Administrative
Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: TAXATION AND COMMERCIAL DIVISION

File Number(s): **2018/0939**

Re: **Michael Wilkins**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **Mr P W Taylor SC, Senior Member**

Date: **22 August 2019**

Place: **Sydney**

ASIC's 31 January 2018 decision is set aside. In substitution for that decision Mr Wilkins is banned from engaging in any "credit activities" for a period of eighteen months. That banning order has effect (for the purposes of s 43(6) of *the Administrative Appeals Tribunal Act 1975* (Cth)) on and from the same date as the 31 January 2018 decision.

.......................[SGD]..

Mr P W Taylor SC, Senior Member

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CATCHWORDS

CORPORATIONS – review of banning order prohibiting the applicant from engaging in any credit activities for a period of three years – alleged contravention of prohibition on giving misleading information etc – applicant alleged to have falsely stated loan applicants held funds in investment accounts and had no superannuation fund balance – applicant alleged to have mis-stated the amount claimed to be held in the investment accounts – no proper basis to conclude the applicant knew the amounts in the loan applications were overstated – applicant directly responsible for mischaracterisation of assets – whether applicant knowingly or recklessly provided false information – meaning of "false in a material particular" – decision set aside and substituted

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) s 43
Australian Securities and Investments Commission Act 2001 (Cth) s 1
Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth)
National Consumer Credit Protection Act 2009 (Cth) ss 3, 5, 6, 7, 8, 9, 80, 81, 83, 85, 169
Superannuation Industry (Supervision) Act 1993 (Cth)
Superannuation Industry (Supervision) Amendment Act (Cth)
Tax Laws Amendment (2007 Measures No. 4) Act 2007 (Cth)

CASES

Australian Securities and Investments Commission v Adler & Ors [2002] NSWSC 483; (2002) 42 ACSR 80
Australian Securities and Investments Commission v Mariner Corporation Ltd [2015] FCA 589
Coakley and Australian Securities and Investments Commission [2008] AATA 247
Farley and Australian Securities Commission [1998] AATA 495; (1998) 16 ACLC 1502, 1521
Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz (1992) 110 ALR 367; (1992) 34 FCR 348
Murphy v Griffiths [1967] 1 WLR 333
Nguyen and Australian Securities and Investments Commission [2017] AATA 920
R v Banks [2014] NZHC 1244
R v Brott [1988] VR 1
R v Mallett [1978] 1 WLR 820
R v Maslen (1995) 79 A Crim Rep 199
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129
Story v National Companies and Securities Commission (1988) 6 ACLC 560

SECONDARY MATERIALS

Australian Securities and Investments Commission, Regulatory Guide 218 Licensing: Administrative action against persons engaging in credit activities, 25 November 2010

REASONS FOR DECISION

Mr P W Taylor SC, Senior Member

22 August 2019

1. Mr Wilkins has an Australian Qualifications Framework Certificate IV qualification in Mortgage Finance and Broking. In addition to that qualification, he has many years' experience as a mortgage broker. Between 2001 and the latter part of 2010, he was employed by Sunpac Finance Pty Ltd ("Sunpac"). In his role as the company's "finance manager", he provided mortgage broking services to Sunpac's clients. Thereafter, until January 2015, still in the role of "finance manager", he provided mortgage broking services for his new employers – Heritage Financial Solutions Pty Ltd ("HFS") (for some time apparently in late 2010 or early 2011) and Heritage Financial Solutions Australia Pty Ltd[1] ("Heritage") (from about late 2010, perhaps partly overlapping with his HFS employment).

2. During 2014, acting under Part 6.1 of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCP Act"), ASIC investigated the activities of Sunpac, HFS and Heritage. That investigation ultimately resulted in, amongst other things, an ASIC delegate's 31 January 2018 banning order decision that is the subject of Mr Wilkins review application. (I outline the substance of that decision later in these reasons:- *see paragraph 15 below.*)

3. A significant part of ASIC's investigation focussed on Sunpac's activities in what Mr Wilkins described as "writing SMSF loans". Sunpac's (and Mr Wilkins') interest in that kind of activity was sparked in the early part of 2009. That was about 18 months after the *Tax Laws Amendment (2007 Measures No. 4) Act 2007* (Cth) amended the borrowing prohibition in s 67(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the SIS Act"). The wording of the 2007 legislative amendments, although included under a sub-heading "exception - instalment warrants" permitted borrowing by a superannuation trustee where (i) the trustee acquired a beneficial interest in an "asset", (ii) the trustee could acquire legal ownership of the "asset" by making "one or more" payments and, (iii)

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[1] Heritage Financial Solutions Australia Pty Ltd later changed its name to Freedom & Security Finance Pty Ltd.

the lender's payment recourse rights were restricted to resort to the asset (or rights relating to the asset).[2]

4. In early May 2009 Mr Wilkins received a detailed written legal advice from Sunpac's lawyers relating to the legislative changes. The advice addressed a specific transaction structure involving borrowing transactions by clients who purchased real estate for the benefit of their self-managed superannuation fund ("SMSF"). The substance of the advice was that the conditional borrowing prohibition contained in (what was then) SIS Act s 67(4A) would not apply to transactions implemented in accordance with the structure described in the advice.

5. Perhaps unsurprisingly in view of the recency of the 2007 amendments, Mr Wilkins described what he called "SMSF loans" as new in May 2009, and said that there had been few prospective lenders. Indeed it was not until about September 2009 he came to understand that "SMSF loan" finance might be available from Westpac Banking Corporation ("Westpac"). At about that time he contacted Mr Graeme Holm, whom he understood was a Westpac bank manager based on the Queensland Gold Coast, and enquired about the prospect of SMSF related lending. Mr Holm undertook to check, and Mr Wilkins offered to send him copies of both Sunpac's legal advice and examples of some of the various deeds and other documents involved in the transaction structure addressed in the legal advice. For his part Mr Holm told Mr Wilkins that Sunpac would have to obtain accreditation from Westpac if the SMSF lending proposal was to proceed.

SUNPAC'S / MR WILKINS' DEALINGS WITH WESTPAC

6. Mr Wilkins sent the legal advice, and example SMSF related documents, to Mr Holm. In early January 2010 Sunpac gained accreditation with Westpac as a commission remunerated loan referrer. Thereafter Mr Wilkins regarded Mr Holm as Sunpac's "relationship manager" at Westpac.

7. Between January and August 2010, Mr Wilkins submitted something substantially more than 60 "SMSF loan" applications to Westpac. Their common characteristic was that the

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[2] Amendments in July 2010 (by the *Superannuation Industry (Supervision) Amendment Act* (Cth)) removed the reference to "instalment warrants", and broadened the conditionally permitted borrowing to include the acquisition of an "acquirable asset". No question of compliance with the SIS Act requirements in relation to permissible borrowing arises in the present proceedings.

loan applicant was never the SMSF corporate trustee and was always the individuals who had contracted to purchase the property. All the applications were submitted to Mr Holm. Although Mr Wilkins occasionally dealt with some other Westpac officers, he said he understood that Mr Holm was responsible for approving the applications. However he was aware Westpac used some kind of computerised process (to produce what I refer to later in these reasons as the Westpac "response" application form:- *see paragraph 37 below*). His entries in the Sunpac "Loan Tracker" communications log evidence his contemporary understanding that the computer generated "response" form indicated conditional approval of the loan application.

8. In mid-August 2010 automated email responses from Mr Holm indicated he had gone on leave. Contemporaneous documents, then unknown to Mr Wilkins, record that Westpac had started an internal investigation of Mr Holm's conduct. On 1 September 2010 Westpac informed Mr Wilkins that all the pending SMSF loan applications he had submitted were on hold. A few weeks later Mr Wilkins received information from Westpac to the effect that Mr Holm, despite being aware of the SMSF nature of the loan applications, had concealed that fact within Westpac and had ignored Westpac's specific internal requirements about the way in which they should have been processed. On 27 September 2010 Westpac terminated Mr Holm's employment for several instances of deliberate misconduct. One of those was the irregular loan application submission processes he followed in relation to the SMSF loan applications Mr Wilkins had submitted.

