Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	TAXATION & COMMERCIAL DIVISION
File Number:	**2018/4530**
Re:	**Mr Marcus Campbell**
	APPLICANT
And	**Australian Securities and Investments Commission**
	RESPONDENT
File Number:	**2018/4531**
Re:	**Mr Mark Landau**
	APPLICANT
And:	**Australian Securities and Investments Commission**
	RESPONDENT

DECISION

Tribunal:	**Deputy President B W Rayment OAM QC**
Date:	**8 February 2019**
Place:	**Sydney**

The Tribunal sets aside the decision of the Respondent dated 10 August 2018, and varies the duration of the banning order imposed on the Applicants, pursuant to s 920A of the *Corporations Act 2001* (Cth), for a period of 18 months commencing from 10 August 2018.

.....[sgd].....

Deputy President B W Rayment OAM QC

CATCHWORDS

CORPORATIONS LAW – ten year banning order – whether conduct misleading or deceptive or likely to mislead or deceive – whether banning order an appropriate sanction – factors to be taken into account when imposing a banning order – duration of banning order – deterrence – likelihood of applicants engaging in further misconduct – impact on employer and clients – decision under review is set aside and varied – applicants banned under s 920A of the Corporations Act 2001 for a period of 18 months

LEGISLATION

Acts Interpretation Act 1901 (Cth) s 15AA

Corporations Act 2001 (Cth) ss 760A, 766B, 769B, 912A, 917A, 920A, 946A, 947C, 1041H, 1041I

CASES

Australian Securities and Investments Commission v Narain (2008) 169 FCR 211; [2008] FCAFC 120

Australian Securities and Investments Commission, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq) [2016] FCA 934

Avoca Consultants Pty Ltd v Millennium3 Financial Services Pty Ltd [2009] FCA 883

Hutchinson and Australian Securities and Investments Commission [2018] AATA 3520

SECONDARY MATERIALS

Australian Securities and Investments Commission*, Regulatory Guide 98: ASIC's powers to suspend, cancel and vary AFS licenses and make banning orders,* 20 September 2018

REASONS FOR DECISION

Deputy President B W Rayment OAM QC

8 February 2019

Background

1. The applicants have been financial planners for some years. They were dismissed by Macquarie Bank (Macquarie) as authorised representatives for breaches of their contracts of employment as authorised representatives in the year 2017, and the Bank reported their conduct to ASIC, which found that they had committed breaches of the *Corporations Act* 2*001* (Cth) (the Act) by reason of the same conduct. After a hearing, they were banned by ASIC as financial planners for ten years. The applicants have applied to the Tribunal for review of those decisions of ASIC.

2. Two questions arise on these reviews. The first is whether the breach by the applicants of their employment contracts involved a breach by the applicants of a financial services law, namely s 1041H of the Act. If so, the second question is what banning order, if any, is an appropriate sanction in each case.

3. The proceedings were heard together and evidence in one was treated as evidence in the other, and in each case the applicants and the respondents had the same representation. These reasons are given in both matters. Mr Brendon Roberts SC with Mr Nathan Day of counsel appeared for the applicants, and Mr Richard Knowles of counsel appeared for the respondent.

4. In November 2007, Macquarie Bank Limited employed both Mr Campbell and Mr Landau as investment advisers. Messrs Campbell and Landau had previously worked together in the finance industry and they worked together at Macquarie. Mr Landau had the degree of Bachelor of Economics from the University of Adelaide. Mr Campbell had the degree of Bachelor of Marketing and Applied Finance from the University of South Australia and a graduate Diploma of Financial Planning.

5. The advice given by Messrs Campbell and Landau to clients was either general advice or personal advice. Those expressions have definitions in s 766B of the Act. Omitting

irrelevant exceptions, personal advice is financial product advice that is given or directed to a person (including by electronic means) in circumstances where the adviser has considered one or more of the client's objectives, financial situation and needs, or where, to use the language of ss 766B(3)(b), "a reasonable person might expect the provider to have considered one or more of those matters". General advice is then defined as financial product advice that is not personal advice. If personal advice were given to a retail client, the Act required a statement of advice or a record of advice: see s 946A of the Act. The Act and the Corporations Regulations 2001 required the giving of a Statement of Advice to clients in certain circumstances: see Part 7.7 of the Act, including section 947C.

