at the time when you got this document?---Yes.

30 And you understood at the time that some of the – at least some of the fees were being charged to members of the superannuation funds of which you had been the chair of the trustee?---I think that's a reasonable assumption to make.

35 And you understood that there was a dispute between ASIC and the advice licensees as to what methodology would be used in order to determine how extensive those failures to provide services were?---So I understood there was discussion. I'm not sure I understood there was a dispute at this point. Yes, they used the word "disagree", but I – I understand there was discussion going on as to what and how the advice business would demonstrate whether or not services had been provided to – to customers of the advice licensee.

40 All right. So you understood that there was what you've termed a discussion as to how the advice licensees would determine when and how services had been provided to the members?---Yes.

45 And were you aware of that even before you got this document?---I – I – in all likelihood, yes.

And were you aware that that discussion had been going on for some period of time?---I was not aware of the length of the time of the discussion.

5 You were aware, though, that ASIC was taking one position and the National Australia Bank was taking a different position?---Well, this letter seems to indicate that.

10 Were you aware before you got this document that ASIC was taking one position and the National Australia Bank was taking a different position?---Not that I can recall.

All right. Presumably, if you were aware that there were - - -?---Discussions.

15 - - - discussions and there hadn't been agreement, then it must be they weren't on the same page?---I can - I - I - I don't know that I thought about it in the - in that way prior to whether I thought there was a disagreement or whether there was discussion.

20 All right. Once you understood - and you must have understood, I'd suggest, no later than receipt of this document - that ASIC was taking one position and the National Australia Bank was taking a different position - - -?---Yes.

- - - as to the methodology by which it would be assessed when and how services had been delivered, did you think that that was an issue that concerned the trustee?---Yes.

25 And so did the trustee then take steps to become involved in that issue?---Other than to remain informed about - about the matter, nothing more specific than that.

30 If you assume for the moment that the position taken by the National Australia Bank was that it would test whether there had been a customer-adviser interaction and the position taken by ASIC was that the National Australia Bank needed to test whether it had delivered on the express commitments that it gave to its customers - assume, as is set out in this document, that those are the two competing positions - is that something that, in your view, sitting here now, the trustee ought to have taken a position on?---So my view is that when the advice licensee had determined what methodology it would use to review appropriate provision of services, that would be the point in time where the trustee would turn its mind to whether it thought it was adequate in respect of superannuation members.

40 What I'm struggling to understand is how, consistent with the duties of the trustee to act in the best interests of the members, and consistent with the duties of the trustee to manage conflicts and always prefer the interests of the beneficiaries over the interests of the trustee or any affiliate of the trustee, how it is possible for the trustee to say that it will sit on the sideline and wait to see what position has been taken by the advice licensees?---I don't think the trustee was sitting on the sideline. I think the trustee was actively making sure it understood what - through CRO reporting - what was happening. And I - I would say that it was the right position for the trustee to have taken at the time.

Sorry, just so that I can understand that position. You said:

5 *My view is that when the advice licensee had determined what methodology it would use to review the appropriate provision of services, that would be the point in time where the trustee would turn its mind to whether it thought it was adequate in respect of superannuation members.*

?---Yes.

10 So you would wait until the advice licensees had come to a decision as to what they thought was the most appropriate methodology?---They would determine a methodology and I think at that point the trustee would – would need to turn its mind to whether or not that was – so – whether or not that was adequate in respect of advice fees that were paid to licensees for superannuation members.

15

But why is it necessary for the trustee to wait to see what position the advice licensees are going to take?---So I – I think – so essentially, I think that unless the trustee were – the trustee was not privy to the information that ASIC had. The trustee is not responsible for monitoring, nor determining or – the advice given by a
20 licensed financial adviser, whether that be Godfrey Pembroke or whether that be Colonial First State or any other financial adviser. So the trustee in this instance, because these are related parties, had a lot more information than it would have otherwise had, and unless the trustee were to undertake a review of itself, the trustee was waiting for a position by the group, and then it would turn its mind to whether
25 we thought, because they were related parties, that that was adequate. And I think that’s reasonable in the context of the trustee’s responsibility to its members as well as the advice and licensees’ responsibility to provide advice in accordance with the provision of the law that they’re required to – to – to provide advice under.

30 I just want to understand that. Your view is or your understanding is that the trustee is not responsible for monitoring the advice given by a licensed financial adviser?---In the context of the trustee’s responsibility is to determine whether or not we’re making a valid payment. We don’t monitor advisers and the provision of the specific advice.

35

I’m sorry, could you just say that again? You’re saying:

40 *In the context of the trustee’s responsibility, it is to determine whether or not we’re making a valid payment.*

40

?---Yes.

45 So I’m just trying to understand how you can make a valid payment without knowing whether the service is being provided?---So I think at this point the advice licensee doesn’t know whether the service has been provided yet or not either until they undertake a review. So at this point, the trustee, based on the control environment it has and the controls it has in place to – to – to actually be able to make the payment,

is making a valid payment for a member who has – who has entered into an agreement with their adviser to pay an advice fee and – and instructed us to make that payment. That’s what we’re – we’re – there’s a whole series of controls that the trustee has in place to ensure that we’re making a valid payment.

5

At least up until the end of 2015, the trustees, the MLC Plum trustees, didn’t have any proper controls to determine whether service has been provided in exchange for payment, did they?---No, it had some controls that were not adequate in all instances that led to us reporting breaches to the regulator, and – and as part of that remediation process, to repay customers where adviser service fees were deducted. That included making sure that the controls were adequate in order to make valid payments.

10

If there was an adviser linked to a member’s account, did the trustee have any controls to determine whether that adviser had actually provided the contracted services in exchange for the adviser service fees?---Other than the – the contractual requirements of the provision that the adviser has via the PDS to provide services and the authorisation that we’ve been given at the point of the member and the adviser agreeing for the payment, and then ensuring that there is an adviser linked to the account and – and across the – from the start to the – to the authorisation and then to the payment, the actual monitoring of service is not the – is not something that the trustee has done. So it has a series of other controls to determine the validity of the payment.

20

And you understood, at least upon receiving this document from ASIC, that ASIC was concerned that between 1 January 2009 and 31 December 2015, NAB Financial Planning and other NAB advice licensees had not been providing the services that they had contracted to provide in exchange for the advice service fees that the trustee was paying to those advice licensees?---Sorry, can you repeat that?

30

Yes. You understood, at least by the time you received this document from ASIC, that ASIC was concerned that the NAB – that NAB Financial Planning and the NAB advice licensees were not providing the advice services that they had contracted to provide in exchange for the adviser service fees that the trustee was paying to them?---That the MLC trustee, along with many other trustees, because it’s not just superannuation that they’re providing – not just our super fund or – or just superannuation. So what we understood was that ASIC did have a concern for the advice licensees in respect of – of what the industry now knows as fee for no service. The extent of that or how much of that related to the superannuation business or how many superannuation – of our superannuation customers were affected, we did not know. And we expected that a review process put in place by the advice licensee and agreed with ASIC would determine the impact of whether or not the advice licensee was – whether or not they were providing advice or whether they were not providing advice for – in respect of superannuation members.

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45

Can I suggest this to you: that if the trustee was acting in the best interests of members, upon becoming aware of this issue, it would insist that these advice

licensees that it was paying carried out a proper review to determine whether or not services had been provided in exchange for the fees?---I – I think the trustee expected that that would happen and potentially, with the benefit of hindsight, should we insisted that happen quicker, then I would potentially think you're right.

5

And can I suggest to you that the reason that the trustee did not do that was because it simply could not manage the conflict of interests that exist within – as between the NAB Wealth business and the trustee?---No. I wouldn't agree that that is the reason.

10 Because the interest of the NAB Wealth business was, as is apparent from the ASIC letter, in attempting to keep the fees and identify a justification for keeping the fees, rather than assessing whether the contracted services had been exchanged for the fees?---So that is not a consideration that the trustee would ever take into account, whether it – when it is acting in the interests of members. The trustee – my
15 experience and my involvement on the board has been a very active board acting in the interests of members, and where there is wrong, either through error and a fee has been charged erroneously, or whether we find out that the advice licensee has not provided advice and needs to refund that payment, the trustee would not, under any circumstances, be thinking that we would be acting in the interests of the advice
20 licensee or the bank over the interests of members.

I tender that document, Commissioner.

25 THE COMMISSIONER: Outline of Suspected Offending by NAB ASIC.0036.0002.2531, exhibit 5.68.

**EXHIBIT #5.68 OUTLINE OF SUSPECTED OFFENDING BY NAB,
ASIC.0036.0002.2531**

30

MR HODGE: Commissioner, could we bring up ASIC.0039.0003.0543. This is a letter from ASIC to Ms Cook, the general counsel of the National Australia Bank, dated 3 November 2017. Do you recall when you first saw this document?---I'd
35 need to see the full letter to know if I have seen this document.

I'm sure a hard copy will be run up to you?---I don't believe I've seen this document before.

40 You don't think you've seen it even in the course of preparing to give evidence today?---No.

All right. Let me ask you, then, about whether you're aware of some matters that are stated here. You see in the paragraph at the bottom of the page it's said:

45

We also note that the approach proposed by NAB is out of step with some of its major peers that have reported fees for no service failures and are close to finalising their customer review and remediation programs for these failures.

5 ?---Yes, I see that.

Were you aware of that fact?---No.

10 I'm sorry, I should say were you aware of that view of ASIC?---No.

You weren't aware that ASIC considered that NABs approach to remediation of fees for no service was out of step with the other banks?---Not at this time, no.

15 When did you become aware of that?---At a meeting with ASIC on 15 June this year.
Not 15 June. A meeting in June this year.

All right. So the first time that you became aware of that was two months ago?---And whether or not ASIC – yes, that's correct.

20 So nobody in the advice business had communicated this to you before then?---No.

All right. And then if we go over the page to page 3, to ASIC.0039.0003.0545?---Yes.

25 You see about halfway down the page there's the heading NAB Further Review Methodology?---Yes.

And then you see:

30 *In December 2015 NAB provided ASIC with a draft methodology.*

?---Yes.

35 Were you aware that at the end of 2015, NAB had first proposed a methodology for assessing the extent of fees for no service?---No.

40 Were you never aware until now that that was the case?---Well, I assume by the letter in – that was the one we were previously discussing that there had been discussion around how NAB would undergo and undertake a review of adviser service fees. So when they put forward methodologies, I was not aware of, but I – I assume from that letter that there had been an exchange between ASIC and the group around a – a proposed review methodology.

45 But you weren't sure for how long this had been going on?---No.

Although presumably at some point in time when you read that outline of
contraventions, you must have known it had been going on for two years because it –
I can bring the document back up, if that would help. I'll just find the correct doc ID.
It's ASIC.0036.0002.2531. And if we go to page 12 of that document, which is
5 .2542, you see a paragraph 60:

*ASIC has engaged in extensive discussion and negotiation with NAB over the
past two years.*

10 ?---Yes.

So presumably, from the time you received this document at the end of last year, you
must have known that this had been going on for two years?---Yes. Well, I
mentioned earlier that the advice licensee and NAB had put in place a customer
15 advocate role, and the distinction between how that role came to be and this matter –
I'm not aware of the detail, and whether or not there's any difference between that
role and how it came about to be, and the concerns that ASIC now have.

20 Sorry - - ?---You've asked me a specific question, "Surely I knew". No, I didn't
know. So - - -

I just want to be clear about what it is you are saying you didn't know. You didn't
know that there had been ongoing discussions - - -?---Well - - -

25 - - - for two years?---Yes, I did.

Right?---But I wasn't privy to the detail of those ongoing discussions.

30 Yes?---And so what I did know was that the customer advocate program had been
put in place to review advice and the provision of advice services by an independent
expert. And so I did know that there had been ongoing discussions with ASIC for
some time. But what they were and where – whether that – the customer advocate
issues were the same issues that are being discussed now, and whether or not
35 different issues were discussed in 2015 to 2017, I'm not aware of because I was not
part of, nor privy to, the discussions of the advice business, nor what was being
discussed with ASIC.

40 I understand. If we then go back to ASIC.0039.0003.0543. And we go back to page
3 which we were looking at, which is .0545?---Yes.

45 What I'm going to do is this, Ms Smith: I'm going to ask you about some specific
matters in this letter just to see whether you had been informed of them at some
stage, and if so when. And then I'm going to ask you what you think the position of
the trustee ought to have been had it been informed of these matters, assuming that
your answers are you weren't aware of them. So you see on page 3 it says:

5 *In December 2015, NAB provided ASIC with a draft methodology which proposed to “undertake reasonable steps to gain an adequate level of assurance that customers who have paid to receive an ongoing advice service have been provided with the services as agreed in the service agreement between the customer and the adviser.”*

Do you see that?---Yes.

10 Do you recall whether you were aware that, at some stage, the NAB had taken the position that it should review whether or not the contracted services had been provided in exchange for the fees that had been taken?---No.

15 All right. Can I suggest to you had you been aware that the NAB proposed to undertake a review of whether the contracted services had been provided in exchange for the fees that had been taken, that you, as the trustee, would have been content with that?---We “would have been content with that”?

20 You wouldn’t have had any issue with that. That would have been exactly what you would expect?---Yes.

That they would test, “Have we provided the services that we contracted to provide”?---Yes.

25 All right. And then if we go over the page to page 4. This deals with some sampling – sample testing that was done. All I want to know is were you aware that sample testing was done by NAB advice licensees as to whether the contracted services had been provided?---I knew that there had been sample testing done but I was not aware of the purpose of that or whether – you know, whether it was to test the provision of service.

30 All right?---And – and I – I will say that I’m not sure I knew whether it was being done in this context or the context of the customer advocate program, which was about reviewing files and determining which files should be reviewed first and kind of that program of work that the trustee did understand was ongoing and had
35 discussions with the customer advocate and presentations from the customer advocate on.

40 And then if we go to page 5 of that document, which is ASIC.0039.0003.0547. You see the statement made by ASIC under heading 4 is:

45 *NABs hypothesis for these sample tests was that it would identify no failures. After the results of the sample tests identified more failures than NAB had expected, disproving NABs hypothesis, NAB changed its views for the purpose of its review.*

?---Yes.

Were you aware that at some point in time sample testing had identified more failures than had been expected by NAB?---No.

5 Were you aware that at some point in time NAB had changed its view as to the methodology for testing whether services had been provided?---No.

You recall we looked at an email chain yesterday that was about fair exchange of value?---That I hadn't seen before yesterday, yes.

10 But I had understood you had been aware at some point in time of the idea of fair exchange of value?---I – I would need to go back to the email and – it is in this letter – and recall, kind of, what you asked me for yesterday.

15 All right. Let me just ask you this then: do you recall being aware at some point in time that NAB had adopted the position that it ought to be able to retain service fees if there had been a fair exchange of value?---Well, I – so I – not that I recall, no.

20 All right. Can I suggest to you that as the trustee, if you had been aware that that was the position being adopted by NAB, you would have objected to it?---So I think it kind of goes to the answer I gave a little while ago, which is what the trustee was waiting for was a methodology to be produced, and then turn our mind to whether or not we believed that was appropriate. And so that hasn't occurred and we haven't seen that. But I would expect that the trustee would require that in order to pay a fee we expect a service to be provided to the member.

25 Well, surely not “a service”?---The provision of advice.

The contracted service. Yes?---Yes, that's right. Well, that's what I – sorry for the loose language, but that's what I mean: the provision of advice.

30 But the loose language is quite important here, because there is a difference between charging a fee for a contracted service and charging a fee and then identifying a service that can be said to have been provided?---So for someone that has worked in professional services, generally you're charging a fee for the provision of a service. And so the provision of advice. So it was not intended to be loose in any other way, other than I expect if I'm charging a fee to a customer for my services, that I'm actually providing the service.

40 Yes. All right. And if we go to page 6 of that document. You can see there's three bullet points in the middle of the page. I just want to ask you whether you're aware of - - -?---The big bullet points or the little ones?

Yes, the big bullet points. You see the first big bullet point says:

45 *On 2 June 2017, NAB stated that if after its searches for digital data and attempts to obtain adviser attestations did not provide evidence of a customer-adviser interact and client does not respond to communications, NAB will*

“conclude that there is inadequate evidence to determine that service was not provided”.

You see that?---Yes.

5

Were you aware that NAB had taken that position in relation to the methodology for assessing whether or not service had been provided?---I had no knowledge of the methodology that NAB had been proposing, other than that there was a disagreement between ASIC and – and NAB around – that ASIC was not comfortable with what NAB had put forward.

10

All right. I tender that document, Commissioner.

THE COMMISSIONER: Letter ASIC to Cook, 3 November '17
ASIC.0039.0003.0543, exhibit 5.69.

15

**EXHIBIT #5.69 LETTER FROM ASIC TO COOK DATED 03/12/2017
(ASIC.0039.0003.0543)**

20

MR HODGE: Could we then bring up ASIC.0015.0002.0296. You see this is a letter from NULIS to the – to ASIC on 1 December 2015?---2017, yes.

I'm sorry, 2017. You see that?---Yes.

25

And this is a document you've seen before?---If you go – I assume so.

Well, if we go to page 9 of the document?---I presume I might have signed it.

30

You signed it. Presumably you would have read it before you signed it?---Yes. And there was a review process put in place to – for – for the letter to occur.

All right. So if we go back to page 1. You see, two-thirds of the way down the page, the paragraph that says:

35

At the outset.

?---Yes.

40

And it says:

At the outset, we would like to reiterate that it is the trustee's position that the PSF was properly applied to MasterKey Personal Super accounts for the continued access to general advice and ongoing support services provided by the adviser that was linked to their account.

45

?---Yes.

5 Now, I just want to understand that. Was that an accurate reflection of your view of the basis on which the PSF was charged to members in the MKPS product?---Yes.

And one of the things we have some difficulty in understanding is the PSF is for a service agreed between the employer and the adviser. Agreed?---Yes.

10 And it is initially applied to the account of an employee in the MasterKey Business Super product. Yes?---Yes.

15 And then when the member transfers over to the MasterKey Personal Super product because they've left - - -?---Both the same product. It's - they're a division of one product covered by one PDS.

When they transfer over to the MasterKey Personal Super division of the product, because they have left employment - - -?---Yes.

20 - - - with the employer, they continue to be charged the PSF?---Yes.

25 And at that point then, has the service that's to be provided changed, in your view, between when they were in the MasterKey Business Super product and when they were in the MasterKey Personal Super product?---It's still general advice services provided to the individual.

30 That states it at a level of generality that seems to enable keeping the fee regardless of whether the contracted service is provided. It's not simply a fee for general advice; it's a fee for the specific services agreed between the employer and the adviser. Agreed?---Yes, but also as the member moves into MKPS it was for the same adviser who knows the member; who has provided services to the member; understands the product that the member is invested in and their individual circumstances to support the member and provide general advice services in the personal division.

35 Now, again, just so we can try to understand that. Obviously, now NULIS has agreed to refund all of the PSFs charged to MasterKey Personal Super members?---It has.

40 And you've explained that there are a number of considerations for that: one is the allegations of misleading or deceptive conduct that had been raised by ASIC?---In respect of the disclosure, yes.

45 Another is that the trustee cannot be satisfied that services were provided in exchange for the fee?---Yes.

And what I'm trying to understand is how the idea that this was a fee for access is reconciled with the idea that the trustee can't be satisfied that the services were provided?---I think it was a fee for services.

5 Yes?---And in the trustee's mind, members were receiving services.

Yes. Your point is, I think, the trustee's position wasn't that it was for access to service; it was for service?---Yes.

10 And you understand those are two very different and important concepts. On the one hand, access to service and on the other hand service?---Absolutely.

And so insofar as this letter says that it's the trustee's position that the fee was for:

15 *Continued access to advice and ongoing support services.*

And then puts in brackets and in bold:

Access to services –

20 that is incorrect?---Yes, I believe so.

And can I suggest the reason that it is incorrect is because this was a negotiating tactic adopted by NULIS as a basis for not having to refund the money because there had been no services provided?---It was not a negotiating tactic adopted by NULIS, no.

25 Was it the position of NULIS that if the fee was for access to service rather than a fee for service, that it would not be necessary to refund the money?---Sorry, can you just say that – I know it was only short but - - -

30 That's fine. Was it the position of NULIS that if the fee was for access to service - - -?---Yes.

35 - - - rather than for service, then it would be possible to retain the money?---No. The trustee, when it put the PSF in place, did so believing services were being provided to members.

40 Isn't this a letter from NULIS by which it's responding and rejecting to the outline of contraventions from ASIC in relation to the PSFs?---Yes.

And isn't a premise of the rejection of the contraventions that it was a fee for access to service rather than a fee for service?---I believe the letter does say that.

45 But that's a premise of rejecting the contraventions?---I'm – I – I can say in my mind, at the point of this letter, it was not in my mind that members were not receiving services for the PSF being deducted.

5 But why did you sign a letter saying that the fee was for access to service if you believe now and have always believed that it was a fee for service?---I would suggest that that was an error on my behalf and in the nine pages I – that – where we are setting out, you know, our view of the letter, that – that I would say that – that was an error and not what I believed at the time.

It's on the first page - - -?---Yes, I know.

10 - - - of the letter?---I know.

And it's the summary of the starting point for the trustee as to the basis upon which the fee was charged?---Yes.

15 You didn't draft it?---No.

Somebody else drafted it. Somebody within the Wealth Management business?---Yes.