9. Later communications from Westpac in October 2010 indicated that the substance of its complaint about Mr Holm's conduct was that he had treated the loan applications as "consumer loans". This was contrary to Westpac's internal requirements which were, at the least, that SMSF loan applications ought to have been processed in a "business channel", and possibly also that no such loans to individuals, and no loans for house and land packages, could be approved. Mr Holm's procedure breaches in relation to the loan applications submitted by Mr Wilkins was thought to have been motivated by Mr Holm's desire to maximise his incentive payments. Resolution of the irregularities involved in Mr Holm's conduct involved a re-assessment of a number of the unfinalised loans that Mr Wilkins had previously submitted. That re-assessment process ultimately resulted in Westpac granting alternative loans to the corporate trustees of the SMSFs of some of the previously approved loan applicants. Notwithstanding that those loans were typically for the same amount as the original loan applications, at least some of the corporate trustees

subsequently borrowed further funds (the "Fast Loans") apparently for the purpose of funding their construction contract obligations.

THE NCP ACT PROVISIONS RELEVANT TO CREDIT ACTIVITIES

10. Subject to observing requirements of appropriate prior notice, and providing a statement of reasons, ASIC can make a banning order prohibiting a person from engaging in credit activities in a range of circumstances:- *see NCP Act s 80(1), 80(4) & 85*. Relevant to the present matter, the circumstances include:-

    (a) where the person has either contravened, or been involved in another person's contravention of, "credit legislation" (a term that includes the NCP Act and the National Credit Code ("NC Code") in Schedule 1 of the NCP Act):- *NCP Act ss 3, 5(1) & 80(1)(d)*

    (b) where ASIC has reason to believe in the likelihood of such a contravention, or involvement, by the person:- *NCP Act s 80(1)(e)*

    (c) where ASIC has reason to believe the person is not "fit and proper" to engage in credit activities:- *NCP Act s 80(1)(f).*

11. For the purposes of the NCP Act the concept of "credit activities" extends to include (where it occurs in the course of conducting a business) both (i) acting as an "intermediary" between a credit provider and a consumer for the purpose of the latter obtaining credit, and (ii) the provision of "credit assistance":- *NCP Act ss 6(1) Item 2, 7 & 9*. The concept of "credit assistance" includes suggestions or assistance relating to applications for a credit contract:- *NCP Act ss 7(a) & 8; NC Code ss 3 & 4.* For the purposes of the NCP Act any contract involving a loan to an individual for the purpose of investment in the purchase of residential property is a "credit contract":- *NCP Act s 5 & NC Code s 5*.

12. The various threshold criteria in NCP Act s 80 suggest that ASIC's statutory discretion is directed at minimising the risk of non-compliance with "credit legislation" and promoting confidence about the competence and conduct of those involved in consumer credit activities. That suggestion reflects ASIC's wider statutory mandate and obligations:- *see Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") *s 1(2)*. Consistent with that mandate, a banning order made under NCP Act s 80 may involve

either a time limited, or a permanent, prohibition: - *NCP Act s 81(2)*. Irrespective of the original prohibition period, ASIC has a discretion to vary or cancel a banning order whenever it is satisfied that changed circumstances make such a course appropriate:- *NCP Act s 83*.

13. In June and July 2010 NCP Act s 33(1) provided as follows:-

> *33 Prohibition on giving misleading information etc.*
>
> *Prohibition on giving misleading information etc.*
>
> *1 A person (the giver) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is false in a material particular or materially misleading.*

14. The NCP Act s 33 prohibition was[3] a "civil penalty provision". Consequently the concept of "contravention" for the purposes of the NCP Act s 80(1)(d) criterion involved both the person's own failure to comply with the prohibition, or being involved in another person's failure to comply:- *NCP Act ss 5 & 169*.

ASIC'S NCP ACT DECISION

15. The ASIC delegate's 31 January 2018 banning order decision prohibited Mr Wilkins from engaging in any "credit activities" for a period of three years. The criterion the delegate found to have enlivened the NCP Act s 80 power was that Mr Wilkins had contravened NCP Act s 33. In the light of that finding the delegate considered it unnecessary to consider whether, and consequently also made no finding that, Mr Wilkins was likely to contravene any credit legislation. The delegate expressly made no adverse finding about Mr Wilkins' contemporary fitness.

16. A factual finding underlying the specific contravention findings in the 31 January 2018 delegate's decision was that Mr Wilkins had deliberately concealed from Mr Holm the SMSF character of five handwritten loan applications he submitted in June and July 2010. In making that finding the ASIC delegate was aware Mr Wilkins had sent Mr Holm loan applications and "Preambles" (*see paragraph 40 below*) on many occasions prior to late April 2010. The delegate was also aware those documents, reasonably understood, did

[3] The section was itself repealed, but re-enacted (in the same terms) as the new NCP Act s 160D, by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth).

disclose that the related purchase transactions would be partly funded by roll overs from existing superannuation funds into the loan applicant's SMSF. Notwithstanding that knowledge, the delegate attached significance to the fact that all the five contentious loan applications, and their related Preambles, differed from the previously submitted applications. (The substance of those differences is summarised later in these reasons:- *see paragraph 38 below.*). Having noted those differences, the delegate considered they had been prompted by intervening advice from Mr Holm to Mr Wilkins. That advice (according to Mr Holm's November 2016 statement to ASIC) was that Westpac would not approve loans to SMSF trustees. Consequently, the delegate considered that the differences in the contentious loan applications, and their related Preambles, evidenced Mr Wilkins' intention to mislead Mr Holm. The delegate considered that the reason for Mr Wilkins' supposed deception was that he knew Westpac would not accept (or was less likely to accept) loan applications that had been made for superannuation purposes.

17. Against that background, the specific basis for the 31 January 2018 decision was that Mr Wilkins was responsible for false information contained in each of the five contentious SMSF loan applications. According to the 31 January 2018 decision reasons, the significant false information was as follows:-

    (a) that the applicants held funds in a National Australia Bank ("NAB") investment account, which were in fact amounts held subject to superannuation trust obligations

    (b) that the NAB investment account had substantial current balances (which ranged in amount from $130,000 to $179,000).

ASIC'S CONTENTIONS PRIOR TO THE REVIEW HEARING

18. On 20 April 2018 the Tribunal directed ASIC to provide particulars of the precise respects in which it contended each of the loan applications was misleading. ASIC provided those particulars on 15 June 2018. The particulars were in two parts. The first part set out ASIC's claim in so far as it was common to the five contentious handwritten loan applications. In it ASIC diffidently suggested that the loan applications should be treated as applications for loans to the corporate SMSF trustees, and that borrowings of that kind were prohibited by the SIS Act. However that suggestion was not pursued at the hearing. ASIC's principal contention (articulated in paragraphs 23, 39 and 40 of the common

particulars) accepted that the applications were for loans to the individual borrowers, and relied on the two aspects of falsity detailed in the delegate's January 2018 decision:- *see paragraph 17 above*. The asserted materiality of these false details was said to be the claim to have funds in an investment, rather than a superannuation, account. That was said to be material in two respects, first as indicating a potential source of income to service the loan and, secondly, as an indication of the loan applicant's past ability to accumulate wealth.

19. The second part of ASIC's particulars detailed specific aspects of the false information in each of the individual loan applications. In each case the substance of the matter relied on was that none of the NAB investment accounts existed when Mr Wilkins sent the loan application to Mr Holm, and all of the funds were, in fact, superannuation assets.

20. ASIC provided an amended version of the particulars on 10 April 2019. The first part of the amended version retained both the principal contention contained in paragraphs 23, 39 and 40 particulars, and the basis for the asserted materiality of the inaccuracies in the loan applications. But it added an imprecise contention that four of the five loan applicants did not have (as either investments or superannuation balances) the amounts asserted to be held in the NAB investment account. The amendments to the second part of the particulars reflected that contention in relation to the NAB investment account balances of the individual loan applicants. The practical effect of these amendments to the particulars was to assert that, but not quantify the amounts by which, Mr Wilkins had overstated the various NAB account balances.

ASIC'S CONTENTIONS AT THE REVIEW HEARING

21. At the start of the review hearing, and despite the recently provided amendments contained in the April 2019 particulars, ASIC's Senior Counsel made clear ASIC no longer positively contended either that Mr Wilkins thought that Westpac's lending policies prohibited "SMSF loans" or that he had misled Mr Holm about the nature of the loans. Indeed there was an acknowledgement that, in relation to any conflict between Mr Wilkins and Mr Holm on those matters, Mr Wilkins' denials were likely to be preferred. That considered position took into account the findings in Westpac's September 2010 investigation of Mr Holm's conduct in relation to his handling of the loan applications, and its consequential termination of his employment. The contemporaneous loan application

correspondence between Mr Wilkins and Mr Holm, to which I refer later in these reasons, shows that ASIC's prediction of the likely acceptance of Mr Wilkins' evidence on this point was justified, and reflected the reality of the situation:- *see paragraphs 40 to 43 below*. Consistent with that reality, ASIC's cross examination of Mr Wilkins, and ASIC's final submissions, expressly resiled from any contrary suggestion, and ultimately unequivocally abandoned paragraphs 23 and 40 of the particulars.