6. Section 766B is within Division 4 of Part 7.1 of the Act. By s 766A, the provision of financial product advice is the provision of a financial service.

7. The particular provision of the *Corporations Act* of which it is asserted by ASIC in this review that Messrs Campbell and Landau were in breach is s 1041H(1) of the Act. Section 1041H is in the following terms:

> ***1041H*** *Misleading or deceptive conduct (civil liability only)*
>
> *(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.*
>
> *Note 1: Failure to comply with this subsection is not an offence.*
>
> *Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.*
>
> *(2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:*
>
> *(a) dealing in a financial product;*
>
> *(b) without limiting paragraph (a):*
>
> *(i) issuing a financial product;*
>
> *(ii) publishing a notice in relation to a financial product;*
>
> *(iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;*
>
> *(iv) applying to become a standard employer-sponsor (within the meaning of the Superannuation Industry (Supervision) Act 1993) of a superannuation entity (within the meaning of that Act);*
>
> *(v) permitting a person to become a standard employer-sponsor (within the meaning of the Superannuation Industry (Supervision) Act 1993) of a superannuation entity (within the meaning of that Act);*

(vi) a trustee of a superannuation entity (within the meaning of the Superannuation Industry (Supervision) Act 1993) dealing with a beneficiary of that entity as such a beneficiary;

(vii) a trustee of a superannuation entity (within the meaning of the Superannuation Industry (Supervision) Act 1993) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;

(viii) applying, on behalf of an employee (within the meaning of the Retirement Savings Accounts Act 1997), for the employee to become the holder of an RSA product;

(ix) an RSA provider (within the meaning of the Retirement Savings Accounts Act 1997) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;

(x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(iia) section 738Y (other liabilities relating to defective CSF offer documents); or

(iii) section 1021NA, 1021NB or 1021NC; or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

8. As is indicated in the heading to s 1041H, the purpose of the section is to produce civil liability under s 1041I of the Act. By contrast other provisions of Part 7.10 of the Act give rise to offences under s 1311 of the Act.

9. An action may be brought under s 1041I of the Act by any person who suffers loss or damage by conduct or another person that was engaged in contravention of, inter alia, s 1041H. The class of persons who may be misled by conduct in relation to a financial

product, in particular the shares of a listed public company, includes a company auditor to whom false information is provided, and that misinformation was held to be conduct in relation to a financial product: see *ASIC in the matter of Sino Australia Oil and Gas Ltd (in liq)* [2016] FCA 934; (2016) ACSR 437. In that case, Davies J said at [50]:

> *In Australian Securities and Investments Commission v Narain (2008) 169 FCR 211; [2008] FCAFC 120, it was held that a publicly listed company and its managing director engaged in misleading or deceptive conduct in relation to a financial product by making false statements about the business of the company which were likely to affect its share price. So too here, the impugned representations concerned the financial performance of Sino's operating subsidiary and were therefore likely to affect the value of its shares. I accordingly accept that the provision of such false information to the company's auditors was conduct "in relation to a financial product": see also Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (2015) 235 FCR 181; [2015] FCA 342 at [349] and Ambergate Ltd v CMA Corporation Ltd (admins apptd) (2016) 110 ACSR 642; [2016] FCA 94 at [56]; Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd (2016) 111 ACSR 638; [2016] FCA 292 at [28]. I find that by providing false information about Huaying's financial position to its auditors, the company engaged in misleading or deceptive conduct contrary to s 1041H of the Act.*

10. In *Narain*, the Full Court rejected the view of the trial judge that s 1041H required that the relationship between the financial product and the written document said to involve misleading and deceptive conduct must appear on the face of the document: The joint judgment of Jacobsen and Gordon JJ includes the following:

> *[66] Mr Myers QC, who appeared for Mr Narain, emphasised that the words "in relation to a financial product" are an adjectival phrase which qualify the conduct that is proscribed by s 1041H. He submitted that the phrase narrows or qualifies the breadth of the proscribed conduct and it directs attention to the characteristics of the conduct itself, not its consequences.*
>
> *[67] So much may be accepted. However, to narrow the scope of the conduct to that which appears "on its face", as the learned primary judge did, is in our view contrary to the meaning of s 1041H(i) considered as a whole. Indeed, it would be contrary to the well-known principles of statutory construction stated in Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 at [69]- [71].*
>
> *[68] There is a wealth of authority for the proposition that the expression "in relation to" is extremely wide and that its meaning will be determined by the context. The leading authorities were collected and stated by Beaumont and Lehane JJ in Joye v Beach Petroleum NL (1996) 67 FCR 275 at 285; see also Australian Competition and Consumer Commission v Maritime Union of Australia [2001] FCA 1549; (2001) 114 FCR 472 at [68] per Hill J.*
>
> *[69] As those cases point out, the words "in relation to" signify the need for there to be some relationship or correlation between the two subject matters that are specified.*

[70] But as Hill J observed in ACCC v Maritime Union of Australia at [68] there will always be a question of degree involved where the issue is the relationship between those matters.

[71] What must be borne in mind is that, as Beaumont and Lehane JJ said in Joye, the context will determine whether the relationship must be direct or substantial or whether an indirect or less than substantial connection will be sufficient: Joye at 285 (citing a number of decisions of the High Court).

[72] Section 1041H was part of a package of measures introduced by the Financial Services Reform Act 2001 (Cth). It replaced s 995 of the Corporations Law. The Revised Explanatory Memorandum to the Financial Services Reform Bill states at [15.8] that the new section was proposed as a general prohibition on misleading and deceptive conduct.

[73] The next paragraph of the Revised Explanatory Memorandum is perhaps of little assistance on the question of construction. It states that the new provision is to provide a general prohibition on misleading and deceptive conduct which will apply in relation to financial products and services.

[74] But what the Revised Explanatory Memorandum shows is that the particular statutory context is that of a prohibition against misleading and deceptive conduct; the relationship between the two subject matters is that of misleading conduct and financial products. So much is also plain from the terms of s 1041H(1) itself.

[75] Misleading and deceptive conduct takes many forms. The degree of the relationship between the financial product and the proscribed conduct is informed by the examples set out in s 1041H(2). They range from issuing a financial product (s 1041(2)(b)(i)) to carrying on negotiations or making arrangements or doing any other act preparatory to "or in any way related to" an activity referred to in the nine earlier examples listed in that subsection: see s 1041H(2)(b)(x).

[76] In our view this indicates that the relationship which is contemplated by s 1041H(1) is at the lower end of the spectrum so that an indirect or less than substantial connection is sufficient.

[77] This is what distinguishes the present case from the decision of the High Court in Tooheys. That case was not a useful analogy because the statutory context was quite different. It was concerned with an exemption from stamp duty under the Stamp Duties Act 1920 (NSW) for "All instruments relating to the services of apprentices, clerks and servants."

[78] The question in Tooheys was whether a particular document, namely a trust deed establishing a pension fund for retiring employees, was an instrument relating to the services of employees so as to fall within the exemption. The provision of the Stamp Duties Act which imposed liability for duty and the exemption provision were concerned with "instruments", not with conduct.

[79] This explains why in Tooheys, Taylor J emphasised at 622 that in considering whether the relationship contained in the exemption was applicable, the Court was confined to an examination of the instrument, without regard to extraneous circumstances.

[80] The breadth of the relationship between the conduct proscribed by s 1041H(1) and the financial product is not confined in this way because the concept of misleading and deceptive conduct is one which embraces all of the circumstances in which the conduct takes place. This is illustrated not only by the terms of s

1041H(2) but by what the High Court has said about the amplitude of the "conduct" which must be considered in analysing the question of whether it is misleading: Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; (2004) 218 CLR 592 at 605.