20 And they gave it to you and you signed it?---Yes. Yes. They gave it to me, I reviewed it and I signed it.

25 And do you say it didn't occur to you that this was an error?---My mindset at this point was that of course the trustee would charge a fee under the circumstances where it expected a service to be provided.

I tender that document, Commissioner.

30 THE COMMISSIONER: Letter from NULIS to ASIC, 1 December '17, ASIC.0015.0002.0296, exhibit 5.70.

**EXHIBIT #5.70 LETTER FROM NULIS TO ASIC, ASIC.0015.0002.0296
DATED 01/12/2017**

35 MR HODGE: Can we bring up NAB.005.562.6921. So this is the papers in relation to the board meeting of the trustees on 7 and 8 December 2017?---Yes.

40 And you can see the relevant agenda item is adviser service fees?---Yes.

And what is recorded as having occurred at the meeting was that:

The directors noted and discussed Ms Pryor's paper dated 27 November 2017 entitled Risk Review of ASF Controls.

45 ?---Yes.

And if we go over the page to .6922. So this is the first page. I just want to direct your attention to certain matters. This is concerned with adviser service fees rather than plan service fees?---Yes.

5 And you see the purpose of the paper is to provide the NULIS board with an overview of risks, findings from a review of the adequacy of controls in place in relation to adviser service fees.

?---Yes.

10

And if you go down halfway down the page, you see a paragraph which explains in relation to a change to NULISs risk appetite:

15 *This followed a number of ASF reportable breaches and issues that have been discovered and reported since 2015, coupled with ongoing regulatory enforcement action on ASFs and plan service fees across various NAB Group licensees.*

?---Yes.

20

And then you see:

25 *In October 2017, ASIC has provided a position paper to NAB covering various NAB Group licensees including NULIS concerning ASFs and PSFs.*

?---Yes.

And:

30 *ASIC sets out its expectations in relation to fees for no service and remediation.*

?---Yes.

35 And can I suggest that position paper must be the outline of contraventions we were looking at earlier?---I expect so.

40 And do you recall whether that was considered at the full board level of NULIS?---Yes. I – I mean, to be absolutely accurate, I would have to go and check the board papers, but all ASIC correspondence and particularly relating to these matters have been discussed and seen at the full board.

All right. And then you say:

45 *Of note –*

and the – you see:

Of note, in the context of PSF, ASIC observes that NULIS has no knowledge of whether the services are provided to customers and NULIS does not require the plan advisers to provide the services.

5 See that?---I do.

And then it goes on to say:

10 *Whilst not stated by ASIC in the paper, it is possible that perspective of ASIC could be extended to ASFs given that both ASFs and PSFs are trustee facilitated expenses of the fund to which arguably the same duty of care applies under best interest duties and the relevant SIS covenants.*

?---Yes.
15

Was it your view that the trustee's duty of care in relation to its members extended to considering whether or not services had been provided in exchange for the ASFs?---For the ASFs?

20 Yes?---I think both ASF and PSF, yes.

All right. And it was also your view that the best interests duty of the trustee required it to consider whether or not ASFs – sorry – whether services had been provided in exchange for the ASFs?---Whether or not – so I – I won't give a – you're asking me a legal question as to whether or not I think best interests applies in specific circumstances. I expect it's a requirement of the trustee in making a – in order for it to be a valid deduction from a member's account, that we have appropriate controls in place to determine that the payment is valid, and we would expect that if we are paying an adviser service fee, it is to an authorised advice – advice licensee and we have appropriate authorisation to make the payment, and that service would be provided. And I – in short, I would expect that for PSF, we expect that services are provided in – in respect of the fee in order for it to be a valid deduction from the member's account.

35 Just so I understand, though, your view as to the nature of the duty of the trustee, does the trustee have a duty to monitor whether services are provided in exchange for fees?---I think there are – I would say we have a duty to ensure that the payment is valid, and how we go about determining the validity of that payment is different for both ASF and PSF, and – and that we have controls in place to ensure that we are making a valid payment which would, in – in its premise, mean that services are being provided to the member.

45 If we go over the page to .6923, you see in the – there's a heading which is Summary of Findings?---Yes.

And then you see the second paragraph says:

However, it is important to note that there are controls in place to (1) check that fees are paid to licensees.

?---Yes.

5

Continuing:

(2) monitor excessive adviser service fees.

10 ?---Yes.

Continuing:

(3) obtain member consent prior to charging or changing an ASF arrangement.

15

?---Yes.

And:

20 *(4) disclose the amount of the ASF charged to the member.*

?---Yes.

25 Now, that, though, can I suggest, doesn't extend to actually monitoring whether services – I'm sorry – whether the contracted services are provided in exchange for the fees?---No. The – the – at this point, the trustee has – has a series of controls in order to – to – to believe it is paying a valid and authorised adviser service fee from a member's account.

30 Well, we will come to that in a moment. Then you see at the bottom of the page there's a heading, which is Next Steps:

Actions to remediate and uplift the control environment will be worked through with executive management.

35

?---Yes.

40 I'm just trying to understand, in relation to remediation, is that something that you would expect to have been left to executive management and risk, rather than the trustee itself having a direct involvement in?---The trustee does not design controls. So yes, I would expect that it is management's job to develop and design controls to manage the risk of the trustee.

45 I'm sorry. I think, actually, to be fair to you, I've – I think you're making a point which is I'd actually misunderstood that sentence, which is "actions to remediate" is part of a compound phrase which is "actions to remediate and uplift the control environment"?---Yes.

The remediate is not about remediating customers who haven't had - - -?---No.

- - - services provided. It's just about fixing the control environment?---It's – it's about the control environment.

5

I understand. And your point is of course that's a matter we need to leave to risk and the executive management team?---Yes. With appropriate reporting back to ensure that it has occurred, and that the control environment is appropriate to manage – manage the risk and – and ensure that, in the context of adviser service fees, valid payments are being made.

10

And then if we go to page .6925, you'll see this is the appendix to the paper which sets out further details on Risk's findings?---Yes.

15 And you can see summary of observations:

Risk considers that overall, the control environment as it relates to ASFs requires improvement to enable the trustee's expectations to be met in relation to its conduct risk appetite.

20

?---Yes.

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

25 *Key observations are outlined below.*

?---Yes.

And the first key observation is:

30

All fees paid to advisers.

And the summary of the observation is:

35

Overall ineffective.

?---Yes.

And it explains that there are:

40

Some controls in place that have been improved recently.

?---Yes.

45 But that there is:

No finance reconciliation performed to ensure that all ASFs are paid on to advisers and not retained by NULIS.

?---Yes.

5

And as it turned out – perhaps I have the time wrong, but there was a breach or there has been a breach notified to ASIC, which I think you refer to in your statement, of adviser fees being retained by the trustee rather than passed on to advisers?---Yes.

10 And do you recall whether that was before or after this identification of the lack of controls?---I believe it was before.

All right. So the breach had already been reported, and what's being reported by Risk to the trustee is that there are – it describes the controls to ensure that ASFs are passed on to advisers as non-existent?---Yes.

15

And - - ?---Well, I – yes.

And then it's explaining, then, in the next point – this is I think what you are talking about then:

20

The current reportable breach being remediated in relation to an automated fee payment suppression control.

25 ?---Yes.

And that's, presumably, a subset of a potentially larger issue of fees not being passed on to advisers, that is, the first point – I'm sorry – the second point:

30 *There is no finance reconciliation –*

is to do with generally whether there is any control over, or checking whether advice fees had been paid on to licensees?---Yes.

35 And then the last point is in relation to a, effectively, subset of that, which is there was a particular system issue that automatically suppressed payments to advisers?---Yes.

All right. And then if we go over the page to .6926, the next key observation is:

40

Monitoring of fees against services provided.

That's described as “non-existent”. Do you see that?---Yes.

45 And it said:

NULIS does not have visibility of monitoring of fees against services.

?---Yes.

And then you see the fourth bullet point down:

5 *Customer consent to adviser service fees – initial plus ongoing changes.*

?---Yes.

And that’s described as “ineffective”?---Yes.

10

And in addition, the second bullet point from the top:

The controls over fees are reasonable, commensurate with expected service –

15 is described as “ineffective”?---Yes.

And then the fifth bullet point from the top:

Obligation and control documentation –

20

is also described as “ineffective”?---Yes.

And then the point at the bottom of the page:

25 *Adviser on-boarding enhancements –*

are also described as “ineffective”?---Yes.

30 And insofar as this is raising concerns about the controls as they will apply in the future, as I understand it, the trustee was addressing that by requiring Risk and executive management to remediate the controls?---Yes.

35 Insofar as those controls had failed in the past and resulted in members being charged fees for services that they should not have been charged, what steps did the trustee take to address that risk?---So at this stage, I would say the trustee has not done a look back or decided to do a look back as a result of these findings. What has happened is a report into the risk committee in February of this year in order to have a report from the management team on what they are doing and when those controls will be remediated. While – I would make only one comment in respect of this, that
40 this was – I will make two. This was a review asked for by the board as a result of the – the succession of events that the board had seen coming through in respect of adviser service fees. While there are some instances of saying no control or ineffective, it doesn’t mean that there are no controls in place and that that we expect
45 necessarily it would result in wholesale or – or even more than what we already know of adviser service being – fees being paid where they are not valid. As the control uplift occurs, as we saw with – I think it’s the adviser service suppression event in my witness statement, as we put in place controls, we – that was – that event

5 was actually found through a control uplift program. And so as the controls are put in place, I would expect that any issues or concerns around whether or not there have been failings that led to issues would come out in the uplifting controls, and that would go through the reporting process, etcetera, to remediate customers where errors have occurred.

10 Just if you consider this: your point is just because there's a failure of – or there are inadequate controls doesn't necessarily mean that there are more incidents of fees being charged for services that have not been provided than are already known about?---Correct.

15 The problem is no review has been done to figure out whether or not fees have been charged where the services haven't been provided?---So I expect, as these controls get put in place, in the same way with the adviser suppression event that occurred, that that event came to fruition and understanding as a result of a program to uplift controls. And that's where the – the issues and event that was raised for that were actually found. So as these controls are put in place, part of that process will include and – and bring to – would – would kind of become obvious whether or not any further errors that we don't already know about have occurred.

20 Are you saying that for the period from 1 January 2009 to 31 December 2015, which is the period the subject of the disagreement about methodology as between ASIC and NAB, that you think the improvements in risk controls, when they eventually come into operation, will help to identify any failures to provide services back then?---So I'm not sure if I'm answering your specific question, but I expect that the advice licensee, in its review of whether or not a service has been provided, will – will ensure that any superannuation members who have paid an advice fee and not received a service will be identified during that review process and will be remediated by the advice licensee.

30 I tender that document, Commissioner.

35 THE COMMISSIONER: Extract from board papers, MLC Nominees PFS Nominees, NULIS, 7 and 8 December '17 concerning adviser service fees, NAB.005.562.6921, exhibit 5.71.

40 **EXHIBIT #5.71 EXTRACT FROM BOARD PAPERS, MLC NOMINEES, PFS NOMINEES, NULIS DATED 07/12/2017 and 08/12/2017**

45 MR HODGE: Can we bring up ASIC.0036.0001.5091. Now, Ms Smith, this is a letter sent by NAB on 15 December 2015 in response to that outline of suspected offending that we've looked at.

THE COMMISSIONER: 15 December '17, I think.

MR HODGE: I'm sorry, Commissioner. 15 December '17.

THE COMMISSIONER: Yes.

5 MR HODGE: That we've looked at?---Yes.

10 Have you seen this document before?---I'm not sure if we responded jointly or separately to the 15 December in respect of ASICs inquiry. So what I mean by that is whether the trustee responded separately to the advice licensee. So I would need to look through this further.

All right. Well, if you go to the next page. And then, in fact, why don't we go to the last page, page 3?---I don't believe I've seen this letter signed by John Sharpe.

15 All right. I tender that document, Commissioner.

THE COMMISSIONER: Letter 15 December '17, NAB to Mullaly at ASIC, ASIC.0036.0001.5091, exhibit 5.72.

20

EXHIBIT #5.72 LETTER FROM NAB TO MULLALY AT ASIC DATED 15/12/2017

25 MR HODGE: Can we bring up ASIC.0036.0002.0913. This is a letter dated 8 January 2018 from ASIC to Ms Cook at NAB?---Yes.

Have you seen this document before?---I would prefer to look at the whole document to decide whether I've seen it.

30

That's all right?---Not just the front page.

THE COMMISSIONER: Yes, a hard copy is being provided?---I don't believe so.

35 MR HODGE: All right. Commissioner, I will just tender that document, then.

THE COMMISSIONER: Exhibit 5.73, letter 8 January '18, ASIC to Cook, ASIC.0036.0002.0913, exhibit 5.73.

40

EXHIBIT #5.73 LETTER FROM ASIC TO COOK, ASIC.0036.0002.0913 DATED 08/01/2018

45 MR HODGE: Can we bring up ASIC.0036.0001.7316. This is a letter from NULIS to ASIC dated 29 March 2018?---Yes.

And - - -?---I signed it.

You signed it?---Yes.

5 You've seen this document before?---I have.

And if we go over the page to page 2?---Yes.

And you see the heading:

10

No obligation PSF conduct.

?---Yes.

15 And we've talked about what ASIC calls the no obligation PSF conduct already - - -

-?---Yes.

- - - this morning. And you see, again, the statement:

20

NULIS deducts PSFs from MasterKey Personal Super members after they have left their employer for access to services described in the PDS as "group based advice".

25 ?---Yes.

And then you see the third bullet point:

NULIS does not require plan advisers to provide services.

30

?---Yes.

And then the fourth bullet point:

35

NULIS has no knowledge of whether these members receive any services in return for PSFs paid.

?---Yes.

40 And then you see:

NULIS maintains that –

And number 1 is:

45

The PSF was deducted from MKPS accounts for the continued access to general advice and ongoing support services provided by the relevant adviser linked to the accounts.

5 ?---Yes.

And point 3 is:

10 *MKPS members have accessed the services on an “as needed” basis to obtain this general advice.*

?---Yes.

And then point 4 is:

15 *Plan advisers are required to provide these services when requested by the MKPS members.*

?---Yes.

20 And this appears to be consistent with NULIS continuing to maintain that the PSF is charged for access to services rather than for services. Do you agree?---I think this is a statement of fact at this point in time, yes.

25 But it’s a statement of fact that does not reflect your view - - -?---Yes.

- - - as to the basis upon - - -?---The need to – yes, correct.

30 And, again, do you have an explanation that you want to offer to the Commissioner as to why you signed this letter, given that it did not reflect your view as to the basis on which the PSF was charged?---So I would make two comments. I think that at that point, the trustee was looking to inquire and make further inquiry as to whether or not we could determine – whether we had any view whether services were, in fact, being provided, and at this point that this letter was approved, the trustee had asked
35 for further work to be undertaken by the breach review committee in respect of the monitoring it had in place and whether or not we could make a determination that services were being provided.

40 I’m sorry; I don’t understand. The statements made by NULIS in this letter are that the PSF was deducted for continued access to advice and services, rather than deducted for advice and services?---Yes.

45 And your explanation for why you signed the letter in this form is what?---That at the point I signed the form, this was the conclusion that management had drawn, and at the point I – form – at the point I signed the letter, I also asked for further work to be undertaken in respect of the monitoring that had been in place over plan service fees, and that for a determine of the associated breaches, if the trustee could not conclude

that services had been provided, be considered by the breach review committee and that would have an impact on the proposal being put forward to ASIC at this point in time.

5 You're saying simultaneously with signing this letter, you asked management to undertake some work to determine whether they could be satisfied that services had been provided?---Whether they could satisfy the trustee.

That services had been provided?---Yes.

10

And because you had requested management to determine whether services had been provided - - -?---Yes.

- - - you signed a letter to ASIC - - -?---Yes.

15

- - - asserting that the fee was for access to service rather than the

provision of service?---I would say in hindsight that I think I would choose different words to describe how I believed the PSF worked and the basis with which I had thought about the PSF up until this point. Notwithstanding I – I signed the letter at this point in time.

20

Again, can I suggest this was part of a positioning for a negotiation with ASIC over what remediation NULIS would have to do?---Yes.

25

And we see then, halfway down the page, that NULIS makes the statement – or you make the statement on behalf of NULIS:

NULISs primary focus is its members, and NULIS considers that it is appropriate to take a proactive member-centric approach to resolve ASICs concerns.

30

?---Yes.

35

And then it says:

Furthermore, whilst NULIS and ASIC may not agree on these issues, it is clear that ongoing dialogue concerning these issues is time-consuming and expensive for all involved and is likely to delay any resolution of ASICs concerns.

40

?---Yes.

And one of ASICs concerns was that this was a fee for service, not a fee for access to service?---Yes.

45

And that was being said by NULIS to be a matter that it was disputing with ASIC?---I'm not sure where it says we're disputing that with ASIC.

Well, you knew that ASIC was saying that this was a fee for service rather than a fee for access to service?---Yes. And I believed it was a fee for service.

And you believed that it was a fee for service?---Yes.

5

And nevertheless, you signed a letter saying it was a fee for access to service?---Yes.

And - - ?---And I'd also signed off multiple other pieces of correspondence that said words like "it is a fee for access to and the provision of ongoing service".

10

Then you see the next paragraph is:

NULIS intends to implement a remediation process to resolve ASICs concerns.

15 ?---Yes.

And NULIS is suggesting that it will implement this proposed remediation program, and then that way further regulatory action by ASIC won't be required?---Yes.

20 NULIS is seeking to resolve the entire issue by the remediation program it is proposing?---Yes.

And then we see the next section down:

25 *Details of the PSF remediation scheme.*

?---Yes.

And the first sentence is:

30

NULIS considers that the PSF remediation scheme is the most accurate and fairest method to remediate all MKPS members, not only the transferred members.

35 ?---Yes.

And it says:

40 *This will place MKPS members in the position they would have been in had the disclosures about the option to reduce the PSF to zero been made in the manner ASIC suggests.*

?---Yes.

45 And what that refers to, can I suggest, is this: that ASIC has raised two issues about the PSFs. The first is the one that we've already spoken about - - ?---Yes.

- - - which is that it is a fee for service and not a fee for access to service?---Yes.

So it should not have been charged unless a service was provided?---Yes.

5 And the second was that, in any event, the Product Disclosure Statement and other documents providing to members were misleading because they did not tell the members that they could reduce the fee down to zero?---Yes.

10 And what NULIS is doing is suggesting that the basis upon which it will remediate is on the premise that there was a problem with the disclosure, rather than that there was a problem because the fee could only be charged if a service was provided?---So I go back to the comment I made at – at the previous point. The proposal that was – or the remediation scheme that this letter was based on was – was based on a recommendation and analysis by the management team that was only about
15 disclosure. And the trustee believed at that point in time that further work needed to be done in order to determine whether or not the trustee – the remediation program and the trustee had, to go back to use ASICs words, or to go back to the point of saying, “If a service hadn’t been provided and we couldn’t – we couldn’t – we didn’t understand or couldn’t turn our mind to satisfy ourselves that a service had been
20 provided, that it would affect the remediation program.”

None of that is explained in this letter, is it?---No, but it was minuted by the – by the trustee delegates in turning its mind to the remediation program that was put in front of it at the – at this point in time.

25 And just so we understand what you mean by that, the trustee delegated to two people on behalf of the trustee to make the decision to approve the proposal for remediation?---Yes.

30 And those two people were you and Peggy O’Neal?---Correct.

And what you are saying is what management put in front of you and Ms O’Neal was this?---Yes.

35 And, therefore, what else could you do?---No. Well, what else we did was ask for what we felt were shortcomings in the review process that had been undertaken at that time to be dealt to by the breach review committee, and – and on that, there would be review as to whether or not this was deemed to be an adequate – not offer, but an adequate proposal put to ASIC.

40 And the way the proposal worked was this, summarised at the bottom of the page:

The PSF remediation scheme would involve the following.

45 You see – I’m sorry. We’ll just wait for that to come up. (1):

NULIS will identify all MKPS members who were charged the PSF.

?---Yes, because at this point ASIC didn't have a – an issue with entire members; they'd only raised an issue with us around transferred members, which was a much smaller subset of the membership. The trustee did not believe that it was appropriate to only look to remediate a very small subset of MKPS members. So if you go back to the previous page where it refers to transferred members - - -

Yes, that's - - -?---It was a very – it was a very specific set of transferred members, not all MKPS members.

10 Transferred members are the members transferred from the - - -?---No.

- - - MKBS to the MKPS?---It was a defined set of members by ASIC that related to, I believe, around \$7 million worth of PSF fees that had been paid.

15 I see. And the proposal is for MKPS members, if we go over the page, that (a):

NULIS will write to each member.

?---Yes.
20

And offer the member – explain to the member the services that the member could access for the PSF?---Yes.

25 Again, that's on the false premise that this was a fee for access to service rather than for service?---No. It was to also – no, I don't believe so.

Well, we agree, don't we, it was a fee for service rather than a fee for access to service?---Yes, and our disclosure was not explicit on the types of services the member could expect to receive from their adviser.
30

This isn't about telling them, "These are the services you should have received"; this is about telling them, "These are the services you could access for the PSF." That's what it says. The services the member could access for the PSF?---Yes.

35 And then (d), what would be offered to the member is the opportunity to retrospectively opt out of the PSF?---Yes.

And so if a member returns an election form or calls the NULIS customer service centre, then they'll receive a refund?---Yes.
40

And then once whatever the allocated time period for a response is up, NULIS will then consider what to do about people who haven't responded?---Yes.

