Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: TAXATION & COMMERCIAL DIVISION

File Number: **2016/4361**

Re: **Anthony Downey**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **Deputy President Dr C Kendall**

Date: **26 June 2017**

Place: **Perth**

DECISION

The Tribunal:

a) sets aside the decision of the respondent dated 15 August 2016; and

b) substitutes a decision that the applicant is banned under s 920A of the *Corporations Act 2001* for a period of four (4) years commencing on 15 August 2016.

.....

Deputy President Dr C Kendall

CATCHWORDS

CORPORATIONS LAW – six year banning order – whether conduct misleading or deceptive or likely to mislead or deceive – factors to be taken into account when imposing a banning order – duration of banning order – decision under review is set aside – applicant banned under s 920A of the Corporations Act 2001 *for a period of four years*

LEGISLATION

Australian Securities and Investments Act 2001 – section 1(2)(b)
Corporations Act 2001 – sections 761A, 913B, 920A(1)(e), 920A(2), 920B(1), 920B(2),1041H(1) and 1041H(2)
Migration Regulations 1994 – regulations 1.03 and 5.19B

CASES

Donald v Australian Securities and Investments Commission (2000) 104 FCR 126
ASIC v Adler (2002) 42 ACSR 80
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 at 197

SECONDARY MATERIALS

Regulatory Guide 98 - Licensing: Administrative action against financial service providers – regulations 98.44 and 98.45

REASONS FOR DECISION

Deputy President Dr C Kendall

26 June 2017

INTRODUCTION

1. This matter requires the Administrative Appeals Tribunal (the "Tribunal") to determine whether it should impose a banning order against Anthony Downey that prohibits him from

providing any financial services and, if so, the length of time that banning order should apply.

2. On 28 June 2016, a delegate for the Australian Securities and Investments Commission ("ASIC") sent a notice to Mr Downey advising him that ASIC might make a banning order against him (the "Notice").

3. On 21 July 2016, legal representatives for Mr Downey provided submissions and documents on Mr Downey's behalf. Mr Downey chose not to appear before the delegate, as was his right.

4. On 15 August 2016, a banning order was imposed and Mr Downey was prohibited from providing any financial services for a period of six years.

5. The delegate found that Mr Downey had not complied with a financial services law. Specifically, he was found to have engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or was likely to mislead or deceive (as per section 1041H(1) of the *Corporations Act 2001* (the "Act")).

6. The conduct that was found to have been misleading or deceptive or was likely to mislead or deceive related to the provision of letters bearing Mr Downey's signature and addressed to his client and the Australian Government containing information that was found to be false. The nature of this false information and the events leading up to the relevant letters being sent is discussed further below.

7. On 18 August 2016, Mr Downey applied to the Tribunal for review of the delegate's decision to the ban him for six years. Mr Downey accepts that information containing false information were sent but believes the penalty imposed is too severe in the circumstances.

8. Having reviewed all of the evidence before it, the Tribunal finds that Mr Downey did indeed engage in misleading or deceptive conduct by producing a series of letters to his client and the Australian Government that contained false information. However, contrary to the finding of the ASIC delegate, the Tribunal finds that Mr Downey did not intend to mislead or deceive anyone. Rather, his actions, albeit resulting in the representation of

misleading or deceptive statements that could very well have been relied on, reflected extraordinary recklessness and inexcusable carelessness on Mr Downey's part of a sort that cannot be condoned. This is particularly so given the need to promote the confident and informed participation of investors and consumers in the financial system.

9. In the circumstances, the Tribunal finds that a banning period of six years is excessive. Instead, a four year term is appropriate.

FACTS

10. A detailed overview of the facts relevant to this matter was provided by ASIC in a Statement of Facts, Issues and Contentions dated 11 November at paragraphs 2.1 to 2.57. Mr Downey also provided a well written and detailed overview at paragraphs 1 to 50 in a Statement of Facts, Issues and Contentions dated 16 January 2016. An accurate summary of the non-disputed facts relevant to this matter is also provided in reasons provided by the delegate dated 15 August 2016 at paragraphs 10 to 60.

11. The Tribunal notes as follows in this regard.

Significant Investor Visa

12. The Australian government offers non-Australians the opportunity to apply for a Business Skills (Provisional) visa ("Significant Investor Visa" or "SIV") (T7 at 71).

13. Under this investment scheme, SIV applicants are required to invest at least $5 million in a "complying investment" in Australia.

14. A "complying investment" is defined under regulation 1.03 and 5.19B of the *Migration Regulations 1994* as including a particular type of "managed fund" (T7 at 71).

15. A "managed fund" is defined under regulation 1.03 of the *Migration Regulations 1994* as, relevantly, an investment comprising an interest in a managed investment scheme within the meaning of the Act, where the issue of the interest in the managed investment scheme is covered by an Australian Financial Services Licence (an "AFSL") issued under s 913B of the Act.

Mr Downey's Directorships

16. Mr Downey:

    a) was a director of Platinum Mortgage Securities Ltd ACN 158 339 372 ("Platinum") (previously known as Platinum Mortgage Securities (Vic) Ltd) from 14 May 2012 to 3 June 2015 (T18);
    b) has been a director of Silvergum Capital Pty Ltd ACN 169 621 998 ("Silvergum") since 29 April 2015 (T19); and
    c) was a director of Ark Asset Management Australia Ltd ACN 604 775 573 ("Ark") from 16 March 2015 to 5 August 2015 (T20).

Silvergum and the Silvergum Fund

17. Francis Chu is a migration lawyer and the principal lawyer of Avia Lawyers (T16). He is also a director of the Silvergum First Mortgage Income Fund (the "Silvergum Fund").

18. In either 2014 or 2015, Mr Downey was asked by Mr Chu to establish the Silvergum Fund. It was intended that the Silvergum Fund would be a managed investment scheme and would meet the "complying investment" requirements for SIV purposes. The target investors for the Silvergum Fund were SIV applicants.

19. The Silvergum Fund did not hold an AFSL and has never held an AFSL (T15 at 261). Mr Downey intended that Silvergum would be the investment manager for the Silvergum Fund and that Platinum would act as the responsible entity of the Silvergum Fund (T15 at 261).

20. Mr Downey was made responsible for the appointment of a responsible manager for the Silvergum Fund and the registration of the Silvergum Fund with ASIC (T16). Mr Downey claimed before the delegate and before this Tribunal that it was always intended that Platinum would be appointed as the responsible manager for the Silvergum Fund (T16 at 308).

21. Neither Platinum or any other entity became the responsible entity/manager of the Silvergum Fund and the Silvergum Fund was never registered with ASIC.

Platinum

22. Platinum has held AFSL Number 432787 since 19 April 2013.

23. Under its AFSL, Platinum is authorised to act as the responsible manager for only one registered managed investment scheme, the Platinum First Mortgage Income Fund ARSN 163 188 565 (the "Platinum Fund").

24. The Platinum Fund offered mortgage investments to retail and wholesale investors (T21).

25. Platinum's AFSL authorises it to deal in a financial product only by way of:

    a) *Issuing, applying for, acquiring, varying or disposing of interests in the Platinum Fund; and*
    b) *Applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of basic deposit products.*

26. On 12 August 2014, Mr Downey had discussions with Mr Richard Eadie, one of Platinum's four directors, about the possibility of Platinum becoming the responsible entity of the Silvergum Fund (T4 at 60).

27. On 14 November 2014 and 11 December 2014, Mr Downey advised Platinum's board that he was working on the variation of Platinum's AFSL to enable Platinum to become the responsible entity of the Silvergum Fund (T5 at 63 and T6 at 69).

28. Platinum's AFSL was never varied to authorise it to act as the responsible entity for the Silvergum Fund.

Ark

29. On 11 May 2015, Mr Downey made an application for an AFSL on behalf of Ark. On 29 January 2016, an AFSL was issued to Ark (T14).

Wu Lee Li Lung

30. Ms Li Ling is a Taiwanese national who made an SIV application (the "Li Ling SIV application"). At all relevant times, Ms Li Ling has been the sole director and shareholder of Ozmosa Pty Ltd, the corporate vehicle through which she intended to make her complying investments for the purposes of the Li Ling SIV application (T16).

31. Ms Li Ling was Mr Chu's client.

32. Ms Li Ling had also engaged a migration agent, Ms Zhuang, from Aute Business & Migration, to handle communications with the Australian government regarding the Li Ling SIV application.

33. Ms Li Ling also had an Australia-based representative, Ms Amy Kuo, who dealt with Mr Chu regarding the Li Ling SIV application (T16).

34. Mr Downey had no direct communications with either Ms Li Ling or Ms Zhuang. His communications were with Mr Chu alone.

Events

35. On 14 May 2015, Silvergum opened two Westpac bank accounts. One account was a "Business Flexi" account. The other account was a "Cash Reserve" account (T12 at 200).

36. On 22 May 2015, Mr Downey and Mr Chu had the following exchange via email (T12 at 201-202):

    a) *At 10:27am, Mr Downey provided Mr Chu with details of the Silvergum bank accounts.*
    b) *At 1:06 pm, Mr Chu asked Mr Downey "What is the account that Wu will be transferring the money to? The Cash reserve?".*
    c) *At 1,44pm, Mr Downey replied to Mr Chu, "Yes, cash reserve account for all investors funds".*
    d) *At 1.55pm, Mr Chu told Mr Downey "The last day for the 188 investor to make a complying investment is next Friday — do we have to wait till the scheme is registered?" (The 'next Friday' was 29 May 2015).*

37. The next entry in the email exchange was on 27 May 2015 at 10.32 am and concerned the finalisation of a proposed product disclosure statement.

38. Mr Chu provided the "Cash Reserve" account (the “Silvergum Account”) details to Ms Li Ling’s representative, Amy Kuo (T16 at 19). According to Mr Downey, he had expected funds from Ms Li Ling to be deposited into the Silvergum Account until the Silvergum Fund was registered (T15 at 24). According to Mr Chu, he did not expect funds from Ms Li Ling to be deposited into the Silvergum Account until Ark became the responsible entity for the Silvergum Fund (T16 at 13 and 18). This never happened, as discussed below..

39. Before the delegate, it was submitted on behalf of Mr Downey that, following the email exchange of 22 May 2015, he and Mr Chu had a telephone conversation. In that conversation, Mr Downey informed Mr Chu that Silvergum could not take funds until it was a registered scheme. Mr Downey says he advised Mr Chu that if investors required immediate investment, investment should be made by application through Platinum into the Platinum First Mortgage Fund (T16 at 13 and 18).

40. On 28 May 2015, Ozmosa Pty Ltd (Ms Li Ling's corporate vehicle) deposited $3 million into the Silvergum Account (T8).

41. On Friday 29 May 2015, Mr Downey was advised that this deposit had occurred (T15 at 22 and 26). It was submitted on behalf of Mr Downey to the Delegate that the deposit of monies into the Silvergum account occurred without the prior knowledge of him or Mr Chu.

42. According to Mr Downey, on becoming aware of the deposit, he and Mr Chu had a telephone conversation in which Mr Downey told Mr Chu that as the Silvergum Fund would not be registered in the near term and if Ms Li Ling wished to make a complying investment, she should invest in Platinum. Mr Downey says he was advised that Mr Chu had spoken with the proposed investor's agent and it was agreed Mr Downey was to issue the necessary paper work to enable the investment with Platinum. Further, he says, it was agreed that Mr Downey was to prepare the documentation and that Mr Downey would provide the documentation to the migration agent once completed.

43. The $3 million from Ms Li Ling remained in the Silvergum Account until 16 June 2015. On 16 June 2015, Mr Downey returned Ms Li Ling’s $3 million to her (T8).

44. On 20 July 2015, Mr Downey also returned the interest that had accrued on the $3 million (T8 at T15 at 45).

Emails and Correspondence

45. On 1 June 2015 at 10:00am, Mr Downey sent Mr Chu an email with two letters attached (T12 at 206-209). The letter to Ms Lee Li-Lings (sic) read as follows:

29th May 2015

Ms Wu Lee Li-Lings

C/O Linda Zhuang

Aute Business & Migration Pty Ltd

29 May 2015

Dear Madam,

Subject: Investment with Platinum Mortgage Securities (Vic) Limited

Thank you for your investment of $3,000,000.00. We enclose our trust account receipt for your records.

Your funds will be allocated in suitable First Mortgage securities shortly and you will receive an Invitation to Invest and Valuation Synopsis for your consideration and approval.

You can access your investment details online including monthly statements and your portfolio details.

Interest shall be credited to your nominated bank account on the 27th day of each month.

Any of your funds invested in a particular First Mortgage after the 14th of each month will have accrued interest paid to you in the following month.

46. The letter to the Honourable Peter Dutton, also dated 29 May 2015, relevantly provided:

We confirm that Ms Wu Lee Li-Lings [sic] has made an investment to the value of AUD$3,000,000,000 with Platinum Mortgage Securities (Vic) Limited ("Platinum")pending allocation to a specific loan.

…

Platinum complies with the Australian Government's investment criteria for the Significant Investor Visa by meeting the requirements set out in reg. 1.03 of the Migration Regulations 1994 to which all of the following apply:

a) the investment is a managed investment scheme (within the meaning of the Corporations Act 2001) in which members acquire interests in the [Platinum Fund].

…

Platinum has supplied to the Investor a copy of the Platinum First Mortgage Income Fund Product Disclosure Statement along with information on a choice of

investments that fulfil the requirements for the Significant Investor Visa through our Supplementary Product Disclosure Statement".

47. The email from Downey to Mr Chu reads: “as discussed, attached is a copy of the investment confirmation and Migration letter" (T12 at 210).

48. Each of these letters was on letterhead titled "Platinum mortgage securities", dated "29th May 2015" and signed electronically by Mr Downey as "Director". As noted by counsel for ASIC to the Tribunal, each letter bore the date on which Mr Chu had advised Mr Downey as being "the last day for the 188 investors to make a complying investment" (the “29 May 2015 Letters”).

49. As discussed further below, counsel for ASIC submitted to the Tribunal that the letters were in final form. Mr Downey, on the other hand, submitted that they were only draft letters and were never intended to be sent out. He believed that all correspondence between him and Mr Chu would not be forwarded to anyone else.

50. On 1 June 2015, Mr Downey and Mr Chu by email had the following further email exchange:

    a) *At 10.28am, Mr Chu asked Mr Downey: "can we change it to 1 June 2015? Safer that way".*
    b) *At 11:28am, Mr Downey stated to Mr Chu: "Attached is a copy of the investment confirmation and migration letter. I confirm that the investment amount of $3,000,000.00 has been received".*

51. The email attached two letters dated 1 June 2015 (the “1 June 2015 Letters”). These letters are the same as the letters attached to the 10:00am email save for the change of date from 29 May 2015 to 1 June 2015.