11. This review is concerned with financial services, namely, the giving of advice by Messrs Campbell and Landau to persons who were clients of Macquarie. It is the reporting by Messrs Campbell and Landau to Macquarie of the advice which they had given to the clients which is said to have been misleading and deceptive or likely to be misleading and deceptive. The reporting was directed to Macquarie, and in particular its compliance staff. The advice itself was not criticised by ASIC. Rather, the advice was mis-described in the course of reporting the advice to the employer bank. For example, it was made to appear that the advice had been general advice rather than personal advice. This was done by altering the purported terms of emails which had passed between Messrs Campbell and Landau and the clients, insofar as these emails were reported. The original emails were kept intact, but secondary copies of them, intended to be read by compliance staff, were doctored.

12. Mr Roberts SC for the applicants submitted that s 1041H of the Act is not wide enough to catch the conduct of Messrs Campbell and Landau. He submits first that it is necessary to know whether the conduct relates to a financial product or a financial service, and that the viable possibility is the latter.

13. He submits that s 1041H is concerned with consumer protection and that there needs to be a relevant nexus between the proscription and the financial service itself, and that such a nexus is absent when the person misled is not the person to whom the service is provided. The “consumer protection” in this case is said to be the protection of the clients to whom the advice is given.

14. He also put that when the misconduct occurred the advice had already been given to the clients, and the service in question could not be affected by what post-dated it. This submission led Mr Roberts to deal with the provisions of s 1041H(2)(x), which had been mentioned in *Narain* by Jacobsen and Gordon JJ. That provision uses the words, “or doing any other act, preparatory to, or in any way related to, an activity covered by any of sub-paragraphs (i) to (ix)” (emphasis added). These words are wide enough to include a subsequent, as distinct from an anterior relationship. They may also be taken to involve

that a relationship in any way will suffice, at least in relation to the specific matters mentioned in sub-section (2).

15. The person or persons who were misled or deceived, or likely to have been misled or deceived by what the applicants did is Macquarie Bank and its compliance staff. That is, there is no allegation that any client of the applicants or Macquarie Bank was misled or deceived or likely to have been misled or deceived. What Messrs Campbell and Landau did was to mislead Macquarie Bank about the details of some of the dealings which they had with clients, and in particular that those dealings had the nature of general advice rather than personal advice, and in some cases, to make it appear to their employer more clearly that the advice was general in nature. In other words, Mr Roberts submits that the misconduct concerned a report to the bank of what financial services had been provided to its clients, rather than misconduct in the performance of the financial service by the applicants and in that sense in relation to it.

16. Mr Roberts referred to the decision of Barker J in *Avoca Consultants Pty Ltd v Millenium3 Financial Services Pty Ltd* [2009] FCA 883; (2009) ACSR 307. The respondent was alleged to have made some representations to the applicants in a deed appointing the applicants as authorised representatives and it was sought to characterise those representations as conduct engaged in relation to financial services within the meaning of s 51AF of the *Trade Practices Act*. That section provided, inter alia, that sections 52 and 55A of the Act did not apply to conduct engaged in in relation to financial services.

17. Barker J said at [232]-[239]:

> *[232] In my view, if M3FS conveyed representations by the relevant deed, such as those pleaded, it is not accurate to describe M3FS's conduct in so doing as conduct engaged in, in relation to providing financial product advice. Rather, it is conduct engaged in, in relation to the authorisation of the applicants as representatives of M3FS, albeit the applicants were thereby authorised to act as the representative of M3FS for the purpose of providing such financial product advice. Any representations arising from the deed thereby arise from conduct which is necessarily anterior to and separate from the provision of financial product advice and, for this reason, are not "in relation to" the provision of such advice. Such conduct is sufficiently remote from the provision of financial product advice not to be considered conduct "in relation to" such advice.*
>
> *[233] This construction of s 51AF(2)(a) is also consistent with the primary focus of s 51AF(1) of the TPA Act, which is limited to the "supply or possible supply" of financial services. The appointment by M3FS of a representative is not an instance of "supply" of such services or "possible supply" of such services.*