And it says in 3:
45

The communications with members will clearly explain the reason for the PSF remediation scheme.

?---Yes.

And those reasons would presumably reflect the continued premise being put forward by NULIS to ASIC that this was a fee for access to service rather than a fee for service?---No, that was not the discussion in the meeting at the time.

Nobody discussed what would go in the communications to clearly explain the basis?---No. But – but my – that’s okay.

I tender that document, Commissioner.

THE COMMISSIONER: Letter 29 March ’18, NULIS to Mullaly, ASIC.0036.0001.7316, exhibit 5.74.

15

**EXHIBIT #5.74 LETTER FROM NULIS TO MULLALY,
ASIC.0036.0001.7316 DATED 29/03/2018**

MR HODGE: Commissioner, I am just concerned. Is that a convenient time.

THE COMMISSIONER: Yes.

MR HODGE: I am concerned the witness has now been giving evidence for - - -

25

THE COMMISSIONER: Two hours.

MR HODGE: Yes, almost two hours.

THE COMMISSIONER: If I come back at 25 to midday.

MR HODGE: Could I – it’s 11.30. Perhaps if you come back – give the witness a 10-minute break, Commissioner. I’m sorry.

THE COMMISSIONER: The witness or counsel, Mr Hodge? 20 to midday.

ADJOURNED

[11.30 am]

40

RESUMED

[11.40 am]

THE COMMISSIONER: Yes, Mr Hodge.

45

MR HODGE: Thank you, Commissioner. Can we bring up NAB.005.562.7367. And then if we can go to – I’m sorry, I should just indicate, these are the papers in relation to the board meeting of the trustee on 18 April 2018?---Yes.

5 And then if we can go to page 86 of that document. It would be _0086. Thank you.

So this is the agenda item in relation to a paper being presented by Mr Marriott to the board about the plan service fees?---Yes.

10

And the – you can see what happened was the directors discussed and noted the paper?---Yes.

15 And then if we go over the page to _0087, see the paper is summarising what has happened since the last meeting of the board on 28 February/1 March?---Yes.

And it’s noting that at that earlier board meeting it had been resolved to delegate the authority to you and Ms O’Neill to approve management’s recommendation proposal in relation to PSFs?---Yes.

20

And this is the point you were making before, that management came and put a proposal to you?---Yes.

And you approved it?---Yes.

25

And that discussion and approval occurred on 19 March 2018?---Yes.

And the strategy – I’m sorry, the proposal was, as we’ve already seen, one that followed the principles that would apply for misleading or deceptive conduct?---Yes.

30

And then we see the delegates approved the proposal to be submitted to ASIC?---Yes.

And the second point is:

35

No admission of liability. Compensation to be paid on an ex gratia basis rather than as a compensation payment for loss suffered as a result of a breach.

40 ?---Yes.

And then the bullet point after that is:

45 *Intention to remove the PSF from the small proportion of current members currently paying the PSF.*

?---Yes.

And then further down you see:

5 *Management are undertaking further analysis in respect of members paying larger PSFs by dollar value which management do not currently believe is a breach, noting that it is subject to further advice and is yet to be considered by the breach review committee.*

?---Yes.

10 Now, that seems to be management undertaking something – some further review that is different from the further review that you described 20 minutes ago?---It was including the actual fees charged to members and it included where members had paid – appeared to be paying fees larger than we would have expected in respect of the – the plan service fee for general advice services.

15 Now, you see, we just need to make sure we've got this as clear as possible. What this paper seems to be recording is that the analysis that management was going to do was in respect of members paying larger PSFs. You agree?---“Paying” – yes.

20 And the point you are making is the reason that was an issue was because it appeared as if some members were paying larger than expected PSFs?---And that our monitoring had not identified that and our monitoring didn't – yes.

25 Pick up that they were paying such high PSFs?---Higher than we would have expected, yes.

30 And that seems to be a different thing from what you had indicated to the Commissioner earlier, which was that the review that was being undertaken was a general review into whether services had been provided in exchange for PSFs?---No. We – essentially, we couldn't – we had discussed whether or not we would be able to do a review of whether or not services were provided. But essentially, over 70 per cent or roughly 70 per cent of the plan service fee are actually charged by external financial advisers – so not related. And we needed a – first of all, a remediation strategy that could be applied across all our members. So while we might have been able to go and test related party planners and whether or not they were providing services, we didn't believe we could extend that to all our members, and so that wasn't seen to be a – an appropriate approach in the context of determining the provision of services. I didn't intend to be misleading in my commentary before but, essentially, what we were looking into was our monitoring of the PSF, and that would, in my view, at the time, give us more information as to what was going on and determine whether or not the trustee could make any other determination other than we didn't have evidence to be able to say categorically that members were receiving services and so would affect the remediation program.

45 When we were addressing that issue before the break, do you recall we were addressing it in the context of a difference between a fee for an access to service and a fee for service?---Yes.

And we were discussing the fact that the letter from NULIS to ASIC continued to present the position that it was a fee for access to service?---Yes.

5 And you were explaining that although the letter was incorrect in asserting that, because that was not your view, that you considered it to be a fee for service?---They weren't my words that I would use to describe the PSF, yes – albeit that I signed the letter.

10 Because you considered it to be a fee for service. I had understood you to be saying that you had asked management to look at what evidence there was of services having been provided for the fees. Was that not what you were saying?---It – it was to look into what monitoring the trustee had in place in respect of PSFs and to consider the controls that the trustee had and whether they were adequate for us to be able to make a determination of whether the trustee had in fact – could turn its mind
15 to say that, “Yes, services were being provided.”

I see. So your evidence was:

20 *And at this point that this letter was approved, the trustee had asked for further work to be undertaken by the breach review committee in respect of the monitoring it had in place and whether or not we could make a determination that services were being provided.*

25 ?---Yes. That would include – and while I wasn't specific at the time, it did include a review into members who were paying fees that were higher than what we expected.

30 But this suggests – this board paper suggests that it was limited to reviewing fees that were higher than what were expected?---It was – at my – at the time, the intent of the delegates was for the trustee to determine whether or not it had any further breaches in respect of the element of the no obligation or the – whether or not we could determine services had been provided.

35 But none of that was written down?---We did have minutes of that particular meeting.

I see. Of the meeting of the delegates with the - - -?---Yes.

- - - executive management?---Yes.

40 All right. Have you seen those in the course of preparing for this?---No, but I would have reviewed them after the meeting.

45 All right. And do you record that they – I'm sorry, do you recall that they record that what was to be investigated was whether there was a breach because services were not provided in exchange for the fees?---I don't, but what we did discuss in the meeting and what the delegates were specific on was understanding what the trustee had actually breached. And we didn't believe that all necessary review had been

undertaken for us to make that analysis at that time, and that was what we were expecting to come back to – to us once that review had been undertaken and completed.

5 I thought you said a moment ago that because 70 per cent of the PSFs were being paid to external advice licensees, it was not possible to review or practical to review whether or not services had been provided by them in exchange for fees?---So – so what I was expecting was that we were asking management to turn their mind to all of the controls that the trustee had in place, including a review of the actual
10 monitoring we had over the fees being paid, and to come back with a position on whether or not the trustee had breached any further requirements.

Right. Let me make sure that, in summary, I've understood the evidence that you're giving, which is that in order to attempt to reach a resolution with ASIC, you put
15 forward one position which was that it was a fee for access to service rather than a fee for service and a remediation proposal which was an opt-in remediation proposal?---I think at the point the opt-in remediation proposal was considered valid was around disclosure breaches. And I think you mentioned that before.

20 And so you, though – you say – were actually going to get management to go back and check whether there was a different breach which was a breach of not having provided service for the fees. Is that right?---Well – well, we weren't providing the service. Whether or not the controls we had in place were appropriate in respect of determining whether or not a valid service had been provided to a MKPS member.

25 I don't understand why you would need to investigate that. You have a risk report that we have already looked at which says you had no controls for determining whether or not services had been provided for fees?---I – I think that that review was in respect of adviser service fees.

30 You think it was only for adviser service fees?---I would need to go back and look whether it called out PSF. So I recognise that – that we did have a review calling out weaknesses and controls. I think what the trustee was trying to do at the March meeting was ensure that all relevant factors in respect of breaches it may have made
35 had been appropriately reviewed and considered.

Let us assume for a moment that the – that ASIC had accepted the opt-in proposal. What would have happened in relation to this further review that was apparently being undertaken?---It would have come back to the trustee delegates.

40 And, again, you say you were making a proposal to ASIC to resolve the entire issue in relation to PSFs, but with the contemplation that, in fact, you might discover that there had been no services provided in exchange for the fees?---Sorry, can you repeat that again?

45 Yes. Let me break it down. You were seeking to resolve this with ASIC – the entire PSF issue – on the premise that it was a fee for access to service rather than a fee for

service?---No, it was based on it being a disclosure breach and it being that we had not disclosed that the member could turn the fee off.

5 The letter that you sent to ASIC with the proposal says NULISs position is that it is a fee for access to service?---I've already agreed that in my mind the trustee would be charging – or would be deducting fees for the provision of service, and while I did sign a letter saying “access to”, it was never my view that we would deduct fees for the mere access of service – services being offered.

10 This review that you say you asked to be undertaken, had that been completed by the time you finished as the chair?---I – I would say that the conclusion that the trustee was looking for in respect of whether or not we could conclude that our controls were appropriate to determine services – sorry, it's a very longwinded answer, I realise – that services had been provided; had been concluded; and that there was a
15 proposal of full remediation that was put to ASIC prior to me finishing my role as the chair.

But what happened was that ASIC rejected the opt-in proposal?---Yes, they did.

20 And, ultimately, then the continuance of this negotiation was that NULIS agreed to return all PSFs to MKPS members?---It did.

And it did that because ASIC refused to accept its proposal for opt-in remediation?---No, I don't believe so - - -

25 Can I tender that document, Commissioner.

THE COMMISSIONER: Board papers, NULIS board meeting 18 April '18 concerning plan service fee, NAB.005.562.7367, exhibit 5.75.

30

EXHIBIT #5.75 BOARD PAPERS OF NULIS BOARD MEETING DATED 18/04/2018 (NAB.005.562.7367)

35

MR HODGE: Can I now bring up ASIC.0039.0001.1729. This is a letter to a number of people within ASIC dated 13 April 2018?---Yes.

40 And if we go to the third page of the letter, .1731, we see it's a letter signed by Ms Cook, the chief legal and commercial counsel for NAB?---Yes.

At some point you've looked at this letter?---I would like to see the full letter. I don't believe I've seen it before.

45 Right. Can we have the full letter provided to Ms Smith?---I don't know whether or not I've seen this. I don't believe I have. I – I did attend a meeting with Ms Cook

and ASIC where there were material – materials were tabled at that meeting but I don't know whether this was part of those.

5 Well, just put that document on one side of the page – one side of the screen and, on the other side of the screen, can we bring up ASIC.0036.0002.3180. You see, on the right-hand side of the screen, there's a letter dated 9 May 2018 to you and Ms Cook?---Yes.

10 And you see that under the heading Suspected Misconduct by NAB Group:

We refer to your letters dated 29 March 2018, 13 April 2018 and 8 May 2018.

?---Yes.

15 You, I assume, would have read this letter addressed to you?---Yes.

20 Given that it refers to three letters sent by NAB to ASIC, would you have also sought out and read those letters?---I did not. I did ask what letters they were referring to and was of the understanding that – I did not seek out and read the letters in respect of the advice business.

I see. When you got this letter on 9 May 2018 - - -?---Yes.

25 - - - you asked about those letters?---Whether they were letters in respect of the trustee business, yes.

30 And, again, the adviser service fees issue – do you see that as not an issue concerning the trustee business?---The – the remediation and the agreement of the remediation of the adviser service fee matter – I do not believe it is my role to be negotiating or involved in the negotiation of that with the regulator.

35 But is it your role to say to the related party advice licensee to whom you have paid the money, “Your conduct is unacceptable”?---I think I've already responded to a similar version of that question earlier where I have talked about the response that the trustee has given and the things and – it has undertaken. I'm still unaware exactly what the poor conduct is and the extent of the poor conduct by the advice licensee, and I believe the point of ASICs review will determine the extent of – of the provision of advice services and the adequacy of that. So at this point, I know that the regulator is unhappy with – with the advice licensee in respect of the provision of
40 advice services. What hasn't been demonstrated is who that relates to, how wide it is and how extensive it is.

45 But you know the issue is have services been provided in exchange for the adviser service fees?---Yes.

And you know that some of those adviser service fees have been deducted by the trustee from the members' accounts and paid to advice licensees?---Yes.

And you don't know, because nobody knows, because NAB has not done a proper review of it, in how many incidents and in how much of a total amount has the trustee incorrectly deducted from members' accounts and paid to the advice licensees?---Correct.

5

Surely, that is something that the trustee should take not just an interest, but an active interest in?---I think I've already said that the trustee has taken an active interest in that.

10 Can we just focus for a moment on the letter on the left-hand side of the page, .1729. You will recall we looked earlier at documents showing the various permutations of proposals that NAB had made in relation to the methodology for determining whether services had been provided and whether refunds needed to be made?---Yes.

15 And you will recall that one of the issues raised by the outline of contraventions from ASIC was an objection to the idea of NAB assessing whether there was some interaction between the customer and the adviser rather than whether the contracted service had been provided?---Yes.

20 Now, what you will see at the bottom of this page is a new variation on a proposal from NAB, and that is – and you can see this in paragraphs 1 and 2:

25 *For post-FOFA customers, that is, customers who commenced their ongoing service arrangement between 1 July 2013 and 31 December 2015, NAB will undertake an automatic investigation and review of the arrangements during the relevant period.*

Do you see that?---Sorry. You're on page 1?

30 Yes, on page 1?---Yes.

But in paragraph 2:

35 *For customers who had commenced their ongoing service arrangement with NAB Financial Planning before the commencement of FOFA, that is, between 1 January 2009 and 1 July 2013, NAB will offer the opportunity to request a review of service delivery under their ongoing service arrangements during the relevant period.*

40 That is to say, an opt-in process?---Yes.

Were you aware of this proposal having been put up by NAB to ASIC to try to deal with the question of whether services had been provided in exchange for service fees?---No.

45

You've never been aware of that? This is the first time you are hearing about it?---Of – I may have – it may have been discussed in the meeting with ASIC on the

15th of – I believe the date was – I could have the date wrong. I attended a meeting with Sharon Cook – Ms Cook after 9 May with ASIC, and there were representatives from the advice business in that meeting. I – I had – whether it was at that point that – it could have been discussed then, but I don't recall it, and – and I was not aware of an opt-in process.

And do you consider an opt-in process to be unacceptable as the trustee?---I – in terms of – I – I think what the trustee would be looking for would be to ensure that all customers, when they have paid an adviser service fee, have been delivered a service, and if there is a – an issue with – that clearly ASIC believes there is – I believe the advice licensee needs to be able to demonstrate for all members of the superannuation business where an adviser service has been paid that service has been provided.

Do you recall at the meeting that you attended with Ms Cook and ASIC what the rationale was that was presented by NAB to ASIC for its approach to remediating adviser service fees?---Essentially, what was mostly discussed at that meeting was a commitment from the advice business to undertake a review in the form that ASIC was requiring, and to – so – so the opt-in – what I was saying is why I don't remember it. It could have been discussed in that meeting so I – I can't say black and white that I haven't heard it before, but I don't remember it. That meeting was really focused on what NAB were proposing in respect of the resolution of the ASF review matter.

Can we go to page 2 of that document. I want to take you to some parts and see whether this brings back any recollection for you. You see in the second paragraph, it said:

Our approach may not be consistent with steps being taken by some of our industry peers; however, we consider a different approach is warranted given NAB led the industry away from commission-based adviser remuneration structures.

?---Sorry, what – yes, I see.

Does that bring back any recollection for you of the position being taken by NAB at that meeting with ASIC?---No. So as I mentioned, the meeting with ASIC was really focused on accepting ASICs requirements and – there was a – there – I believe there was a document or a discussion – I'm not sure if it was actually documented in the meeting – around the – the – what ASIC was looking for in respect of an adviser service fee review was being committed to by the – the – the bank.

Perhaps I will frame the question more generally. Does this bring back any recollection for you of any explanation given by somebody within NAB as to the rationale for NABs approach to remediating - - -?---No.

- - - the payers of adviser service fees?---No.

All right. And then you see in the next paragraph:

5 *Hindsight suggests that NAB might have been better served if we elected, like many of our peers did, to take the easier and more attractive option of placing continued reliance on commission arrangements until the long tail of the generous FOFA grandfathering regime eventually runs out.*

?---Yes.

10 Do you recall being informed by anybody within NAB that NAB considered that in hindsight, it might have been better served if it had simply elected to stick with commissions rather than moving to fees for service earlier?---No.

And then in the fourth paragraph, you'll see:

15 *Asking NAB now conduct a historical pre-FOFA review of how we transitioned customers, advisers and product issuers to fee for service arrangements in circumstances where there was no corresponding regulatory requirement to do so challenges whether NAB ought to have taken a leadership position in this regard.*

20

And then you'll see also:

25 *But for the changes, the pre-FOFA customers would have continued to be in commission paying arrangements.*

?---Yes.

30 Does that bring back any recollection for you of having been informed by anybody from NAB that what is set out here was a reason why NAB didn't think it should have to check whether it had provided services to customers who had entered into ongoing service agreements before 1 July 2013?---No.

35 And so that we can be clear, what this paragraph appears to be saying is that NABs position was that if it had just stuck with commissions for pre-1 July 2013 clients, it wouldn't have had to have provided any services in order to be entitled to the money. And, therefore, where it entered into an agreement to provide a service in exchange for money before 1 July 2013, it shouldn't have to check whether it has provided that service in order to keep the money. Is that your understanding of it?---I – I would

40 say I am not sure of the intent behind what those paragraphs are, and I was not involved in any of the conversations or the preparation of this letter. I – I have not been briefed on the remediation approach being proposed here, nor the thinking that underpins this letter. So I would have to say I don't know.

45 Right. Can you see the next paragraph:

As you know, commission-based remuneration structures are opaque, lack any corresponding customer service obligation and are not generally understood by customers.

5 ?---Yes.

Is that a view you share?---I think that's a fair assessment.

10 And then if we go over the page to .1731, you see the heading, ASICs Outline of Suspect Offending – Adviser Service Fees?---Yes.

And you see about halfway down the page, the paragraph that begins:

To provide ASIC - - -

15 ?---Yes.

20 And so what's being set out there is that an independent expert will be retained to test and assure the controls, design and operational effectiveness of this proposed approach?---Yes.

25 And the proposed approach, as we've seen, is that pre-FOFA service clients will have to opt in to be remediated, but post-FOFA service clients will be remediated where there's no evidence of service?---Yes, I think that's what the paragraph 2 on page 1 is saying.

And then you see the next paragraph:

30 *I note that ASIC has previously suggested that NAB consider making a community benefit payment in respect of this matter. Our preference is to provide for a more direct, relevant and effective use of funds. Accordingly, as noted above, we have taken the step of including a pool of \$3 million for certain customers to receive further advice about their circumstances.*

35 ?---Yes.

And then you see the next paragraph after that:

40 *In terms of ASICs request for a significant regulatory response, given the steps being undertaken, we do not consider that administrative action is a necessary way to conclude this matter.*

?---Yes.

45 Now, that proposal seems to be – and I want to check whether you knew about this – that for pre-FOFA clients, they will get to opt in to say they didn't receive advice and, therefore, should get their fees back. That's the first part. The second part is

that for post-FOFA clients, if there's no evidence of service having been provided, then they will get their fees refunded. The third part is there will be an independent expert who will test that process, and the fourth part is that rather than making a community benefit payment, NAB will create a pool of \$3 million to fund further financial advice to affected customers, presumably by its own advisers?---So I don't know of any of the proposals in – in the paragraphs on page 1, nor the paragraph in respect of the \$3 million, but I do believe the customer advocate program also involved an offer of financial advice to customers of a member's choosing, so not – it didn't have to be within the group.

Had you been advised of this proposal, would you, as the trustee, have considered it adequate?---I – I think that I probably have already answered that in the context of saying that my view is that where – where we have paid adviser service fees, whether it be pre-FOFA or post, there would need to be an understanding of – that services were actually provided.

So the answer to my question is no. Had you been advised about it as the trustee, you would not have considered it adequate?---Based on the limited conversation we've had, I would suspect the answer is no. I would not think it was adequate.

And just – and to enable you to comment on the particular part of the proposal that would concern you, can we go to page .1743, and you'll see this is appendix B, setting out what will happen for pre-FOFA clients?---Yes.

And the first step in the pre-FOFA clients' process is that NAB will write to the pre-FOFA client on one occasion?---Yes.

And you see it says:

The correspondence will –

and then there's a number of things that the correspondence will do?---Yes.

And (e) is:

Inform the pre-FOFA client that they have six months to contact NAB to request a review of their OSP –

which would be - - -?---Ongoing service.

Arrangement. And then (f) is:

Request that the pre-FOFA client attest that they didn't receive the service.

?---Yes.

And then step 2 is:

For pre-FOFA clients who contact NAB within the six-month period –

and then everything else follows for that?---Yes.