22. ASIC's case in its final submissions was confined to the following propositions:-

  (a) each of the five relevant loan applications falsely stated the applicants held funds in their own bank accounts, when there were no such accounts and the amounts stated were merely the asserted value of their superannuation fund balance

  (b) the applications falsely stated that the applicants had no superannuation fund balance

  (c) Mr Wilkins knew that both of those matters were false

  (d) four of the loan applications mis-stated the amount claimed to be held in the NAB accounts

  (e) Mr Wilkins was at least reckless in relation to his knowledge of the mis-statement of the NAB account balance.

23. In the course of the hearing, at my request, ASIC attempted to quantify its contentions about the extent of the NAB account balance overstatement in each of the four loan applications. Those details were based on assertions contained in statements some of the applicants had provided to ASIC in 2015, and ASIC's own suggested interpretation of those statements and the limited available documentary information. The details provided were not entirely reliable. In so far as they purported to rely on statements by the loan applicants they did not fairly reflect what was, in some instances, vague and inconsistent information. In so far as the details purported to represent ASIC's interpretation of the limited evidence, they did not have an authoritative justification. I have included in Schedule 2 – in the columns headed "Actual (at the time of Loan Application)" – two columns indicating (i) the superannuation balance that should fairly be regarded as having been asserted by the applicants and, (ii) the corresponding superannuation balance asserted by ASIC. (Those details in the Schedule show that, in two of the four instances,

ASIC's assertion is significantly less than the amount asserted in the applicant's statements.)

THE STEPS INVOLVED IN SUNPAC'S SMSF "LOAN WRITING"

24. Each of the impugned loan applications were part of a business strategy directed at encouraging people to use their existing superannuation fund balances to acquire residential properties as investment assets. The strategy involved canvassing prospective purchasers to elicit their interest. People who expressed an interest would then be interviewed by a Sunpac "sales" representative.[4]

25. The Sunpac sales representative would typically attend an interview with a number of standard form "Fact Finder" documents, and "subject to finance" purchase and construction contracts. In the course of an initial interview the representative used the format of the Fact Finder documents to obtain income and asset information from the clients. One of the standard pieces of information the representatives sought to obtain was the client's total current superannuation fund balance.

26. The role of the Sunpac "sales" representative appears to have expanded over time. By early 2010, the prospective purchasers they interviewed would be invited / encouraged to take, or agree to take, the following steps:

    (a) access their existing superannuation fund balance for the purpose of assisting in the purchase of a residential property as an investment

    (b) enter into a property purchase contract (typically expressed to be subject to timely approval of finance "sufficient to complete"), and a contract for the construction of a dwelling on the property

    (c) submit a loan application to finance the purchase price balance (i.e., the balance after allowing for their "personal" and superannuation "roll over" contributions to the property purchase and construction cost

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[4] No question arose in the review proceedings about the propriety of this strategy, the way in which it was implemented or the extent of Mr Wilkins' role in its implementation. ASIC deliberately confined its criticism of Mr Wilkins to his conduct in relation to the content of the five contentious loan applications.

(d) provide, or agree to provide, details of their financial situation, and supporting documentation, for the purpose of their loan application

(e) submit a request to establish an SMSF, and to incorporate a fund trustee, with the borrowers as the trustee's only directors

(f) have the incorporated SMSF trustee enter into a Deed of Trust establishing the SMSF

(g) have the incorporated SMSF trustee open an NAB bank account

(h) transfer funds from the purchasers' existing superannuation fund balance into the SMSF trustee's bank account as a superannuation "roll over"

(i) complete the property purchase (and embark on the house construction) – using the loan proceeds and the SMSF "roll over" amount

(j) after completion of the property purchase, execute in favour of the SMSF corporate trustee, a Declaration of Trust relating to the property.

27. In relation to the first topic in the preceding paragraph, obtaining the client's agreement to access their existing superannuation, there was evidence to the effect that Sunpac ordinarily regarded an $80,000 superannuation balance as a minimum requirement, and that it had trained its sales representatives to use that figure in their discussions with prospective clients. In relation to the incorporation of an SMSF trustee, one of the kinds of documents the sales person would typically obtain in the course of a client interview was a "Company Registration Request" directed to HFS. That standard form document included a template table (which appeared immediately below where the form provided for the loan applicants' names and signatures). The Table contemplated that the sales representative would record details of each of the prospective purchaser's existing superannuation funds and the "estimated balance" of their superannuation entitlements.

MR WILKINS' ROLE IN SUNPAC'S SMSF "LOAN WRITING"

28. Mr Wilkins' personal involvement typically extended to the following activities:-

(a) reviewing the loan application (including superannuation) information obtained by the Sunpac "sales" representative

(b) filling out the loan application details by hand

(c) submitting the completed loan application to Mr Holm, by email, with a short explanatory note about the loan application, and supporting documents (which typically included the respective applicant's recent payslips)

(d) following Westpac's conditional loan approval, sending Westpac's "response" loan application document to the prospective purchasers, for their approval and execution

(e) occasionally, receipt of the following loan documents from Westpac (although these documents were usually sent to the purchasers or their legal advisers)

 (i) the loan contract

 (ii) a property mortgage, together with an authority to complete

 (iii) a direct debit form (authorising the loan repayments)

(f) in those instances where he received the Westpac loan documents, arranging a meeting with the prospective purchasers, going through the loan documents with them, and having them signed.

29. The actual extent of Mr Wilkins' activities in completing the handwritten loan application form, and obtaining the applicant's signatures on both that application and the subsequent Westpac response form, was not entirely clear. In relation to the former, apart from having a practice of telephoning applicants to verify their identity and contact details, Mr Wilkins said that his involvement was limited to filling out the forms, essentially as a scribe, relying principally on the information reported by the sales representative who had interviewed the applicant. That evidence did not specifically explain whether, or the circumstances in which, handwritten loan application forms were usually signed. Some of the Sunpac / Heritage sales representatives said, in their statements to ASIC, that they got applicants to sign blank application forms and gave those forms, with the other information they had obtained, to Mr Wilkins for him to complete. Other statements indicated that Mr Wilkins would arrange to meet the applicants to get their signatures for the loan applications. The numerous loan applications put into evidence (*see paragraphs 40 to 44 below*) did not clarify the apparent conflict between those assertions. The majority of the loan applications had been signed and were typically dated several days

(sometimes weeks) before Mr Wilkins' submission email to Mr Holm. About 25% of the loan applications had been neither signed nor dated. Those circumstances are arguably consistent with Mr Wilkins' asserted role as a scribe. In the case of the five contentious loan applications, statements from four borrowers contain accounts of Mr Wilkins meeting with them, either at their homes or workplaces, getting information from them about their financial situation (including a range of supporting records) and going through the loan application form with them. Despite those accounts, the copies of three of those four handwritten applications (at least those that were in evidence) had not been signed. Neither the reason for the absence of signatures, nor the reliability of the borrowers' accounts of their dealings with Mr Wilkins in relation to the completion of the handwritten loan application, was actively explored in the evidence. In the absence of meaningful exploration, the reliability of each of the four borrowers' accounts of meetings with Mr Wilkins was too doubtful to accept - as I indicate later in these reasons.

30. In relation to Mr Wilkins' involvement in having the Westpac response form signed, Mr Wilkins said his usual practice was to send the complete document to the clients, and ask them to send back only the three pages that required their signature. He conceded that there may have been occasions (including some of the five contentious loan applications) when the clients were only sent the signature pages, rather than the complete Westpac form. That concession provoked the criticism that applicants who received only the signature pages of the Westpac response form were deprived of the opportunity to check the accuracy of its contents. But Mr Wilkins was not challenged about his asserted usual practice. Nor was it asserted that on the occasions when he only sent applicants the Westpac response form signature pages, that this was the result of a deliberate decision motivated by his knowledge of the false information in the application.