52. As discussed further below, before this Tribunal, ASIC submitted that each of the 1 June 2015 letters was in final form. Each letter was on letterhead titled "Platinum mortgage securities", dated "1st June 2015" and signed electronically by Mr Downey "Director". It was submitted by Mr Downey to the Tribunal (Statement of Facts, Issues and Contentions at paragraph 40) that he:

> *…sent a number of draft Immigration Department letter to Chu after it was agreed that the investor would become a member of the Platinum fund including immediately before the directors’ meeting, in all instances seeking confirmation*

that the content was correct, before showing the letter to the Platinum directors (Exhibit F, Email to Chu from Downey). Chu was a migration agent and the applicant understood that he knew the format and content requirements. Chu was not the acting migration agent for the Investor. At all times, it was understood, so far as the applicant was concerned, that he (the applicant) would send the originals of the necessary correspondence to the acting migration agent. The applicant was working on the basis that any letters being prepared had to be accepted by Chu and that once Chu approved the documentation, the applicant would send originals via post. At no time did Chu inform the applicant that Chu would forward any letters to the migration agent or Department of Immigration.

53. Both sets of letters dated 29 May 2015 and 1 June 2015 and addressed to Ms Li Ling indicated (incorrectly) that Ms Li Ling had made a $3 million investment with Platinum. She had not done so and never did.

54. Both sets of letters dated 29 May 2015 and 1 June 2015 and addressed to the Minister for Immigration and Citizenship are stated as being "in support of" the Li Ling SIV application".

55. The information in these letters was false as Ms Li Ling had not made any investment with Platinum.

56. On 1 June 2015, the 1 June 2015 Letters were emailed by Mr Chu to Ms Zhuang (T16 at 324). In evidence to the delegate, Mr Chu explained that he assumed the letters were in final form and were to be sent out by him (T16 at 323-324). Mr Chu stated that:

> *…this letter has been drafted at least probably one or two months ago in anticipation*
>
> *…There wasn't any discussion because I just assumed that - because we've got all this ready all the time anyway so - and this letter — all these letters are - go out as soon as Ms Li Ling makes her investment, so nothing was discussed, you know, I just sent it out"* (T16 at 324).

57. On 1 June 2015 at 11.46 am, the 1 June 2015 Letters were emailed by Ms Zhuang to Ms Joyce So (at the Department of Foreign Affairs and Trade ("DFAT") who was assessing the Li Ling SIV application (T9 at 99-101).

58. Ms Zhuang's email to Ms So of DFAT stated:

> *...my client has changed her investment strategy in relation to utilization of funds and will invest $3million into a complying fund instead. I attached [sic] letter from the complying fund* (T9 at 91)*.*

59. On 2 June 2015 at 12.28 pm, Ms Joyce So of DFAT replied by email to Ms Zhuang's email and requested that Ms Zhuang confirm that Ms Li Ling had made "*investments into two CI [Complying Investment], namely: (1) ..., and (2) AUD 3m into a managed fund operated by Platinum Mortgage Securities (Vic) Limited - Platinum First Mortgage Income Fund*" (T10 at 102).

60. Ms So of DFAT also stated in her email:

> *You stated that the investment strategy of the applicant has changed. In this regard, have you sought approval from the Victoria state on the change of proposed CI? If yes, please forward their approval*" (T10 at 102).

61. On 2 June 2015 at 12.35pm, Ms Zhuang forwarded Ms So's DFAT email to Mr Chu. At 12.50 pm on the same day that email was then forwarded by Mr Chu to Mr Downey. Relevantly, the forwarded email chain included Ms Zhuang's email to Ms Joyce So sent on 1 June 2015 at 11.46 am and Ms So's email to Ms Zhuang sent on 2 June 2015 at 12.28pm.

62. Mr Chu stated in his email to Mr Downey (at 12:50 pm): "*Hi Anthony, need to discuss this — what we have to provide and so on*" (T10 at 102).

63. In his Statement of Facts, Issues and Contentions (at para. 64), Mr Downey submitted that:

> *The applicant received an email from Chu at 12.50pm on 2 June 2015. The applicant acknowledges receipt of the email from Chu, but having now had the opportunity to read the email chain attached, realises that he did not fully read that email chain nor did he understand that any of the Platinum letters had been provided to the Australian government at that time. The delegate states that the applicant "was informed that the Minister...had accepted the $3 million in that email" (Tribunal Document - T2, 70(f)). The email as addressed to the immigration lawyer and not the applicant. The email was in a chain forwarded by Chu. There was no reason for the applicant to read the full chain or suspect that the letters had been forwarded. The applicant at this time was under a great deal of pressure and workload.*

64. The first page of the email exchange between Mr Chu and Mr Downey included the above quoted parts of the email from Ms So of DFAT to Ms Zhuang which referred to an

investment of $3 million in the Platinum Fund. This is not disputed, although, as noted above, Mr Downey says he never read the full content of the email exchange.

65. On 2 June 2015 at 4.58 pm, Mr Chu sent Mr Downey an email the subject line of which stated "Letter to draft for State Government — Re Li-Ling Wu Lee / Ozmosa Pty Ltd" (T12 at 214-216). In the email, Mr Chu stated: "*This for Ms. Li-Ling, Wu Lee / Ozmosa Pty Ltd*". The letter was attached. The letter was addressed to Ms Li-Ling and relevantly stated:

> *I understand that as an applicant for the Australian Government's Significant Investor visa you are seeking certain assurances from Platinum Mortgage Securities (Vic) Limited as the responsible administrators of the "Platinum First Mortgage Income Fund".*
>
> Compliance:
>
> *Platinum Mortgage Securities (Vic) Limited warrants that the Platinum First Mortgage Income Fund is a 'complying' fund for the purpose of meeting the requirements of the Australian Government's Department of Immigration and Border Protection's Significant Investor visa...*
>
> *Your application to become a member of the Scheme has been accepted and your initial investment has been deposited into the Fund's cash account.*

66. It was submitted on behalf of Mr Downey to the Delegate (T26 at 385) that:

> *Downey had a discussion with Chu at about 8.30 am on 3 June during which Chu told Downey that Platinum needed to issue a letter in the format supplied in Chu's earlier email. Downey drafted a new letter adopting the format provided by Chu.*

67. On 3 June at 10.20am, Mr Downey replied to Mr Chu's email of 2 June 2015 and stated "*Attached is a draft letter for the Victorian government letter*". The attachment is the letter back dated to 1 June 2015, on Platinum letterhead and signed electronically by Mr Downey. The letter is addressed to Ms Li Ling (the "Victorian Government Letter"). It was submitted on behalf of Mr Downey to the Delegate that "*Downey expected Chu to confirm the letter met the SIV requirements*" (T26 at 385).

68. ASIC contends that the letter was in final form because it was on letterhead titled "Platinum mortgage securities" and dated "1st June 2015". It was also signed electronically by Mr Downey as "Director".

69. It was submitted by Mr Downey (T26 at 385):

At all times, Downey operated on the understanding that the letters would be held by Chu until the investor's funds had been transferred from the Silvergum account to the Platinum account. Chu knew that the funds were not yet received by Platinum. The transfer was to occur immediately following Platinum's directors' meeting scheduled for 3 June 10.20am. Downey took a copy of the 3 June 2015 [sic] letter with him to the directors' meeting to update the other directors.

70. Mr Downey further contended that:

> *… the Platinum letters signed by him were never intended to be sent until funds had been transferred from the Silvergum Westpac account to the Platinum Westpac account. They were not to be sent because the funds had not been transferred into Platinum's account"* (T26 at 385).

Subsequent Events

71. After sending the email to Mr Chu on 3 June 2015, Mr Downey attended a meeting of the directors of Platinum. At the meeting, Mr Downey's employment with, and directorship of, Platinum was terminated. The events that transpired are explained by Mr Downey in his Statement of Facts, Issues and Contentions as follows (paragraphs 43 to 50):

> *43. Following receipt of the Investor's funds, the applicant decided upon a mechanism to place the investment in the Platinum First Mortgage Fund and meet the Investor's needs. Under the Constitution of Platinum, (Tribunal Document - T29, Platinum Constitution)*
>
> *1. clause 4.6 provides that where a Manager receives application money not accompanied by a completed application relating to a current product disclosure statement it will, as soon as practicable, return the application money to the applicant or attempt to obtain the application from the applicant or pay the application money into the trust account.*
>
> *2. Clause 4.7 of the Constitution provides that should the Manager pay the application money into the trust account, the Manager will:*
>
> *I. hold the application money on trust for the applicant until the application is received;*
>
> *II. if the application has not been received by the Manager within 30 days after the application money was received, return the application money and interest (if any) to the applicant as soon as practicable.*
>
> *44. The applicant operated on the assumption that he could take steps to comply with the Constitution of Platinum and arrange for the Investor to invest in the Platinum First Mortgage Fund within the time frame.*
>
> *45. The Silvergum account with Westpac as at 29 May 2016 was not set up for online banking. The facility was there, but the applicant had not taken steps to finalise the arrangements, such as setting up online passwords. The applicant had not expected the account to be used by investors at the time.*

Accordingly, the applicant intended to physically transfer the $3,000,000 Investor funds by his attendance at Westpac bank to arrange for a bank cheque to transfer the funds from the Silvergum Westpac account to the Platinum account which was also held with Westpac. He intended to arrange that bank cheque on Wednesday, 3 June 2015 after the Platinum directors' meeting where all directors would be informed of the Investor funds. It was his intention to discuss the investment at the meeting. The applicant knew at the time that the deposit of the Investor funds into the Westpac account of Silvergum was not an investment in Platinum.

46. Until 10.30am on 3 June 1015, the applicant had no reason to believe that there was any difficulty in transferring the Investor's funds from Silvergum's Westpac account into Platinum's Westpac account and then taking steps as provided for in Platinum's Constitution to give effect to the Investor making an investment with Platinum.

47. The applicant was unable to arrange the transfer of the Investor's funds after the Platinum directors' meeting on 3 June 2015 as his position as director of Platinum had been terminated. Approximately 10 minutes into the directors' meeting, the applicant fainted and collapsed….

…

49. Following his collapse on 3 June 2015, the applicant was not well. Based on the statements to him on 3 June 2015 from the two Directors of Platinum that attended the meeting, the applicant assumed that they would make contact with Chu and deal with the investment.

50. The applicant had a discussion with Chu, following his termination. Chu advised the applicant that Chu had not had any communication from Platinum and that, in any event, Chu would not look to recommend an investment with Platinum under the circumstances. The applicant and Chu discussed that the Investor's funds needed to be returned immediately. Neither gentlemen had the Investor's bank details as the funds had been received unexpectedly. Chu contacted the Investor and provided the applicant with the Investor's account details on or about 16 June 2015. On that day, the applicant went to his Westpac Bank branch, obtained a bank cheque and took it across the road to the National Australia Bank and deposited the funds into the Investor's bank account.

72. Following Mr Downey's termination from Platinum, Ms Li Ling decided not to proceed with an investment in Platinum. She ultimately obtained an SIV later in 2015.

ASIC delegate's finding

73. Mr Downey was then investigated by ASIC. Ultimately, an ASIC delegate found that Mr Downey had not complied with a financial services law. Specifically, he was found to have engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or was likely to mislead or deceive (as per section 1041H(1) of the Act). The conduct that was found to have been misleading or deceptive or was likely

to mislead or deceive was the provision of letters bearing his signature and addressed to his client and the Australian Government containing information that was found to be false.

74. The ASIC delegate relevantly found:

> ***C. CONDUCT UPON WHICH ASIC IS CONCERNED THAT MR DOWNEY MAY NOT HAVE COMPLIED WITH A FINANCIAL SERVICES LAW***
>
> ***C1 Generally***
>
> *61. Under s761A each of s 1041H(1), s1041G(1) and s601FD(1)(a) is a financial services law". Under s920A(1)(e) ASIC may make a banning order against a person who has not complied with a financial services law. ASIC was concerned that Mr Downey may have not complied with s1041H(1), s1G41G(1) and s601FD(i)(a).*
>
> *62. Under s1041H(1) "A person must not in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive". Mr Downey's relevant conduct concerned a financial product, namely an investment in the Platinum Fund.*
>
> *63. Under s1041G(1) "A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service". I am not satisfied that Mr Downey's conduct was dishonest. Mr Downey did not misuse the amount of $3m and appears to have intended at all times to have the amount of $3m invested in a managed investment scheme that was either registered or would become registered. The 1 June 2015 Letters state what would have been the situation had Mr Downey's intention, at to date, come to fruition.*
>
> *64. Under s601FD(1) "An officer of the responsible entity of a registered scheme must ... act honestly; and exercise the degree of core and diligence that a reasonable person would exercise if they were in the officer's position..." In view of the below finding that Mr Downey did not comply with s1G41H(1) there is no need to make a finding about whether the conduct also comprised a failure to comply with s601FD(1)(b).*
>
> ***C2. Mr Downey did not comply with s1041H(1)***
>
> *65. The representation made in each of the 1 June 2015 Letters that Ms Li Ling had made a $3m investment with Platinum was false. Ms Li Ling had not made a $3m investment with Platinum. The making by Ms Li Ling of such an investment would significantly enhance her chances of being issued a SIV. Each letter was likely to cause an Australian government employee who read the letter to erroneously understand that Ms Li Ling had made a $3m investment with Platinum and hence had made a $3m "complying investment. Accordingly, each representation was likely to be both misleading and materially misleading.*
>
> *66. Mr Downey brought the 1 June 2015 Letters into existence, knew that the 1 June 2015 Letters were false, knew that each letter was likely to cause an Australian government employee who read one of the letters to have the*

above erroneous understanding and knew that each letter was likely to be materially misleading if read by such a person.

67. *According to Mr Downey he understood the 1 June 2015 Letters to be in draft, and he did not intend that the letters be sent to the Australian government until Ms Li Ling's $3m had been transferred to Platinum.*

68. *It was submitted: "It is important to consider how it came that these letters were sent to the addressees. At no time did Downey expect that the letters would be forwarded to addressees other than by Downey and certainly not without approval by Downey. At all times, Downey anticipated being in a position to provide that approval in the afternoon of 3 June 2015 when he could arrange for the investor's funds to be transferred from the Silvergum Westpac account to the Platinum Westpac account".*

69. *It was submitted: "Downey was at all times acting on the understanding that Chu was aware that the Investor's funds had not been deposited into Platinum's account. Chu acknowledges in the transcript of his interview that he was aware when the 1 June 2015 letters were provided to him by Downey that the Investor had not made a $3,000,000 investment with Platinum at that time. He confirmed that the Investor had deposited the money and that the investment now had to go through Platinum. Downey's position is that the letters were not to be used for any purpose and certainly not to be released by Chu until Downey was able to effect the transfer of the Investor funds on the afternoon of 3 June 2015 and until Downey himself released the letters. That release would only occur once funds had been placed with Platinum, an event expected to occur on 3 June 2015. In any event, at all times, it was Downey's responsibility to issue the letters to third parties. Downey had no reason to believe that Chu would pass on the Platinum tetters to any third parties".*

70. *I am satisfied that Mr Downey provided the 1 June 2015 letters to Mr Chu for the purpose of them being, ultimately, provided to the Australian government because:*

    (a) *On 22 May 2015, Mr Downey became aware that the last day for investors to make a "complying investment" was 29 May 2015.*

    (b) *On 1 June 2015 at 10.00am, Mr Downey sent by Mr Chu the two letters dated 29 May 2015. Each letter was in final form. Each letter was backdated, bore the date known to Mr Downey as being critical, was on letterhead titled "Platinum mortgage securities", was dated "29th May 2015" and was signed by Mr Downey as "Director". None of these factors are consistent with the letters being drafts. They are all consistent with an intention that they be provided to the Australian government.*

    (c) *On 1 June 2015 at 10:28am, Mr Chu asked that the date of the letters be changed to 1 June 2015. Mr Chu did not make a request that anything else be changed. If Mr Chu wanted the letters to reflect the date on which $3m was received by the Platinum Fund he would have asked that the letters bear the date that the funds are received by the Platinum Fund. It is unlikely that Mr Chu was of the opinion that as at 1 June 2015 the Funds had been received by the Platinum Fund because if he was of such an opinion it would have been as a result of a misrepresentation made to him by Mr*

Downey. If Mr Downey wanted the letters to reflect the date on which the $3m was received by the Platinum Fund he would not have acceded to Mr Chu's request. It was Mr Chu's and Mr Downey's intention that the letters in their final form be dated 1 June 2015 thus representing, falsely, that as at 1 June 2015 Ms li Ling had made a $3m investment with Platinum.