5 And it's that particular part, which is that in order for there to be a review of whether
the service has been provided, the pre-FOFA client has to contact NAB within six
months and attest that they didn't receive the service – that is the part that you, as the
trustee, had you known about it, would not have considered acceptable?---So I think
the trustee would need to turn its mind to understand what the difference the
10 organisation thinks between pre-FOFA and post-FOFA is and – and consider kind of
whether or not – I – on face value, you need to demonstrate that advice has been
provided. I'm not sure whether there's a difference between pre and post-FOFA. I
would expect that we would be looking for ensuring that all – all members are
appropriately remediated in respect of advice services.

15 You know what NAB says is the difference. We've looked at that part of the
letter?---I've looked at a – a brief summary of a letter that – I would expect it is
based on far more information and detail, and so – I think I've said to you I agree
that the review should ensure that services are provided to members and appropriate
20 remediation is provided when services are not.

I tender that document, Commissioner.

25 THE COMMISSIONER: Letter NAB to ASIC, 13 April '18,
ASIC.0039.0001.1729, exhibit 5.76.

**EXHIBIT #5.76 LETTER FROM NAB TO ASIC, ASIC.0039.0001.1729
DATED 13/04/2018**

30

MR HODGE: Now, the document on the right-hand side of the screen which we
were looking at a moment ago is ASIC.0036.0002.3180?---Yes.

35 And this is a letter to you and to Ms Cook?---Yes.

And you recall having received this letter?---Yes.

And read it?---Yes.

40

And you recall that ASIC rejected both the proposal that Ms Cook had made for
dealing with adviser service fees and the proposal that you had made for dealing with
plan service fees?---Yes.

45 I tender that document, Commissioner.

THE COMMISSIONER: Letter ASIC to Cook and Smith, 9 May '18,
ASIC.0036.0002.3180, exhibit 5.77.

5 **EXHIBIT #5.77 LETTER FROM ASIC TO COOK AND SMITH,
ASIC.0036.0002.3180 DATED 09/05/2018**

10 MR HODGE: Now, one of the things that was going on at the same time, of which
you are I think at least now aware, was that ASIC was raising an issue as to the
number of occasions on which NAB had breached the requirement to provide a
notice of significant breach as soon as possible, but in any event, within 10 business
15 days?---So at the – at this time, what I was aware of was that ASIC had been
undertaking a industry-wide review of breach reporting, of which the NAB Group,
including the Wealth entities and NULIS, were participating in by providing
information. We had received ongoing updates through the CRO report that – that
that review was occurring.

20 Did you know that ASIC regarded NAB as an outlier in the industry?---No, I did not.

I want to show you a document, which is NAB.005.896.0001. Now, I'm assuming
you haven't seen this document before?---No.

25 Including in preparation for giving evidence?---I may have seen it on Sunday
evening.

Okay. So this is a briefing planner for a meeting between Mr Thorburn and Mr
Shipton?---Yes.

30 And if we go to page .0008 of that document, you see there's a section at the very
top, Breach Reporting Project?---Yes.

35 And I think you've referred to this, which is that you were aware that ASIC was
undertaking an industry-wide review of breach reporting practices?---Yes, and that
we had – I – I didn't want to quote section 33 because I thought might get it wrong,
but a section 33 notice, yes.

And you see the last sentence there is:

40 *ASIC will likely seek further engagement with NAB about the extent of the
issue, noting that NAB appears to be an outlier to industry.*

?---I can see that.

45 But that wasn't a matter that you, as the trustee, had been told at any time?---Not
while I was on the board, no.

All right. Is it a matter that you've now been told after you left the board - - -?---I didn't – no, I didn't know that NAB was considered to be an outlier.

I tender that document, Commissioner.

5

THE COMMISSIONER: Briefing planner for meeting of 26 April '18 between Thorburn and Shipton, NAB.005.896.0001, exhibit 5.78.

10 **EXHIBIT #5.78 BRIEFING PLANNER FOR MEETING OF 26/05/2018
BETWEEN THORBURN AND SHIPTON, NAB.005.896.0001**

MR HODGE: Can we bring up ASIC.0039.0001.1797. So this is a letter from
15 ASIC to NAB following up on a section 33 notice dated 27 April 2018?---Yes.

Now, this is a document that you saw in the course of preparing to give evidence?---I think it's attached to my witness statement.

20 You've exhibited it?---Yes.

And it notes – and this is what I want to direct your attention to – that in paragraph 1:

25 *We have attached a schedule with the current list of 110 breach reports from licensees within the NAB Group lodged to ASIC between 2014 and 2017. It appears that all of these breach reports were lodged in excess of the maximum allowable 10 business days to report a significant breach to ASIC upon awareness.*

30 ?---Yes.

And I don't need to tender that document, Commissioner. That's already in evidence through Ms Smith. And then can we bring up ASIC.0039.0001.1776. And I think this document is also exhibited to your statement?---Yes, this was the response that
35 was provided by NAB in respect – for that letter.

That's right. This is NABs response. And we can see, about halfway down the page:

40 *Based on NABs data validation, there are 84 significant breaches which were reported to ASIC in excess of 10 business days (out of a total of 297 significant breaches reported to ASIC in the 2014-2017 calendar years).*

?---Yes.

45 And NAB has done a recalculation, the effect of which seems to be, “We don't agree with all of the 110 that you have identified, ASIC; there are some that you've

missed.” And that’s how they get to 84?---I don’t know how they got to 84, but they’ve done analysis and determined it to be 84.

5 All right. Now, I’m trying to understand, the fact of this deficiency in breach reporting by NAB to ASIC – that is something that you became aware of for the first time when?---In preparation for my witness statement.

10 And that was after you had finished as the chair of the trustee?---Yes, but I will make one comment that I did talk about yesterday, that pre-2015 for the trustee, it had been identified that our breach review process was – was not as it should be, and we had an external review undertaken by Pricewaterhouse Coopers, and improvements were implemented – recommended and implemented in respect of the breach review process for the trustee. And so I think, as detailed in my witness statement, the bulk of NULISs non-compliance with the 10 days occurred prior to that uplift in control
15 as a result of the review. I think there have only been a couple of instances of one or two days being late since the 2015 period. So what I was trying to – long-winded way of saying yes, I did believe we had a problem-2015. We undertook an external review, took steps and actions in place to ensure we were meeting legislative requirements to – to report breaches within 10 days, and that we – we were largely
20 complying with that requirement.

25 Just so we can break that down – or I can break that down – your recollection is that there was an issue about the breach reporting by NAB in 2015 which prompted steps to be taken?---So I can’t speak for NAB. I can speak for NULIS.

Well, let’s just be clear about that. NULIS doesn’t have its own internal breach reporting facility?---Yes, it does. So facility – so we use infrastructure, so databases and those sorts of things, across the entire group, one system called risksmart to lodge breaches into, etcetera, but the breach review committee assessing breaches for
30 NULIS is not NABs breach review committee. It does consider NAB Wealth matters, but it’s different to the – the rest of the NABs process for reviewing and assessing breaches.

35 I think the question I asked you on 7 August was:

The breach review committee is not within the trustee.

And you answered:

40 *Correct.*

?---So what I meant by that was the trustee does not sit on the breach review committee, nor is it part of the trustee’s formal committee structure. It’s a management committee that operates under a charter that the trustee approves.
45

And - - -?---So I - - -

- - - it's a charter within NAB Wealth?---It's a charter – charter approved by NULIS.

But the breach review committee sits within NAB Wealth?---Yes.

5 And it's the breach review committee for all of NAB Wealth, including the trustee?---Yes.

And insofar as the trustee complies with its obligations to report significant breaches to ASIC, it is – and also to APRA, it is dependent upon that breach review committee sitting within NAB Wealth?---Yes.

10 And the breach review committee determines whether there has been a significant breach and gives notice to APRA or ASIC of the breach?---Yes.

15 And then once it has done so, that is reported to the trustee?---Yes.

Now, what I want to understand is for the trustee, in its management of its relationship with NAB Wealth, does the fact of the number of failures to make a significant breach notification within the maximum allowable period of 10 business days raise an issue for the trustee?---So I – I think the report relates to the whole of NAB, as I understand it, and not just NAB Wealth. I – the trustee has not considered the findings from the ASIC review. It has not gone to the board yet. And I expect it will be discussed at the board and I understand there are steps – I – I expect that part of that will be looking at whether or not further steps need to be taken to enhance the breach review committee process, but that has not happened and it hadn't happened at the time I – before I left the board.

Ms Dias is just pointing out to me if you look at footnote 2 on that document, you see - - -?---Yes, I can see that 83 of them relate to NAB Wealth licensees.

30 All right. So - - -?---What I don't - - -

- - - 83 – yes, go on?---The improvements I spoke about in respect of the trustee's breach reporting would actually also be improvements for the other licensees. I have not reviewed the other licensees' late notices; I've just reviewed the trustee's in responding to – in – in terms of drawing to – or drawing to attention the elements that actually relate to the trustee. I think if there was a systemic issue still continuing with the other – the other parts of Wealth in terms of not reporting, you know, post-2015, that that would – that that would, potentially, still be a risk for the trustee.

40 I tender that document, Commissioner.

THE COMMISSIONER: Letter ASIC to NAB of 15 May '18, is it?

45 MR HODGE: Sorry, you don't need to do that, Commissioner.

THE COMMISSIONER: No, it's in?

MR HODGE: I'm told it's exhibited to Ms Smith's statement.

THE COMMISSIONER: Exhibited to her statement. Very well.

5 MR HODGE: Can we bring up ASIC.0039.0001.1173. This is a letter from NULIS to ASIC dated 7 June 2018?---Yes.

And it's signed by you?---Yes.

10 And you see it refers to two letters that we've already looked at, your letter of 29 March 2018 presenting the opt-in remediation approach - - -?---Yes.

- - - and the letter in response from ASIC on 9 May 2018?---Yes.

15 And it then says:

We note your observations that the plan service fee remediation scheme does not adequately address ASICs concerns.

20 And then it goes on to explain that:

NULIS has considered those comments and is prepared to enter into the following arrangement to bring this matter to finality.

25 ?---Yes.

And it then runs through a series of things, one of which is, in number 2:

30 *NULIS will fully refund all PSF amounts charged to MKPS members' accounts together with investment earnings.*

?---Yes.

35 Now, just so I understand, the reason for that change of position was what?---I – I believe it was based on the facts that were put – that the trustee – so what didn't – I believe it was based on the facts that – of the matters that I talked about earlier, that the trustee delegates asked to be reviewed by the breach review committee.

40 Are you saying that at some time between the meeting between you and Ms O'Neal and management and this date on 7 June 2018, that there is a report by management to the trustees - - -?---No, there was not.

All right. Was there any information provided by management to the trustees?---No.

45 So it had – can I suggest the change in position, then, had nothing to do with management coming back and telling the trustee about anything?---No, I don't agree.

I – I believe that we would have reached the position and did reach the position regardless of what ASIC said to us. I - - -

5 The - - -?---I – I will only say the trustee in the nearly 12 years I’ve been on the board has never sought to not remediate a customer where we have done the wrong thing. And I will agree this matter has taken far too long to come to fruition. But I do believe that regardless of what ASIC said to us, we would have remediated customers based on the work that the trustee delegates asked to be undertaken by the breach review committee.

10 I think perhaps we’re not disagreeing that the work being undertaken by the breach review committee had nothing to do with this change in position?---Sorry, I’m – that was a bit of a double negative for me.

15 Aren’t you saying – aren’t you saying that you think ultimately the work of the breach review committee would have led to this position?---Yes.

But the breach review committee hadn’t completed its work by the time - - -?---I - - -
20 - - - you changed position?---I had – they hadn’t formally completed their work, but I had been in discussions with the chief risk officer and the CEO of MLC Super as to what the review was finding, and it was basically a – a – a merging of matters at the point that ASIC wrote to us and discussions with the board.

25 All right. Well, do the best you can for us. What do you recall that you were told by the chief risk officer about what this review was finding?---Essentially that – that the control environment for the trustee was not adequate, and that we would need to fully remediate the plan service fees for MKPS members.

30 You already knew that the control environment was not adequate. We have seen that in the report from the end of 2017?---Yes.

Do you agree?---Yes.

35 So is the only thing that changed was that somebody within management said, “We’re going to have to remediate all of the customers”?---No.

40 What else changed?---I – I think that – I think we – essentially, all of the factors that led to the view that full remediation was appropriate came to – came to a conclusion and came to kind of be viewed at one point in time, which led to a view of full remediation being required.

45 Can I suggest this to you: that what happened was this: that after NULIS had tried everything but the right thing without ASICs agreement, that it finally fell back on doing the right thing?---No, I don’t agree.

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

NULIS has determined to cease charging PSFs to all remaining MKPS members.

?---Yes.

5

And it says:

The fee will cease on 30 September 2018.

10 ?---Yes.

Can you explain why the fee couldn't cease any earlier than that?---I'm going off memory. Basically, it was to do with the need to provide notice to advisers that we would be ceasing the payment, and we didn't have a clause in the contract which
15 enabled us to – that had a – a – excuse me – I'm – I'm – I'm at the end of a long period. It didn't have a clause in the contract of a specific notice period, and so we were required to determine what was a reasonable notice period to provide advisers for ceasing the PSF, and this was the – the time period. What the trustee considered at the time was that members would be remediated for the full amount and not –
20 would not be disadvantaged as a result of extending the cut-off period or – or when we were turning the PSF off.

I tender that document, Commissioner.

25 THE COMMISSIONER: Letter NULIS to Mullaly ASIC – 7 June '18, ASIC.0039.0001.1173, exhibit 5.79.

30 **EXHIBIT #5.79 LETTER FROM NULIS TO MULLALY,
ASIC.0039.0001.1173 DATED 07/06/2018**

MR HODGE: And then can we bring up ASIC.0036.0003.0730. So this is a letter dated 26 June 2018. And if we turn over the page to the second page, you see it's
35 sent by Mr Steele, the general manager for NAB Financial Planning and NAB Direct Advice?---Yes.

Now, what it refers to is a meeting that occurred on 7 June 2018?---Yes.

40 Were you at that meeting?---That was the meeting that I was referring to earlier where Ms Cook was in attendance.

All right. And was it at that meeting that NAB via, I assume, Ms Cook said that NAB would conduct a full review of adviser service fees for all clients who had paid
45 those fees between 1 January 2009 and 30 June 2018?---If that's what's detailed in the letter, then I expect that to be correct. When I described what I described earlier, which was that NAB was putting forward a – a proposal and an approach for review

of the ASF matter, an agreement with what ASIC had been asking for, that was what was discussed in that meeting.

5 All right. But did you – would you have seen this letter that we are looking at here?---No.

I tender that document, Commissioner.

10 THE COMMISSIONER: Letter NAB to ASIC, 26 June '18, ASIC.0036.0003.0730, exhibit 5.80.

**EXHIBIT #5.80 LETTER FROM NAB TO ASIC, ASIC.0036.0003.0730
DATED 26/06/2018**

15

MR HODGE: And then can we bring up ASIC.0039.0001.4084. And this is a letter back from ASIC to you and Ms Cook on 28 June 2018?---Yes.

20 And this was two days before you finished as the chair. Would you have looked at this before you finished?---I suspect so.

All right. And so you – I'm sorry. I should just check one other thing related to that. You see there's a reference to:

25

At the meeting on 7 June, a draft enforceable undertaking was put forward to resolve the adviser service fees issue.

?---Yes.

30

Did you see a copy of the enforceable undertaking or the draft - - -? - - - -No.

- - - enforceable undertaking?---It was – it was in respect of the advice business and not in respect of NULIS.

35

All right. And if we go over the page to page 2, you see at the top of the page it said:

NABs proposal only covers NAB Financial Planning.

40 And that:

NAB has yet to propose a further review methodology for its additional advice licensees.

45 ?---Yes.

Were you aware of that difference between the position taken with respect to NAB financial planning and the position taken with respect to NABs other advice licensees?---I believe it was discussed in the meeting on 7 June.

5 All right. Do you know what the reason for the distinction was?---No.

Do you know whether it's been resolved?---No.

10 And then you see that at the end of that section, it said:

ASICs investigations into the adviser service fees issue is continuing.

?---Yes.

15 And then in relation to the plan service fees, you will see that it said at the end of that, as well:

ASICs investigation into NABs plan service fees conduct is ongoing, and when completed, ASIC will decide what, if any, enforcement action is required.

20 ?---Yes.

25 I want to just understand what happens between this date and when the media release goes out on 26 July 2018 announcing that NAB will refund the PSFs for MKPS members. Now, you've given a statement about that, but I take it you weren't directly involved in it because you had finished by then?---No. And I only became aware of the media release as a result of preparing my witness statement.

30 All right. Well, I'll ask you some questions and see if you can assist us with it, given that you've given the statement in relation to it. I tender that document, Commissioner.

35 THE COMMISSIONER: Letter ASIC to Cook and Smith, 28 June '18, ASIC.0039.0001.4084. Exhibit 5.81.

**EXHIBIT #5.81 LETTER FROM ASIC TO COOK AND SMITH,
ASIC.0039.0001.4084 DATED 28/06/2018**

40 MR HODGE: Now, you've exhibited the media announcement to your statement. I think it's tab 1 of your response to Rubric 5-77. The doc ID is NAB.005.817.0001?---Yes.

45 I'll just bring that up. Can we go over a page. The next page. Now, I just wanted to try to understand some aspects of this. If we go to the second page of that document, you see it says there in the second paragraph:

MLC has decided to refund members directly, even though the trustee did not retain these fees, as the trustee passed these fees on to financial advisers.

?---Yes.

5

And then it says:

Approximately 305,000 members will receive a refund, with the average refund being approximately \$220 per member, plus interest.

10

?---Yes.

And that would suggest that the amount to be refunded is \$67.1 million, plus interest?---I think that the total is included in my witness statement, yes.

15

THE COMMISSIONER: Sorry, Ms Smith, speak up?---I think that the total is included in my witness statement.

MR HODGE: Well, I think your witness statement gives a different number. That's what I'm trying to understand. So if we go to paragraph 24 of your statement, which is WIT.0001.0094.0001?---I believe that includes a compensation calculation in the 87.1 million.

20

I see. So the total dollar amount now is \$87.1 million, which is both the number of members multiplied by the average amount plus compensation. That's your understanding?---No, no. It's the individual fee - - -

25

Yes?--- - - - paid by a member, rolled up with compensation as it relates to that member, and that is the estimate at the point of providing my witness statement of the 67.1 million, plus compensation.

30

Right. I think what we've been trying to understand is – can I show you a document, which is NAB.005.894.0132. So this is an internal email. You're obviously not on it. But you see at the bottom there's the calculation of the number of customers, the total PSFs deducted and the future PSF deduction up to 30 September 2018?---Yes.

35

And it has different amounts for the PSFs. And I'm just wondering whether you know what the difference is?---I – I – I don't, and I haven't seen the email before, but I did endeavour to ensure that the data I was providing was accurate. What I do know is that the – the media release also includes amounts that would be – that would go into the pool. So for anyone under a \$20 error who has left the fund, those – those – the amounts in respect of those members will go into – into the pool of assets and for the benefit of all members in accordance with the trustee's remediation policy. I suspect that the only way I could conclude, but I can't accurately tell, would be it's just the 87.1 million would be the compensation to members – to members actually receiving money.

45

All right. I tender that document, Commissioner.

THE COMMISSIONER: Email 19 July '18 between Campbell, Baker and others, PSF

5 figures for media release, NAB.005.894.0132, exhibit 5.82.

10 **EXHIBIT #5.82 EMAIL BETWEEN CAMPBELL, BAKER AND OTHERS,
PSF FIGURES FOR MEDIA RELEASE, NAB.005.894.0132 DATED
19/07/2018**

MR HODGE: Then can we bring up NAB.005.891.0019. Can we just zoom in on the two paragraphs at the top and the comment. And the - - -

15

THE COMMISSIONER: And the comment.

MR HODGE: Do you see a draft of the media release had said that NULIS would, in addition to plan service fees, also stop charging adviser contribution fees from 1 October 2018?---Yes

20

And then you will see there's a comment from someone with the initials SC, which is:

25 *We're also ceasing adviser contribution fee.*

But then says:

30 *I support not mentioning this as ACF has been around much longer, is effectively a grandfathered Commission, much less dollar impact. Would need us to explain why there is no refund of ACF.*

?---Yes.

35 And so I want to ask a few questions about that. The first is, to your knowledge, is the adviser contribution fee also stopping from 1 October 2018?---I don't know the date but yes, it's stopping.

40 And do you know why it is not being refunded?---No, I think we discussed this yesterday, and I said I was not aware that we had done a review or not done a – had done a review into the – the adviser contribution fee and whether there was an issue with it or not.

45 Well, if the adviser contribution fee and the plan service fee are both for effectively the same thing, which is some service that's to be provided by the adviser - - -?---Yes, I think we discussed this yesterday when I said I – I haven't thought

about it before and I didn't – I would be speculating on a – you know, the legal construct of the fee for me to answer.

All right. I tender that document.

5

THE COMMISSIONER: Draft media release concerning NULIS switches off plan service fee and refunds members, NAB.005.891.0019, exhibit 5.83.

10 **EXHIBIT #5.83 DRAFT MEDIA RELEASE CONCERNING NULIS SWITCHES OFF PLAN SERVICE FEE AND REFUNDS MEMBERS, NAB.005.891.0019**

15 MR HODGE: Commissioner, could I just ask – there's two possibilities I can throw up. I want to put some propositions to Ms Smith. What I'd probably prefer to do is to stand down for five minutes so I can have a brief discussion with Ms Dias before I do that, but I'm also noticing the time, and I'm wondering whether the alternative is to adjourn for lunch now and come back at 2 o'clock. It may depend on whether Mr
20 Young thinks he will be very long in re-examination.