THE CONTENT OF THE CONTENTIOUS LOAN APPLICATIONS

31. All the loan applications Mr Wilkins lodged relating to "SMSF loans" involved handwritten completion of a standard Westpac loan application form for "Home Loans, Investment Property Loans and Equity Loans". The first page of the form required disclosure of the loan purpose, the total proposed purchase cost, the amount of the applicant's contribution to the purchase, and the requested loan amount.

32. After other matters relating to the applicant's employment and income details, page 4 of the 8 page application form required the loan applicants to list all their assets. It segregated the required disclosure into the following five groups

(a) ***My real estate property assets*** – this required details of the property address, description, current use, market value and ownership particulars (in the case of co-ownership)

(b) ***My cheque, savings, term deposit and other accounts*** – this required details of the financial institution where the account was held, the type of account, ownership particulars and the account balance

(c) ***My investments, including superannuation, life insurance, shares, unit trusts, etc*** – this required details of the name of the fund or insurer, the particular investment type, ownership details and the amount of the "current cash balance"

(d) ***My motor vehicles*** – this required details of the make, model, build year, ownership and market value

(e) ***My other assets, including household items and personal effects, cash, boats, tools of trade, etc*** – this required a brief description of the type of assets, their ownership and market value.

33. A later section of the application form required details of the proposed loan security, the applicant's solicitor or conveyancer, and the requested loan features. The required loan security details included the property address, type of title, market value and anticipated rental. In the present case all five applications were by NSW resident couples and involved properties located near Ipswich in Queensland. They sought interest only loans with monthly repayments over a 30 year term.

34. The application form concluded with various "acknowledgements and consents" that were required from the loan applicants. These included a confirmation that the "information contained in this application and the financial information supporting it are in all respects complete and correct".

35. After receiving the handwritten loan application forms Westpac generated its own loan response form – apparently as part of an automated assessment and conditional approval

process. It returned that form to Sunpac / Mr Wilkins to have the loan applicants sign, after carefully reading various “Declarations and Authorities” contained on the later pages of the form. The Westpac response form stated the requested loan amount, and noted the loan purpose as “erection of a dwelling for rental / resale”. Subject to one modification, the response form repeated the substance of the asset groupings and details in the handwritten loan application. The modification was that it differentiated on the one hand (and perhaps unsurprisingly – given their different realisable natures) between superannuation and life assurance assets, and on the other hand, share, unit trust and debenture type assets. The response form set out details of the address, contract price, and estimated market value of the property to be purchased. It did not refer to either the fact, amount or source, of the loan applicant’s intended contribution to the purchase price.

36. The Westpac application response form provided for the applicant’s signature on three pages where the terms of various required acknowledgements and consents were set out. These included a statement confirming that the information contained in the form “is in all respects complete and accurate and is not, by omission or otherwise, misleading”. That statement was immediately followed by an acknowledgement that Westpac would rely on both the information in the form, and the confirmation of its accuracy, “when making its decision whether to approve the application.”

37. Details of the five contentious loan applications (and the related transaction documents) are set out in Schedule 1:- “Loan "Preamble", application, contract and SMSF details” to these reasons. The following matters are apparent from the details in Schedule 1:-

(a) Each of the five loan applicants executed their purchase and construction contracts on the same day, and all five did so before Mr Wilkins submitted the loan applications:- *columns L, N & D*.

(b) Three of the SMSF trustees had been incorporated before Mr Wilkins submitted the loan application:- *columns S & D*.

(c) Three of the loan applicants did not sign the handwritten loan application form, and only one of the two signed applications was dated:- *column D*.

(d) Each handwritten application asserted that the borrowers would make an “own contribution” to fund the proposed purchase. (The contribution amounts ranged from $120,000 to $135,000.):– *column Q.*

(e) All five applicants signed the Westpac "response" application form (or at least the pages containing the required acknowledgements)*:- column F*.

38. Further details of the contents of each loan application, and of the apparent actual value of the relevant assets, are set out in Schedule 2:- "Loan application asset details & subsequent receipts // "Fast Loan" amounts. The following matters are apparent from the details in Schedule 2:-

(a) Each application asserted ownership of an NAB investment account, with a substantial balance. (The amounts ranged from $130,000 to $179,000.)*:- column J.*

(b) The asserted NAB investment account balance exceeded the amount of the purchaser's "own contribution" to the proposed purchase*:- columns J & F*.

(c) The only apparent source of the asserted "own contribution" was the balance of the asserted NAB investment account*:- columns J, F& L to O*.

(d) No NAB investment account was opened, or held any funds, until several weeks or months after Mr Wilkins submitted the loan applications*:- columns Z to AB & Schedule 1 column D*.

(e) In every case the amount subsequently deposited to the NAB account was substantially less (and typically tens of thousands of dollars less) than both (i) the asserted NAB investment account balance and, (ii) the originally contemplated "own contribution" amount*:- columns AB & F*.

(f) No loan application disclosed the fact or value of any applicant's existing superannuation fund balance*:- column L*.

(g) All of the SMSF corporate trustees subsequently entered into loan agreements with Westpac and further loan agreements with "Fast Loans" *:- columns AG & AH.*

39. The omission from the loan application of any details of existing superannuation is surprising. It occurred despite (i) the specific disclosure request in the Westpac application form, (ii) the "complete and correct" declaration in the acknowledgement section of the form and, (iii) the fact, evident from the employment details provided in (or

with) the Preambles and the completed application forms, that in each case at least one of the joint loan applicants had been in paid employment for many years.

PREVIOUS LOAN APPLICATIONS SUBMITTED BY MR WILKINS

40. The five contentious loan applications relevant to the present proceedings were amongst the last applications Mr Wilkins submitted before Westpac's September 2010 termination of Mr Holm's employment. The short explanatory note Mr Wilkins typically sent with the applications in his email to Mr Holm was written on a "facsimile transmission" form under Sunpac's letterhead. Mr Wilkins referred to this note as the loan "Preamble".

41. The contents of the various "Preamble" notes varied in the extent of the detail they provided. The earliest Preamble versions typically stated explicitly that the loan applicant had an existing superannuation fund balance, was in the process of establishing an SMSF, and said that the balance of the funds required to fund the proposed purchase and construction would come from the SMSF fund balance. Sometimes the material submitted with the loan application included copies of a statement verifying the loan applicant's existing superannuation fund balances. In addition, the "Preamble" occasionally described the proposed purchase transaction as being in the nature of a "joint venture" between the loan applicants and the SMSF trustee. (Sunpac's May 2009 legal advice had used that as one of the possible descriptions of the substance of the transaction structure it addressed.) More usually, especially after about mid-March 2010, the Preamble cryptically stated that "funds to complete will be drawn from newly formed Self-Managed Superannuation Fund – see attached letter". By mid-April 2010 the typical Preamble statement changed slightly to say that the funds to complete would be drawn from credit funds "held" in the newly formed self-managed superannuation fund, and again referred to an "attached letter". In both cases the "attached letter" was a statement from HFS. The letter said HFS had been retained to establish the loan applicant's SMSF and stated that the applicant's existing superannuation fund balance (though not yet rolled over into the SMSF trustee's bank account) would be made available ("on receipt and clearance") to contribute to the settlement of the proposed purchase.

42. In early May 2010 the Preambles tended to repeat the wording in the April versions - that the funds to complete would be drawn from a newly formed SMSF - but without referring to any "attached letter". Occasionally the Preamble either added the explanation "as

noted on the loan application" or included a reference to those funds being held in an NAB account. The completed Westpac loan application forms that accompanied those Preamble emails to Mr Holm typically provided the applicant's superannuation information in the "My investments, including superannuation" section of the form. Commonly the information simply described it as "SMSF Super", without giving any fund name, and the asserted fund balance. However, in all these instances the loan application forms were consistent in following the previous practice, in that the superannuation amount was not included in the personal "savings" asset category in the loan application form.

43. In about mid-May 2010 however, the contents of the Preamble email varied between the previously used "as noted on the loan application" statement, and a more expansive explanation – to the effect that the applicant's existing super was in the process of being rolled over into a new SMSF account "held with NAB". In those instances (assuming the complete loan application was as contained in the annexures to Mr Wilkins' statement) there was neither an accompanying letter from HFS, nor any copies of statements from the loan applicant's existing superannuation fund. Neither was there any such explicit note in the details on the accompanying loan application form. Indeed the completed forms departed from the evident past practice, in that they omitted any reference to superannuation from the "My investments, including superannuation …" asset category. (This occurred despite the fact that both the Preamble and the loan application itself typically indicated the applicant's employee status.) Instead, the "savings" category in the form included a description "NAB Investment A/CC", and gave an account balance, in an amount that typically exceeded the applicant's intended contribution to the purchase. These particular loan applications appear to have been the first instances when the NAB account was explicitly identified in the loan application forms as a source of completion funds for the purchase and construction contracts.