[234] The applicants further point out that the provisions now included in Pt 2, Div 2 of the ASIC Act 2001 were first introduced into the predecessor Act, the Australian Securities and Investments Commission Act 1989 (Cth) by the Financial Sector Reform (Consequential Amendments) Act 1998 (Cth). The second reading speech makes it clear that its purpose was to "transfer responsibility for consumer protection in the financial system from the ACCC to ASIC". In the second reading speech in the Senate incorporated into Hansard on 14 May 1998, it was said of these amendments that they would do two things:

> *First, they will amend references to the word 'bank' and like expressions, and to the 'Insurance and Superannuation Commissioner' in the Corporations Law and the Australian Securities and Investments Commission Act 1989.*
>
> *Secondly, they will confer on ASIC sole responsibility for consumer protection in relation to financial services. These proposed amendments are part of the on-going implementation of the Financial System Inquiry recommendations. In particular, recommendation 3 was to the effect that ASIC should have sole responsibility for administering consumer protection regulation within its jurisdiction over the financial sector. For this purpose, consumer protection provisions comparable to those in the Trade Practices Act 1974 were recommended to be included in ASIC's legislation.*
>
> *…*
>
> *The Financial Sector Reform (Amendments and Transitional Provisions) Bill, does not, however, confer general consumer protection functions and powers on ASIC. Currently, the Australian Competition and Consumer Commission (the ACCC) exercises this general function in the financial system through the provision of Parts IVA and V of the Trade Practices Act.*
>
> *The amendments will explicitly transfer responsibility for consumer protection in the financial system from the ACCC to ASIC.*
>
> *: Hansard, Senate, Thursday 14 May 1998, page 2796 – 2797.*

[235] The applicants contend that a construction of the scope of s 12DA to give effect to that purpose is to be preferred: s 15AA Acts Interpretation Act 1901 (Cth).

[236] The applicants also contend that the heading for Div 2 of Pt 2, which is deemed part of the ASIC Act 2001 by s 13(1) of the Acts Interpretation Act 1901, describes the provisions as concerning, "Unconscionable conduct and consumer protection in relation to financial services". The applicants contend this shows that the purpose of the legislation has not changed: it provides consumer protection in relation to financial services. The applicants say an authorised representative of a licensee is not a consumer of financial services protected by Div 2 of Pt 2.

[237] I accept the applicants' contention that in resolving any textual ambiguity it is helpful to note what was said in the second reading speech in relation to the passage of the relevant 1998 amendments, to the effect that they were intended to transfer responsibility for "consumer protection" matters from the ACCC to ASIC. I do not consider that the conduct of M3FS, as a financial services provider, in the course of authorising the applicants to be its representatives is apt to be described as a dealing with a "consumer" of financial services as defined in the ASIC Act 2001 that is caught by s 12DA of the ASIC Act, or s 51AF of the TPA.

> *[238] Surprisingly, the issue of whether s 52 of the TPA applies in relation to conduct of the type alleged by the applicants against M3FS in this case, has not previously been determined by judicial authority. For my part, while I recognise the force of the respondent's literal textual analysis, that representations allegedly made in a deed whereby the holder of an AFSL authorises representatives to act for it, are made "in relation to" financial services, for the reasons given above I do not prefer that interpretation or construction.*
>
> *[239] For these reasons I reject the submissions made on behalf of M3FS that s 52 of the TPA is incapable of applying to the pleaded representations or conduct of M3FS.*

18. Reference was also made to the Tribunal decision in *Hutchinson and ASIC* [2018] AATA 3520, a decision of Deputy President Boyle. Mr Roberts relied upon the decision except insofar as it does not appear to take account of the decision in *Narain*. The respondent for its part submitted that the decision, which I was told is under appeal, is wrong.