THE COMMISSIONER: Well, Mr Young, do you yet have a view of how long you will require in re-examination?

25 MR YOUNG: I won't take any time, subject to what follows. Subject to these propositions.

THE COMMISSIONER: I suspect the longest way around will be the most efficient, Mr Hodge. If we break and come back at 2. How long do you - - -

30

MR HODGE: I think I will be three minutes. That's all.

THE COMMISSIONER: All right. I will come back at five past 1.

35 MR HODGE: Thank you.

ADJOURNED

[1.00 pm]

40

RESUMED

[1.05 pm]

THE COMMISSIONER: Mr Hodge.

45

MR HODGE: Thank you, Commissioner.

Ms Smith, I just want to put some propositions to you and give you an opportunity to respond to them. The first proposition that I want to put to you is this: that the approach of the trustee to retaining grandfathered commissions, at least from 1 July 2016, was not in the best interests of the members and was a failure to prioritise the interests of the members over the interests of members of the NAB Group. Do you agree with that?---No.

And I want to put to you that the approach of the trustee to managing and monitoring the transition of ADAs to the MySuper product was inadequate and did not involve sufficient systems for the trustee to be satisfied that the best interests of the members were being prioritised over the interests of the NAB Group?---No.

And I want to put to you that the approach of the trustee to the allocation of the investment management fee for the investment management of the MySuper product was – did not involve sufficient monitoring or action and was not in the best interest of the members or sufficiently prioritising of the interests of the members over the interests of the members of the NAB Group?---No.

And finally, I want to put to you that the approach of NULIS and the other trustees within the NAB Group of standing by while NAB Wealth and the executive management team sought persistently, over several years, in its interactions with ASIC and with the trustee, to seek to retain fees where it had not properly reviewed or concluded that there was services provided in exchange for those fees was a failure to act in the best interests of the members and a failure to prioritise the interests of the members over the interests of the NAB Group?---No.

Commissioner, I don't have any further questions.

THE COMMISSIONER: Yes, Mr Young.

MR YOUNG: Commissioner, I have no questions.

THE COMMISSIONER: Yes.

MR YOUNG: I would ask that Ms Smith be excused.

THE COMMISSIONER: Mr Hodge, what do you say?

MR HODGE: I don't have any objection to that, Commissioner.

THE COMMISSIONER: Yes. You may step down. You're excused, Ms Smith.

<THE WITNESS WITHDREW

[1.09 pm]

45

MR HODGE: Commissioner, I'm not going to close the NAB case study. I need to consider our position in relation to it. I would like to tender at this point some statements of Ms O'Neal. Can I give you those references.

5 THE COMMISSIONER: Yes.

MR HODGE: The first is a statement of Peggy O'Neal dated 19 July 2018. The document ID is WIT.0001.0078.0001.

10 THE COMMISSIONER: That will be exhibit 5.84.

**EXHIBIT #5.84 STATEMENT OF PEGGY O'NEAL, WIT.0001.0078.0001
DATED 19/07/2018**

15

MR HODGE: The second is a statement dated 23 July 2018. It has the document ID WIT.0001.0077.0001.

20 THE COMMISSIONER: Exhibit 5.85.

**EXHIBIT #5.85 STATEMENT OF PEGGY O'NEAL, WIT.0001.0077.0001
DATED 23/07/2018**

25

MR HODGE: The third is a statement dated 3 August 2018. It has the document ID WIT.0001.0092.0001.

30 THE COMMISSIONER: Exhibit 5.86.

**EXHIBIT #5.86 STATEMENT OF PEGGY O'NEAL, WIT.0001.0092.0001
DATED 03/08/2018**

35

MR HODGE: Those are the statements, Commissioner. Is this a convenient time, then, to adjourn for lunch.

40 THE COMMISSIONER: Yes. If we come back at 2.15.

MR HODGE: Thank you, Commissioner.

THE COMMISSIONER: And is – what do we go on with at 2.15, Mr Hodge?

45

MR HODGE: Mr Silk from AustralianSuper.

THE COMMISSIONER: Mr Silk from AusSuper. Yes, thank you. 2.15.

5 **ADJOURNED** [1.10 pm]

RESUMED [2.15 pm]

10 THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, the next witness is Ian Silk from AustralianSuper.

15 **<IAN SCOTT SILK, AFFIRMED** [2.15 pm]

<EXAMINATION-IN-CHIEF BY MR O'BRIEN

20 THE COMMISSIONER: Thank you, Mr Silk. Do sit down?---Thank you.

Yes, Mr O'Bryan.

25 MR O'BRYAN: Commissioner.

Mr Silk, is your full name Ian Scott Silk?---Yes.

30 Yes. And is your business address level 26, 50 Lonsdale Street, Melbourne?---Yes, it is.

Yes. And are you currently the chief executive of AustralianSuper Proprietary Limited?---Yes, I am.

35 Mr Silk, have you received a summons dated 31 July 2018 to give evidence and produce your signed witness statements?---I have.

Yes. And do you have the summons with you?---Yes, I do.

40 I tender the summons.

THE COMMISSIONER: Exhibit 5.87, the summons to Mr Silk.

45 **EXHIBIT #5.87 SUMMONS TO MR SILK DATED 31/07/2018**

MR O'BRYAN: And, Mr Silk, have you made a witness statement dated 30 July 2018 in response to the Royal Commission's Rubric 5-01?---Yes, I have.

5 Yes. And do you have a signed copy of that witness statement with you?---I do.

Yes. And are the contents of that witness statement true and correct to the best of your knowledge?---Yes, they are.

10 I tender that witness statement and the annexures to it, Commissioner.

THE COMMISSIONER: Witness statement and annexures, 30 July '18, concerning Rubric 5-01, exhibit 5.88.

15 **EXHIBIT #5.88 WITNESS STATEMENT AND ANNEXURES OF MR SILK CONCERNING RUBRIC 5-01 DATED 30/07/2018**

MR O'BRYAN: And, Mr Silk, have you also made a second witness statement, 20 dated 31 July 2018, in response to the Royal Commission's Rubric 5-60?---Yes, I have.

Yes. And do you have that witness statement with you?---I do.

25 Yes. And are the contents of that witness statement true and correct to the best of your knowledge?---Yes, they are.

Yes. I also tender that witness statement and the annexures thereto.

30 THE COMMISSIONER: Further witness statement and annexures of 31 July '18, exhibit 5.89.

35 **EXHIBIT #5.89 FURTHER WITNESS STATEMENT AND ANNEXURES OF MR SILK DATED 31/07/2018**

MR O'BRYAN: Thank you, Commissioner.

40 THE COMMISSIONER: Thank you, Mr O'Bryan. Yes, Mr Hodge.

<CROSS-EXAMINATION BY MR HODGE

[2.18 pm]

45 MR HODGE: Thank you, Commissioner.

Mr Silk, AustralianSuper is the – or AustralianSuper Fund is the largest superannuation fund in Australia?---Yes, it is.

5 And it's also the largest holder of MySuper products in Australia?---Yes, it is.

And the majority of the assets invested – I'm sorry – the majority of the member accounts of – with AustralianSuper are invested in MySuper assets?---Correct.

10 All right. And AustralianSuper was born out of a merger that occurred in 2006?---That's right.

And that was a merger between – was it three superannuation funds?---Yes, there was one smaller fund called Finsuper and two large funds, Australian Retirement Fund and Superannuation Trust of Australia.

15 And you were the CEO of Australian Retirement Fund?---Correct.

And the other large fund was called what?---Superannuation Trust of Australia, or STA.

20 And could you just explain to the Commissioner the mechanism of the merger. Was it a successor fund transfer from the two smaller funds into the Australian Retirement Fund, or was it done by some other means?---It was a similar mechanism but not into Australian Retirement Fund. Both Finsuper and Australian Retirement Fund
25 formally merged into STA, Superannuation Trust of Australia, and simultaneously – this is on 1 July 2006 – the name was changed to AustralianSuper.

And from that point, you've then been the CEO of AustralianSuper?---That's correct.

30 And I wanted to ask you some questions in relation to the way in which the rules for board positions have come about for AustralianSuper?---Yes.

35 Could you tell the Commissioner how many directors AustralianSuper presently has?---AustralianSuper presently has 11 directors.

And that's five member directors, five employer directors, and one independent director?---That's right.

40 And the present chair of the board is one of the employer directors?---Correct. That's Heather Ridout.

And was there a change made to the constitution in 2007 dealing with the – or importing term limits for directors?---2017.

45 No, 2007. Is that right? Perhaps there's an error in the statement. In paragraph 8.5
- - -

THE COMMISSIONER: Which statement?

MR HODGE: This is the first statement of Mr Silk. It's ASU.0019.0001.0590.
And on page – on .0602, paragraph 8.5?---Yes, I believe that was 2017.

5

THE COMMISSIONER: Could I trouble you, Mr Silk, to make the amendment in
handwriting and initial the amendment?---Yes, thank you.

MR HODGE: Just before you do that, Mr Silk, I think – I think you're thinking of a
different amendment. So I think if you – if you look two paragraphs on, in 8.7,
you're dealing with your – you're thinking of the amendment that was made in June
2017?---I'm sorry, yes, I am. I am.

10

THE COMMISSIONER: I nearly led you into a perjury, Mr Silk.

15

MR HODGE: So just to clarify - - -?---Yes.

- - - there was an amendment made in 2007 to introduce term limits in relation to the
directors?---That's correct.

20

And then there was another amendment made in June of 2017, which I think was in
relation not to the constitution but to the board renewal policy to introduce a default
maximum tenure?---That's right, four by three-year terms. So a total of 12 years.

And the way in which the board renewal policy interacts with the constitution is that
the maximum tenure of 12 years under the policy applies to directors who are
covered by clause 8.5 of the constitution?---That's correct.

25

And clause 8.5 is the clause that was introduced in December of 2007?---That's
right.

30

And that was the clause that originally introduced a term limit?---Correct.

Which was a three-year term?---That's right.

35

And of the 11 directors that presently sit on the board of AustralianSuper, four of
those directors are not covered by clause 8.5?---That's correct. Those four directors
were in place prior to that change. And it was a prospective change.

And so those four directors are – and I think you explain this at page 14 of your
statement beginning at paragraph 9.1 – Ms Ridout, who is the present chair and was
appointed on 1 July 2007?---That's correct.

40

And she is one of the employer directors?---That's right.

45

And then Mr Oliver, who is the deputy chair. He is one of the member
directors?---Yes.

And he was appointed on 1 July 2007?---Yes.

And so, again, clause 8.5 doesn't apply to him?---Correct.

5 And then the third director is Mr Willis?---Yes.

And he is, again, an employer director?---That's right.

10 And he was appointed as a director – I think you say in your statement he was appointed as a director in June of 1988. That was of a predecessor fund. Is that right?---That's correct. Must was a predecessor of STA.

And so as you've explained already, in 2006 there was this merger of STA and the retirement fund and the smaller fund?---Correct.

15 And he continued on as a director of the new entity?---That's right.

And then the fourth director is Mr Daley?---Yes.

20 And he's a member director?---Correct.

And so there are four directors who aren't covered at all by the term limits?---That – that is true, as we sit here today, but the shareholders are formally reviewing that position at the moment, and are considering whether to include those four directors

25 into the same term limit arrangements that apply to all the other directors.

I see. And does the board of the trustee – so separate from the shareholders – does the board of the trustee have a view as to whether term limits should apply to all directors? I'm sorry, I should say tenure limits. Tenure limits?---Tenure limits, yes.

30 By implication, because it was the board that authorised a letter to be sent from the company secretary to the two shareholders inviting them to reconsider the current arrangements.

Do you know why the current arrangements are as they are, that is, why was this –

35 why was it only prospective that clause 8.5 operated?---I don't know.

All right. But in any event, of the four directors who are presently excluded from the application of clause 8.5, they are part of this board that has formally asked the shareholders to reconsider the position?---That's correct.

40 All right. Now - - -?---And I might say that was a unanimous resolution of the board.

And in relation to independent directors, there is only one independent director, as I think you've already explained, on the board?---That's right.

45 And does the board have a position as to whether there should be more independent directors on the board of AustralianSuper?---The board has discussed that and is

open to that. But the board's starting position is that rather than the structure of the board be defined by, for example, a third director's being independent, the more important consideration is that the board is comprised of appropriately skilled and qualified and experienced people. And so that's their overriding starting point for the optimum composition of the board, the optimum structuring of the board.

And so in order for the board to be satisfied that it has the right composition in terms of skills, does it develop some sort of matrix when a board seat becomes vacant to determine whether – or what the necessary skills are for that position?---Yes. So the board maintains a skills matrix, and when a position becomes vacant, a letter goes from the trustee office to the relevant shareholder advising that there is a vacancy, advising of any relevant skill issues that the shareholder is invited to consider when nominating a representative back to the board, and when that nomination comes back to the board, the board considers it against the skills matrix, considers all the other accompanying documentation, including curriculum vitae, reference checks and the like, and has the authority to decline it. So the board has the authority to not accept the nominee and return it to the shareholder and invite them to reconsider.

And is that under the constitution or under the – a policy of the company?---It's certainly under the policy. I'm not sure whether it's under the constitution.

And what happens if the board declines to accept the nomination but the appointing shareholder insists? How does – how would that sort of deadlock be resolved?---The – the shareholder cannot insist. If there was a deadlock, to use that term, then no appointment would be made, but in practical terms, there would be negotiations between the board, on the one hand, and the shareholder, on the other, to – to reach an agreed position.

And has this happened on a few occasions in the last few years?---The filling of a vacancy or - - -

The filling of a vacancy?---Yes, this has happened – we currently have four directors on the board who have served less than two years. So it's happened four times in the last two years.

All right. I want to move then to a second topic - - -

THE COMMISSIONER: Just before you do, you say the shareholder cannot insist. Can you expand that and tell me why the shareholder cannot insist - - -?---Yes.

- - - on the nominee?---Because the board has the authority to make the formal appointment. We – we use different terminology. We say the shareholder can appoint but the board must confirm the appointment, or sometimes we say the shareholder can nominate and the board appoints. But the practical effect is the same.

Yes. It can be expressed diplomatically or not diplomatically, I'm sure, but if push comes to shove, do I understand it that the board has the final say?---The board has the clear final say.

5 Yes.

MR HODGE: And perhaps to assist with this, Commissioner, can we bring up the current constitution of AustralianSuper, which is ASU.0013.0001.0001, which should be exhibit ISS-1.1 to the – I think this will be the first statement of Mr Silk. If we go to page .0014. We should go back a step first. If we go to page .0012. So this is providing, Commissioner, you'll see, clause 8.1:

The company must have an equal number of A class directors and B class directors.

15

I assume, Mr Silk, that an A class director is an employer – or – sorry, an A class director is the union-appointed director?---Yes, that's right.

And the B class director is the director appointed by Australian Industry?---Correct.

20

Which is the employer - - -?---Yes.

- - - representative body?---Yes.

25 And then if we go over to clause 8.3, which is on page 0014 – Commissioner, you will see 8.3(1):

The appointment and removal of A class directors and B class directors must be ratified by the board and will take effect from a date determined by the board.

30

So that – I think, in answer to the question I asked earlier, which is is it - - -?---Yes, I will adopt - - -

35 - - - under the constitution - - -?---Yes.

- - - it seems to be the constitution. Thank you. Did you want to ask anything further about that, Commissioner?

40 THE COMMISSIONER: No, no.

MR HODGE: Thank you. I want to move now, Mr Silk, to the second topic, which is The New Daily. And, Commissioner, to assist with dealing with this, can I just tender a statement of Paul Schroder. The doc ID is ASU.0018.0001.0372. I believe the solicitors for AustralianSuper have a signed – final original signed copy of the statement.

45

THE COMMISSIONER: And the statement is of what date? Have we got a date on it?

MR HODGE: 1 August, Commissioner.

5

THE COMMISSIONER: 1 August. Statement of Paul Johan Schroder, 1 August 2018, ASU.0018.0001.0372, exhibit 5.90.

10 **EXHIBIT #5.90 STATEMENT OF PAUL JOHAN SCHRODER,
ASU.0018.0001.0372 DATED 01/08/2018**

MR HODGE: Thank you, Commissioner.

15

Mr Silk, Mr Schroder is a group executive within AustralianSuper?---That's correct.

And he's given the statement in response to some questions that the Commission had asked about the investment by AustralianSuper in The New Daily?---Yes.

20

We haven't required Mr Schroder to attend to give evidence. We're hoping – I think we've indicated this to AustralianSuper – that to the extent that we need assistance or the Commissioner needs assistance with this, that you're able to address some of these issues in relation to New Daily?---Yes.

25

And I assume you have at least some level of familiarity with the new daily?---I have some level of familiarity, yes.

All right. So as we understand it, in 2012 a proposal was made for AustralianSuper to invest in The New Daily?---Yes.

30

And to help, can we bring up ASU.0018.0001.0087. This is an item from the member and employer services committee meeting, and it has been prepared by Mr Coyle?---Yes.

35

Can you explain to the Commissioner who Mr Coyle was or is?---Mr Coyle no longer works at AustralianSuper, but he was the group executive responsible for marketing at this time.

40 And - - -?---Marketing and communications, I think.

And he explains in this – I should confirm you've seen this before?---Yes, I have.

45 You have seen this memo. He explains in this memo that the Industry Super Network have approached AustralianSuper about investing or developing in an online daily newspaper?---Yes.

And at that time it was to be known as Free News?---That's correct.

And ultimately, it became known as The New Daily?---Yes.

5 And then if we go to page 2 of that document, it sets out, we can see there, the various pros and cons that were to be considered as part of the investment?---Yes.

I've used the word "investment"?---Yes.

10 That, I think, is probably misleading. As I understand it, it wasn't an investment in the sense that ultimately, when AustralianSuper acquired shares in the relevant company, they weren't acquired as an asset of the fund?---That's correct. It was offered – the – the shares in Australia – in The New Daily or Free News were offered to AustralianSuper. We ultimately accepted that invitation, but they were not, as Mr
15 Hodge says, an asset in the portfolio of assets of the fund. Instead, they were paid for out of the \$1.50 per week member fee. So the – the fund has two sets of costs, if you like, a member fee of \$1.50 a week or \$78 a year, and that pays for all non-investment costs of the fund, including marketing and the like, and it was paid out of that source, not an asset of the fund.

20 And does that reflect the fact that it – the acquisition of an interest in The New Daily wasn't perceived by AustralianSuper as being an investment intended to generate an investment return for the members?---That was our judgment, yes.

25 And rather, it was seen as something like a marketing tool?---Yes. It was – it was seen as a tool to enhance the fund's engagement with members.

And can you just explain that a little bit more, because I wonder whether – I've used the term "marketing" which would suggest it's about marketing to non-members to
30 try to attract them to the fund, but I think you're not agreeing with that. You're suggesting that it was about something else?---If I could give some context here, as Mr Hodge said in his opening yesterday, superannuation is a compulsory product, it's relatively complex, which means that many of the people who are members of superannuation funds – and it's certainly true of AustralianSuper – are not engaged with superannuation, much less their fund. And, also, as Mr Hodge said, there's a
35 significant issue in the community at large about numeracy and literacy, and in particular financial numeracy and literacy. So put all those factors together – you might expect the superannuation industry is a very stable, inert sort of industry with a whole lot of disengaged people. Notwithstanding those characteristics, it's a very
40 active industry. As the May draft report of Productivity Commission reported, there's more than two million buying decisions each year. The Productivity Commission estimated there were, I think, 450,000 people who enter the workforce, there's around 1.5 to 1.6 million – this is annually – 1.5 to 1.6 million people who change jobs or re-enter the workforce, and by their numbers, there's 220,000 people
45 who switch superannuation funds each year unrelated to a change in employment. So there's over two million decisions which go to joining a fund or electing to remain a member of a fund. In AustralianSuper's case, we have more than 200,000

members each year that leave the fund, which means that we need to replace those members and hopefully more than leave, because economies of scale and our capacity to leverage those economies of scale for the benefit of members is at the very heart of how the fund operates. So as a result of all of that, we're very keen to
5 retain as many members in the fund as we can and, where possible, recruit new members. And The New Daily was seen as a vehicle to assist us in that.

That is, to both retain existing members and also to, to some extent, gain new members?---Yes, that was very much a – a secondary consideration. This was - - -
10

Gaining new members?---Yes. It was principally about retaining members, because the economies of scale, which are so important to the operation of the fund, depend on retaining members, as well as gaining.

And what's the logic behind saying there's a free newspaper – free online newspaper that's being distributed to members and that will, therefore, lead to members staying with the fund?---So we have – in terms of a strategy to retain as many members as possible, we have a – a multi-pronged approach, more than a dozen particular activities that are directed to the – to that objective, and each of them are directed to
20 achieving one of two, preferably both, objectives. One is to remind people that they are a member of the fund, reinforce with them that they are a member of AustralianSuper, bearing in mind this is a low engagement product, most people default into the fund, they don't elect to choose the fund. So this is a – this is an important part of their membership of a fund. “Yes, I'm a member of
25 AustralianSuper; that's right. They've contacted me about this or that.” And secondly, having made that contact, seek to communicate with them means by which they can increase their retirement savings. And we – we talk about a range of actions that they can take. So the idea with The New Daily was to send them a publication, The New Daily, and for the receipt of – in the receipt of – by receipt of that
30 publication, to be reminded that AustralianSuper, my super fund, has been involved in the provision of this service to me, and in the content of The New Daily, approximately 20 to 30 per cent of the content is superannuation or finance related. So to the extent they read it, hopefully the numeracy and financial literacy issue we spoke of before might be addressed at least in part.