44. All of the available Preambles and loan applications referred to in the preceding paragraph related to proposed "house and land" purchases of properties in the same street. They were all submitted within a few days of each other, and some Preambles did expressly both refer to a current SMSF establishment process and state that the proposed roll over amount would be put into an account that "is held with NAB". The totality of that information, given the essentially similar transaction pattern in previous loan applications submitted by Mr Wilkins, would arguably have conveyed to Mr Holm that the "investment account" balance stated in the completed application forms submitted in mid-May 2010

was in fact the component of the existing superannuation fund balance intended to be rolled over into an applicant's SMSF.

THE CONTENTIOUS LOAN APPLICATIONS AND THEIR PREAMBLES

45. As the details in Schedule 1 indicate, the Preambles for the five contentious loan applications were all dated between 3 June and 27 July 2010. They stated simply that "funds to complete will be obtained from investment account held with NAB", and made no reference to the applicant's existing or proposed superannuation. (However, on at least one occasion the email to which the Preamble and loan application were attached did say that "this one is for super".)

46. The accompanying loan application forms uniformly included, in the "my cheque, savings … other accounts" asset section of the form, an NAB balance that was described as an investment account. No amount was shown in the "my investments, including superannuation …" asset section of the contentious loan applications. In these respects the Preambles and the application forms were consistent with the contents of those referred to in paragraphs 43 and 44 above. In that context, the cryptic content of the Preambles for the five contentious loan applications can be regarded as an incremental progression in the brevity of the Preamble, after its earlier change to the assertion that the balance of the funds required for completion would be drawn from the newly formed SMSF "as noted on the application form".

THE REASON FOR THE CHANGED TREATMENT OF SUPERANNUATION FUND BALANCES IN THE LOAN APPLICATIONS

47. Although the altered content of the contentious loan Preambles can be viewed as reflecting an incrementally adopted shorthand description of a transaction pattern that Mr Wilkins and Mr Holm had come to well understand, Mr Wilkins gave different, and not altogether consistent, explanations for them and, more specifically, for the NAB "investment account" detail in the corresponding loan applications.

48. At one point in his statement Mr Wilkins set out several paragraphs in which he suggested that his usual practice had been to include the SMSF related amount in the "investments / superannuation" asset category of the loan application form but, influenced by his assessment of the stage of the applicant's "roll over" process, he would there describe it

as either an "investment" (if he considered the "roll over" imminent or certain) or as "superannuation". However Mr Wilkins conceded in cross examination that the subjective discrimination such a practice required was not readily capable of implementation in relation to the loan applications with which he typically dealt (having regard to the steps involved in the Sunpac business model:- *see paragraph 25 above*). Moreover the practice is not at all evident in the more than 40 (pre June 2010) Preamble and loan application examples Mr Wilkins exhibited to his statement. On the contrary, whilst the superannuation details were (prior to mid-May 2010) always included in the "investments / superannuation" asset category in the loan application, they were uniformly described as "super" – with the fund name being given as either "SMSF" or that of the relevant retail / industry fund.

49. At another point in his statement Mr Wilkins acknowledged, without explanation, that there were occasions when he allocated the SMSF related funds (in effect the estimated available roll over amount) to the "savings" category in the loan application. As I have noted, this seems to have first occurred in about mid-May 2010, and to have specifically identified the amount as held in an NAB account:- *see paragraph 43 above*. Apparently related to that change in the usual content of the loan applications, and to explicit reference to the NAB account in some Preambles, Mr Wilkins' statement included his recollection of "several conversations" in which Mr Holm enquired whether "this NAB account is one of the SMSF accounts". Where an account of these conversations first appeared in his statement, Mr Wilkins gave no specific timing as to when they occurred. But a time in mid to late May 2010 seems likely, given that the enquiry attributed to Mr Holm curiosity about the nature of the NAB account. In later parts of his affidavit Mr Wilkins says that he had substantially similar telephone conversations with Mr Holm shortly after submitting each of the contentious loan applications.

50. Although Mr Wilkins' affidavit suggested only occasional (and not specifically explained) departures from his usual practice of including superannuation in the "my investments" asset category, his evidence in cross examination was that his altered treatment of funds to complete in the five contentious loan applications was the result of a conversation with Mr Holm, and one not referred to in his affidavit. According to Mr Wilkins, Mr Holm said to him that because the funds being rolled over from the applicant's existing retail superannuation fund were going to be deposited into the NAB investment account, they

should be regarded as an investment and he should "put them in the investment section" in the loan application forms.

51. ASIC criticised this aspect of Mr Wilkins' evidence on several bases. One of those was that the conversation had not been included in Mr Wilkins' affidavit. Another criticism was that Mr Wilkins had not even raised this explanation in his 28 August 2018 response to ASIC's particulars. A third basis was that in the earlier 19 January 2018 response by his solicitors to ASIC's notice of concerns, the repeatedly stated explanation for the NAB investment account entry was Mr Wilkins' subjective assessment (without mention of any related instruction or request from Mr Holm) that the NAB account was most appropriately described as an investment, rather than superannuation. A fourth consideration was that, irrespective of where the "roll over" funds were held, they were still superannuation funds, and that was a matter Mr Holm well understood. Consequently, there was no readily apparent sensible reason for Mr Holm to have requested or instructed Mr Wilkins to include the roll over amount in the "savings" asset category in the loan application form.

52. There is significant force in ASIC's reasons for scepticism of Mr Wilkins' evidence about having received that instruction from Mr Holm. There was no reference to any such conversation in Mr Wilkins' December 2018 affidavit. On the contrary, Mr Wilkins had asserted a deliberate practice of always including superannuation in the "investments / superannuation" asset category, and merely acknowledged unexplained "occasions" when he had departed from the practice. Moreover, there is some incongruity about the proposition (advanced by Mr Wilkins) that Mr Holm's instruction or request related to the five contentious loan applications, when the contemporaneous documents suggest Mr Wilkins had altered his practice in some loan applications he had submitted several weeks earlier.

53. Yet another oddity about Mr Wilkins' cross examination evidence is that whilst he consistently attributed to Mr Holm a request to include the roll over amount as an "investment", Mr Wilkins actually included it in the "savings" asset category in the loan application forms. Furthermore, as the details in Schedule 2 tend to suggest, the "own contribution" contemplated in the loan application form was typically less (or understood by Mr Wilkins to be less) than the applicant's existing superannuation balance. Consequently, it is difficult to see that Mr Holm's asserted request provides a logical basis

for Mr Wilkins to have entirely omitted any superannuation details from the “my investments” asset category in the loan application.

54. The oddity referred to in the first sentence of the preceding paragraph may be explicable as Mr Wilkins’ mistaken understanding (when giving evidence) about the objectively accurate description of the “savings” and “investments” asset categories in the loan application forms. Certainly the thrust (as distinct from the actual wording) of his evidence was that Mr Holm requested him to treat the NAB account balance as he did – i.e., by including it in the “savings” category. The second difficulty noted in the previous paragraph, relating to the complete omission of superannuation from the completed loan applications, is less readily explained by resort to the asserted conversation with Mr Holm.

55. Both the oddity and the difficulty noted in the previous paragraph may perhaps be dismissed as indicating Mr Wilkins misunderstood the thrust of Mr Holm’s request or instruction, rather than as inconsistent with some such conversation having occurred about the preferred treatment of the NAB account. But taking that approach leads to the apparent incongruity in the propositions that, on the one hand, Mr Holm instructed Mr Wilkins to include the roll over amount as an “investment” and, on the other, after giving that instruction, repeatedly enquired (according to Mr Wilkins’ affidavit) as to whether the NAB account was another SMSF account. The formulaic generality of the recollection Mr Wilkins asserted in his affidavit that he had repeated conversations with Mr Holm about such a topic, especially when viewed against the background reality that the overwhelming preponderance of the loan applications Mr Wilkins submitted to Mr Holm were for SMSF loans, invites scepticism about the reality of Mr Wilkins’ recollection.