19. In the course of his reasons for decision, DP Boyle observed at [50] that:

> *The context in which the words of s 1041G of the Act should be read is the context of consumer or investor protection, the context of consumers or investors having confidence in the financial services and financial products. In that light the reference to dishonest conduct in s 1041G of the Act must be read as dishonest conduct which relates directly to the nature, qualities or characteristics of the financial service or financial product, not to the broader context of dishonesty in the carrying on of a financial services business which does not impact the consumer or investor. In that regard "it is necessary that the relationship be direct or substantial" as envisaged by the Court in Joye v Beach in the passage cited at [46] above.*

20. Further at [60] the Deputy President stated that:

> *In any event, as with s 1041G of the Act, the relevant misleading conduct for the purposes of s 1041H must be in "relation to a financial product…". Even if there was the claimed misrepresentation in relation to how fees were to be distributed as claimed by ASIC, that does not have the "direct or substantial" connection to the financial product envisaged by the Court in Joye v Beach in the passage cited at [46] above to cause the conduct to come within the operation of s 1041H of the Act. The need for the conduct, in this case the misrepresentation, to be directly and substantially related to the financial product or service is even clearer in s 1041H than in s 1041G of the Act because of the provisions of s 1041H(2) of the Act. The subsections of s 1041H(2) of the Act make it clear that the misrepresentation must relate to the quality, characteristics and nature of the financial product. A misrepresentation relating to the arrangement between the Applicant and RI does not have those characteristics and is therefore not a misrepresentation "in relation to a financial product or financial service" for the purposes of s 1041H of the Act.*

Discussion

21. Mr Knowles for the respondent submitted that those remarks were not correct, not only because of their inconsistency with *Narain*. He drew attention to the other main objects of the Part of the Act in which s 1041H is located. Section 760A makes it clear that in addition to the promotion of "confident and informed decision making by consumers of financial products and services", Chapter 7 is also directed to the promotion of "fairness, honesty and professionalism by those who provide financial services" and "fair, orderly and transparent markets for financial products". Thus while consumer protection is one of the objects of Chapter 7, the main objects extend more widely.

22. The objects of Chapter 7 specified in s 760A are described as the "main objects". Section 15AA of the *Acts Interpretation Act 1901* provides that "in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to each other interpretation".

23. The scheme provided for in the Act makes the licensee and the authorised representative jointly and severally liable to an investor for advice given to clients. There are provisions in the Act in the case of activities by employees acting within the scope of their actual or apparent authority making both the corporate employer and the employee liable for conduct engaged in by the employee, and attributing to the corporate employer the state of mind of the employee: see s 769B, which also provides for certain exceptions, and see s 917A. Section 912A of the Act requires a financial services licensee to take reasonable steps to ensure that its representatives comply with the financial services laws, and that it have adequate resources, inter alia, to carry out supervisory arrangements, that it ensure its representatives are adequately trained and are competent to provide financial services, and that it has adequate risk management systems. The making of a false report to the employer by an authorised representative may frustrate the performance by the licensee of its own duties and functions under the Act.

24. The Act does not expressly require authorised representatives to keep the licensee fully informed of activities which the authorised representatives undertake, even though s 769B makes the licensee responsible for those activities. This matter would be expected to be dealt with by a contract between the licensee and the authorised representative.

Compliance with the Act is obviously a matter of interest both to the licensee and to the representative. The honesty and professionalism expected of those who provide financial services appears to me to extend to information given by the authorised representatives to the licence holder about the activities in which they have engaged.

25. In a case involving an authorised representative, insofar as s 1041H speaks of conduct in relation to a financial service, does the class of persons who might be misled extend beyond those who are given financial advice? In particular, does it include the licensee, to whom the authorised representative reports about the advice he or she has given? Such a construction of the section would tend to promote the main object mentioned in s 760A(b), namely, fairness, honesty and professionalism by the providers of financial services.