Now, when it was – when AustralianSuper initially acquired its interest in The New Daily, it acquired that by purchasing I think two million partly paid shares. Is that right?---That's correct, yes.
35

And they were partly paid in the sense that the initial capital contribution made by AustralianSuper was \$1 million?---That's correct.
40

And then at some stage, the further capital contribution of another million dollars was made?---Yes, about 12 months later.
45

And one of the things I'm interested in understanding is – if we just pull down that table and pop out the paragraph above, you see it says:

In order to serve this purpose, Free News –

Which, as we talked about, was what The New Daily - - -?---Yes.

5 - - - was originally to be called:

...must not, however, be a house journal and reflect the industry fund view of the world. A charter of editorial independence will need to be signed and adhered to by the owners.

10

What I'm interested in understanding is, first, do you know whether that ultimately occurred?---Yes. There is a charter of editorial independence.

15 And the second thing is I'm not sure I understand why it's in the interests of members for the trustee of the fund to acquire or put out a publication that doesn't reflect its view of the world?---Yes. The – it's not my document, of course, but I think I understand what is being sought to be communicated here. What I think is intended to be communicated, because we did speak about this, was that we didn't want to have a document that was overtly branded, overtly appeared to be just
20 another publication from the superannuation fund, because, sadly, too many of those find their way to the waste paper basket without being read. So it was really in that context that that comment's made.

25 Now, once the – once The New Daily started in publication, the original shareholders were AustralianSuper, CBUS and was it an industry super - - -?---Industry Super Holdings, ISH.

30 All right. So – and did each of those companies own a third of The New Daily or - - -?---Yes, I believe so.

All right. And it attracted controversy, the publication of The New Daily?---Yes, some controversy.

35 Was that expected?---It was not unexpected. We identified that as a risk in proceeding with that venture.

And APRA contacted AustralianSuper about the publication?---Yes, it did.

40 And we might bring that up, which is ASU.0018.0001.0119. I think this is actually the response of AustralianSuper to an email that it received from APRA querying the decision. But I take it, after this response, there wasn't further engagement with APRA?---Yes, there was communication from APRA because The New Daily had been raised at a Parliamentary committee. I think a select – Senate select committee or Senate economics committee, and the APRA representative there contacted me to
45 seek similar information as contained here as to the basis for our involvement with The New Daily.

We might come back to that in a moment. That was in relation to The New Daily, not in relation to - -?---Yes.

--- fox and henhouse?---I think you're right, sorry. That's right.

5

It was in relation to fox and hen house?---Yes, that's right. So The New Daily was raised in some discussions we had with APRA, but I – I don't recall any other formal exchanges with them on this issue.

10 All right. But you also wrote to Senator Sinodinos in relation to The New Daily?---Correct.

If we bring that up, that's ASU.0018.0001.0170. And this was in response, I think, to some comments that may have been made by Senator Sinodinos in public?---That's correct.

15

And he'd expressed some concern about The New Daily?---Yes, he had.

And then if we then bring up ASU.0018.0001.0171. And this is the response from Senator Sinodinos. He was then the assistant treasurer?---That's correct, yes.

20

And one of the things I'm interested in understanding is you see his sentence in the middle of the page, which is:

25 *The government, as per my public statement, remains concerned that the publication only be used as an engagement tool and not to progress any broader policy or political position.*

?---Yes.

30

And I understand your position is The New Daily was just an engagement tool?---Yes.

Is that right? But I'm interested in understanding, because it will tie into the next issue we're going to deal with, this position that it cannot be used to progress any broader policy or political position?---Yes.

35

Does AustralianSuper have a view as to whether it can use the fees that it collects to push a policy position in relation to superannuation?---Absolutely. We believe we can use fees – member fees to advocate for policies that we believe are to the benefit of the fund's members.

40

And we might come to the – to the detail of that in a moment, then, when we get to fox and henhouse. In relation to The New Daily, do you recall having received some emails from a journalist about it?---Yes, I do.

45

And we might just bring that up. That's ASU.0009.0002.0260.

THE COMMISSIONER: Is it annexed to the statement or is it - - -

MR HODGE: No, Commissioner.

5 THE COMMISSIONER: - - - freestanding?

MR HODGE: It may be – I don't have it as an extract. I have the document ID is ASU.0009.0002.0260, but it's, I suspect, part of a board pack supplied to the board of AustralianSuper?---Yes, that's correct.

10

All right. I'll try ASU.0009.0002.0261. All right. That's the second page of the document, but in any event, you provided a chief executive's report to the board for their meeting on 12 December 2013?---Yes.

15 And the part that we see there is a reference to The New Daily and some things that you had said to the board about The New Daily?---Yes, that's right.

And then I think annexed or attached to that was a chain of emails that you'd exchanged with a journalist named Michael Lawrence?---That's right.

20

And I should check, Commissioner. Can we just – is that subject to a non-publication direction? I suspect it's not. It will be fine. Can we then bring up page .0263. If I just ask you the questions, Mr Silk - - -?---Yes.

25 - - - I suspect you'll remember the issue. Initially, one of the ways in which this story was reported was that AustralianSuper had made an investment in The New Daily?---Yes.

30 And that created the type of confusion that you and I have already discussed because if it was an investment, AustralianSuper would be looking to earn a return in financial terms from the New Daily?---Yes, that's right.

A direct return?---Yes.

35 As distinct from obtaining membership. And so initially, the query that was raised with you was why is AustralianSuper investing in The New Daily?---Yes.

And then you explained that wasn't the case, that it was being used for member engagement, which you've already referred to?---Yes.

40

And then the question – it was put to you in response to that, which I'm interested in understanding your view of – is why is the investment in The New Daily as a member engagement tool a worthwhile use of that \$78 a year per member. So I will ask you that first, and then I have some further questions about that?---So I said this is part of a multi-pronged approach. You have to see this in the context of our – of those – that multi-pronged approach. For example, a direct mail-out – a one-off direct mail-out to AustralianSuper's members costs \$2.3 million. We are coming off

45

a low base of engagement and we're trying to improve our ability to engage meaningfully with members. This was a new and innovative approach. It was our best judgment that it was worth trying this, because heaven knows, most techniques that we've used and the industry at large have used have not been successful, if you
5 look at the – the level of disengagement. We thought it was a – a worthwhile service to provide to members on the basis that it may yield the engagement dividends I was speaking about earlier.

10 THE COMMISSIONER: What was the connection that the member drew or was able to draw between publication and AusSuper?---In the first instance, we emailed fund members for whom we had an email address and alerted them to the publication and the fact that they could participate in it. We're also hamstrung by – by our own approach. We had conflicting legal advice through this period as to whether – not as
15 to whether we could provide the service, but how we could provide it. Could we provide it on an opt-out basis or an opt-in basis. In the event, we'd started providing it on an opt-in basis, and as you might expect, the – the numbers who availed themselves of that were relatively modest. Of recent times, in an endeavour to measure the success of The New Daily in achieving both the engagement objective and the – the role it might play in assisting members making smart decisions in
20 relation to their superannuation, we have, from the start of this year, begun a 12-month trial, and members who join online are being – receiving The New Daily unless they opt out, and we're going to compare the engagement factor of that group and the decisions they've made over the course of the 12 months with a control group. So that at the end of this year, we think we'll have as good an idea as we can
25 as to whether the two objectives, in particular the retention and engagement objective, has been achieved.

And when each edition or issue arrives in the inbox, does the recipient have any overt cue connecting the receipt of the publication with AusSuper?---Not on an
30 ongoing basis.

Or at all?---Well, initially, because they - - -

35 Either opt in or opt out?---Correct.

I understand that?---Correct.

But beyond that?---That's correct.

40 Yes.

MR HODGE: Now, one of the other things that was suggested to you was rather than becoming effectively the owner of a media company, that AusSuper could simply afford to lower the administration fee?---Yes.

45 You've made the point, "Well, this came out of our \$1.50 a week fee that we were charging in any event", but I do want to understand that. Why isn't it the case that

AustralianSuper couldn't say, "Well, we're not going to spend \$2 million acquiring The New Daily, and instead we're going to lower the administration fee." Now, to be fair, it's probably going to equate to, I would guess, 90 cents in one year for all of the members, but nevertheless, why couldn't it do that?---We certainly wouldn't
5 have lowered the administration fee. As a \$2 million one-off payment from the time we've made it to now, it works out about 20 cents per annum per member. If we continue in it for some years to come, then that figure obviously declines. It was a – in the context of our overall marketing budget – and I'll back up here – \$2 million is serious money in anybody's language. For a member-focused organisation, we don't
10 splash money around lightly. So \$2 million – this expenditure was not made lightly. I think you've seen the significant material that occurred through the organisation, including at board level, before the final decision was made, but it was made on the basis of our judgment that that relatively small amount of money in the context of our multi-pronged marketing approach was worth spending.

15 I think the – to take the first part of what you said, you're effectively saying, "Whether we spent \$2 million on this or not was not going to have an effect on what our administration fee was"?---No. The – the fund's administration fee was last set in 2009 at \$1.50. It's remained at that level to this point. In the interests of full
20 disclosure, I'll say we are reviewing that, but it has been frozen at that level for – well, since 2009. And it simply wouldn't have been a realistic prospect to decline this option of participating in The New Daily and reducing the \$1.50.

25 The fee that is charged, the \$1.50 fee per week, is that charged as remuneration to the trustee that the trustee can then spend in any way that it wants, or is it effectively a limit on the amount of indemnity that the trustee is going to take against the fund each year? That may be a legal question that - - -?---Yes.

30 - - - you're not able to readily answer?---Yes. I'll – can you rephrase the question?

35 What I'm – what I'm trying to understand is – and I suppose you can look at it in this way – you charge all your members \$78 a year, and then for certain categories of members, there'll be a percentage administration fee for a very limited number of members, I think?---Yes.

In a retirement product?---Correct.

40 If AustralianSuper doesn't incur costs that rise to the full level of that \$78 per member per year - - -?---Yes.

45 - - - what happens to the balance?---That money is retained in the fund for future use for members.

As – is it effectively set aside as part of some sort of reserve?---It's into an administration reserve, the only purpose of which is spending on member services.

All right. Now, ultimately, there came a point when the operators of The New Daily said that they needed further funding to continue?---That's right.

5 And at that point in time, AustralianSuper said it didn't want to provide further funding?---That's correct.

And instead, the company that operates The New Daily was then wholly acquired by ISH?---That's right, which had been a part owner.

10 And the consideration that was paid by ISH to each of CBUS and AustralianSuper for their shares in The New Daily company was zero?---Yes. I think by that stage, there were four additional shareholders.

I'm sorry?---Yes.

15 Mr Dinelli points that out. There were some additional shareholders - - -?---Yes.

- - - that had invested. The consideration paid to the other shareholders was zero. Is that right?---Correct.

20 And can you explain to the Commissioner how that came about, that this investment – I used the word investment – this acquisition for \$2 million ultimately ended up getting sold to Industry Super Holdings for nothing?---Yes. So the – The New Daily approached us, sought additional funding from AustralianSuper. We were not
25 convinced that it was operating as successfully as we would have hoped. We were in a – a state where we hadn't reached a definitive decision as to its success or otherwise, because we didn't have the data that the trial I spoke of earlier will hopefully provide, and in the event, we declined to participate. The New Daily came back with ISH and said that they would – or they were prepared to acquire it for zero
30 consideration, that being the valuation, and would operate The New Daily on an ongoing basis, and that we were free to continue to use its services.

And so - - -

35 THE COMMISSIONER: What was New Daily's revenue stream?---It was principally advertising.

MR HODGE: And is The New Daily, do you know, now self-funding?---No, I believe it is not.

40 So it has to continue to be supported by ISH?---Correct.

ISH is owned by a number of industry funds?---That's right.

45 One of which is AustralianSuper?---Correct.

And just to be clear, it's the fund rather than the trustee in its personal capacity that owns the interest in ISH. Is that right?---That's right. The fund has an investment into ISH and that's part of the investment portfolio.

5 And has ISH ever produced a dividend, do you know?---Yes, it has.

Right. Is that a relatively recent thing?---I can't recall when, but it has proven to be a very successful investment for the fund. It's written up about 30 per cent in the last financial year.

10

THE COMMISSIONER: Sorry, in the - - -?---I'm sorry. It's written up about 30 per cent in the last financial year.

Yes?---It's worth around \$900 million.

15

MR HODGE: At some point in time, did AustralianSuper, the fund, sell down part of its stake - - -?---Yes.

- - - in ISH?---Yes, it did.

20

All right. And did it sell that down at a profit?---Yes, it did.

Right. And when was that?---That transaction would have been completed about 12 months ago.

25

I want to – Commissioner, I was going to move off the New Daily to the last topic, which is - - -

30 THE COMMISSIONER: Can I just stay with New Daily a moment. At the time of determining whether or not to acquire, did AustralianSuper have any view about what kind of voice New Daily would add to the media landscape?---This is at the time of the original acquisition?

35 At the time of acquisition?---The intention was to provide online publication that was directed at – I'll – I'll say middle Australia.

40 Forgive me if I smile. Everyone says it's directed at middle Australia, Mr Silk. Yes?---Okay. I will try and be a bit more specific, Commissioner. Directed at the sort of people who are the bread and butter members of industry funds, and in our case, AustralianSuper. And so there's a – the – the sort of sections that you find in general media, but this was directed at – not a – not a tabloid style format, a little above tabloid, but specifically directed to the interests of not working class but working Australians.

45 Adding what kind of voice to the media landscape?---Well, the – the particularly distinctive part of The New Daily was intended to be its focus on superannuation and financial matters. As I said, 20 to 30 per cent of the publication was to be directed in

that area. And that's – that's far from the norm in any general media that we were aware of.

5 But is that the voice that it developed?---Well, it – it has stayed true to the 20 to 30 per cent content in superannuation and financial services. That was the particularly attractive part for us, so I would say yes.

Yes.

10 MR HODGE: The last – I'm sorry, I tender that document, Commissioner.

THE COMMISSIONER: The CEO report of 12 December '13 - - -

15 MR HODGE: Could you say together with attachment? Is that – Commissioner, would you mind saying - - -

20 THE COMMISSIONER: At the moment I haven't said anything, Mr Hodge. But am I right – it's the CEO report of 12 December '13, and its attachments, do you want?

MR HODGE: I'm sorry. It's the CEO report for the meeting of 12 December 2013. The report itself is dated 30 November 2013.

25 THE COMMISSIONER: Yes.

MR HODGE: And also together with attachments.

THE COMMISSIONER: And its attachments?

30 MR HODGE: Yes, please, Commissioner.

THE COMMISSIONER: Right. Are we on the one page now, Mr Hodge?

35 MR HODGE: Yes, thank you, Commissioner, we are.

THE COMMISSIONER: Good. ASU.0009.0002.0260 becomes exhibit 5.91.

40 **EXHIBIT #5.91 CEO REPORT FOR MEETING OF 12/12/2013,
ASU.0009.0002.0260 DATED 30/11/2013**

45 THE COMMISSIONER: Just one last question about New Daily, Mr Silk. At the time of the original acquisition, was it any part of the purpose of New Daily that it would act as a voice for or a voice about superannuation and, in particular, industry superannuation?---Yes, Commissioner.

Yes. And is that a voice which it has maintained in the period since acquisition up until the point of your divestiture into ISH?---Yes, I would say so, and subsequently. So if I might just explain that answer.

5 Yes, do?---Say a voice for superannuation. The – the publication does frequently have superannuation articles, seeks to demystify superannuation for the readers. I'm happy to arrange a subscription if you'd like.

10 Thank you so much, Mr Silk. Thank you so very much. Yes?---Seeks to demystify superannuation for the sceptics, and – and lists means by which members can increase their superannuation savings. Actions that they can take, practical actions that they can take to ultimately increase their retirement savings and have a greater lump sum at the point of retirement.

15 Yes.

MR HODGE: Could I just ask a follow-up question to that, and when I ask this question, Commissioner, it's in no way intended as a criticism of your question, but I think you may have been asked a - - -

20 THE COMMISSIONER: "What the Commissioner was really asking you was", Mr Silk, is the preface. Go on.

25 MR HODGE: I think you may have been asked a compound question, which was was it intended to be a voice for superannuation, and was it specifically intended to be a voice for industry funds, and I think you've addressed the voice for superannuation. Was it also intended to be a voice for industry funds and advocate for the position of industry funds?---In the sense of advocating in relation to the positive features of industry funds, I suspect we will get on to this in the – the topic
30 you've foreshadowed, but the difference between the best funds and the poorest funds is literally life-changing for a lot of people, and to advocate for superannuation, in particular for the best superannuation funds, the funds that produce the best returns for members, is in the DNA of industry funds, and we were happy to see the – The New Daily do that. Not be a – a – a thoughtless cheerleader
35 for industry funds, but where there are merits of those funds, and where people are best served by being members of those funds, and we think it's important to point those features out to people.

40 Again, the answer, then, is yes, it was originally intended to be a voice also in favour of industry funds?---Where – where the facts warrant that, and we say in most cases the facts do warrant that.

And to come back to the point we looked at earlier, which was editorial independence - - -?---Yes.

45 - - - how does that fit with editorial independence?---I think you've received the – or the Commission has received the charter of editorial independence. It labours the

point almost to death about the fact that it's to – to be editorially independent. But, again, I come back to the point that where the facts warrant it, to advocate on behalf of industry funds is entirely consistent with that.

5 I said I was going to move to the last topic, which is fox and henhouse. I just actually need to ask you about one other small thing, which is about cash returns?---Yes.

10 Could we bring up Mr Silk's second statement, which is ASU.0020.0001.0273. Can we go to page 26 of that statement, which is .0298. This is a table setting out in response to some questions that the Commission asked about investments that are labelled as cash investments?---Yes.

15 And the way in which an investment with AustralianSuper can work is that a member can opt not to go into the default product?---Yes.

And the member can go into, effectively, a customised investment option that they might choose?---That's right.

20 And there will be various – I think you call them premixed options or do it yourself mix options?---Yes.

25 And then there's also a further direct investment available?---Yes. Yes, we call that Member Direct.

And in relation to the premix – I'm sorry. In relation to the do it yourself mix options, it's possible to invest wholly in cash?---Correct.

30 And I think in this table you're setting out if you invested wholly in cash - - -?---Yes. - - - first, what you're being invested in, and second, what the return is that's been generated over each of the last three financial years?---That's correct.

35 And if – it appears as if, if you invested wholly in cash, you're also exposed to what you describe as non-cash securities?---Yes, or you were at the time of this document being prepared.

All right. That's no longer the case?---That's correct.

40 And now if you're invested in cash, you're invested wholly in cash?---Correct.

And are you able to say what difference that has made to the return?---The – the change from the exposure of around two per cent to zero per cent?

45 Yes?---No, I'm not able to do that because this has only occurred in the last couple of months, but I would – I would say with some confidence it would be a – a modest

difference by virtue of the fact that we're talking about, in the case of these figures, 2.35 per cent of the portfolio.

Sorry. I think - - -?---I'm sorry. 1.83 per cent of the portfolio.

5

Yes. And then the average return is 2.35 per cent?---Correct.

So when you're talking about some modest change, a modest change to the 2.35 per cent?---Correct. That's right.

10

And if you are wholly invested in cash - - -?---Yes.

- - - that average return, I assume – it said it's pre-tax. Would it also be pre-fees, or is that post-fees?---No, this will be post-fees.

15

All right. So that - - -?---Fees will be very modest on – on cash.

And presumably that will mean first the \$78 per year administration fee?---No.

20

Or is that – that doesn't include the \$78?---Correct. That doesn't include the \$78.

All right. So it would include the, I think, .05 per cent investment management fee that applies just to cash?---No. I'm sorry. Yes, that's correct. That's correct.

25

But it wouldn't include the \$78?---That's right.

And so then the \$78 would come off whatever that return is, which is going to - - -?---That's correct.

30

It's the fixed fee, so it would depend what the balance is?---Exactly right.

All right. Thank you. And what was the reason for going from having the approximately two per cent exposure to non-cash options, to no exposure to non-cash options?---So APRA wrote to – I think all super funds, but certainly to a large number, including AustralianSuper, a couple of months ago, advising that during their supervision activities, they had identified a number of cash options which had a substantial proportion of assets in them that were non-cash, and that members that might have been expecting not just a return of cash but the volatility of a cash option were really invested in a way that they had not bargained for, and asking funds to review their cash options and to make them true to label. Ours were, we thought, very close to true to label, only having 2.35 per cent – sorry, 1.83 per cent of assets other than cash, but immediately upon receipt of that letter, we instructed the manager to revert to a 100 per cent cash portfolio.

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Commissioner, I want to now deal with the last issue, which is fox and henhouse.

THE COMMISSIONER: Yes.

MR HODGE: There are, we think, a few different versions of the fox and henhouse advertisement, Mr Silk?---I'm only aware of one final one. But there may be – there may be others.

5 When you say “one final one”, I think one is the – finishes with a website which is “banks aren't super”?---Yes.

And there's another one that finishes with “help save our super”?---Right. Okay.

10 Do you know which - - -?---Yes.

- - - one is which?---No.

Okay?---I'm not - - -

15

Okay. Was it the case that fox and henhouse was a campaign developed by ISA?---ISA in conjunction with a number of its constituent funds.