56. The reliability of Mr Wilkins’ belated explanation for his treatment of the intended superannuation roll over amounts in the five contentious loan applications is very questionable. It is hard to accept that the “NAB” investment account content of the loan application forms was the result of a direct request or instruction from Mr Holm, when that was an explanation Mr Wilkins offered only in cross examination, and when his earlier affidavit had contained a rather detailed, and apparently different, explanation of his practices.

57. Despite the questionable reliability of Mr Wilkins’ belated explanation for his inclusion of the NAB account balance in the “savings” asset category in the contentious loan

application forms, I am inclined to accept it. Five matters provide the basis for my inclination.

58. First of all is the risk of unfairness in a close forensic scrutiny of Mr Wilkins' previous representations and the content of his affidavit. As I have set out earlier, ASIC's decision, and the concerns expressed in the notice that preceded it, involved the proposition that Mr Wilkins had deliberately set out to deceive Mr Holm, and the further proposition that the NAB "investment" account particulars in the five loan applications were evidence of that deceitful intention. ASIC's apparent primary emphasis on those serious allegations did not appear to alter until the morning of the review hearing (obviously months after the date of Mr Wilkins' affidavit). Whilst those propositions were the principal points of emphasis, it is reasonable to contemplate that Mr Wilkins' attention (at the time of his previous explanations) was directed at negativing the deceit allegation, rather than in assembling the totality of the reasons for the content of the contentious loan applications.

59. The second matter is that the contemporaneous documents show that until mid-May 2010 Mr Wilkins consistently allocated applicants' superannuation balances to the "investments / superannuation" asset category in the loan application forms. It follows that the subsequent departures from the previous consistent practice were, more likely than not, intentional and responsive to some particular event.

60. That consideration leads on to the third matter. It is that Mr Wilkins had no discernible reason (other than the asserted conversation with Mr Holm) to alter his previous treatment of the superannuation roll over amounts in the loan application forms. Since early 2010 he had submitted many SMSF related loan applications to Westpac. Mr Holm was aware of their nature and Mr Wilkins understood Mr Holm had the relevant loan approval authority. There is no evidence (apart from the Holm assertions the delegate accepted, but which ASIC disavowed in the review proceedings) that Mr Holm had expressed any concern about the SMSF nature of the loan applications. Nor is there a basis to conclude that Mr Wilkins himself attached any contemporaneous significance (in terms of the risk of rejection) to the classification of the roll over amount as "savings" or "superannuation" within the loan applications.

61. The fourth matter is that where the loan application contemplated an "own contribution" to the property purchase and (as in the present cases) the intended (and only realistic)

source of that contribution was the SMSF "roll over", there is some underlying logic (notwithstanding its conceptual inaccuracy) in including the source of the contribution in the "savings … other accounts" asset category, rather than as the amount of a superannuation fund balance. That arguable logic is marginally helpful in assessing the potential reliability of Mr Wilkins' evidence.

62. The fifth consideration is that whilst there is no basis for concluding that Mr Wilkins sought to deceive Mr Holm, it is known that Westpac dismissed Mr Holm shortly after the contentious loan applications had been submitted, and that it did so partly because of his self-interested breach of Westpac's loan approval processes in relation to superannuation related loan applications. It is also known that, prior to 23 May 2010 Westpac had raised with Mr Holm some concerns about his lending practices and, in early June 2010, had given him a policy / guideline reminder that all superannuation related loans were to be processed as business loans. Mr Holm had apparently been defying that internal Westpac requirement for months. It follows that there is some basis to suspect that, by mid-2010, Mr Holm would have had a subjective motive to minimise the risk of internal scrutiny identifying the "business" nature of the loan applications, and to have the loan applications presented to him in a way that provided an apparently arguable explanation for his treatment of them as "consumer" loans. The request / instruction that Mr Wilkins attributed to Mr Holm in his cross examination evidence is consistent with that suspicion. Its consistency is another consideration that contributes (although I regard the first three matters as determinative) to my acceptance of Mr Wilkins' evidence about the reason he assigned the NAB "investment" amount to the "savings" account in the five contentious loan applications.

ASIC'S AMENDED "AMOUNT" PARTICULARS

63. ASIC's late amended particulars contended that Mr Wilkins had mischaracterised the NAB account "investment" in the "savings" asset category in the loan applications, and that, in four cases, the amount was overstated. The latter contention, expressed in the passive voice, did not contain any explicit assertion about Mr Wilkins' contemporaneous awareness of the overstatement. The obscurity of ASIC's position was compounded by the fact that, although ASIC apparently relied principally on the statements of some of the loan applicants, the particulars did not specifically assert that Mr Wilkins had been given the assertedly correct superannuation estimates. Aside from the particulars, during the

course of the review hearing it became apparent that ASIC additionally relied on inferences from (i) the amounts that were actually deposited to the NAB account and, (ii) the fact that, in all four cases, the applicants later entered into what appears to have been a supplementary loan agreement with Fast Loans.

64. The four instances where ASIC alleges Mr Wilkins overstated the NAB investment amount, and the paragraphs where I address the loan applicants' statements on which ASIC relies, are as follows:-

(a) Chung / Lay loan application:- see paragraphs 69 to 75 below.

(b) Ghazawy loan application:- see paragraphs 76 to 89 below.

(c) Nadin / Holden loan application:- see paragraphs 90 to 104 below

(d) Ursino loan application:- see paragraphs 105 to 117 below.

THE DIFFICULTY OF "INFERENCE" IN RELATION TO THE ACCURACY OF THE NAB "INVESTMENT" AMOUNT

65. Neither the amount of the actual deposits to the applicants' NAB accounts, nor the fact that a purchaser later entered into supplementary loan agreements provides a persuasive basis for reliable inferences about the accuracy of the information contained in the loan application forms. Nor does either matter reliably indicate Mr Wilkins' state of mind when he sent the loan applications to Mr Holm. The potentially confounding considerations are illustrated by considering some of the circumstances relating to the Donovan loan.

66. The details summarised in Schedule 2 indicate that the Donovans contemplated a $120,000 personal contribution to their May 2010 purchase contract, and that it was likely to be made from their existing superannuation balance of $130,000 (i.e., the amount shown in the loan application as the NAB "investment" account balance). However, nothing was deposited to their NAB account until October 2010, and then only about $99,500 was ultimately deposited. Later, the Donovans entered into a $33,000 loan agreement with Fast Loans. Despite those details, ASIC does not contend the NAB balance included in the loan application was overstated (as distinct from mischaracterised).

67. Part of the explanation for ASIC's stance is that Mr Dononvan said, in his November 2015 statement to ASIC, that he and his wife did indeed have "about $130,000" in their combined superannuation balances at the time of their loan application. Another part of the explanation emerges from a proper understanding of the circumstances relating to the apparently complicated later history of the Donovan's purchase and construction contracts. Those circumstances included:-

(a) ***September & October 2010***:- there were difficulties in arranging the roll over of the existing superannuation, particularly in relation to Mrs Donovan.

(b) ***14 October 2010***:- about $99,000 had been deposited to the NAB bank account by early October 2010, there had been some difficulties in withdrawing funds from his wife's superannuation.

(c) ***25 October 2010***, the Donovans entered into a contract for a different property (Lot 65 – purchase price increased to $129,000).

(d) ***6 December 2010*** they received a Westpac loan offer of $178,500, which was approximately the amount they had sought in their original May 2010 application. Westpac internal documents (apparently dated in around December 2010) inconsistently record that the total purchase and construction contract price was $304,000 and $341,000 and had increased from the $295,000 total shown in the original loan application.

(e) ***February 2011***:- The difficulties involved in rolling over Mrs Dononvan's superannuation continued into February 2011, and seem not to have been resolved by the time of the March 2011 settlement of the property purchase.

(f) ***3 to 10 March 2011***:- $100,554 was withdrawn from the NAB account, and a further $33,000 Fast Loan borrowing, was used to settle the purchase of the substituted property.

(g) ***31 March 2011***. The Donovans received a formal loan offer from Westpac for a larger amount of $199,500, but relating to the acquisition of the same property.

(h) ***mid-April 2011***:- After completing the property purchase, the NAB investment account still had a credit balance of just over $11,000. By mid-April 2011 the

balance had increased to $21,000. By September 2011.the balance was $47,602 by September 2011. It remained at about that amount until the end of March 2012.

(i) ***between January and April 2012***:- The Donovans paid out the Fast Loans borrowing.

68. The sequence of events outlined in the preceding paragraph, though relating only to the Donovan loan, illustrate the difficulty of drawing accurate factual and causal inferences from limited details and understanding of subsequent events.