(d) On 1 June 2015 at 11:28am, Mr Downey sent Mr Chu the 1 June 2015 Letters. Each letter was in final form. Each letter bore a date by which the $3m had not been received by the Platinum Fund, was on letterhead titled "Platinum mortgage securities", was dated "1st June 2015" and was signed by Mr Downey as "Director". None of these factors are consistent with the letters being drafts. They are all consistent with an intention that they be provided to the Australian government.

(e) Mr Downey took no steps to inform Mr Chu that any of the letters were drafts. Mr Chu understood that Ms Zhuang would forward the letter dated 1 June 2015 and addressed to the Minister for Immigration and Citizenship to the Australian government. Ordinarily a person preparing a document in final form, on providing that document to another person with an intention that it be treated, as a draft, will take steps to ensure that the person does not act on, or forward, the document.

(f) On 2 June 2015 at 12.50pm, Mr Downey was informed that the Minister for Immigration and Citizenship understood that $3m had been transferred to Platinum. Mr Downey took no steps to correct what he would have known to be an erroneous understanding. Mr Downey's submission that he did not read the part of the email concerning the $3m is not plausible given that that part of the email was contained on the first page of the email and was the first matter of substance referred to in the email.

(g) On 3 June 2015 at 10.20am Mr Downey provided Mr Chu with a further letter backdated to 1 June 2016. The letter was in final form. The letter bore a date by which the $3m had not been received by the Platinum Fund, was on letterhead titled "Platinum mortgage securities", was dated "1st June 2015" and was signed by Mr Downey as "Director". None of these factors are consistent with the letter being a draft. They are all consistent with an intention that the letter be issued.

71. I am satisfied that Mr Downey engaged in conduct, regarding a financial product that is likely to mislead and in so doing did not comply with s 1041H(1).

ISSUES

75. As correctly outlined by ASIC in a Statement of Facts, Issues and Contentions dated 11 November 2016, the Tribunal is required to determine:

a) whether or not the power to exercise the discretion to make a banning order against the Mr Downey is enlivened;

b) if the Tribunal is satisfied that the power is enlivened, whether or not a banning order should be made against Mr Downey; and

c) if the Tribunal decides to make a banning order against Mr Downey, the duration of that banning order.

EVIDENCE BEFORE THE TRIBUNAL

76. This matter was heard in Perth on 27 March 2017.

77. Mr Downey appeared in person and was self-represented. ASIC was represented by counsel, Ms Hodgson.

78. The Tribunal had before it a 526 page set of T Documents at T1 to T35 (R1). The T Documents included all evidence relied on by the delegate charged with determining whether a banning should apply in relation to Mr Downey. The Tribunal also had before it the following submissions and evidence:

- A Statement of Facts, Issues and Contentions from ASIC dated 11 November 2016 (R3);
- A Statement of Facts, Issues and Contentions from Mr Downey dated 16 January 2017, with various attachments identified as A-J (A1);
- An email dated 4 May 2015 (R2);
- Final Written Submissions from ASC dated 26 April 2017;
- Final Written Submissions from Mr Downey dated 12 May 2017; and
- Final Written Submissions in Reply from ASIC dated 25 May 2017.

79. Mr Downey also gave oral evidence before the Tribunal. Somewhat unusually, Mr Chu was not called as a witness.

LEGISLATION

Introduction

80. Section 1(2)(b) of the *Australian Securities and Investments Commission Act 2001* requires that ASIC "promote the confident and informed participation of investors and consumers in the financial system". As correctly noted by counsel before this Tribunal, this objective is also fundamental to the Tribunal's exercise of its review powers, in which it "stands in the shoes" of ASIC.

81. ASIC's powers under the Act are supplemented by policy guidelines issued by ASIC. The Tribunal notes, in particular, "Regulatory Guide 98 - Licensing: Administrative action against financial service providers" (RG 98). The Tribunal has regard to these guidelines, as it must.

Legislation

82. The provisions in Division 8 of Part 7.6 of Chapter 7 of the Act set out the circumstances in which ASIC may disqualify or ban a person from providing financial services.

83. Subdivision A of Division 8 deals with banning orders. A banning order is a written order that prohibits a person from providing any financial services or specified financial services in specified circumstances or capacities: s 920B(1) of the Act. A banning order may be permanent or for a specified period: s 920B(2) of the Act.

84. Subsection 920A(1)(e) of the Act provides that ASIC may make a banning order against a person if the person has not complied with a financial services law.

85. Section 761A, in turn, defines 'financial services law' to include relevantly Chapter 7, including section 1041H(1).

86. Pursuant to section 1041H(1), "a person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive." Pursuant to section 1041H(2)(a) the reference in subsection

(1) to engaging in conduct in relation to a financial product includes (but is not limited to) dealing in a financial product.

87. Subsection 920A(2) of the Act provides that ASIC may only make a banning order against a person after giving the person an opportunity to appear, or be represented, at a hearing before ASIC and to make submissions to ASIC on the matter. The hearing before ASIC takes place in private.

Policy

88. RG 98.44 states that ASIC is likely to make a banning order against a person where there are serious concerns about the person and, in particular, where there is a need to protect the public and where conduct may result in investor detriment.

89. RG 98.45 relevantly provides that, in determining whether or not to pursue administrative action, such as a banning order, against a person, consideration is to be given to the particular facts of each matter. While it is not possible to identify all factors that are relevant to each decision, RG 98 provides a guide in relation to relevant factors.

90. Specifically, at the end of RG 98 there are two tables. Table 1 sets out a non-exhaustive list of key factors which might be taken into account in determining whether or not to pursue administrative action as follows:

Table 1: Key factors ASIC considers in deciding to take administrative action

Factors	Relevant considerations
Nature and seriousness of the suspected misconduct	• Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent • The amount of any benefit gained or detriment suffered as a result of the misconduct • The amount of any loss caused to investors and consumers • The impact of the misconduct on the market, including potential loss of public confidence • Whether the conduct is continuing • Whether the misconduct indicates systemic compliance failures • Whether the licensee or person has a poor compliance record (e.g. they have previously engaged in the misconduct) • Conduct which may amount to a serious conflict of interest

Internal controls	• Whether the licensee had in place effective internal procedures to ensure compliance with obligations and to detect any breaches of them • Whether those procedures were complied with and whether any breaches of obligations were detected • If the misconduct was committed by a representative of a licensee, whether it indicates a systemic compliance failure of the licensee • Whether a corporate culture conducive to compliance with obligations is evident
Conduct after the alleged contravention occurs	• When and how the breach came to the attention of ASIC • The level of cooperation with our investigation • Whether remedial steps have been taken
The expected level of public benefit	• Whether the case is likely to help participants in financial markets to better understand their obligations • The protective effect for the public and reinforcement of the integrity and reputation of the financial services industry
Likelihood that: **• the person's or entity's behaviour will change in response to a particular action** **• the business community is generally deterred from similar conduct through greater awareness of its consequences**	• The compliance history of the licensee or person • Whether behaviour (of an entity or broader industry) is more likely to change if the person is banned or has their licence suspended or cancelled
Mitigating factors	• Whether there would be any personal hardship were a banning order to be made • Whether the misconduct relates to an isolated complaint and consumers have generally not suffered substantial detriment • Whether the misconduct was inadvertent and the person undertakes to cease or correct the conduct

91. Table 2, in turn, details the factors and conduct which will result in banning orders in categories of less than 3 years, 3-10 years, and 10+ years. It provides as follows:

Table 2: Factors and examples of conduct relating to specific periods of banning

Outcome	Factors	Examples of conduct (indicative only)
Banning for less than 3 years	• Conduct is the result of carelessness or inadvertence • Attempt to remedy the contravention and person has fully cooperated with ASIC • No loss (or minimal loss) to client	• Giving a complying disclosure document, but not within the required time • Failing to lodge documents with ASIC as required • Failing to notify ASIC about a representative's breach of the licensee's obligations
Banning for 3-10 years	• Conduct inconsistent with the orderly operation of a financial market	• Insider trading • Market manipulation or other misconduct in relation to a

	• Adverse impact on confidence in or the integrity of a financial market • False, misleading or deceptive, or unconscionable conduct, or conduct with a lesser degree of dishonesty • A deliberate course of conduct to enrich themselves at others' expense • Incompetence, irresponsibility or high level of carelessness, but with the possibility that the person may develop requisite skills and abilities • Disregard for the law and compliance with regulations	financial product traded on a financial market (e.g. s1041A-1041E) • Misconduct in relation to financial products or financial services (e.g. s1041F-1041H and Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act)) • Not acting in the best interests of the client, in relation to any personal financial advice given, and not complying with the associated best interests obligations (s961B-961Q) • Offering or recommending interests in a managed investment scheme that needs to be registered, but has not been • Carrying on a financial services business without holding an AFS licence Providing financial services that are not covered by the AFS licence, if one is required • Providing financial services contrary to s911B • Failing to keep financial records that must be kept • Failing to comply with disclosure requirements, including not disclosing commissions and other benefits or relevant interests and associations • Unauthorised discretionary trading • Failure by a director of the licensee to ensure the licensee complies with its obligations • Misleading clients about the nature of the products being acquired or disposed of on their behalf that are not for the clients' benefit
Banning for 10+ years and permanent banning	Dishonesty or intent to defraud Continued, knowing and wilful contraventions of the law, including market integrity rules and disregard of legal obligations Previous contraventions of the law Serious incompetence and irresponsibility A likelihood that the person will engage in contravening conduct in the future Significant adverse impact on confidence in or the integrity of a financial market	Misappropriation of client funds or otherwise engaging in fraud or theft Falsification, concealment or deliberate destruction of records required to be kept Engaging in a pattern of persistent contraventions that indicates systemic failure or a general lack of understanding of and regard for compliance More substantial insider trading More substantial market manipulation or other significant misconduct in relation to a financial product traded on a financial market (e.g. s1041A-1041E)

	Conduct significantly inconsistent with the orderly operation of a financial market Any dishonest conduct involving clients	Failure to apply client's funds in accordance with the client's instructions Forging a client's signature Providing clients with false insurance documents

92. The factors in this table take into account the propositions formulated in *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd*, *Re: ASIC v Adler*, (2002) 42 ACSR 80. A combination of more than one example of misconduct can increase the seriousness of the misconduct, such that a longer banning than indicated by this table may result. Relevantly, investor loss is not a prerequisite for a period of banning.

ASIC'S AND MR DOWNEY'S CONTENTIONS AND SUBMISSIONS TO THE TRIBUNAL

93. At their core, ASIC's contentions before the Tribunal stress that Mr Downey engaged in misleading or deceptive conduct that warrants a banning order of six years:

> **The discretion to make banning order was enlivened**
>
> *5.1. The discretion to make the banning order was enlivened when the Delegate was satisfied that the Applicant had not complied with a financial services law (subsection 920A(1)(e) of the Act).*
>
> *5.2. The Applicant had not complied with a financial services law in that he engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or was likely to mislead or deceive (section 1041H(1)).*
>
> *5.3. The conduct that was misleading or deceptive or was likely to mislead or deceive was the provision of letters bearing his signature and addressed to Ms Li Ling and the Australian Government, containing information that was false. As stated by the Delegate:*
>
> > *'The representation made in each of the 1 June 2015 Letters that Ms Li Ling had made $3m investment with Platinum was false. Ms Li Ling had not made a $3m investment with Platinum. The making by Ms Li Ling of such an investment would significantly enhance her chances of being issued a SIV. Each letter was likely to cause an Australian government employee who read the letter to erroneously understand that Ms Li Ling had made a $3m investment with Platinum and hence had made a $3m 'complying investment'. Accordingly each representation was likely to be both misleading and materially misleading.*
> >
> > *Mr Downey brought the 1 June 2015 Letters into existence, knew that the 1 June 2015 Letters were false, knew that each letter was likely to cause an Australian government employee who read one of the letters to have the above erroneous understanding and knew*

that each letter was likely to be materially misleading if read by such a person.

…

5.6. Accordingly, the discretion to make the banning order was enlivened.

A banning order should be made against the Applicant

5.7. ASIC contends that a banning order should be made against the Applicant for the following reasons:

(a) The Applicant engaged in conduct that was misleading or deceptive or was likely to mislead or deceive, in the provision of letters bearing his signature and addressed to Ms Li Ling and the Australian Government, containing information that was false.

(b) While the Applicant stated he understood the letters to be in draft and did not intend the letters to be sent to the Australian government until the $3million was transferred to the Platinum account;

(i) Each of the 29 May 2015 Letters, the 1 June 2015 Letters and the Victorian Government Letter were in final form including bearing the Applicant's signature;

(ii) The 29 May 2015 Letters were backdated to the date the Applicant knew was the critical date for investors making a 'complying investment';

(iii) Both on the date of the letters and the date the letters were signed, the information contained in them was false, in that the investment was not made in Platinum and the $3million was not transferred into the Platinum account;

(iv) The Applicant knew the information was false in that he knew the $3million investment by Ms Li Ling was not transferred to the Platinum account;

(v) On 2 June 2015 at 12.50pm, the Applicant was informed by email that the Minister for Immigration and Citizenship (through Ms Joyce So of DFAT) understood that Ms Li Ling had made a $3million investment into a complying investment, namely the Platinum Fund; and

(vi) Despite knowledge of the erroneous belief held by the Minister for Immigration and Citizenship, the Applicant provided the Victorian Government Letter under cover of email dated 3 June 2015, but backdated to 1 June 2015 regarding Platinum's "Economic contribution to Victoria.'

(c) The purpose of a banning order is to protect members of the public. A banning order is not made to punish a person even though punishment or the imposition of a penalty may be the practical outcome of such an order. If imposed, a banning order protects the public from a person from providing financial services. A banning order may also have the effect of maintaining consumer confidence.

(d) Deterrence is relevant to the protection of the public. A banning order does not only provide deterrence to the person the subject of

the order but also to others who are involved or might potentially become involved in the industry. A banning order may also have an educative effect on the person concerned and the industry at large. It informs other participants in the industry, including advisers and consumers, that certain conduct is neither acceptable nor tolerated.

5.8. Having regard to the seriousness of the representations made to the Australian Government in circumstances where those representations were false, and known to be false, protection of the public and maintenance of consumer confidence require that a banning order be made against the Applicant. Accordingly, the Tribunal should make a banning order against the Applicant.