And ISA is a wholly-owned subsidiary of ISH?---That's correct.

20

And ISA provides, amongst other things, marketing services to funds?---It provides – strictly speaking, it provides marketing services on behalf of funds, in a – in a collective sense. So it doesn't provide marketing services to an individual fund, but it does to the – the group of members of ISA.

25

Does it also provide research by or on behalf of industry funds?---Yes, it does.

And what are the other activities that ISA undertakes?---Its principal activities are marketing related and policy related. Policy can involve liaison with government, making submissions to Parliamentary inquiries, issuing discussion papers, research papers, and the like.

30

I might, just so we know what we're talking about – I'll play one video first. I may not get the right one, so then I just need to figure that out. But can we bring up ISA.0031.0001.0012.

35

RECORDING PLAYED

40

MR HODGE: Was that the final version of the ad, do you know?---I don't know, but it's horribly close to the final version, if it's not the actual final version.

All right. I think there's a – there's a slightly different version which, as I said, has a slightly different website and has a slightly different voiceover where it refers to putting pressure on the Federal Government, rather than putting pressure on federal

45

politicians?---No. No, that – the Federal Government version was – as far as I’m aware, was not the final version, and has not been used.

5 All right. And that version also doesn’t have the ISA logo at the end, I think?---I don’t know about that.

10 All right. And can you then just explain to the Commissioner – or I will take you through for the Commissioner – the process of the development of this ad and what exactly it is that it’s trying to achieve?---Yes.

15 Do you remember when the concept of the ad was first developed?---So this is the third in a series of advertisements that go to the issue of the appropriateness of banks in superannuation and the issue of how the default fund system works. Perhaps I might explain how the default system works in superannuation. So as we’ve
20 discussed, superannuation is a – a low engagement product for individuals, and employers have at least one default system that operates at their workplace. Some employers have a number of default funds to apply in relation to different cohorts of workers, and an employer will typically select the default fund or funds to apply at their workplace from a selection available to them or the only option available to
25 them through an industrial instrument, in particular, an industrial award, or an enterprise agreement. And the – the import of the default fund for an employer is that they will make the superannuation contributions due to an individual into the default fund that the employer has selected unless the employee specifically nominates the fund that they want their superannuation contributions paid into. And because superannuation is a low engagement issue for individuals, most superannuation contributions turn out to be default contributions, and, therefore, end in the fund chosen by the employer. In AustralianSuper’s case, 15 years or so ago, I would say that number would have been 95 per cent, maybe even higher. Today, that figure is 70 per cent, and declining but declining slowly. So default – the choice
30 of the default fund is very important. And, again, the Productivity Commission report in May, I think, emphasises with all the subtlety of a sledgehammer how important it is. They had what they call cameos which were examples, and one example with all – all the assumptions being identical between the two cases was for a 21 year old, starting salary \$50,000, retiring at 67, if they went into a top quartile performing fund versus a top – a bottom quartile performing fund, they would
35 receive \$570,000 at retirement in the case of the bottom quartile fund and \$1.2 million for the top quartile fund.

40 I don’t want to interrupt you, Mr Silk, but is the point you’re trying to make that your fund generates higher returns than a bank fund?---Well, that is the case. It’s not really the point I’m trying to make. I’m trying to make the point that the selection of a default fund is critically important to the retirement outcome of individuals. But – but - - -

45 Again, I – just for - - -?---Sorry.

- - - to manage this, I understand this ad is – you’re saying is concerned with default funds?---Yes.

5 And you’re making the point that depending on what fund you default into can have a significant - - -?---Yes.

- - - effect on the return that you generate over your working life?---Yes.

10 That, though, is not – the ad is not an informative ad about the effect of default funds. It doesn’t have the - - -?---No.

- - - pretty examples from the Productivity Commission?---No.

15 So it’s concerned with doing something else?---Yes.

Perhaps the first question might be who is the target audience for the ad?---The target audience is – there – there are multiple audiences. The ultimate audience is a narrow audience, and that’s members of the Federal Parliament, but the broader initial foundational audience, if you like, is men and women of Australia who are members of superannuation funds and to alert them to what was proposed. So to your point, Mr Hodge, the purpose of the advertisement was to – was our endeavours to prevent the lobbying effort that was being undertaken by retail wealth management companies, in particular the big banks, to change the default system from a framework that we say provided significant protection for workers to one that exposed workers to significant risks of misselling, cross-selling and conflicts of interest that would have done them significant damage.

25 So when the ad or the idea of the ad first started being developed, I think that was – was it 2015 that it first began being - - -?---Yes.

30 - - - conceived of? And then in 2016 – I’m sorry, Commissioner, before I bring up a document, I should tender the ad.

35 THE COMMISSIONER: What’s the description, Mr Hodge?

MR HODGE: An advertisement titled Fox and Henhouse.

THE COMMISSIONER: Fox in the Henhouse.

40 MR HODGE: I think Fox and Henhouse. I keep being corrected - - -

THE COMMISSIONER: Is it?

45 MR HODGE: - - - about that, Commissioner.

THE COMMISSIONER: ISA what?

MR HODGE: .0031.0001.0012.

THE COMMISSIONER: Exhibit 5.92.

5

**EXHIBIT #5.92 ADVERTISEMENT TITLED FOX AND HENHOUSE,
ISA.0031.0001.0012**

10 MR HODGE: And can we bring up ASU.0009.0002.1300. So this is a report of yours dated 6 September 2016 to the board of directors of AustralianSuper?---Yes, it is.

And if we go to page 2 of that document and item 4.2, you see:

15

ISA management is preparing a proposal for consideration by their board as to when to deploy the fox and henhouse advertisement. Whilst there is still discussion at the board as to the timing of the advertisement, it is agreed that it represents an important part of the strategy to maintain industry funds as the predominant default superannuation funds in Australia:

20

?---Yes.

Now, again, when I'm critical of the use of the passive voice, it's not specific to you. You see it says:

25

It is agreed that.

It is agreed by whom? Who was it that had agreed that this was an important part of the strategy, do you recall? Was it the board or was it an ISA issue?---That was an ISA position that was similarly held by the AustralianSuper board.

30

Now, at some point in time, the AustralianSuper board had not been prepared to participate in the fox and henhouse campaign. Is that right?---That's correct.

35

And was that at this time, that is in 2016, when your report is going up to the board, or was that at some earlier time?---This – this was in the period leading up to a federal election. And the board was concerned to take a – a prudent and cautious approach to the airing of the advertisement, lest that the organisation be accused of adding to the – the typical febrile atmosphere around elections. So AustralianSuper's position was not to participate due to the timing of the election, as opposed to the substance of the advertisement.

40

So – I hope I'm not getting the timing wrong. The federal election was in 2016. Is that right?---Yes. Yes.

45

And in the middle of 2016?---Yes. July, I think it was.

So at some point in time before this paper, there had been some discussion that had occurred at the board level about fox and henhouse?---I believe that was the June board meeting.

5 And so the advertisement had already been developed by then?---If it hadn't been finalised, it was certainly in development, yes.

And did it end up getting run at all during 2016?---I don't think so.

10 Did it get run without AustralianSuper's support?---No.

All right?---It didn't. It went back to the ISA board, and the ISA board resolved not to air it at that time.

15 I tender that document, Commissioner.

THE COMMISSIONER: AustralianSuper CEO report, 6 September '16, is exhibit 5.93. That's ASU.0009.0002.1300.

20

**EXHIBIT #5.93 AUSTRALIANSUPER CEO REPORT, ASU.0009.0002.1300
DATED 06/09/2016**

25 MR HODGE: And then if we bring up ASU.0014.0002.3622. This is a report prepared by you to the AustralianSuper board for a meeting on 1 March 2017?---Yes, that's correct.

And it concerns the ISA marketing campaign?---Yes.

30

And is it the case – do you sit on the ISA board?---Yes, I do.

All right. So what you're reporting back to on the board is – the board of AustralianSuper is where things are at with the development of the fox and henhouse campaign?---That's right.

35

And I think you note there that issues that remain to be settled include the script of the advertisement?---Yes.

40 Timing of the advertisement?---Yes.

And sending a letter to the Prime Minister urging a change of tack on certain policy issues?---Yes.

45 And unfortunately we don't have the attachment, but what was the change of tack that the ISA board was seeking from the Prime Minister?---In relation to the advertisement to – to drop the proposal that had been pushed by the retail wealth

management sector, in particular the banks, to remove the protections that exist in the default fund structure that then applied and currently still do apply.

5 And when you're referring to the protections, can you be more specific about what you mean by that?---Yes. So currently, awards and enterprise – most awards and enterprise agreements have a superannuation clause. The superannuation clause will identify usually a small number of superannuation funds from which employers can select the default fund. That's a process of negotiation between trade unions representing workers and members of superannuation funds and employers. The
10 proposal was to essentially strip superannuation from the industrial system and allow employers the unfettered right to choose the default fund that would apply at their workplace, and in doing so, create the likelihood, based on research that had been undertaken, that retail wealth management organisations, in particular the banks, would seek to leverage their business relationship with employers with a view to
15 influencing them to choose, in the case of the banks, a bank-owned fund as the default fund to apply to the workplace. And the misselling, the cross-selling, the conflict of interests in particular that would apply through that model present a situation where the very great likelihood, indeed, the express design objective of such a change, would be to see millions of Australians that would otherwise be in
20 higher performing industry funds in poorer performing retail funds.

If we just go back to my question. The particular protection mechanism that you're referring to is that enterprise agreements and awards contain a superannuation clause. Is that the essence of it?---It – it's – that's part of it, but it's the preceding step, that
25 the parties involved in the negotiations of that clause, the ultimate outcome of which is the clause in the industrial instrument, comprise employers or employer representatives and trade unions representing the members. So there's a – an express member stake in the game.

30 But the legislative change would be to remove a provision for superannuation from industrial awards and enterprise agreements?---Correct.

35 And in that case, employers would be free, outside of those enterprise agreements and awards, to choose what would be the default fund?---Correct.

And the concern that I think you're identifying as driving ISA and, therefore, AustralianSuper, is that this would mean that it will be possible for employers to select a – I'll call it a retail fund rather than an industry fund?---That's right. Most
40 employers, in our experience, want to do the right thing by their employees, and will be minded to choose the best fund for their employees. But, as I said, we know with certainty that some of these institutions have sought to negotiate with employers and sought to leverage a business banking relationship into a change of default fund applying at – at the workplace.

45 Well, I understand the concern that you're identifying as driving the fund. You've referred to research that had been undertaken?---Yes.

I don't think we need to go to that but there were some – there were some PowerPoint presentations that ISA had prepared summarising some market research that had been done?---Yes, that's right.

5 And once the ad aired, it immediately attracted political attention. Do you agree?---Yes, it did.

And it also attracted attention from APRA?---Yes, it did.

10 Although, I didn't say immediate and I think the point you were making before was APRA got in contact with AustralianSuper after an event that we probably strictly can't talk about because of Parliamentary privilege, but in any event, APRA got in contact with AustralianSuper at a point in time?---Yes.

15 And in response to that query, you wrote back to APRA to explain the position of AustralianSuper?---That's right.

I tender that document, Commissioner.

20 THE COMMISSIONER: AustralianSuper CEO report, 1 March '17, ASU.0014.0002.3622, exhibit 5.94.

25 **EXHIBIT #5.94 AUSTRALIANSUPER CEO REPORT, ASU.0014.0002.3622 DATED 01/03/2017**

THE COMMISSIONER: Mr Hodge, I would be assisted if attachment 1 to that document were to be provided and tendered at some point.

30

MR HODGE: Thank you, Commissioner.

35 THE COMMISSIONER: I would also be assisted if at some point it can be made plain whether there was at that time some proposed legislative step which was underway to give effect to proposals of the kind of which Mr Silk has spoken. I can think of ways in which you could achieve that result, but my febrile imagination, to take up Mr Silk's view, might not be right. So I'd like to know what proposals were then publicly on foot.

40 MR HODGE: There was – can I assist you in part with that - - -

THE COMMISSIONER: Yes.

45 MR HODGE: - - - Commissioner. I'm not sure whether this is the particular piece of legislation that was of concern, but there was a Bill which was Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures Number 2) Bill 2017, which I think allowed workers covered by – or if

passed would have allowed workers covered by enterprise agreements to choose their own super fund.

THE COMMISSIONER: Yes.

5

MR HODGE: Would that – does that sound like that was one of the pieces of legislation?---Well, there were different views about that particular provision, but the – the fox and the henhouse advertisement was not directed specifically to that. It was directed to proposals that have been argued for for many years, but the – the political temperature around the issue had increased dramatically in the – the months that we’re speaking of, late 2016 into 2017, and the – the Minister for Superannuation had made plain that it was the government’s intention to introduce legislation to that effect.

15 THE COMMISSIONER: But to do what? To change the Fair Work Act or to – definition of industrial matter, or what?---Well, that has changed, Commissioner. The – the means by which this might be implemented has changed over the years, but the proposal to achieve the end has, as I say, been advocated for some time. The mechanism to achieve it has changed on three occasions, to my knowledge.

20

Yes. Well, as I say, I’ll be assisted by knowing what public proposal, if any – - -?---Yes.

25 The answer may be there was none or there were several?---Yes.

But what public proposal, if any, was on the table at about the time – I think it may be as well to have a couple of times identified, first at the time of this memorandum of February ’17 and second at the time of the first airing of fox and the henhouse?---Yes.

30

MR HODGE: The ad aired in about – for the first time in about June of 2017?---Yes.

Does that sound right?---Yes.

35

And after it aired, you received an information request from APRA?---Yes, that’s right.

40 And I might just show your response. Can we bring up ASU.0009.0002.9102. So this is an email – I am sure you’ve seen the unredacted version. This is an email back to a representative of APRA?---Yes.

And the request for information was about AustralianSuper’s involvement in fox and henhouse?---That’s correct.

45

And you refer in paragraph 2 to some reports and advice about the matter, including about surveys demonstrating – and you refer to SMEs being vulnerable to

approaches from their business bank to transfer default superannuation to a fund associated with the bank?---Yes.

5 And I think we have required – or the Commissioner has required by notice production of those various documents and PowerPoint presentations. Commissioner, I didn't propose to bring those up now, but I might just tender them at a convenient time if that's - - -

10 THE COMMISSIONER: Yes. I don't think - - -

MR HODGE: - - - satisfactory.

15 THE COMMISSIONER: I'll leave to you whether we need to go to them in the hearing, but at some point they need to be in evidence.

MR HODGE: I don't think they are necessary to go to in the hearing.

And it's then explained – and you see there at point 4:

20 *The June 2017 board meeting agreed to participate in the campaign.*

?---Yes.

25 And the reason that the board agreed to participate was said to be because:

It was consistent with AustralianSuper's obligations to members by assisting to retain and build upon the scale of the fund so that we can continue to provide an excellent offering to members.

30 ?---Yes. So there was both a – a direct and an indirect issue here. It was the fund's view, the board's view – my own view as well, that if – if this policy changed, current members of the fund – some current members of the fund were likely to leave the fund and go to a fund that we would say would provide poorer experience and ultimately poorer financial outcome to members. So those members would be worse
35 off. And the remaining members of the fund would have diminished economies of scale available to the fund to deploy on their behalf. So both a direct and an indirect impact.

40 Was a possible effect depending upon the framing of legislative change also that AustralianSuper might end up being the default fund for less employers? Is that the - - -?---Yes.

- - - point here?---Yes.

45 So that with the consequence that you have – it's not just losing existing members; it's losing the flow of members into the fund. Is that right?---Yes. That's right.

And is that – I just want to understand – are those the only two relevant aspects of the effect on scale, one of which is losing the flow of members into the fund, the other of which is losing existing members? I can't think of anything else?---No, I think that's right.

5

And so that the Commissioner can see the logic such as it is behind the ad, the logic is this is an ad targeted at – I think you said ultimately federal politicians?---The – the ultimate purpose was to ensure that legislation was not passed that would diminish the financial outcomes of superannuation fund members, in particular AustralianSuper members. So in that sense, the ultimate test is whether legislation passed.

10

I understand. I just want to make sure we've identified all of the steps before we then test those steps?---Right.

15

The first step is that it would discourage politicians from passing a certain type of legislation?---Yes. So either by virtue of their own viewing of the advertisement and consideration of the issues, or by virtue of others having viewed the advertisement and lobbying the politicians about it.

20

The second step is the type of legislation that you were talking about – independent of the particular form – is one that would change how the default system operated?---That's correct.

25

The third step is that the types of changes contemplated to the default system would be disadvantageous to the flow of members into AustralianSuper's fund?---That's not the principal issue. The principal issue is that such a change would be to the disadvantage of the members of the fund.

30

I understand. I think if we just step this through, though. The reason that, in your view, it's a disadvantage to the members of the fund is because there is a potential decrease in the flow of new members into the fund. That's one part?---That's one part.

35

And another part is that members who are in the fund, which AustralianSuper regards as high performing compared to other funds - - -?---Yes.

- - - would leave the fund and join lower performing funds?---Correct.

40

Have we, in what we've just laid out, encapsulated the full logic behind the ad?---I think so – yes.

From the perspective of AustralianSuper when it agreed to support it?---Yes.

45

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

THE COMMISSIONER: Email Silk to APRA 17/7/17 ASU.0009.0002.9102.

**EXHIBIT #5.95 EMAIL FROM SILK TO APRA DATED 17/07/17
(ASU.0009.0002.9102)**

5 MR HODGE: Can we then bring up ASU.0009.0002.3530. This is your chief executive report dated 8 June 2017 but for the board meeting on 23 June 2017?---That's correct.

10 And I think what has happened, if we go to the second page, we see item 6, which is Industry Super Australia?---Yes.

And ISA is seeking voluntary contributions of up to half a million dollars to the fox and henhouse campaign?---Yes.

15 So this was not a campaign that was going to be covered by the regular quarterly contributions of the funds to ISA?---That's correct.

There was going to be a separate voluntary contribution for this campaign?---Yes.

20 And the board of AustralianSuper, when it had met in May, had already decided to support the campaign. Is that right?---Yes.

25 And you are reporting back on the final outcome of that; that there's going to be a contribution of half a million dollars to the fox and henhouse campaign?---Yes.

And you sit on the ISA board, so presumably you knew throughout May and June what was going on in relation to that?---Yes.

30 And that seems to be – in terms of the value of it – we see that last sentence which is:

The correspondence also confirms AustralianSuper's contribution to ISAs funding of –

35 and we see it's almost \$5 million?---Yes.

Do you know whether the \$500,000 was in addition to or separate from the \$5 million?---It was. Pardon me, it was.

40 It was in addition to?---Correct.

So it was effectively an increase by one eleventh of the contribution to the ISA?---Yes, a one-off contribution of \$500,000.

45 And for this specific campaign?---For the specific campaign.

And therefore, was it approached by the board on the basis that it needed to satisfy itself that this specific campaign satisfied the sole purpose test?---That's correct.

And is there anything more to the reasoning as to how the board satisfied itself that this was – this satisfied the sole purpose test than what we have – the steps we have laid out?---In what sense?

5 Well, let's – perhaps if we do the steps but we do them in reverse - - -?---Yes.

- - - which maybe helps to see the logic of it, such as it is. If the – if a member, in AustralianSuper's view, leaves the AustralianSuper fund and joins a different fund, they might well end up with a lower return?---Yes, that's a probable outcome.

10

And Australian – and AustralianSuper has a particular view that if they leave the fund and join a bank fund, they will end up with a lower return?---That's a probable outcome.

15 And also for members who stay with the fund, they are advantaged by scale and by a constant flow of new members?---Yes.

20 If there is a change to the industrial relations system to change the ways in which default funds are selected under awards or enterprise agreements, or whether they're selected at all under awards or enterprise agreements, that could increase the likelihood of a member of AustralianSuper moving to a different fund – to a retail fund. Is that right?---Yes, and suffering a corresponding financial loss.

25 And also decrease the likelihood of new members joining the fund?---Yes.

Therefore, any action that might deter the passage of that type of legislation is something that maintains the retirement incomes – or retirement outcomes of members of the fund?---Yes.

30 I just want - - -?---Yes.

That's the logic. Is that right?---Yes, that is the logic.

And that is the logic that the board approved?---Correct.

35

Was it any part of the board's consideration the related issue of whether there are changes to the SIS Act in respect of the number or percentage of independent directors?---No.

40 And – go on?---The – the material words – in fact, I think the only material words in the advertisement, from memory, are, “The big banks want to get their hands on your super and they're putting pressure on our federal politicians to let them in.” Those words go to default funds; they don't go to anything else.

45 I tender that document, Commissioner.

THE COMMISSIONER: AustralianSuper CEO report, 8 June '17,
ASU.0009.0002.3530, exhibit 5.96.

5 **EXHIBIT #5.96 AUSTRALIANSUPER CEO REPORT DATED 08/06/2017
(ASU.0009.0002.3530)**

10 MR HODGE: The campaign started running in June of 2017?---Yes.

Or about then?---About then.

Do you recall when it finished?---No, I'm afraid I don't.

15 Do you know whether it was treated by ISA as a political donation or as a political
matter that required declaration to the Electoral Commission?---Yes, I believe they
had advice to that effect.

20 And that it was treated, therefore, as a political contribution to whom?---I – I don't
know whether it was treated as a political contribution, but the – the words at the
end, "Authorised by David Whitely", etcetera, required by some particular federal
agency for advertisements that are or might be seen to impinge in the political arena.
I'm not aware of the expenditure being characterised as a political contribution.