THE CHUNG & LAY LOAN APPLICATION JULY 2010

69. Much the same point emerges from consideration of the evidence on which ASIC relied to support its particularised complaint about the NAB investment account balance in the Chung & Lay loan application. The starting point in ASIC's complaint was the contrast, evident in the Schedule 2 details, between the $125,000 "personal contribution" (and the $130,000 NAB investment account balance) shown in the loan application, and the $100,000 ASIC assertion about the amount of the applicant's combined superannuation balances.

70. That ASIC assertion appears to be based on one part of what Ms Chung said in her July 2015 statement, when she was giving an account of the first meeting she and her husband had with one of the Sunpac sales representatives (Mr Dona). She vaguely timed that meeting as having occurred in "about 2010". She said that either she or her husband told Mr Dona that they had "at least $100,000 saved in superannuation". She could not remember whether they also said they had any additional savings. She says she provided their current superannuation statements (but was no longer able to find any of those copies).

71. The available documents relating to the Chung & Lay loan application do not include copies of any such superannuation statements. Neither do they include a copy of the Company Registration Request – a document that would have been completed, as a matter of ordinary practice, during the sales representative interview, and on which the superannuation balance amount would ordinarily have been recorded:- *see paragraph 27 above*. However the available documents do include (i) a signed purchase contract, and related acknowledgement forms, all dated 20 July 2010, (ii) payslips, including one

recording a pay period to 16 July 2010, and leave entitlements as at 23 July 2010 and, (iii) two undated forms which Mr Dona said (in his statement to ASIC) were completed by Mr Lay and Ms Chung in their own handwriting when he interviewed them. (Both of those documents contain handwritten entries asserting $10,000 in savings. That savings amount is one of the amounts specifically noted on the loan application form.) In addition, the Sunpac "Loan Tracker" record of communications with Ms Chung and Mr Lay indicates that (a) they had first been interviewed by Mr Dona some time prior to 20 July 2010, (b) Mr Dona saw them again on 20 July 2010 (because they had changed their mind, and wanted to downsize their intended purchase to a three bedroom property) and, (c) on 23 July 2010, they dropped off at Sunpac's office various documents needed to support the loan application.

72. Those documents comfortably demonstrate that Ms Chung met Mr Dona, and signed the purchase contract on 20 July 2010. They do not suggest she had any contact with Mr Wilkins prior to the loan application being submitted. Consistent with that recollection of events, Ms Chung says in her statement that it was only after she and her husband had "rolled over our super into our SMSF" that she spoke with Mr Wilkins. Her recollection of that conversation was that Mr Wilkins reported to her that the money had been received into the SMSF and that "we need to send someone to see you to get your loan application together". This was followed by a subsequent meeting when Mr Wilkins came to see her and her husband at their workplace. In the course of this conversation Ms Chung said she told Mr Wilkins that "we have about $100,000 in super, maybe a bit more". She said Mr Wilkins began to fill out the loan application form at that meeting.

73. There is a considerable apparent incongruity in the proposition that Mr Wilkins met and completed the handwritten loan application form after Ms Chung and Mr Lay had completed the fund roll over to their SMSF. This casts significant doubt on the proposition that she even met Mr Wilkins prior to the loan application being submitted, and that doubt is only fuelled by the content of the Sunpac "Loan Tracker" records, which record no such interaction. But the more important point is that later in her statement, after Ms Chung had been shown the completed handwritten loan application, and her attention drawn to the $130,000 amount recorded as the balance of the NAB investment account, she contradicted her earlier $100,000 statement and said "we had about $130,000 in our superannuation". She repeated that acknowledgement in a later part of her statement, in

relation to the contents of the Westpac "response" form she and her husband signed on 3 August 2010.

74. ASIC speculated in its final written submissions that those later acknowledgements by Ms Chung "might be explained" as a mistake she made after being shown the content of the loan application, and misled by it. The submissions offered no reason to embrace that speculation as fact, nor any reason to reject the converse possibility - that the content of the loan application might have prompted an accurate disavowal of her previous $100,000 estimate. In the absence of any such reasoning the choice between the two possibilities is uninformed. Consequently, an objectively fair reading of Ms Chung's July 2015 statement, against the background of the available documents, leads to the conclusion that her evidence provides no support for either of the propositions that (i) the $130,000 amount in the handwritten application form overstated their superannuation cash balance estimate, or (ii) that Mr Wilkins knew of any such overstatement. On the contrary, the literal content of Ms Chung's explicit acknowledgement after being shown the content of the loan application, provides a basis for concluding that the loan application did accurately reflect the information that Ms Chung and Mr Lay said they had conveyed (though more likely to Mr Dona than to Mr Wilkins).

75. Whether or not the $130,000 estimate Ms Chung acknowledges having provided was in fact accurate is a different question. The first deposits were not made to the NAB investment account until the end of October 2010. The only significant subsequent deposit (approximating $86,500) was made in early January 2011. Thereafter the account continued to grow. By 27 April 2012 the account balance was over $99,000 before a $90,000 withdrawal, apparently in connection with the completion of the house construction on the property. Neither those bare facts, nor the knowledge that Ms Chung and her husband entered into a $45,000 additional loan agreement with Fast Loans in April 2012, permits any conclusion that, almost two years earlier, Mr Wilkins had been aware of any overstatement when he submitted the loan application to Westpac.

THE GHAZAWY LOAN APPLICATION JULY 2010

76. The details set out in Schedule 2 contrast the $127,000 "personal contribution" (and $140,000 NAB investment account balance) shown in the loan application with Mrs

Ghazawy's later assertion (in her February 2015 statement to ASIC) that the actual amount of their combined superannuation balance was only "about $80,000".

77. Mrs Ghazawy said in her statement that during the initial interview at their home on 1 July 2010 she told the Sunpac sales representative that they had "about $80,000" in their superannuation accounts, and no savings.

78. Few documents provide context and content to the meetings about which Mrs Ghazawy (but not Mr Ghazawy) provided a statement. One matter of potential relevance is the fact that $80,000 appears to have been a qualifying threshold amount that featured in the usual explanation Sunpac's sales representatives provided to potential purchasers in the course of initial interviews:- *see paragraph 27 above*. Mr Naish, who conducted the initial interview with Mr and Mrs Ghazawy, explained his general interview practice without addressing the content of the specific meeting with Mr and Mrs Ghazawy. He explained that his usual practice was to fill out various forms, including the Company Registration Request (*see also paragraph 27 above*) in the course of the interview. He also collected, and took away with him, whatever supporting financial documents the clients were able to provide. He gave the client provided information to Mr Wilkins when he returned to the office.

79. Mrs Ghazawy says in her statement that she and her husband signed various documents, including the property purchase contract, during the course of their interview meeting with Mr Naish. Consistent with that recollection, there are many documents dated 1 & 2 July 2010. They include signed copies of (i) the property purchase contract, (ii) various related acknowledgements, (iii) authority to open the NAB account and, (iv) an acknowledgement by HFS of having received instructions to establish an SMSF.

80. Notwithstanding the documents alluded to in the preceding paragraph, and the SMSF trustee's incorporation on 15 July 2010, the available documents do not include either a signed copy of the usual Company Registration Request or a copy of Sunpac's "Loan Tracker" document relating to the loan. Nor are there any copies of balance statements from any superannuation funds. However, there is a 20 July 2010 letter from HFS which acknowledges their instructions to establish an SMSF and states that their client "has numerous retail superannuation funds which reflect a total of $140,000".

81. Mrs Ghazawy says she met with Mr Wilkins at her home in “mid to late July 2010”. She gave Mr Wilkins various supporting financial documents and he then “partially filled out” the loan application form. He then gave her the loan application form. She looked at it and, according to her statement, confirmed that she considered it to have been accurately filled out. She also said that parts of the form, which she did not detail, were blank and Mr Wilkins said he would take the application away and complete it in his office.

82. It seems likely that any incompleteness in the application during the course of any such meeting was the absence of available information from Mr and Mrs Ghazawy. This likelihood arises from the content of a letter Mr Wilkins wrote to them on 28 July 2010. Mrs Ghazawy refers to this letter in her statement, and sets out part of it. But the part she set out omitted the paragraph in which Mr Wilkins thanked her and her husband “for forwarding to us the documentation required to complete your loan application”. Whilst this letter confirms that she and her husband provided some further documentation after the 2 July 2010 meeting with Mr Naish, it contains no reference to any meeting with Mr Wilkins. Nor is there any reliable information to indicate the content of the documentation referred to in the letter.