The terms and duration of the banning order imposed on the Applicant

5.9. Having regard to the Regulatory Guide Table 2 and the recommendation of an outcome of a banning order period of 3-10 years for conduct that involves false, misleading or deceptive conduct and misconduct in relation to a financial product including section s1041H, the appropriate period for a banning order is 3-10 years.

5.10. Given that the conduct itself involved false representations to the Australian Government whilst knowing the information was false, the seriousness of such conduct, for the reasons outlined above in paragraph 5.7, warrants a period of banning that recognises the seriousness of such conduct. Accordingly, it is submitted that six years, being in the middle of that range, is the appropriate period for such conduct.

5.11. The Tribunal should affirm the decision under review to make a banning order against the Applicant for the period of six years.

94. Mr Downey, in turn, contended that although he had acted carelessly and recklessly, he also acted as quickly as he could to rectify what had happened and, further, that no one suffered any loss because of his actions. He accepted that the discretion to make the banning order was enlivened but that his actions cannot, on the facts, be seen as constituting misleading or deceptive conduct. He further contended that a banning order of less than six years is appropriate.

95. Mr Downey explains in his Statement of Facts, Issues and Contentions:

12. It is not accepted that the conduct of the applicant was misleading or deceptive or likely to mislead or deceive. This situation is no different than had the applicant prepared the letters, signed them and left them on his office desk and another person taken them and sent them out. The applicant cannot be held responsible, in this situation, for the acts of Chu in releasing the letters.

13. The applicant accepts that creating the letters in their final form was a mistake. Greater care and precautions should have been taken to clearly identify the documents as "drafts". Further the applicant should have made the transfer of funds to Platinum on the day the investor agreed to become a member of Platinum. The applicant would like the tribunal to have regard

to the fact that the letter was sent without the applicant's authorisation and that this was an isolated incident with no allegation of actual dishonesty or loss to the investor. The applicant has no previous history of contraventions and would like the tribunal to consider a shorter banning period.

…

54. … In this case the applicant;

1. *Never had communication with the investor;*
2. *Had no knowledge that the $3 million had been transferred until after the fact*
3. *Never authorised the letters to be issued to a third party*
4. *Made a business decision for Platinum to accept the investor as a member based on the knowledge that the $3 million was available and Platinum, through the Applicant, had control of those monies, and the investor could comply with the identification and domestic bank account requirement;*
5. *In creating the letters there was an honest belief that the transaction would occur and that the investor would become a member of the Platinum fund;*
6. *Did all things possible to rectify the mistake of the funds being credited to Silvergum once he became aware of it.*

55. Section 1041H of the Corporations Act 2001, ASIC must establish that the conduct is misleading and/or deceptive or likely to mislead or deceive, and that the letters where reasonably relied.

56. Section 1041H and its analogue section 12GI of the ASIC Act, sets out the defences for allegations of misleading and deceptive conduct:

1. *That the contravention in respect of which the proceeding was instituted was due to reasonable mistake; or*
2. *That the contravention in respect of which the proceeding was constituted was due to reasonable reliance on information supplied by another person; or that:*
3. *The contravention in respect to which the proceeding was instituted was due to the act or default of another person, to an accident or some other cause beyond the defendant's control; and*
4. *The defendant took reasonable precautions and exercised due diligence to avoid the contravention.*

57. In this case, there is no evidence that the applicant sent the letters to the investor or government directly. The evidence confirms that the email and correspondence to remove third parties was done by Chu. (Tribunal Document - T16, ASIC interview with Chu, page 324, line 4) There is no evidence to support that the applicant authorised these letters to be issued. The letters being issued was and act or default of another person (Chu) beyond the applicants control;

68. *At all times, the applicant operated on the understanding that the letters would be held until the Investor's funds had been transferred from the Silvergum account to the Platinum account. Chu knew that the funds were not yet received by Platinum. The transfer was to occur immediately following Platinum's directors' meeting scheduled for 3 June at 10.20am. The applicant took a copy of the 3 June 2015 letter with him to the directors' meeting to update the other directors.*

69. *Chu confirmed in his ASIC examination (Tribunal Document - T16, ASIC interview with Chu, page 323, line 21-24) that there was a practice of preparing documentation in advance or in his words, "in anticipation". Chu went on to say further at (Tribunal Document - T16, ASIC interview with Chu, page 324, line 4) that he assumed without any discussion with the applicant that the letter could go out. This was wrong in circumstances where Chu knew that the money had not yet been placed in the Platinum account and the applicant had not authorised those letters to be released.*

70. *The delegate states that the applicant "was aware the last day for an investment was 29 May 2016" (Tribunal Document - T2, 70 (a)), however if this was the fact, then why would the applicant date letters the 1 June 2015? If the letters where final, why didn't the applicant simply backdate all letters to the 29 May 2015 and issue originals?*

71. *The delegate states that the applicant "did nothing to correct the actions of the email of the 2 June 2015" (Tribunal Document - T2, 70 (e)) however the email sent on the 3 June 2015 clearly states in the subject matter "RE Letter to draft for State Government- Re Li-Ling Wu Lee Osmose Pty Ltd.msg" (Letter by Downey to ASIC, 10.09.2015, page 129, "Letter to draft for State Government- Re Li-Ling Wu Lee/Ozmosa Pty Ltd". This shows that the applicant was working under the assumption that the letters where in draft only. In addition the applicant took corrective as pleaded in para 91 - 94.*

72. *The applicants position is that the Platinum letters signed by him were never intended to be sent until funds had been transferred from the Silvergum Westpac account to the Platinum Westpac account and the applicant had authorised them to be released.*

73. *Chu should not have sent Platinum letters to Ms Zhuang on 1 June 2015. This was done without the knowledge of or instruction of the applicant. At no time did the applicant expect that Chu would send the letters prior to receiving confirmation that the investment funds had been transferred into the Platinum account. Chu confirms he just sent the letters. (Tribunal Document - T16, ASIC interview with Chu, page 324, line 4) ASIC v Narnia (2008) 66 ACSR 688 found that the real culprit in these cases lies with the person who authorises the release of such documents. At no time did the applicant expect that the letters would be forwarded to the addressees other than by the applicant and certainly not without approval by The applicant.*

74. *At no time did the applicant intend to mislead or deceive anyone in relation to the 1 June 2015 letters sent to Chu and the 1 June 2015 letters provided to the Australian government in support of the Li-Ling SIV application. The letters where intended for internal use only. It was not unusual for the applicant to provide loan offers and other documents, completed with signature to staff or business partners to ensure that they had no further*

amendments before they were released. Another example is in the preparation of an application for a Financial Services Licence where the applicant prepares draft Constitutions, compliance plans, product disclosure statements, marketing material ect. See (Tribunal Document - T12, page 161, Copy of Draft PDS, electronic signature). In all cases there was no intention to mislead or deceive, it was a simple case of being organised.

75. *It is not accepted that the conduct of the applicant was misleading or deceptive or likely to mislead or deceive. This situation is no different than had the applicant prepared the letters, signed them and left them on his office desk and another person taken them and sent them out. The applicant cannot be held responsible, in this situation, for the acts of Chu in releasing the letters.*

Were the letters relied on

76. *The point raised by the delegate "the making of the letters would significantly enhance her chances of being issued an SIV" are misguided. The letters were for the purpose of proving how the fund would benefit the Victorian economy. At all times further documentation was required for the Platinum approval to be given effect. (Tribunal Document - T7, Letter from Australian Government to Wu Lee Li Ling page 72, last para) " You will receive confirmation from this office that the alternative assets can be used to make the complying investment" including and not limited to form 1413 stamped by the Fund Manager (Platinum) (Exhibit J, Form 1413)*

77. *(Tribunal Document - T7, Letter from The Department of immigration and Boarder Protection") states that the visa application had been accepted on the 3 March 2015. Independently from the letters.*

78. *The SIV application is done independently from the fund manager. A minimum of $5 million is required. (Exhibit H, SIV application overview). In addition, the letters drafted were to satisfy the State Government that the fund is a compliant fund and benefits the Victorian economy. The letters themselves have no bearing on the application. The letter is to: "warrant that the Platinum First Mortgage Income Fund is a complying fund for the purpose of meeting the requirements of the Australian Governments Department of Immigration and Boarder Protection's Significant Investment Visa"*

79. *(Tribunal Document - T10, Email chain between Joy, Chu and Zhuang, page 102, General matters para 2,) "have you applied to the State Government for approval" "if so forward approval"*

80. *(Tribunal Document - T30, email from Chu to the applicant) detailing what information needed to be included in the letters and the format it needs to take. Attached to the email was a sample letter from the government: 188C Sample Letter from Managed Fund Doc"*

81. *An email from immigration on the 2 June 2015 (Tribunal Document - T10, page 103, complying investment, para 3) addressed to Ms Joyce that clearly states "Form 1412 and 1413 are missing, and without the forms the application cannot be granted" Form 1413 needs to bear the stamp of the fund Manager "Platinum". ASIC understood this to be the case Tribunal Document - T16, ASIC interview with Chu, page 324, line 4)*

82. *There is no evidence to support the delegates decision that the letters "significantly enhance the investors chances of being issued an SIV". At all times further documentation was required for the investment in Platinum to be approved by the government agency.*

A Proper Bases in creating the letters

83. *In creating the letters there was an honest belief that the transaction would occur and that the investor would become a member of the Platinum fund. The letters where based of facts and I had a reasonable basis to create them. The investor had agreed to invest in Platinum and for the transfer of funds from Silvergum to Platinum. The applicant had all of the investors details and confirmation of the funds in the Silvergum account. There was no reason to believe that the investment could not take effect. In Grande Enterprises Ltd v Pramoko,34 Le Mere J stated: The question whether there are reasonable grounds for making a particular representation is an objective not a subjective question. A genuine or honest belief on the part of the representor is relevant but not sufficient to show reasonable grounds: Cummings v Lewis (1993) 41 FCR 559, Sheppard and Neaves JJ at 565. For there to be reasonable grounds for a representation, including a representation as to intention and ability, there must exist facts which are sufficient*

> *Klusman and Australian Securities and Investments Commission [2011] AATA 150 (8 March 2011) the Judge "Mr Klusman breached section 1041H of the Act in relation to the statement he made about Macquarie on 17 September 2008, because he made a misleading and deceptive statement which was without a reasonable basis"*

Intentional Misconduct

84. *In exercising ASIC's discretion in imposing a banning order, the delegate states that the applicants misconduct was intentional, "he provided false reasons for his misconduct in exercising his right to be heard"*

85. *Intentional misconduct generally means "intentionally doing that which should not be done or intentionally failing to do that which should be done"*

    1. *intentional misconduct occurs when the "the person has committed the conduct constituting the misconduct with the intent of acting with a lack of integrity"*

    2. *Conversely, misconduct that can be categorized as unintentional misconduct occurs when the person has committed the conduct constituting the misconduct but without an intent to act with a lack of integrity,*

86. *The applicant rejects the assertion that the misconduct was intentional, for intentional misconduct would require a lack of integrity.*

87. *The applicant had no knowledge that an SIV applicant was to place funds in the Silvergum account on the 28 May 2015. Chu admits in that he gave the bank account details to the SIV applicant*

88. *Once the applicant became aware of the funds in the Silvergum account, he took action to correct this. He decided upon a mechanism to place the investment in Platinum.*

89. *The applicant informed Chu that Silvergum would not be a registered scheme in the near term and that Platinum could offer compliant investment and, in the circumstances, the most appropriate step was for the Investor to invest with Platinum until such time as Silvergum was registered.*

90. *Chu had spoken with the proposed Investor's agent and agreed to the investor becoming a member of Platinum and the applicant was to issue the necessary paper work to enable the investment.*

91. *Once the applicant became aware that the funds and investment had not been dealt with after he left Platinum he ensured all funds including all interest was repaid to the investor. This was done on the 11 June 2015, well before any litigation or investigation by ASIC commenced.*

92. *The government was notified via email on the 11 June 2015 (Exhibit A, Change of Compliant investment and Exhibit B, Email from SIV solicitor to Immigration department) that "she has since decided not to invest in Platinum First Mortgage Income Fund but invest $1.5Million into Vanguard Australian Government Bond Index Fund"*

93. *A change of compliant investment dated 15 June 2015 lodged with the Victorian Government from Osmose Pty Ltd to Vanguard (Exhibit A, Change of Compliant investment and Exhibit B, Email from SIV solicitor to Immigration department).*

94. *If Immigration was misled, it was corrected and advised that the investor had not made an investment with Platinum. These actions are inconsistent with a person who is trying to mislead and deceive another. There was nothing further the applicant could have done to rectify the mistake.*

96. In his written closing submissions, Mr Downey submitted:

8. *There was never an intention to mislead or deceive anyone with the letters addressed to Department of Foreign affairs and Trade (DFAT). As far as the Applicant was concerned, the letters where being worked through to ensure they met the requirements of DFAT with Chu confirming the content was correct. Once the letters where approved by Chu and the funds transferred from Silvergum to Platinum, original letters would be sent out to DFAT with all supporting documentation, which included a form 1413 and evidence of the transfer of funds*

…

56. *The Applicant submits that the Respondent was aware the investor had an approved visa application as at the 3 March 2015 and a compliant investment as at the 24 March 2015. Further they were aware the Applicant did not authorise the letters to be sent to any third party and DFAT had not relied on the letters as at all times further information was required.*

57. *The Applicant fully accepts any just disciplinary action that is issued due to any wrongdoing he has done in creating the letters.*

58. *The Applicant submits that he had no criminal history whatsoever. He had completed a Bachelor of Economics and Finance and has worked in the*

finance industry for the past 15 years, specifically in the contributory mortgage area …

59. *Except for the subject matter of this proceeding, the Applicant has not been the subject of any disciplinary action.*

60. *The Applicant is highly embarrassed by the events and the publicity that was given to his case. The industry is fully aware of the case and the likelihood of regaining employment in the Financial sector is low. A reduction in the banning period would at least allow the Applicant an opportunity to try and rebuild his reputation and livelihood.*

61. *By way of mitigation:*

    a. *The conduct did not result in any loss or detriment to consumers of financial products and financial services,*

    b. *The Applicant had no financial gain from the conduct and was not motivated by financial gain;*

    c. *There was never any intention to misappropriate funds belonging to another person;*

    d. *There was no evidence of any previous or subsequent misconduct;*

    e. *Has attempted to remedy the contravention and has fully cooperated with ASIC;*

    f. *Indications of clear intention to comply with legal obligations by demonstrated behaviour;*

    g. *Conduct was the result of a genuine mistake which arose from very unusual circumstances;*

    h. *This was an isolated event and in no way reflected the standard of work usually performed;*

    i. *There is no pattern of behaviour or course of conduct from which the public requires protection.*

62. *Rather than distance himself from that conduct, he took immediate steps to correct the error and refund the moneys to the investor with any losses which may have been incurred after he ceased employment with Platinum.*

63. *The consequences of the six year banning order on the Applicant are grave and affected his reputation and livelihood. His wife has recently given birth and they will be a single salaried household. Financial services are his career and the investigation and its aftermath has had an enormous impact to the Applicant's mental wellbeing and financially crippling. Gaining employment in other areas will be unlikely and regaining employment in the financial sector now ASIC has made public the decision difficult.*

64. *Having regard to Regulatory Guide 98 and the evidence put forward by the Applicant where no consumer or investor suffered any financial detriment and the Government agency did not rely on the letters that where issued without the Applicant's authorisation, a reduction in the time of the banning period for less than 3 years should be made.*