25 All right. You're not – exactly how it was declared to the Electoral Commission is
not something you are familiar with?---No.

All right. Are you aware of whether there was research done after the advertisement
was run to determine how successful or otherwise it was?---Yes.

30

And was that done by AustralianSuper or by ISA?---That was done by ISA.

35 Can I – I want to show you a document so you can tell me whether this is the one.
Can we see ISA.0003.0001.0680. Does that document look familiar to you?---Yes, it
does.

Is this the product of the research that you're referring to?---I believe so - - -

40 All right. I might – if we go over to the second page, which is .0681. Does that
help? Does that look like it's the document you're thinking of?---It doesn't help a
lot, to be honest, but yes, I think this is the document.

45 All right. And are you able to – I can take you through the document if it helps, but
are you able to summarise to the Commissioner what the outcome was of the
research?---I don't know what the particular question was here but clearly there has
been an increase in recognition, but I'm not sure of what.

If we go to page .0682?---Yes.

So this seems to be, effectively, evaluating the perception of industry funds as against retail funds or bank funds?---Yes.

5

And do you recall whether that was the thing that was being evaluated?---I – I don't recall.

All right. I will tender that document, Commissioner, and then I have some more general questions.

10

THE COMMISSIONER: Member information campaign – have we got a date on it anywhere, Mr Hodge?

MR HODGE: I'm told it's September 2017.

15

THE COMMISSIONER: September '17, ISA.0003.0001.0680, exhibit 5.97.

EXHIBIT #5.97 MEMBER INFORMATION CAMPAIGN DATED 09/2017 (ISA.0003.0001.0680)

20

THE COMMISSIONER: Do I understand, Mr Silk, you agree that surveys of this kind depend entirely on what question is asked?---Yes, I would – I would acknowledge that, Commissioner.

25

I thought Yes, Prime Minister had something to say about that at some stage, yes.

MR HODGE: What I'm trying to understand was whether the way in which AustralianSuper would measure the success or otherwise of this campaign is concerned with whether and to what extent it has altered, favourably or unfavourably, the perception of banks as against industry super funds for the public or whether its success or otherwise is concerned ultimately with something entirely different, which is the likelihood that – and I think it's framed as federal politicians but it presumably means certain cross-bench Senators – the likelihood that certain cross-bench Senators would or would not support legislative reform to the default system?---Yes. It was squarely directed at the latter.

35

Right. And in that respect, then, was it regarded as a success or not?---It's a – it's a – if that's the objective, it's a pretty binary view. And to date, it has been successful, or it has – the objective that it was seeking to achieve has been achieved, whatever the contribution of the advertisement, but it's a battle that has been won, not the war. Forces continue to seek to pursue that legislative change.

40

45

Commissioner, I don't have any more questions for Mr Silk.

THE COMMISSIONER: Can I just see if I can get the question right, because until you get the question right you don't know what the answer ought to be. The question was about payment for a form of political communication. That's - - -?---I'm sorry

5

- - - the start from which we begin, isn't it? The ad is a form of political communication seeking to influence Members of Parliament and their constituents about the legal and regulatory regime of the country. Do we get that far, Mr Silk, or have I derailed at the very outset?---Well, I would say the first proposition is that the advertisement and the – the broader campaign that this is part of – is very much a public policy issue.

10

Yes?---And - - -

15

The language of political communication harks back to my not-so-distant past, Mr Silk, and some constitutional ideas. But your – AustralianSuper made a payment to ISA for ISA to prepare and broadcast an advertisement directed towards persuasion?---That – that is correct.

20

Thus far?---Correct, yes.

Yes. The people to be persuaded you said, ultimately, were the Members of Parliament?---Yes.

25

Intermediately, you persuade Members of Parliament by persuading their constituents?---Yes.

If I wrap that up as payment for a form of political communication, I'm not seeking to talk about partisan political communication - - -?---Yes.

30

- - - at least not yet. You are just paying for a form of persuasion of elected representatives and those who elect them?---Yes. Can I make two points?

35

Yes, please?---The first is, as I know you're aware, superannuation is a very heavily regulated form of public policy. It exists by virtue of statute. The SIS legislation, the tax legislation – take away those that don't have a super system. It is heavily regulated, a creature of the federal Parliament. And so regulators – federal regulators and federal politicians are key players in the system by virtue of the design in the system. That's the first point. The second point is the way you've described it is correct and the same description, I think, could be attributed to policy work – lobbying work when there's interaction between an industry association and politicians.

40

As I say, at the moment, I'm concerned to formulate the question, and if I get the question right, then at least there's a chance of getting the answer right?---Yes.

45

Get the question wrong, and you will go awry. But, payment for that communication is payment for a communication directed to what the payer perceives to be the interests of present and future members?---That's correct.

5 Yes. Then, to expand the question out still further – and so I am cutting it up in bits – the question, I think, is or may be that payment for a form of political communication directed to the perceived interests of – to what are perceived to be the interests of present or future members – here you arrive at a fork in the road – either is not, in the particular case, or can never be – I think is the proposition that's
10 being considered. Again, another fork in the road. Either is not or cannot ever be in the best interests of members. That's one formulation that might be being alluded to, or perhaps the other formulation is not, in this particular case, or cannot ever be, for sole purposes of maintaining retirement benefits for members. Now, I think that may be the underlying proposition that is at play in this area. Now, I raise it now so that
15 everybody later, when we come to submissions, can tell me how wrong I am, where I'm wrong and how I've got it completely wrong way up. Yes.

MR HODGE: Commissioner, I don't have any further questions. Can I just clarify – you're not saying that's your positive proposition. You're saying that's the
20 proposition that's put up for question.

THE COMMISSIONER: Yes. I'm not embracing the proposition. I'm saying this is the proposition that I think is in play.

25 MR HODGE: Yes.

THE COMMISSIONER: That those who say that this cannot be done are, I think, ultimately saying one or other of those alternatives.

30 MR HODGE: There may - - -

THE COMMISSIONER: But I don't want people running away thinking, yes, I've come to some conclusion that this is not or cannot be of this kind. I've reached no such conclusion at all. I've reached no conclusion about any of these issues.

35 MR HODGE: Thank you, Commissioner. I don't have any further questions.

THE COMMISSIONER: Yes. Mr O'Bryan.

40 MR O'BRYAN: No questions, Commissioner.

THE COMMISSIONER: Yes.

MR HODGE: Could Mr Silk be excused, Commissioner?

45 THE COMMISSIONER: Yes, thank you, Mr Silk, you may step down. You're excused?---Thank you.

<THE WITNESS WITHDREW

[4.10 pm]

THE COMMISSIONER: Now, Mr Hodge.

5

MR HODGE: How late would you like to sit, Commissioner.

THE COMMISSIONER: If we go through till 4.30, it will give us another 20 minutes.

10

MR HODGE: Thank you. That would be good. Thank you, Commissioner.

THE COMMISSIONER: Yes.

15

MR HODGE: Could we just stand down for two minutes so we change everybody around.

THE COMMISSIONER: Yes. I will come back in a couple of minutes time.

20

MR HODGE: Thank you, Commissioner.

ADJOURNED

[4.11 pm]

25

RESUMED

[4.15 pm]

THE COMMISSIONER: Yes, Mr Hodge.

30

MR HODGE: Commissioner, the next witness is Mr Oliver. Just before he gives evidence, can I just note something, which is I'm told by the junior counsel for NAB – and I'm sure it's right – that the document I referred to this morning which is ASIC.0036.0003.0730, which I had said had not previously been subject to an application for a non-publication direction, had in fact been subject to a non-publication direction that was sent to the solicitors assisting, I'm told, at 12.18 am on Monday, 6 August. So I correct that from this morning, Commissioner.

35

THE COMMISSIONER: Thank you, Mr Hodge.

40

MR HODGE: The next witness is Mr Oliver.

<MARK OLIVER, SWORN

[4.17 pm]

45

<EXAMINATION-IN-CHIEF BY MR PETERS

THE COMMISSIONER: Thank you, Mr Oliver. Do sit down, please. Yes, Mr Peters.

5 MR PETERS: Thank you, Commissioner. Mr Oliver, is your full name Mark Oliver?---It is.

Is your current business address, level 3, 30 Hickson Road, Millers Point, New South Wales?---30 Hickson Road, yes.

10 Are you the general manager distribution of IOOF Investment Management Limited?---Correct.

And you've held that position since 29 February 2016?---Correct.

15 All right. Now, do you appear today in answer to a summons dated 1 August 2018?---I do.

I tender that, Commissioner.

20 THE COMMISSIONER: Have we got the summons with you - - -

MR PETERS: We have the original here.

25 THE COMMISSIONER: - - - Mr Oliver? Exhibit 5.98, the summons to Mr Oliver.

EXHIBIT #5.98 SUMMONS TO MR OLIVER DATED 01/08/2018

30 MR PETERS: Mr Oliver, has a witness statement with exhibits been prepared for you?---It has.

And do you have the originals in the witness box with you?---I do.

35 And is the witness statement dated 26 July in respect of Rubric 5-38?---It is.

And it's signed by you?---It is.

40 And is it true and correct?---It is.

I tender that, Commissioner.

45 THE COMMISSIONER: Exhibit 5.99, the witness statement of Mr Oliver of 26 July, together with its annexures.

**EXHIBIT #5.99 WITNESS STATEMENT OF MR OLIVER OF 26 JULY,
TOGETHER WITH ITS ANNEXURES**

5 MR PETERS: Thank you, Mr Oliver.

THE COMMISSIONER: Yes, Mr Hodge.

10 <**CROSS-EXAMINATION BY MR HODGE** [4.18 pm]

MR HODGE: Thank you, Commissioner.

15 Mr Oliver, you, as I understand it, started work at IOOF at the end of February of last year?---2016.

I'm sorry, your statement says 29 February?---That's right.

20 Was it 26 February?---29 February 2016.

I'm sorry. 29 February 2016?---That's correct.

25 I'm sorry. And the role of general manager distribution – who does that mean you report to?---I report to the group general manager of Wealth Management.

And who is that?---That's Mr Renato Mota.

30 And how does your role intersect with superannuation and, in particular, IIML, the trustee?---So my areas of responsibility include sales, which, amongst other products and services, include the products and services of IIML as responsible entity. My product teams also constitute the products which IIML as responsible entity – for which IIML is responsible entity.

35 So I just want to try to help the Commissioner to understand the particular structure that IOOF has. IOOF is the holding company for the group?---IOOF Holdings Limited is, yes.

40 Is the holding company for the group?---Yes.

It's a publicly listed company? It owns a company which is referred to as IIML?---Yes.

45 And that's an abbreviation - - -

THE COMMISSIONER: I think you'll need to help the transcriber, Mr Hodge. We've got someone trying very hard to keep up with acronyms.

MR HODGE: Yes, IIML - - -

THE COMMISSIONER: She's had a long day.

5 MR HODGE: - - - is I-I-M-L?---Yes.

And IIML is an abbreviation for IOOF Investment Management Limited?---Correct.

10 And IIML is the RSE licensee for a superannuation fund?---That's correct.

And IIML is also the responsible entity for a number of managed investment schemes?---That is also correct.

15 And IIML, as RSE licensee for the super fund, invests in the managed investment schemes that it operates as responsible entity?---Among others, yes.

It also invests in some other external managed investment schemes?---Many external investments, yes.

20 The IIML managed investment schemes are the largest investments by the IIML superannuation fund?---I don't believe that to be correct. I – I - - -

You don't think that's right? You think there's a - - -?---I believe the largest single investment may be a third party

25 THE COMMISSIONER: I'm sorry; you're going to have to - - -

MR HODGE: You need to speak up?---Okay.

30 THE COMMISSIONER: - - - keep your voice up, Mr Oliver?---I believe the largest single holding – I – I may be corrected – is a third party.

35 MR HODGE: I see. And this structure of IIML as both RSE licensee and RE for managed investment schemes – that's also a structure that was used for another entity that was owned by IOOF called Questor?---It was before my time. So I – I can't confirm or deny that to be the case.

40 Questor had been – effectively, both the managed investment schemes that Questor was operating and the superannuation fund that Questor was operating were no longer being operated by Questor by the time you joined IOOF?---I believe the successor fund transfer happened close after I joined, but - - -

Okay. Again, I think you probably just need to - - -?---Move the microphone.

45 It's a bit unusual. A lot of witnesses find it challenging, but you just need to speak more loudly. Thank you. Now, you responded to a number of questions that the Commission has asked about the operation of the superannuation business?---Yes.

And to go back to your role in the superannuation business, you have a sales team. Is that right?---I have a sales teams who - - -

5 Yes, go on. And what do the sales teams do?---Broadly, they represent the products and services across the group. And those products and services include the services of IIML as a superannuation entity, but also the products and services of third party providers. We also provide trustee services under the brand of Australian Executor Trustees, and my sales teams and relationship teams represent a broad set of capabilities.

10 And one of the things, then, that you would do is to sell the superannuation fund to somebody?---We promote the superannuation fund along other – along with others.

15 And to whom do you promote the superannuation fund?---The principal channels are to employers in respect of corporate superannuation, and through financial advisers, and they're the principal two channels.

20 So you would promote use of the IIML superannuation fund to financial advisers?---Yes.

25 And is that only financial advisers who are authorised representatives of licensees affiliated with the IOOF Group, or is that - - -?---No, no, it's not. So the cohort of advisers who are not AFSLs for the group we would refer to as open market or independently – independent financial advisers.

Okay. Now, when you were describing the role you have, I thought in addition to sales you said you had another responsibility. Could you just - - -?---Also responsible for the product team.

30 And is the product team the team that designs the product that – the products that are issued by IIML?---They design and maintain the products provided by IIML. Also maintain relationships with third party providers. If I could just elaborate, we're somewhat unique as a diversified financials organisation in that we offer the products and services of other platform providers and superannuation providers to financial advisers.

35 You offer the products of other – of other platform providers, did you say?---Yes.

40 To licence – to – I'm sorry, to authorised representatives?---To AFSLs.

Right. To the licensees, whether they're affiliated with the group or otherwise?---Yes.

45 And how does that work? You ask an AFSL licensee to use a platform that isn't the platform operated by IOOF?---We offer choice. So it may not – it may be the case that in – not – in not all circumstances the product – the propriety product we offer is a viable solution for a financial adviser to offer to their customers. So the ability to

offer choice across a range of solutions we think is – is – is attractive for financial advisers.

5 Can we bring up page 15 of your statement, which is the page ending – it's IFL.9999.0003.0062. Now, you don't sit on the board of the RSE licensee?---That's correct.

10 Do you occasionally attend meetings of the board of the RSE licensee?---On occasion I will make a presentation or prepare papers for.

15 And what sort of matters would you report on to the board?---Broadly, when we're making change to the nature of the superannuation fund in preparation to make that change and the approval or consideration by the board, either myself or my team will prepare a paper.

20 What sort of change? Could you give us an example of one change that you've dealt with recently?---Well, for example, if we go back to the successor fund transfer, a lot of the paperwork whereby the trustees of both Questor and both IIML considered that successor fund transfer. A lot of the – the materials to support that decision were produced from within my teams for the product team, for example.

Was produced by your product team. Is that right?---That's correct.

25 Okay. And would you be involved in governance issues in relation to the RSE licensee?---Yes, in a number of ways. I – I see – as a member of the organisation, I feel I have a governance obligation on behalf of members generally, and specifically in respect to my membership of the product investment committee, which is a delegated group of the IIML board, which is charged with overseeing investment governance for the fund.

30 Okay. You're not involved in the consideration being undertaken by IIML as to changing its structure?---Not directly, no.

35 You have, though, attempted to give some evidence about that?---Yes, I've relied on input from others to answer the questions in my statement.

Okay. Well, what we might try to do is to understand how much of this comes from your direct knowledge. You see question 13 that was asked was about:

40 *Any consideration given by the RSE licensee –*

that's IIML:

45 *...at any time since 1 January 2013 as to whether the payment of commissions from the assets of the fund is in the best interests of members.*

?---Yes.

Have you ever been involved in any consideration by the RSE licensee of that issue?---I have not been involved with consideration by the RSE board with respect to that – to that matter, no.

5 And in order to answer this question, bearing in mind that, as I understand it, (a) your role wouldn't involve consideration of this issue anyway, is that fair?---That's fair.

And (b), you've only been at the company since 29 February 2016?---Yes.

10 How did you go about answering this question?---Well, I've relied on the input of others, but I would also acknowledge the extent that the board would consider this area, they may have required input from my teams.

I'm sorry, say that again?---I also considered it from the perspective if the board was to consider this matter they would have relied on some input from my product team in particular.

15 If the board had considered removing commissions, you think they would have needed to have relied upon some input from your team?---I would have anticipated that, yes.

And the part of the team that you're referring to is the part of the team that designs the products?---That's right, the product team.

25 And what would the relevance of the product team be to the question of whether commissions should cease?---Well, I – I – I would have anticipated that to understand the extent to which commissions existed within the product, they would be the natural place to go to establish that information.

30 Okay. Commissions do exist within IIML super fund?---Yes.

And do commissions also exist within IIML's managed investment schemes?---Not to the best of my knowledge.

35 Okay. So it's just the super fund. If a member is invested in the IIML super fund, and assuming that the grandfathering provisions of FOFA apply, there will be commissions paid?---I believe there are as well – I know that there is a small amount in closed products.

40 In closed products?---That's right.

Okay. And are you involved in the acquisition of the OnePath business by IOOF?---Yes, I am.

45 Do you know how commissions are to be dealt with in relation to the acquisition of the OnePath business?---I do not.

Okay. In answer to the question that I read out before, I'm just trying to understand if the answer is, "This has never been considered by the RSE licensee." You seem to have given a different answer. You say:

5 *In the lead-up to the implementation of the FOFA reforms, IIML considered the impact on members of the new requirements on superannuation products, including the grandfathering of pre-existing commission arrangements.*

You see that?---Yes.

10

So did you speak to somebody who told you that the continuation of commissions had been considered by the RSE licensee before 1 July 2013?---Yes, that has been the input I was provided because, clearly, I wasn't there at the time.

15

And who did you speak to?---That was our legal counsel – internal legal counsel.

And he told you it had been considered?---To the extent it had been considered, it was described as that.

20

Sorry, I'm not sure I understand. Your statement says:

In the lead-up to the implementation of the FOFA reforms on 1 July 2013, IIML considered the impact on members of the new requirements on superannuation products including the grandfathering of pre-existing commission arrangements.

25

?---Yes.

30

I think I do understand. What you're saying is you've been told in the lead-up to FOFA taking effect, IIML considered what the effect would be on members of the new requirements for superannuation products and the limit of the consideration in relation to commission was that pre-existing commission arrangements could be grandfathered?---Yes, and further, as I understand it, and as I've described it, there also was a consideration to ensure that members could move to a product which did not comprise of those features from that point forward.

35

There was consideration given to whether it would be possible for members to move to a non-commission product?---Again, I – I understand it to be the case that the primary consideration of grandfathered commissions at that time was to ensure that unbundled or more contemporary products were available to members from the point of 1 July 2013 onward.

40

I see. And do you know who it was that undertook that consideration?---I don't.

45

So, again, this is just something that the – did you say the legal counsel or the general counsel?---Our legal counsel, senior legal counsel.

Told you that the consideration was it should be possible for a member in a commission product to move to a non-commission product?---Yes.

5 Why would it be anything other than possible?---I think my point was – and if it’s not been made clear – is that the consideration at that time was to ensure that members could move to a similar product without those trail commissions embedded.

10 By “ensure”, do you know what you mean?---Well, that there would be no artificial barrier for a member to be able to move to an equivalent product to that which was grandfathered.

15 Do you mean your understanding is the limit of the extent to which IIML has ever considered whether it’s in the best interests of members to keep paying commission is that IIML considered but decided not to erect artificial barriers to being able to move from a commission product to a non-commission product?---I wouldn’t put it in those terms. The idea was that we would give members the freedom to move and make a decision that way.

20 But don’t members have that freedom?---Well, again, I believe so – yes, but there were a number of products which had to be closed, so to ensure that we had equivalent range of products for them to access.

25 “Had to be closed” to new members?---That’s right.

Because they had built-in commissions?---Yes.

30 And IIML opened equivalent products that didn’t have built-in commissions?---That’s correct.

So that it could accept new members into those products?---Yes.

And comply with the law?---That’s correct.

35 Is that – is there some other action that you are aware of IIML having taken to ensure that members could move from a commission product to a non-commission product?---Not that I’m aware of.

40 And in answer to the question that was posed by the Commission, has IIML considered whether it’s in the best interests of members, the payment of commissions – I’m sorry, whether the payment of commissions from the assets of funds is in the best interest of members, is the answer to that question no?---I believe that that is correct.

45 Okay. But, again, you’re wholly dependent on what you’ve been told - - ?---Yes.

- - - by the legal counsel – senior legal counsel at IOOF?---Or subsequent learned from board.

5 Or what, sorry?---Or subsequent learned from what may have been discussed at board.

Have you learned anything relevant to this question from the board?---No.

10 Okay. Is that a convenient time, Commissioner?

THE COMMISSIONER: Yes.

MR HODGE: Thank you.

15 THE COMMISSIONER: 9.30 tomorrow, Mr Hodge.

MR HODGE: Thank you, Commissioner.

20 <THE WITNESS WITHDREW [4.38 pm]

MATTER ADJOURNED at 4.38 pm UNTIL FRIDAY, 10 AUGUST 2018

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