26. The statement of the Full Court of the Federal Court in *Narain* that the relationship contemplated by the words “in relation to” in s 1041H is at the lower end of the spectrum, so that an indirect or less than substantial connection is sufficient and is binding on the Tribunal. A report to the licensee about financial advice that has been given by an authorised representative, which therefore is a report about a financial service, appears to me to be sufficiently connected to the financial service.

27. The submission of the applicants about the timing of their conduct, relying on the fact that the service had already been performed prior to the report being given, also deserves to be dealt with. In my opinion, this also is sufficiently connected to the financial service. Section 1041H(2)(x) of the Act uses the language of conduct “in any way related to“ certain financial products. This suggests to me that timing will not determine the reach of s 1041H.

28. For these reasons I reject the submission that s 1041H does not cover the conduct in question.

29. Since s 1041H is a financial services law, the power of ASIC to make a banning order under s 920A of the Act was enlivened.

30. There has been a detailed investigation before me of the misconduct involved, and the considerations involved in the sanction question.

31. The case is a very unusual one. None of the clients of Macquarie and the applicants were disadvantaged as a result of the actions taken by the applicants. Indeed, a number of the clients remain loyal to the applicants and have followed them to their new employer. Among the references tendered by the applicants are a number from the clients in question.

32. The applicants have suffered reputational loss as a result of their dismissal by Macquarie and the publication of the banning order, and have lost income. They have found other employment and the supervision of their work by the new employer has given no cause for concern.

33. They have acknowledged the fact of their misconduct and its seriousness, both in evidence before me and at all other stages of the investigation by ASIC and the earlier investigation by Macquarie. Their actions were dishonest, but the steps which they took involved isolated acts in a very small percentage of the cases with which they were concerned in their employment.

34. Having attended closely to the evidence which they gave, and endeavoured to sum them up in the witness box, I am satisfied that neither of them will in the future engage in similar misconduct. They have, in short, learned a very bitter lesson.

35. The fact that neither their employer nor any of the clients suffered loss is a significant feature of the case. The misconduct was not for personal gain, and seems to have been motivated by a desire to avoid relatively minor criticism by compliance staff, which may have been excessive. That is no excuse for a lack of frankness between authorised representatives and the holder of an Australian financial services licence.

36. Each of the applicants has a long professional history, and the facts apparent from the evidence in this case are the exception rather than the rule.

37. The respondent has published Regulatory Guide 98 (RG 98), first introduced in July 2013 and amended in September 2018. One purpose of that document is to lay down guidelines for sanctions to be imposed by the regulator, to promote consistency in decision-making. In this Tribunal such a document is one to which the Tribunal will have regard, because policy of which the Tribunal approves is a matter to which it is proper to

have regard. RG 98 does not purport to bind decision makers, although in many cases regard may properly be had to it. The making of a banning order and its period of operation is the subject of a statutory discretion to be exercised, having regard to all the facts and circumstances of the case.

38. One of the circumstances of the case is the need to deter similar conduct by other authorised representatives. That need has regard to the matters to which I have referred in [22] above. If dishonesty in dealings between an authorised representative and a licensee were overlooked or excused, that would subvert important aspects of the statutory scheme.

39. One could imagine many cases of such conduct that would justify a ten year banning order, or even a lifetime ban, consistent with the dictates of good government, which are the touchstone of decision making in this Tribunal.

Motivations for behaviour

40. The motivation of the applicants to do what they did is appropriately characterised as absurd and wholly unnecessary, as well as being dishonest. It does not appear from the evidence that the applicants would have suffered any significant consequence if they had been completely accurate in describing their actions as authorised representatives in the advice situations with which these proceedings are concerned. In my opinion, that is one of the circumstances of the case to which regard must be had. It may be that the judgment of the applicants was adversely affected by certain personal circumstances which affected them at or about the time of the misconduct, or some of it, although the fact that eleven transactions were affected by the practice over an extended period militates against such a possibility.

41. Between 13 January 2014 and 28 March 2017, Mr Landau, for the purposes of reporting to Macquarie falsified eleven email exchanges with clients and saved the emails as falsified to Macquarie's central system for recording client advice so as to mislead compliance officers of Macquarie, and entered 15 false transaction records into the Bank's order management system about the circumstances of the transactions.