65. *The powers of ASIC is discretionary and the discretion to make a banning order of six years appears excessive given the contradictory material in the case. The consequences to the Applicant are grave which have affected*

his reputation and taken away his livelihood, a decision must be made on rational probative information

97. In written closing submissions dated 26 April 2017 ASIC submitted as follows:

> *7. In addition to the matters set out in the SFIC, the Respondent refers to the following evidence and the conclusions which are appropriately drawn from that evidence.*
>
> *7.1. Each of the 29 May 2015 Letters, the 1 June 2015 Letters, and the Victorian Government Letter (together, the Letters) were in final form including bearing the Applicant's signature. The Applicant's improbable reason for putting his signature on the Letters, in circumstances where he contends that they were in draft and a final version would be signed in pen by him before being posted out, was so he could show Mr Chu what the final documents would look like. When challenged that it would make more sense to leave a blank space if he intended to sign them by hand, he suggested 'it was stupid and 'I should never have done that.'*
>
> *7.2. Each of the 29 May 2015 Letters and the 1 June 2015 Letters which were addressed to the Minister for Immigration and Citizenship stated that they were* 'in support of Ms Wu Lee Li Ling's application for a Significant Investor Visa (#I88(C)).' *The Victorian Government Letter was stated to be provided as part of an application for* 'the Australian Government's Significant Investor Visa.'
>
> *7.3. The 29 May 2015 Letters were emailed to Mr Chu on 1 June 2015 but were backdated to 29 May 2015, being the date the Applicant believed at that time was the critical date for the SIV investor making a 'complying investment'. While the Applicant disputes that he knew this to be the critical date, Mr Chu emailed him on Friday 22 May 2015 stating that the last day for the 188 investor (which the Applicant understood was a SIV applicant) to make a complying investment is next Friday. The last date for Ms Li Ling to make the complying investment had, in fact, been extended to 1 June 2015.*
>
> *7.4. It is clear from an email dated 4 May 2015, between the Federal Government (Ms Joyce So of the Department of Foreign Affairs and Trade (DFAT)) and Ms Zhuang (Ms Li Ling's migration agent) that the date for Ms Li Ling to make a complying investment was 1 June 2015. The Respondent does not suggest that the Applicant had seen this email as at 1 June 2015, but rather that it is evidence of the actual deadline for Ms Li Ling's Visa requirements, rather than the 29 May 2015, as previously indicated by Mr Chu.*
>
> *7.5. The 1 June 2015 Letters were identical to the 29 May 2015 Letters, save that they were dated 1 June 2015. The 1 June 2015 Letters were dated as such after Mr Chu requested the Applicant change the date, because it was* 'Safer that way'. *This was the only change made.*
>
> *a) Despite being asked several times in cross examination, the Applicant did not give clear evidence about why he changed the date from 29 May 2015 to 1 June 2015, although he did*

state that because it was early in the morning it was still his intention to go to the bank that day to transfer the funds to Platinum. This is at odds with the Applicant's SFIC in which he states that he did not intend the Letters to go out until after the 3 June 2015 directors meeting and did not expect the funds to be transferred until after the 3 June directors' meeting.

b) In the Respondent's submission, the most probable explanation for the Applicant changing the date to 1 June 2015 and providing a signed letter of that date to Mr Chu is that he understood that the 1 June 2015 Letters were to be sent out on that date.

7.6. Each of the Letters was on Platinum letterhead, signed by the Applicant as director and contained a representation that Ms Li Ling had made an investment with Platinum as follows:

a) in respect of each of the 29 May 2015 and 1 June 2015 Letters:

i. The letter addressed to Ms Li Ling stated 'Thank you for your investment of $3,000,000.00.'

ii. The letter addressed to the Minister for Immigration and Citizenship stated: 'We confirm that Ms Wu Lee Li-Lings has made an investment to the value of AUD$3,000,000.00 with Platinum Mortgage Securities (Vic) Limited (Platinum) pending allocation to a specific loan.'; and

b) in respect of the Victorian Government Letter, addressed to Ms Li Ling: "Your application to become a member of the Scheme has been accepted and your initial investment has been deposited into the Fund's cash account."

7.7. As at the date shown on each of the Letters; the date the Letters were signed by the Applicant; and the date they were sent by the Applicant to Mr Chu by email, the information contained in each of the Letters (as set out at paragraph 7.6 above) was false, as Ms Li Ling had not made a $3million investment in the Platinum Fund. Nor had any of the documentation referred to in the 29 May 2015 and 1 June 2015 Letters been provided to the investor, as those letters stated.

a) While the Applicant was aware that $3 million had been transferred into the Silvergum account on Friday 29 May 2015 and was purportedly authorised to make the investment into the Platinum Fund instead of Silvergum, he did not transfer those funds into the Platinum account on the afternoon of Friday 29 May 2015.

b) While the Applicant states that it was his intention to transfer the funds to the Platinum account on Monday 1 June 2015, he said he did not do so because he spent the whole day preparing for a compliance meeting.

c) *The Applicant also states that he did not transfer the funds into the Platinum account on Tuesday 2 June 2015 because he had a compliance meeting. In the Applicant's SFIC he stated that the compliance meeting went from 10am-12pm, however during his viva voce evidence he stated that the meeting did not finish until 3.30pm.*

d) *The Applicant further states that he did not transfer the funds on the morning of Wednesday 3 June 2015 because he was due to have a directors meeting, which was due to begin at 9.00am, but did not begin until 10.30am.26 However, in the Applicant's SFIC, he states that the meeting was scheduled to begin at 10.00am.*

7.8. *The Applicant knew the information was false in that he knew the $3 million investment by Ms Li Ling was not transferred to the Platinum account.*

a) *The Applicant knew the funds were not invested in the Platinum Fund and were instead with Silvergum (a non-complying investment for the purposes of Ms Li Ling's visa application), in that he was solely responsible for transferring the funds to Platinum and had not done so at the time he sent the Letters to Mr Chu.*

7.9. *Despite being told that Ms Li Ling had authorised the investment to be made in Platinum on Friday 29 May 2015, the Applicant did not provide Ms Li Ling with an application form for the Platinum Fund, or with the Product Disclosure Statement (PDS) or Supplementary PDS prior to emailing the Letters to Mr Chu or at any time thereafter.*

7.10. *On 2 June 2015 at 12.50pm, the Applicant was informed by email that the Minister for Immigration and Citizenship (through Ms Joyce So of DFAT) understood that Ms Li Ling had made a $3million investment into a complying investment, namely the Platinum Fund.*

a) *The Applicant gave improbable explanations for not reading the email chain from Ms So of DFAT. In his viva voce evidence he said that he thought 'need to discuss this' as indicated by Mr Chu in forwarding the DFAT email referred to an attachment, albeit no attachment appears to be appended to the email. However, in his section 19 interview with ASIC, the Applicant gave evidence that he 'hadn't potentially read this email properly'.*

7.11. *Despite knowledge of the erroneous belief held by DFAT, the Applicant took no steps to inform the Government of any error. Instead he provided the Victorian Government Letter (which was addressed to Ms Li Ling) under cover of email to Mr Chu dated 3 June 2015, but backdated to 1 June 2015, which again purported to confirm that Ms Li Ling had made an investment into the Platinum Fund and provided details regarding Platinum's 'Economic contribution to Victoria.'*

98. In relation to whether Mr Downey engaged in misleading or deceptive conduct, ASIC contended:

> **Misleading or Deceptive**
>
> *8. While the single fact of the $3million investment into a complying investment was not the only thing Ms Li Ling would need to do in respect of obtaining a Significant Investor Visa (SIV), it was an important step in obtaining such a visa. Accordingly, it can be said that by providing information about that investment that was not true to the Federal and State Governments, the Applicant's conduct was misleading or deceptive or was likely to mislead or deceive the Government that Ms Li Ling had made a complying investment for the purpose of an SIV.*
>
> *9. In his SFIC, the Applicant accepts that emailing the Letters to Chu in final form without marking the Letters 'draft' and with an electronic signature was a 'mistake and careless' and 'accepts that it fell short of the standards expected of a person in such a position.'*
>
> *10. The Applicant says that his conduct was not intentional. However, there is no requirement that misleading or deceptive conduct be intentional to contravene section 1041H. The High Court held that in respect of similar provisions in what was the* Trade Practices Act 1974 *(Cth): "*There is nothing in the section that would confine it to conduct which was engaged in as a result of a failure to take reasonable care. A corporation which has acted honestly and reasonably may therefore nevertheless be rendered liable to be restrained by injunction, and to pay damages, if its conduct has in fact misled or deceived or is likely to mislead or deceive. The liability imposed by s 52, in conjunction with ss 80 and 82, is thus quite unrelated to fault and it need not involve any infringement of a right to a trade name, trade mark, copyright or design." [quoting *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197)].
>
> *11. Similarly, section 1041H of the Act does not confine misleading or deceptive conduct to any fault element such as requiring the conduct to be intentional or a failure to take reasonable care. Accordingly, it is submitted that it is not necessary for the Tribunal to find the Applicant intended to mislead or deceive the Government. Rather, it is sufficient to find that the Applicant's conduct was misleading or deceptive or likely to mislead or deceive. However, it is submitted that a finding of intentional conduct and at the very least careless conduct is open on the facts.*
>
> *12. Further, the level of awareness (intention or carelessness) by the Applicant that the information was false and was being conveyed to the Government ought to weigh heavily in determining an appropriate period of banning order.*

99. ASIC also submitted as follows:

> **Continuing Conduct Not Necessary**
>
> *13. The Respondent does not submit that the Applicant continues to or will again specifically engage in conduct to mislead the Government in relation to overseas investors' investment status. However, as Heerey J noted in* Donald v Australian Securities and Investments Commission *(2000) 104*

FCR 126 at 136, there is no requirement in making a banning order that the conduct be ongoing or repetitive:

> Obviously Parliament contemplated that a single contravention could be sufficient to trigger the power to make such an order. It is not permissible to read into the statute some further requirement such as the necessity for threatened continuance of the conduct.

100. ASIC also submitted that a banning order would act as a form of general deterrence and promote consumer confidence:

> **General Deterrence & Consumer Confidence**
>
> *14. The Applicant's conduct, albeit short in duration, was serious in nature in that it involved misleading or deceptive statements about investments in a financial product, which were necessary to obtain a Significant Investor Visa. Those statements were made to the Australian Government in support of a decision about granting certain rights to an overseas national within Australia.*
>
> *15. The consequences of such conduct ought to be a banning order for an appropriate length of time, for reasons of specific and general deterrence and consumer confidence.*
>
> *16. General deterrence will be achieved by demonstrating that engaging in conduct that misleads the Government in relation to an overseas national's investment status will result in a person being banned from providing any financial services.*
>
> *Without imposing a banning order in this case, others will not be dissuaded from engaging in such conduct.*
>
> *17. As Deputy President Forgie held in Howarth v ASIC (2008) 101 ALD 602 at [180],* 'the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry*.' Such deterrence is ultimately for the public protection.*
>
> *18. A banning order also has an educative effect on an individual and the industry at large. It informs other participants in the industry that certain conduct is neither acceptable nor tolerated.*
>
> *19. A banning order promotes and maintains consumer confidence in the market. As stated in section 760A of the Act, the object of the law in relation to financial services and markets is to promote '*confident and informed decision making by consumers of financial products and services*' and* 'fairness, honesty and professionalism by those who provide professional services.'
>
> *20. For these laws to achieve those objectives in this particular case, the conduct of the Applicant needs to be condemned and a banning order is appropriate to ensure such objectives.*
>
> *21. The Respondent notes that a banning order will also act as a personal deterrent to the Applicant in relation to how he conducts himself in the future with respect to financial services laws once the banning order period ends.*

101. In relation to the length of any banning order imposed on Mr Downey, ASIC submitted:

> **Period of the Order**
>
> *22. Guidance on the appropriate period of the banning order is set out at Table 2 of ASIC's Regulatory Guide 98. The Tribunal standing in the shoes of the decision maker ought to have regard to these guidelines unless there is a cogent reason for not doing so.*
>
> *23. As noted by the Tribunal in* Re Gray and ASIC *(2004) 86 ALD 230 at [35] '*As a general proposition, deference by primary decision makers (and by this tribunal on review) to Governmental policy (including ministerial policy) is appropriate... provided deference does not become surrender*.'*
>
> *24. Regulatory Guide 98 at Table 2, gives 'examples of conduct' which attract a banning order for a period of 3-10 years and includes false, misleading or deceptive conduct and misconduct in relation to a financial product including section s1041H.*
>
> *25. Regulatory Guide 98 at Table 2, also sets out the 'factors' which are relevant to a banning order period of 3-10 years. It is submitted that 4 out of 6 of those factors are relevant to the Applicant's conduct, including:*
>
> *a) conduct inconsistent with the orderly operation of a financial market;*
>
> *b) adverse impact on confidence in or the integrity of a financial market;*
>
> *c) false, misleading or deceptive, or unconscionable conduct, or conduct with a lesser degree of dishonesty; and*
>
> *d) incompetence, irresponsibility or high level of carelessness, but with the possibility that the person may develop requisite skills and abilities.*
>
> *26. Given that the Applicant made false representations to the Federal Government whilst knowing the information was false and given the need for general deterrence and the maintenance of consumer confidence, this conduct warrants a period of banning that recognises the seriousness of such conduct. Further, the Applicant has failed to acknowledge the seriousness of his conduct (both at the hearing before the ASIC delegate and the hearing before the Tribunal). Rather, the Applicant has sought to justify his conduct (see paragraphs 7.1, 7.3, 7.5, 7.7, 7.10 above). The ASIC delegate found that the justifications provided by the Applicant were false. She stated, '*Mr Downey's misconduct was intentional. Mr Downey has, in exercising his right to be heard, rather than acknowledging the misconduct and explaining the reasons for the misconduct, chosen to provide false reasons for his misconduct*.' Accordingly, it is submitted that six years, being in the middle of the range noted above, is the appropriate period for such conduct.*

102. Mr Downey, in turn, offered a very different analysis of his conduct in his written closing submissions:

> *Response to the alleged Conduct*
>
> *Authority to Send Letters*

11. *The Respondent has supplied no evidence to the Applicant or Tribunal that the Applicant sent the letters to Ms Li Ling (Investor), DFAT or any other person or entity other than Chu. The evidence confirms that the email and correspondence to third parties was done by Chu without the Applicant's knowledge or consent.*

    Chu "the letters where to go out as soon as the investor made her investment, so nothing to discuss I just sent it"

12. *The Respondent has assumed that because the letters where emailed in the final looking form to Chu that those actions constituted an authority by the Applicant for Chu to issue those letters. The Respondent's assumption was based on something other than the evidence:*

    a. *Firstly, Exhibit E contains emails between Chu and the Applicant in relation to the preparation of and settlement of SIV correspondence. The Applicant and Chu exchanged these emails and others including a draft PDS as part of the ongoing preparation of all paperwork pending the anticipated variation of Platinum's AFSL to include the Silvergum Fund . The exchange demonstrates Chu's input into the content of the letters and other documents, letters being signed by the Applicant, amended by Chu then redrafted and signed by the Applicant - all in anticipation of Platinum's AFSL being varied.*

    b. *Secondly, Chu confirmed in his ASIC examination that there was a practice of preparing documentation in advance or in his words, "in anticipation".*

    c. *Thirdly, Chu went on to say further that he assumed without any discussion with the Applicant that the letter could go out. ASIC v Narnia (2008) 66 ACSR 688 found that the real culprit in these cases lies with the person who authorises the release of such documents. Chu was not authorised by the Applicant to send these letters or any other documents that they had exchanged.*

13. *The Respondent suggests that the Applicant did nothing to advise DFAT after reading the email chain between Chu, the migration agent and DFAT.*

    The Applicant has always held that he had not read the full content of the email

14. *The Respondent's interpretation that the Applicant read the email and did nothing to advise DFAT of the misstatement is based on something other than the evidence and fact.*

    a. *Firstly, the email sent on 3 June 2015 clearly states in the subject matter "RE Letter to draft for State Government- Re Li-Ling Wu Lee Osmose Pty Ltd.msg". This clearly shows that the Applicant was working under the assumption that the letters where in draft only.*

    b. *Secondly, if the Applicant had intended to mislead DFAT that the investor had made an investment with Platinum (which he is not) then the Applicant would have done all things to satisfy DFAT that the investment had been completed. In that email from DFAT they requested Form 1413 to be issued by Platinum along with evidence of the funds transferred*

I. "Form 1412 and 1413 are missing without which the (visa) applicant cannot be granted. Please forward to us. Form 1413 needs to bear the stamp of the fund manager, in this case Platinum Mortgage Securities"

II. After making the investment you must supply proof of transfer of funds

15. *The Applicant did not issue a signed and stamped form 1413 or supply proof of the transfer of funds required by DFAT in the email from the Applicant to Chu on 3 June 2015 or any other time. The Respondent has supplied no evidence to the Applicant or Tribunal of signed and stamped form 1413 or evidence of the transfer of funds from Ozmosa to Platinum as there is no such forms or bank statement.*

Letters and time of compliant investment

16. *The Applicant's position is that the Platinum letters signed by him were never intended to be sent until Chu had confirmed the content of the letters issued on the 3 June 2015 and funds had been transferred from the Silvergum Westpac account to the Platinum Westpac account. Once Chu had confirmed this, the letters would be printed and the original hard copy signed and dated. Chu understood that the investor needed to make the investment in Platinum before the letters would be issued.*

17. *The date to be placed on the letter would be the date the original letters would be issued. As the Applicant understood it, there was not a specified date to be placed on the letter to satisfy DFAT or anyone else as suggested by the Respondent, rather pressure from Chu to ensure that the funds were placed into a compliant fund as Silvergum was not.*

18. *The delegate states that the Applicant "*was aware the last day for an investment was 29 May 2016*."*

    The Respondent submitted T36, email correspondence between the migration agent and DFAT and came to the conclusion that a compliant investment was due on the 1 June 2015 and not the 29 May 2015, the date being the one the delegate made a decision on.

19. *The Respondent's allegations do not match the facts or the evidence as a whole.*

    a. *Firstly, there were many versions of the letters. Chu is a migration lawyer and the correspondence from the Applicant to Chu was to confirm the content of the letters was correct and that all relevant information included.*

       The letters addressed to the Minister of Immigration and Citizenship dated to 29 May 2015 and revised letters of the 1 June 2015 along with the investment confirmation were in the wrong format and addressed to the wrong person. Chu supplied the Applicant a sample letter with the investors details. The correct formatted letter was issued on the 3 June 2015. "Attached is a draft letter to the Victorian Government". This confirms Chu was advising the Applicant what needed to be included in the letters. The Applicant thought nothing of this as he expected Chu to advise him on the content. At no time did the Applicant think he had issued the letters.

*The Respondent's claim that the Applicant intended the letters to be issued does not make sense as the Applicant would not have included in the heading "*Letters to Draft*" and "*attached is a draft letter*" if the intention was to issue these letters or had he thought the previous letters had been sent.*

The letter was to satisfy the State Government that Platinum benefited the Victorian economy. Along with the letter was the requirement for form 1413 that is signed and stamped by the Fund manager confirming that it meets the requirements set out in reg. 1.03 of the Migration Regulation 1994 along with proof of transfer of funds

In Grande Enterprises Ltd v Pramoko, Le Mere J stated:

The question whether there are reasonable grounds for making a particular representation is an objective not a subjective question. A genuine or honest belief on the part of the representor is relevant but not sufficient to show reasonable grounds: Cummings v Lewis (1993) 41 FCR 559, Sheppard and Neaves JJ at 565. For there to be reasonable grounds for a representation, including a representation as to intention and ability, there must exist facts which are sufficient.

The letter was to satisfy the State Government that Platinum benefited the Victorian economy.

Platinum was based in Victoria and did benefit the Victorian economy. The letter, if relied upon by DFAT (which it was not) was to confirm the benefit rather than the investment amount.

b. Secondly, at all times further documentation was required for Platinum approval to be given effect.

I. If you choose to make part of your compliant investment in a managed fund, you should forward a form 1413 Declaration in relation to managed funds to the responsible fund manager to complete and return to you

II. After making the investment you must supply proof of transfer of funds

Additionally, the email chain involving Chu, DFAT and the migration agent confirms at page 103 para 1 that DFAT

I. "requires evidence of the remittance of funds to Platinum" and

II. "Form 1413 is missing and needs to bear the stamp of the fund manager, in this case Platinum".

c. Thirdly, the evidence shows that the SIV Applicant had reached a stage where the investor was invited to make a compliant investment on the 3 March 2015

d. Fourthly, The SIV Applicant had a compliant investment as at the 24 March 2015 as detailed in an email between the acting migration agent and DFAT on the 18 June 2015 first para I.

"The investor had a compliant investment in a bond and private company. My client has always maintained her investment plan to design, build and operate the accommodation and lavender farm business. Her original proposal was to invest $3.5Million into the company (Ozmosa Pty Ltd) and $1.5Million into Government Bonds. The transfer of funds in excess of $5Million into Ozmosa Pty Ltd was completed on 24 March 2015".

Further evidence to support that the SIV application had a compliant investment was submitted which supports the investment of $3.5 million into the company (Ozmosa Pty Ltd) and $1.5 million into Government Bonds.

20. *An investment in Platinum would be a change of investment from the already compliant investment of $3.5 million in (Ozmosa Pty Ltd) and $1.5 million in Government Bonds made on the 24 March 2015. There is no evidence to suggest that the investment in Platinum of $3 million was due on the 29 May 2015 or 1 June 2015 as suggested by the Respondent. The evidence shows that the investor continued a $3.5 million investment in Ozmosa Pty Ltd as at 18 June 2015*

The Respondent's interpretation of the date surrounding a compliant investment being the 29 May 2015 (in the Delegate's reasons) and changed to the 1 June 2015 at the hearing are factually wrong. The facts clearly show the investor had satisfied the Visa requirements and a compliant investment had been made on the 24 March 2015 and that investment approved by DFAT.

21. *The date around the compliant investment is a matter of fact as the investor had already nominated a compliant investment as at 24 March 2015 and a visa application approved on the 3 March 2015.*

The Applicant did all things

22. *The Respondent asserts in its Final submission that the Applicant did nothing to notify the government that the letters where wrong or inform the Respondent or Tribunal.*

    a. Further, prior to the hearing before the Tribunal, the Applicant had never indicated in his material to the delegate, in the hearing before the delegate, or in his SFIC to the Tribunal, when he had become aware of the 1 June Letters being sent to the Government. Until he was asked in cross examination when he says he became aware that the 1 June Letters had been sent, he had never offered the time or circumstances in which he became aware.

23. *The allegations do not match the facts or the evidence as a whole.*

    a. Firstly*, in the Applicant's submission to the Respondent's delegate*

    "Downey had his first discussion with Chu, following his termination, on or about 10 June 2015. Chu advised Downey that Chu had not had any communication from Platinum and that, in any event, Chu would not look to recommend an investment with Platinum under the circumstances. Downey and Chu discussed that the Investor's funds needed to be returned immediately. Neither gentlemen had the Investor's bank details as the funds had been received unexpectedly. Chu contacted the Investor and provided Downey

with the Investor's account details on or about 16 June 2015. On that day, Downey went to his Westpac Bank branch, obtained a bank cheque and took it across the road to the National Australia Bank and deposited the funds into the Investor's bank account"

b. Secondly, Chu confirms that the Applicant returned the investment principal plus any interest earned on those monies while in Silvergum's Bank account

c. Thirdly, in the ASIC interview with the Applicant it states that the Applicant did not know that the investment had not taken effect after his termination on the 3 June 2015 and the incoming Directors had ceased all of the information on the 3 June 2015 and where made fully aware about the investment

d. Fourthly the Applicant's SFIC at point 8,

On or about the 10 June 2015, the Applicant became aware that the investment had not been effected with Platinum. At this time the funds where returned to the investor with any interest earned. The Government agency was notified that the investor had changed their mind and would not invest in Platinum.

e. Fifthly, the Respondent was aware that the Applicant was issued a letter by Bransgrove lawyers at the Directors' meeting of the 3 June 2015 prohibiting him from contacting any client of Platinum, stating

"Should you attempt to contact investors or borrowers of our client, we are instructed to approach the Victorian Supreme Court and obtain urgent injunction interlocutory orders preventing such misrepresentation and seek indemnity of costs".

The Respondent was fully aware that the Applicant was not authorised to contact DFAT or any client of Platinum after the 3 June 2015. The Respondent's claims in their closing statement at para 35 appear to be based on something other than facts. The Applicant returned the funds to the investor as they were from Silvergum and not Platinum and Chu arranged to inform DFAT that the investment in platinum would not be effected. The Respondent is suggesting that the Applicant contact DFAT after he had been terminated by Platinum and advise them that an investment in Platinum was not affected, when he was not authorised to do so or was not an employee of Platinum

f. Sixthly, the Applicant had no knowledge that Chu had sent the letters until around the 10 June 2015. Prior to this, there was no reason to believe that the Applicant should contact DFAT or anyone else to that matter as far as he was concerned the letters where never sent.

24. The Respondent was made fully aware that the Applicant had no knowledge that the letters had been sent until the 10 June 2015.

103. In relation to whether he breached section 1041H by virtue of any misleading or deceptive conduct, Mr Downey further submitted:

26. *In this case, there is no evidence that the Applicant sent the letters to the investor or government directly. The evidence confirms that the email and correspondence to third parties was done by Chu. There is no evidence to support that the Applicant authorised these letters to be issued. The letters being issued was an act or default of another person (Chu) beyond the Applicant's control.*

27. *No party relied on the letters including DFAT. At all times further documentation was required to be supplied by Platinum to DFAT. Additionally, the email chain involving Chu, DFAT and Migration agent DFAT confirms*

    a. The investor requires evidence of the remittance of funds to Platinum; and

    b. Form 1413 is missing and needs to bear the stamp of the fund manager, in this case Platinum"

28. *An email from immigration on the 2 June 2015 addressed to Ms Joyce that clearly states*

    a. "Form 1412 and 1413 are missing, and without the forms the application cannot be granted Form 1413 needs to bear the stamp of the fund Manager Platinum".

29. *No consumer in a financial products or services suffered any financial loss as a consequence of the Applicant's actions. I refer to the McCormack and Australian Securities and Investments Commission case Senior Member Fice found*

    > No consumer or investor in financial products or services suffered any financial detriment as a consequence of the Applicant's actions It is significant in this context that a breach of s. 1041H is not an offence and that failure to comply with that section of the Corporations Act may give rise to a civil liability under s.1041I. Section1041I provides for the recovery of any loss or damage suffered by a person for the reason of a contravention.

30. *The Applicant ensured that the investor did not suffer any loss or damage as a consequence of his conduct, ensuring the funds transferred plus any interest was returned to the investor on the 16 June 2015. Importantly, this was done prior to commencement of litigation between the Applicant and Platinum or ASIC being informed on the 22 June 2015.*

31. *There was no countervailing potential benefit of any significance to Platinum in taking the conduct At all times further documentation was required for the investment in Platinum to be given effect.*

32. *The misconduct allegation was lodged with ASIC by Bransgrove's Lawyers, on 22 June 2015, 6 days after the funds had been returned to the investor. Bransgrove's where the firm that represented the other Directors of Platinum that instigated the hostile takeover on the 3 June 2015. The affidavit made by Mr. Poperwell and relied by ASIC had many untruths, being that the other Directors had no knowledge of Silvergum and that the Applicant deleted emails, where the other Directors had changed the password on the 3 June 2015. There was no complaint by the investor or DFAT. Chu alerts to this in his interview with ASIC stating "Platinum stated in their affidavit that the money was not returned to the investor when the*

Migration agent emailed them to say it had" and "they just wanted to get rid of him".

33. *In determining whether contravening conduct has occurred "*is a matter of fact and the task is to examine the relevant course of conduct as a whole in the light of the relevant surrounding facts and circumstances". *The facts in the matter and surrounding circumstances paint a very different picture to the one the Respondent is alleging;*

    a. *The letters where never authorised by the Applicant to be sent and the letter sent was due to the act or default of another person, beyond the defendant's control, confirmed by Chu in the ASIC interview*

    b. *The letters where not relied on, at all times further documentation was required as confirmed by DFAT in the email Chain involving Chu, DFAT and Migration agent.*

104. Mr Downey further submitted that this matter represents an exceptional situation that should be noted when deciding to impose a banning order:

Exceptional Circumstances

34. *I refer to the Tribunal decision in* Rosenberg and Australian Securities and Investments Commission *case. In particular, the Tribunal said, at [115]:*

> This was an exceptional situation, unlikely to be repeated and, without doubt, Mr Rosenberg will be circumspect in taking any future action of the kind taken in this case. We note there is also no other evidence of Mr Rosenberg having breached provisions of the Act.... we doubt whether there is any further specific deterrent effect to be gained from making a banning order in respect of Mr Rosenberg. Moreover, given the exceptional circumstances of this case, we also doubt whether any more general deterrent effect will flow from a banning order.

35. *The circumstances around the alleged misconduct on this occasion is exceptional in that the events would be unlikely to occur again. The Applicant was creating a registered scheme for Silvergum that was 90% completed, waiting on the NTA requirement, and found himself in a situation where funds had been credited into an account without his knowledge or instruction. The Applicant then went about trying to remedy the situation by facilitating an investment through the Responsible Entity (Platinum) rather than through Silvergum which was not yet registered.*

36. *Had the other Directors of Platinum not executed a hostile takeover on 3 June 2015, the funds would have been transferred that day and original letters would have been issued to DFAT including all other the supporting documents (Form 1413 and copy of the Bank Statement). The other Directors removed all files on the 3 June 2015 and where advised of all current investor and borrower applications.*

37. *Rather than distancing himself from the issue, the Applicant went about trying to resolve the problem and ensuring the investors funds where invested in a compliant managed investment scheme. Furthermore, once*

becoming aware that the investment had not been effected, he arranged to return the funds to the investor with any interest earned on those monies.