Mr Landau

42. To illustrate the findings I make about the motivation of the applicants, Mr Landau said at T72-73 that the compliance manager may have interpreted advice given to a named client as personal advice, which in his opinion it was not. He said his alterations to the email chain were to make it clearer that the transaction was as he perceived it to be. He described his falsification of the records as a silly thing to have done and put the transaction into the system as "execution only". If the transaction was personal advice, the compliance manager would have checked that there was a statement of advice sent to the client, and such a document was on file for the client.

43. Mr Landau said at T86 that his actions showed that he did not respect the system Macquarie had set up and that he made the alterations in order to make it appear that the transactions were as he believed them to be.

44. Some of the alterations made related to what had clearly been personal advice so as to make it appear to be general advice, and included a false statement that a general advice warning had been given, and in some cases that other disclosures had been made which were not made.

45. Mr Landau well knew that he was not reporting to Macquarie as it intended he should. That the difference between what he did and what he was purporting to record may have produced no consequence, is part of the background, but in no way excused what he did.

46. Macquarie has requirements for its authorised representatives which were additional to the requirements of the Act in a number of respects. They changed from time to time.

47. Cross-examined by Mr Knowles, Mr Landau largely acknowledged the correctness of a suggestion made in a number of cases that what he recorded as general advice was properly characterised as personal advice, and that what he reported involved misrepresentations. He agreed that his motivation in most or all cases was to avoid a confrontation with the compliance manager, who would, rightly or wrongly, regard the transactions as personal advice.

Mr Campbell

48. Between 16 August 2014 and 15 March 2017, Mr Campbell falsified 11 email exchanges with clients and saved the emails to Macquarie's central system for recording client advice so as to mislead compliance officers of Macquarie, and entered 14 false transaction records into the bank's order management system about the circumstances of the transactions. Those falsified records suffered from the same defects as those of Mr Landau's mentioned in [43] above.

49. In his oral evidence Mr Campbell made no attempt to deny that what he had done to the records was wrong, and he recognised that his actions were dishonest.

50. Mr Campbell's motivations were generally similar to those of Mr Landau's except that his motive in altering records in some cases was to make the emails appear to accord with his original description of the transaction at the time a buy or sell order was placed. He said that in many other cases he sought to, and did, correct any mistakes made in describing the transaction at the time of its execution and recorded email exchanges accurately on those occasions.

51. In some cases Mr Campbell agreed that the advice which he recorded as general advice was properly characterised as personal advice.

Conclusion

52. As between the two applicants, there is nothing to suggest that the sanction should differ in either case.

53. The respondent submitted that I should affirm the banning order made by ASIC. The applicants submitted that any sanction should not endure for longer than twelve months.

54. As I have said, the applicants were both employed by a stockbroker shortly after they were dismissed by Macquarie Bank. The view was expressed to me that if they were banned for three years or more, they would no longer have any connection with the clients that they brought to their new employer. The banning order interrupted their new employment on 10 August 2018.

55. I think that taking into account all of the circumstances I have mentioned as to sanction, a banning order of 18 months is appropriate in this matter, to date from 10 August 2018 and to expire eighteen months thereafter. The facts of these cases are, as I have said, very unusual. The dishonesty practised by the applicants had consequences much less serious than otherwise might have been the case, and notions of deterrence, while relevant, should not overlook the question of the seriousness of the breach of s 1041H.

Decision

56. The reviewable decision will therefore be set aside and the banning order will be varied as I have indicated.

I certify that the preceding 56 (fifty-six) paragraphs are a true copy of the reasons for the decision herein of Deputy President B W Rayment OAM QC

.....[sgd].....

Associate

Dated: 8 February 2019

Dates of hearing:	**26, 27, 28 and 29 November 2018**
Counsel for the Applicant:	**Mr B Roberts SC and Mr N Day**
Counsel for the Respondent:	**Mr R Knowles**