38. The chain of events would not likely be repeated.

105. In relation to the term of any banning order, Mr Downey further submitted that a six year period is too long:

39. As identified by Santow J in ASIC v Adler, there are a number of matters relevant to a consideration by the Tribunal in particular:

a. the banning order is protective against present and future breach;

b. banning orders are designed to protect the public from harm;

c. banning order has a motive of personal deterrence, though is not punitive;

d. in assessing the fitness of a person to provide financial advice, it is necessary that they have an understanding of their role and obligations;

e. in assessing an appropriate length of prohibition, consideration has to be given to the degree of seriousness of the contraventions, the propensity that the person may engage in similar conduct in the future and the likely harm that may be caused to the public;

f. longer periods of disqualification are reserved for cases where contraventions have been of a serious nature, such as those involving dishonesty;

g. it is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public interest from any repeat of the conduct;

h. a mitigating factor in considering a period of disqualification is the likelihood of the person reforming;

i. it is necessary to assess matters, such as the character of the person, the nature of the breaches, the risk to others from the continuation of the person as an authorised representative of a licenced person and the honesty and competence of the person;

j. where large financial losses are involved, a longer period ban is often appropriate.

40. In the present case, there are many factors which favour reducing the banning order, including the following:

a. there is no evidence of actual dishonesty on the part of the Applicant;

b. there is no suggestion or evidence of any previous misconduct by the Applicant;

c. there is no suggestion or evidence that there have been complaints regarding the Applicant, despite the fact that he has been involved in the financial services business for over 15 years;

d. *there is no suggestion that financial detriment has been caused to any person as a result of the Applicant's actions;*

e. *the Applicant acknowledges the inappropriateness of putting documents in final form when they were not ready to be issued to third parties and acknowledges that he has discontinued this action and will never do so in the future;*

f. *the Applicant has at all times been fully cooperative with ASIC in relation to its investigations;*

g. *the Applicant has a strong understanding of the regulatory framework and compliance issues and poses no risk to the public in this regard; and*

h. *this matter has taken a serious personal toll on the Applicant in terms of his financial position and inability to earn an income of any significance in his chosen field since 3 June 2015, as well as an emotional and mental toll*

41. *The Commissioner has issued a policy document - Regulatory Guide 98, setting out matters taken into account when exercising powers to suspend or cancel an AFSL or to make a banning order. Table 2 sets out factors and examples of conduct relating to specific periods of banning. The table is said to have been compiled having regard to propositions formulated in HIH Insurance Ltd and HIH Casualty and General Insurance Ltd and ASIC v Adler.*

42. *Those propositions emphasise that the primary purpose of the banning power is to protect the public from a person's future conduct. Notions of general and personal deterrence are relevant, as are the personal circumstances of the person in question, ie the Applicant.*

43. *Factors and examples in RG 98 of conduct suggestive of a permanent ban, a ban between three and ten years and a ban for under three years. In the latter category the factors listed are:*

    a. *No loss to client,*

    b. *Has attempted to remedy the contravention and person has fully cooperated with ASIC;*

    c. *No previous history of contraventions;*

    d. *Indications of clear intention to comply with legal obligations by demonstrated behaviour;*

    e. *Isolated Incident.*

    In this case all factors listed above are present

44. *Australian Securities Commission v Kipper clearly characterised a banning order as protective. The Court said, at 687 - 688:*

> The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventative in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing that person from participation therein.

> Chapter 7.3 of the Law, the legislative context in which s 829 is found, is concerned with persons engaged in the securities industry. Division 5 is concerned with the exclusion of persons from participation in the industry and to preserve the effective operation of the industry. The broad range of discretionary remedies supports the view that the purpose of the provision is to protect the operation of the industry by moulding the remedy to the particular circumstances of the individual case under consideration

45. *If the above is correct, then a banning order should only be made where the evidence discloses that there is a (perceived) real threat that the conduct complained about or conduct in similar circumstances is likely to arise again in the future.*

46. *The exceptional circumstances in this case and actions of the Applicant after becoming aware that the investment had not been effected with Platinum was to return all monies to the investor plus any interest earned and the Government agency was notified that the investor had changed their mind and would not invest in Platinum. This clearly answers whether the actions would likely occur in the future.*

47. *Furthermore, ASIC did not suggest that the Applicant's conduct constituted dishonesty Consumer Confidence.*

48. *A lengthy banning order in this case would not have the effect of maintaining investor and consumer confidence. No consumer or investor in financial products or services suffered any financial detriment as a consequence of what the Applicant did.*

This was found in a similar case by Senior member Fice in McCormack and Australian Securities and Investments Commission:

> "Finally, I cannot envisage how a banning order in Mr McCormack's circumstances could have the effect of maintaining investor and consumer confidence. No consumer or investor in financial products or services suffered any financial detriment as a consequence of what Mr McCormack did"

106. In relation to the issue of deterrence, Mr Downey further submitted:

49. *The adverse publicity to which has been exposed as a consequence of his actions in this matter, coupled with the fact that the Applicant has now been prevented from working in the financial services industry since June 2015 , should deter any other person who might find himself or herself in similar circumstances from attempting similar action.*

50. *Australian Securities Commission v Donovan , Cooper J said...*

> that in determining whether a disqualification order is appropriate and, if so, the length of such disqualification, the extent to which the person benefited from the conduct personally or tried to conceal it are relevant matters

A permissible consideration regard must be had to not only the objective aspects of the grounds that justify the order but also to the person's personal circumstances and the extent to which, if at all, they already

involve an element of hardship and punishment that will itself have relevance as a deterrent

51. The Applicant submits that since the release of the public announcement of the banning order against him by ASIC that he immediately lost his job, ruined his reputation and has been subject to extreme financial hardship. In addition, the embarrassment that a banning order has both professionally and personally has been extremely difficult to handle. Even if a banning order is reduced, the effect will not change in that it would be difficult to get employment in the financial area again.

52. At no time did the Applicant try to conceal the misconduct to any party including the Respondent. In fact, the Applicant contacted the Respondent 22 times in an attempt to settle the matter and offer a full explanation of the events.

53. The Applicant had no financial gain or any other benefit from the transaction.

107. Finally, Mr Downey submitted:

Applicants acknowledges the seriousness of the Respondent's concerns

54. The Applicant fully understands the regulators responsibility and processes it must follows. He has demonstrated this by fully cooperating with ASIC before and during the investigation. The Applicant contacted ASIC on his own accord in June 2015 and supplied documentation to the Respondent to be reviewed. In fact, the Applicant made contact 22 times starting from the 10 September 2015 - 14 January 2016. The respondent made no attempt to respond to any of the communication made by the applicant.

55. The communication with ASIC and the fact that the Applicant was responsible for returning the funds to the investor with any interest earned on those monies along with making sure DFAT was informed, demonstrate prior to any intervention from a third party, that the Applicant took the matter very seriously. The Applicant fully accepts any just disciplinary action that is issued due to any wrongdoing he has done.

108. ASIC, in submissions in reply dated 25 May 2017, counters much of what Mr Downey submits above as follows:

Authority to send letters

5. The Applicant seeks to rely on the provision of draft letters on other occasions or amendments made to signed letters to argue that the provision of a signed letter is not authorisation for it to be sent.

6. The signatures, together with the context in which the letters were sent, the improbable explanation for including his signature, and the absence of any evidence the Applicant told Mr Chu not to send the letters, demonstrate the letters were clearly authorised by the Applicant to be sent.

7. The Applicant concedes that he 'should never have included an electronic signature to a document unless it was ready to be released.*' It is submitted that the provision of letters bearing his signature had the effect of*

authorising those letters to be sent. Any other construction of the conduct, in the absence of an express declaration by the Applicant to Mr Chu not to send them or to delay sending them, is nonsensical.

Email from DFAT dated 2 June 2015

8. *The Applicant asserts that he did not read the full contents of the email from DFAT to Ms Zhuang, migration agent. The email sought, among other things, confirmation about the investment into Platinum. Further, in asserting he did not intend to mislead or deceive DFAT, he relies on the fact that the email requested that further steps to be undertaken including the provision of a Form 1413, which he did not do. The Respondent does not suggest that the 1 June Letters (as previously defined) comprised all things necessary for the investor to obtain an SIV (as previously defined). Indeed, it is clear from the Department of Immigration and Border Control letter to the investor on 3 March 2015 that the total investment amount required was AUD 5 million, rather than the AUD 3 million placed in the Silvergum account. Accordingly, the AUD 3 million investment into Platinum was not the only thing required of the investor to obtain an SIV. However, the information in the 1 June Letters was an important step in the investor obtaining an SIV.*

9. *The fact that the Applicant did not provide further documentation (a Form 1413), which would also have been misleading in circumstances where the funds had not been deposited with Platinum, does not negate the provision of the original misleading information in the form of the 1 June Letters.*

Letters and timing of complying investment

10. *The Applicant asserts that '[Mr]* Chu understood that the investor needed to make the investment in Platinum before the letters would be issued*. The transcript evidence does not support such an assertion. The extract of Mr Chu's section 19 examination cited, is as follows:*

    *'*There wasn't any discussion because I just assumed that - because we've got all this ready all the time anyway so - and this letter - all these letters are - go out as soon as Ms Li Ling make her investment, so nothing was discussed, you know, I just sent it out.'

11. *Accordingly, the opposite of what the Applicant contends is true of Mr Chu's evidence. Further, read as a whole, Mr Chu's evidence suggests he understood that Platinum would be the responsible entity for Silvergum, not necessarily that the money was to be transferred into the Platinum account. The Applicant did not call Mr Chu to give evidence about what he '*understood*' in relation to sending the letters. Accordingly, the Respondent submits there is no evidence to support the proposition advanced by the Applicant about what Mr Chu '*understood*' about the sending of letters and the transfer of funds.*

12. *The Applicant contends that the Victorian Government Letter was an amended version of the letter to the Minister of Immigration and Citizenship (or the 29 May and 1 June Letter to the Federal Government). It is plain from the evidence that this is not correct. It was an additional requirement. The email from DFAT on 2 June 2015 clearly sets out that it requires* 'approval from the Victoria [sic] state on the change of proposed CI *be forwarded to DFAT. Accordingly, the Victorian Government Letter was clearly a further step in obtaining Federal Government approval. Further,*

the letter from the Department of Immigration and Border Protection to the investor dated 3 March 2015 clearly stated that the investor was required to return information, included any evidence of having made a complying investment, to 'this office'. The Victorian Government Letter was a letter addressed to the investor and not the Federal Government and accordingly did not meet the requirements for an application for an SIV as set out in the letter to the investor on 3 March 2015.

13. *In any event, the Victorian Government Letter was again signed by the Applicant and contained a representation which was false and misleading.*

14. *The Applicant states that the Victorian Government Letter was '*to confirm the benefit *[to the Victorian economy]* rather than the investment amount*.' The letter as written however, does both. It sets out the economic contribution to Victoria and the amount invested and contains the words* 'your initial investment has been deposited into the Fund's cash account*.' Further, the benefit to the Victorian state only flows if the investment was actually made, which it was not.*

15. *The Applicant states that '*the SIV Applicant had a compliant investment as at 24 March 2015' *and relies on the email dated 18 June 2015 in support of that proposition. Firstly, the Applicant misquotes the email, which does not include the line '*The investor had a compliant investment in a bond and private company*.' Secondly, there is no evidence that the investment in Ozmosa Pty Ltd is a complying investment rather, that it is the previously proposed investment under the SIV application. In any event, the Applicant gave evidence he was not aware that such an investment had been made '*until after the fact, after well and truly after 3 June*.' Accordingly, the effect of any investment in Ozmosa could not have impacted the Applicant's decision making or his understanding of Mr Chu's email that* 'the last day for the 188 investor to make a complying [sic] investment*' was 29 May 2015. It is submitted that, when the Letters were created, the Applicant was aware of the impending date to have the letters to the Minister of Immigration and Citizenship issued by either 29 May or at least 1 June 2015 for the purpose of establishing that the 188 investor had made a complying investment.*

The Applicant did all things

16. *In responding to the allegation that he did nothing, or did not do all things necessary to remedy the breach of a financial services law, the Applicant points to his return of funds to the investor. However, the breach of the financial services law was the misleading or deceptive conduct by virtue of the letters, not the retention of the investor's funds. The Applicant provides no explanation about when he suggests he became aware that the letter had been sent to the Federal Government, or any steps he personally took to rectify the false and misleading information provided to the Government.*

17. *It is not in dispute that the Applicant returned the investor's funds with interest.*

18. *The Applicant points to a letter from Platinum's lawyers prohibiting him from contacting investors or borrowers of Platinum. However, DFAT, or the Minister of Immigration and Citizenship or the Federal Government generally were not investors or borrowers of Platinum. Further, the investor*

(Ms Wu Li-Ling) was not a client of Platinum, having invested AUD 3 million in Silvergum which was never transferred to Platinum.

19. *The Applicant submits that '*The Respondent was made fully aware that the Applicant had no knowledge that the letters had been sent until 10 June 2015*.' The Applicant provides no occasion on which he made the Respondent aware of this information. Accordingly, the Respondent refers to and repeats paragraphs 33-35 of its Submissions dated 21 April 2017.*

Breach of Section 1041H

20. *There is no requirement under section 1041H of the Corporations Act to show that the letters were '*reasonably relied*' upon, as asserted by the Applicant.*

21. *The Applicant points to the fact that the investor did not suffer any loss or damage as a result of his conduct. He relies upon the decision in* McCormack v Australian Securities and Investments Commission *[2016] AATA 1021. That decision is currently under appeal in the Federal Court. In any event, the Respondent notes the Tribunal is not bound by that decision.*

…

Exceptional Circumstances

28. *The Applicant seeks to characterise the circumstances of this case as exceptional and says that the chain of events would not likely be repeated.*

29. *At its heart, the conduct in this case involves the Applicant providing letters (through an intermediary) to the Government bearing his signature which stated something had occurred which had not occurred and which he knew had not occurred.*

30. *This case does not involve exceptional circumstances. There are a myriad of situations in which a person engaged in the provision of financial services faces perceived pressure to confirm that a certain step has been taken by a deadline. It is easily conceivable that a situation may arise where, due to time pressure or expediency, a financial services employee would consider providing documentation which states that what they intend to occur, has actually occurred. Accordingly, this situation ought not be characterised as '*exceptional *and analogous situations are readily imagined.*

31. *Even if the Applicant intended to transfer the money at a later time, the fact remains that as at the date the representation was made there was no investment into Platinum. A transfer, if it did occur, would merely have served to regularise a false representation that had already been made.*

…

Reliance on Kippe test

33. *The Applicant relies upon the test as stated in* Australian Securities Commission v Kippe *(1996) 67 FCR 499. Namely, that a* banning order should only be made where the evidence discloses that there is a (perceived) real threat that the conduct complained about or conduct in similar circumstances is likely to arise again in the future.'

34. *However, the passage quoted in* Kippe *was overruled by High Court in* Rich v Australian Securities and Investments Commission *(2004) 220 CLR 129 at [38] to the extent that it attempted to distinguish between protective and punitive proceedings. The High Court did not, however, suggest that the protective purpose of a banning or disqualification order should not be taken into account when deciding whether such an order should be made, and if so, its length.*

35. *The protective purpose of a banning order includes general deterrence. General deterrence is achieved by the imposition of a banning order encouraging compliance with legal requirements and discouraging false and misleading conduct, thereby ensuring the public is protected by having a legally compliant financial services industry.*

36. *Further, protection of the community is not limited to an assessment only of the threat that similar conduct may be repeated in the future. Protection can also be achieved by having an appropriate disciplinary regime whereby individuals who do not comply with financial services laws are excluded from acting in the industry for a period.*

37. *Finally, the proposition advanced by the Tribunal in Kippe, ignores that the banning order regime has a separate provision for a banning order based on a belief that a person is likely to contravene a financial services in the future. Accordingly, it is not necessary that there is a threat that the conduct is likely to arise again or be continuing.*

Adverse publicity and period already undergone

38. *The Applicant refers to the adverse publicity and the period of time he has already been subject to the banning order as sufficient to act as a general deterrent to others from engaging in similar conduct. While it is true that adverse publicity may be a consequence of a banning order and may have an additional impact to deter others from such conduct, it does not abrogate the role of the law in imposing a banning order. As the Court held in* Gilfillan & Ors v Australian Securities and Investments Commission *(2012) 92 ACSR 460 at [243], '*The potential for a diminution of reputation is no doubt a powerful deterrent to carelessness and an incentive to discharge responsibilities diligently. But it should not be assumed that the prospect of disqualification, with the attendant financial consequences and public obloquy attributable to the fact of disqualification, cannot have a powerful additional deterrent effect. In addition, the publicity accorded to particular contraventions does not necessarily diminish the importance of the law maintaining appropriate standards of corporate conduct by imposing disqualification orders on contravenors *[underline added].*

39. *Further, the Applicant has been subject to the banning order for less than one year. Such a period is inconsistent with the guidance under RG98, as set out in paragraphs 22-26 of the Respondent's Submissions dated 21 April 2017.*

Investor's 'approved visa application'

40. *The Applicant submits that '*the Respondent was aware the investor had an approved visa application as at the 3 March 2015 and a compliant investment as at the 24 March 2015*. ' Such a submission is inconsistent with the evidence before the Tribunal. The Department of Immigration and Border Control letter to the investor on 3 March 2015 is not evidence of an*

approved visa application but advice on further steps in the application process. In respect of the investor having made a complying investment as at 24 March 2015, the Respondent refers to paragraph 15 above.

CONSIDERATION

Has the power to exercise the discretion to make a banning order against the Mr Downey been enlivened?

109. The discretion to make the banning will be enlivened if the Tribunal is satisfied that Mr Downey has not complied with a financial services law (subsection 920A(1)(e) of the Act).

110. Pursuant to s 920A(1)(e) of the Act, ASIC (or the Tribunal standing in ASIC's shoes) may make a banning order against a person who has not complied with a financial services law.

111. Pursuant to s 761A of the Act, s 1041H(1) (which refers to misleading or deceptive conduct) is a "financial services law".

112. Pursuant to s 1041H(1) of the Act "a person must not in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive".

113. Relevantly, Mr Downey's conduct concerned a financial product – namely, an investment in the Platinum Fund.

114. The Tribunal finds that Mr Downey did not comply with a financial services law in that he engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or was likely to mislead or deceive as per s 1041H(1) of the Act.

115. The conduct that was misleading or deceptive or which was likely to mislead or deceive was the provision of letters bearing Mr Downey's signature and addressed to Ms Li Ling and the Australian Government. These letters contained information that was clearly false.

116. The ASIC delegate found that:

> *The representation made in each of the 1 June 2015 Letters that Ms Li Ling had made $3m investment with Platinum was false. Ms Li Ling had not made a $3m investment with Platinum. The making by Ms Li Ling of such an investment would significantly enhance her chances of being issued a SIV. Each letter was likely to cause an Australian government employee who read the letter to erroneously understand that Ms Li Ling had made a $3m investment with Platinum and hence had made a $3m 'complying investment'. Accordingly each representation was likely to be both misleading and materially misleading.*

117. The Tribunal agrees with this assessment. It is not disputed that the letters (those being the 29 May 2015 Letters and 1 June 2015 Letters) contained information that was false. No investment had been made in the Platinum Fund on either of these dates and no investment was ever made. Rather, an investment of $3 million was made in the Silvergum Fund – a non-complying Fund.

118. In effect, Mr Downey asserts that his conduct was reckless and careless, but not misleading because he never intended for what he refers to as "draft" letters to be sent. He further asserts that his conduct cannot be seen to constitute misleading or deceptive conduct because no one relied on the false information in his "draft" letters and no one suffered any loss.

119. The Tribunal disagrees. The Tribunal finds that Mr Downey's conduct was careless and reckless, but also likely to mislead or deceive.

120. It is not necessary for the Tribunal to find that Mr Downey intended to mislead or deceive the Government or anyone else. This issue goes to the length of the banning order imposed (discussed below). Rather, it is sufficient to find that Mr Downey's conduct was likely to mislead or deceive.

121. The fact that Mr Downey intended that the letters be in "draft form" and not sent out is irrelevant in so far as the recipients of these letters is concerned. The basic notion is clear: conduct is misleading or deceptive if it "leads into error" or is likely to do so (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197).

122. The letters did not say "draft". Indeed, they were signed and appeared under Platinum letterhead. It is hard to conceive of a situation whereby those who received them would not have believed them to be true, thereby significantly enhancing Mr Li Lings prospects of being issued a Significant Investment Visa.

123. Further, as ASIC rightly argued before this Tribunal, while the single fact of the $3 million investment into a complying investment was not the only thing Ms Li Ling would need to do in respect of obtaining a Significant Investor Visa, it was an important step in obtaining such a visa. By engaging in conduct that resulted in the provision of information about an investment that was not true to the Federal and State Governments, Mr Downey's conduct is found to have been likely to lead the government into believing that Ms Li Ling had made a complying investment for the purpose of a Significant Investment Visa.

124. In the circumstances, the discretion to make the banning order was enlivened.

Should a banning order should be made against Mr Downey?

125. The financial services regime is intended to ensure that investors feel confident when dealing with persons (or those acting on their behalf) who are licensed to provide those services or products or engage in those activities. To promote public confidence in the financial services industry, ASIC endeavours to ensure that providers of financial services comply with their obligations and meet community expectations. When they don't, it is essential that appropriate action be taken to ensure that any wrongful behaviour is addressed. In these circumstances, immediate action must be taken to protect the public and deter all industry participants from engaging in reckless behaviour and misconduct.

126. As discussed above, and as accurately summarised by counsel for ASIC before this Tribunal, Mr Downey engaged in conduct that was likely to mislead or deceive. He did so by providing letters bearing his signature and addressed to Ms Li Ling and the Australian Government. The information in those letters was false.

127. All of the letters relevant to this matter bore Mr Downey's signature and were on Platinum letterhead. These letters would have been perceived as final by Mr Li Ling and any government official who ultimately received them. The information contained in these letters was false. Importantly, an investment was not made in Platinum and $3 million was not transferred into the Platinum account. Mr Downey knew the information was false. He knew the $3 million investment by Ms Li Ling had not been transferred to the Platinum account.

128. Mr Downey seemed to suggest before this Tribunal that a banning order was not appropriate because no one ultimately suffered any loss. The Tribunal disagrees. Mr

Downey cannot escape liability simply because no loss ultimately arose. As correctly summarised by counsel for ASIC before this Tribunal, if the Tribunal were to find that a banning order should not be imposed when no loss is suffered, that would mean that people engaged in the provision of financial services and advice could make misleading or deceptive statements with relative impunity so long as no one suffered any loss. This approach would mean that if someone attempted to make a financial gain by providing misleading and deceptive information, but was unsuccessful, they would escape a banning order. With respect, this approach would defeat the entire purpose of the government's financial services regime and, importantly, its emphasis on consumer protection. It is, accordingly, an approach that is rejected by the Tribunal.

129. Finally, as correctly outlined by counsel for ASIC, there is no requirement that the conduct which underpins the banning order is continuing. As Heerey J explained in *Donald v Australian Securities and Investments Commission* (2000) 104 FCR 126 at paragraph 29, "it is not permissible to read into the statute some further requirement such as the necessity for threatened continuance of the conduct."

130. Overall, ASIC submitted in written closing written submissions that protection of the public and maintenance of consumer confidence requires that a banning order be made against Mr Downey.

131. In light of the above, the Tribunal agrees with ASIC's submissions and finds that a banning order is indeed appropriate.

Banning order: what duration?

132. Throughout these proceedings, Mr Downey has vehemently argued that he never intended to mislead Mr Li Ling or any government official. To his mind, the letters relevant to this matter were drafts and were never supposed to be sent out. The ASIC delegate disagreed, finding that the letters were in final form and were intended to mislead others into believing that a deposit into the Platinum Fund had been made in circumstances when no deposit had in fact been made.

133. In submissions before this Tribunal, counsel for ASIC summarised ASIC's position as follows:

While the Applicant stated he understood the letters to be in draft and did not intend the letters to be sent to the Australian government until the $3million was transferred to the Platinum account;

(i) Each of the 29 May 2015 Letters, the 1 June 2015 Letters and the Victorian Government Letter were in final form including bearing the Applicant's signature;

(ii) The 29 May 2015 Letters were backdated to the date the Applicant knew was the critical date for investors making a 'complying investment';

(iii) Both on the date of the letters and the date the letters were signed, the information contained in them was false, in that the investment was not made in Platinum and the $3million was not transferred into the Platinum account;

(iv) The Applicant knew the information was false in that he knew the $3million investment by Ms Li Ling was not transferred to the Platinum account;

(v) On 2 June 2015 at 12.50pm, the Applicant was informed by email that the Minister for Immigration and Citizenship (through Ms Joyce So of DFAT) understood that Ms Li Ling had made a $3million investment into a complying investment, namely the Platinum Fund; and

(vi) Despite knowledge of the erroneous belief held by the Minister for Immigration and Citizenship, the Applicant provided the Victorian Government Letter under cover of email dated 3 June 2015, but backdated to 1 June 2015 regarding Platinum's "Economic contribution to Victoria.'

134. The Tribunal has reviewed all of the evidence before it and has heard directly from Mr Downey, who was extensively cross examined. Mr Downey struck the Tribunal as an honest and credible witness, albeit clearly distressed by what has happened. He has paid a considerable personal price for his actions and that is to be expected.

135. ASIC believes that a banning order of six years is appropriate because Mr Downey intentionally conspired to deceive Ms Li Ling and government officials.

136. It is here that the Tribunal and ASIC differ.

137. The Tribunal believes a banning order of four years is more appropriate on the facts of this case.

138. The Tribunal accepts that Mr Downey engaged in misleading or deceptive conduct and has so found. It does not believe, however, that, he did so with malice or with any clear

intention to deceive anyone. Rather, his actions are more appropriately described as extraordinarily reckless, bordering on incompetent. This then goes to the length of any banning order the Tribunal decides to impose.

139. The Tribunal accepts that Mr Downey honestly believed the letters he was sending to Mr Chu were drafts and that Mr Chu would do the right thing by him. The letters were not, however, drafts. It is one thing to provide an unsigned and undated letter draft (preferably marked "draft"). It is a completely different thing to send out a signed and dated letter. Signed documents indicate that the document is final. The letters relevant to this matter were signed electronically, written on Platinum letterhead and dated as per Mr Chu's instructions. Anyone seeing them would think they were in final form, as did Mr Chu. This behaviour is myopic and completely unprofessional.

140. Further, and equally troubling, Mr Downey's evidence shows that this was common practice. Unfortunately, for him, this "common practice" is what has landed him in a considerable amount of legal trouble. What we see here is not an intention to deceive (even though misleading or deceptive conduct arose). Rather, what we see is professional incompetence. Mr Downey should not have signed any letter that was intended to be reviewed as a draft. Once signed, it inevitably looks final. Nor should he have "trusted" Mr Chu to know better or "do the right thing". His instructions should have been clear and unequivocal. He consistently took his eye off the ball and then tried to blame someone else for his mistakes. This reflects poorly on his professional pedigree and will no doubt haunt him professionally for many years to come.

141. Unlike the delegate and counsel for ASIC, the Tribunal accepts Mr Downey's explanation that he did not read the contents of the email exchange that revealed that DFAT had been incorrectly advised that Ms Li Ling had deposited $3 million into the Platinum Fund. Mr Downey's professional standards struck the Tribunal as chaotic and dysfunctional. That he relied far too much on others, like Mr Chu, failed to exercise diligence with his clients and failed to read important email exchanges is not surprising. Completely unacceptable, yes. But, sadly, not surprising given Mr Downey's account of his past practices.

142. The Tribunal accepts that it is unlikely Mr Downey will ever work in the financial services sector again. This matter has received considerable attention and his reputation is all but shattered. The Tribunal also acknowledges that Mr Downey gained nothing financially as

a result of his actions and that he ensured all monies and accrued interest were repaid quickly to Ms Li Ling. Fortunately, Mr Li Ling was able to obtain an SIV in late 2015.

143. The Tribunal accepts that Mr Downey is unlikely to repeat these mistakes again, in large part because, as noted above, it is unlikely anyone in the financial services sector will ever hire him, such is the nature of his professional misconduct. Contrary to what Mr Downey believes, however, his actions were not reasonable in the circumstances. Nor was this this a "special circumstance" or a "one off" incident. Rather, on his own account, sending out "draft" letters that were signed and appeared "final" was par for the course when dealing with Mr Chu and others. In his own words:

> *It was not unusual for the applicant to provide loan offers and other documents, completed with signature to staff or business partners to ensure that they had no further amendments before they were released. Another example is in the preparation of an application for a Financial Services Licence where the applicant prepares draft Constitutions, compliance plans, product disclosure statements, marketing material etc. In all cases there was no intention to mislead or deceive. It was a simple case of being organised.*
>
> *…. This situation is no different than had the applicant prepared the letters, signed them and left them on his office desk and another person taken them and sent them out. The applicant cannot be held responsible, in this situation, for the acts of Chu in releasing the letters.*

144. With respect, Mr Downey's actions reflect a great deal more than being organised. On the contrary, they reflect a careless and cavalier approach that is short sighted and quite unacceptable given what consumers expect and deserve. Nor can Mr Downey continue to blame others for his failure to properly supervise and instruct those he works with. To suggest otherwise does him no favours and reflects poorly on his character.

145. These factors weigh heavily in favour of a lengthy banning order.

146. The Tribunal also notes that deterrence is a core feature of any banning order. A clear message must be sent that misleading or deceptive conduct and professional incompetence of this sort will not be tolerated. The public deserves better and that message must be conveyed in strong and unequivocal terms.

147. On the evidence, the Tribunal finds that a banning period of four years achieves this objective.

DECISION

148. For the reasons outlined above, The Tribunal:

a) sets aside the decision of the respondent dated 15 August 2016; and
b) substitutes a decision that the applicant is banned under s 920A of the *Corporations Act 2001* for a period of four (4) years commencing on 15 August 2016.

149. The Tribunal notes that the effect of its decision is that, under ss 920A(1)(e) and 920B of the *Corporations Act 2001*, the applicant is prohibited from providing any financial services during the above period.

I certify that the preceding 149 (one hundred and forty nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President, Dr Christopher Kendall.

.....

Administrative Assistant

Dated: 26 June 2017

Date of hearing:	**27 March 2017**
Counsel for the Applicant:	**Self Represented**
Counsel for the Respondent	**Ms N Hodgson**
Solicitors for the Respondent:	**Australian Securities and Investments Commission**