83. Apart from her insistence that neither she nor her husband told Mr Wilkins that they had either $6,000 in savings or $140,000 in investments Mrs Ghazawy does not say what (if anything) she did say to Mr Wilkins about those matters.

84. In the absence of specific and reliable evidence of what (if any) information Mr and Mrs Ghazawy gave Mr Wilkins about their superannuation balance, the likely conclusion (consistent with the usual practice of both the Sunpac sales consultant and Mr Wilkins) was that the information he relied on in completing the handwritten loan application form was the estimated balance recorded on the Company Registration Request that the applicants usually signed during their initial interview. The HFS letter of 20 July 2010 (which Mr Wilkins said in his oral evidence he was likely to have seen before submitting the loan application) encourages the inference that the only information available to Mr Wilkins when he submitted the loan application was that the applicants had several relevant existing superannuation accounts, whose combined value approximated $140,000.

85. In the absence of either any documentary contradiction of the HFS 20 July 2010 letter, or specific evidence from Mr or Mrs Ghazawy, the recollection Mrs Ghazawy asserted in her statement to ASIC is obviously limited and lacking in relevant detail. Consequently, what she claims to have been able to remember almost five years after the event does not provide an adequate basis for an affirmative conclusion that Mr Wilkins knowingly overstated the NAB investment account balance in the handwritten application.

86. No stronger basis for such a conclusion is provided by knowledge of the deposits that were subsequently made to the NAB account. They occurred over a three month period from 18 August 2010 (when $51,062 was deposited) to 12 November 2010. On the latter date a deposit of $15,595 took the balance up to $74,743. Thereafter, regular deposits from "Superchoice P/L" increased the account balance to about $79,296 as at 22 September 2011. The $75,222 withdrawal made on that date was, according to Mrs Ghazawy's understanding, for the first progress payment for the house construction on the property.

87. On 12 October 2011 the Ghazawys appear to have taken out a further $59,000 loan with Fast Loans. However the documentation relating to this loan confusingly refers to 3 different amounts ($45,000, $59,000 and $64,000) as the loan principal. The $59,000 appears to be correct because it is included on a July 2012) statement as the amount of the loan advance made on 23 October 2011.

88. One possibility suggested by the details of the deposits to the NAB investment account (*see paragraph 86 above*) is that there was some difficulty in effecting the roll over of funds into the SMSF account. Another possibility is that one or other of the Ghazawys made a deliberate decision to retain the "Superchoice" account and make only small periodic deposits to the SMSF account, pending completion of the house construction. Whatever the actual significance of those possibilities, it is tolerably clear that the September 2011 withdrawal from the NAB account related to the approaching completion of that construction. That understanding gives rise to a further complication in reaching any adequate conclusion about the significance of the October 2011 Fast Loan Mr and Mrs Ghazawy obtained. Part of that complication is the appearance of an inconsistency between the $212,000 construction price indicated in the original loan application, and the total of the construction payments that Mr and Mrs Ghazawy made in November and December 2011. According to Mrs Ghazawy's statement the construction related

payments totalled approximately $257,000. The total of those payments clearly exceeded the originally reported construction contract price and, according to Mrs Ghazawy's statement, still left one outstanding payment (which she did not quantify) as due to the builder. All of this tends to suggest that, whatever was at play in influencing the decision to take out the additional loan in October 2011, rather more was involved than an asserted shortfall in the originally reported $140,000 investment amount.

89. It would be unsafe to proceed on any basis other than the likelihood that, based on both Sunpac and Mr Wilkins' usual practices, he relied on the superannuation estimate likely to have been recorded on the Company Registration Request document. Although Mr Wilkins understandably gave no evidence about any specific recollection of his dealings with Mr and Mrs Ghazawy, the imprecise and uncorroborated content of the recollection Mrs Ghazawy asserted in her 2015 statement is not an adequate basis for satisfaction that at the time he submitted the handwritten loan application in July 2010 Mr Wilkins had any knowledge of overstatement in the $140,000 NAB investment amount it included.

THE NADIN & HOLDEN LOAN APPLICATION – JULY 2010

90. As summarised in Schedule 2, both the $135,000 "personal contribution" (and the $179,000 NAB investment account balance shown in the loan application) are considerably less than both ASIC's assertion about the actual amount of the relevant superannuation balances, and the assertion in the March 2015 statement by one of the loan applicants.

91. In her 11 March 2015 statement Ms Nadin recalled that she and Ms Holden had a total of about $225,000 in their combined superannuation funds. That total comprised "about $130,000 in a defined benefit fund" from her time in the military (from 1991 to 2002). Later in the statement she reported having given a smaller total of $205,000 in the course of the initial interview with the Sunpac sales consultant, Mr Naish.

92. According to Ms Nadin's March 2015 statement her interview with Mr Naish occurred "in about the first half of 2010". In the course of that interview she signed the purchase contract, and a related acknowledgement of an independent advice warning, both being dated 12 June 2010.

93. Ms Nadin then goes on in her statement to recount a meeting with Mr Wilkins which she says occurred "in around early June". During that meeting with Mr Wilkins she was given (i) a "checklist", (ii) a hand completed loan application which she checked, said was correct and signed, and (iii) an authority to open an NAB bank account, which she also signed. The second and third of these documents were in evidence and are dated 12 June 2010.

94. There are other documents, also dated 12 June 2010, that Ms Nadin signed. They include (i) an investment trust deed and, (ii) the standard form of "Company Registration Request" (to which I have referred earlier in these reasons - *see paragraph 27 above*).

95. The idea that Mr Naish interviewed Ms Nadin on 12 June 2010, and that Mr Wilkins also met with her later that day, and presented her with a correctly completed loan application (apart from the NAB investment account details), as well as having her complete the NAB account authority form, is difficult to accept, and quite contrary to the usual Sunpac practice:- *see paragraph 26 above*. It is much more likely that Mr Naish was the only person who met with Ms Nadin on 12 June 2010, and that any meeting with Mr Wilkins, if there was one, occurred some time later.

96. Even though Ms Nadin claimed to be quite sure she would not have signed a blank purchase contract, there are several reasons why the 12 June 2010 date on the handwritten application form is not a reliable indicator of any meeting with Mr Wilkins on that date. First of all there is the evidence that some Sunpac representatives had a practice of getting applicants to sign a blank application form at the initial interview:- *see paragraph 29 above*. Second, Ms Nadin herself says that it was not until after 12 June 2010 that she provided financial records to support the loan application. Third, Mr Wilkins' first Loan Tracker entry is dated 17 June 2010 and contains a request for one of the other Sunpac / Heritage personnel to chase up "supporting docs to complete loan application". Fourth, another Loan Tracker entry later the same day states that Ms Nadin had just had a checklist emailed to her. This contrasts with the recollection in her statement that Mr Wilkins gave her the checklist at the meeting on 12 June 2010. Other records in the Loan Tracker document indicate that (i) Ms Nadin was still assembling the requested documents on 22 June 2010 and, (ii) they were not provided until 1 July 2010. Even then, according to another entry which Mr Wilkins posted in the Loan Tracker on 6 July 2010, the documents that had been provided did not contain copies of any superannuation

statements. In his 6 July 2010 note Mr Wilkins asked for one of the HFS staff to contact the client and obtain copies of their superannuation statements. Later the same day, after Mr Wilkins had submitted the Preamble and loan application to Mr Holm, there is a further Loan Tracker entry indicating that the statements would be sent by fax within 24 hours. That appears to have been done, and there is a further note on 13 August 2010 indicating that Ms Nadin had approximately $115,000 in her Military Super account.

97. Neither Ms Nadin's statement, nor the Loan Tracker entries, suggest that Mr Wilkins met with Ms Nadin at any time between 12 June 2010 and 6 July 2010 when he submitted the loan application. It is doubtful therefore that Ms Nadin is at all correct in her recollection that she met Mr Wilkins as she claimed, almost five years after the event, to have done. In any event, Ms Nadin does not say in her statement that she gave Mr Wilkins any information about the amount of the relevant superannuation balances at this meeting. Indeed, the only relevant information she recounts in her statement concerns the estimates of $75,000 and $130,000 she says she gave to Mr Naish. But the accuracy of that recollection is difficult to reconcile with the superannuation balance information that Mr Naish recorded in the table at the end of the Company Registration Request. The table records the estimated balances in two of the applicant's three existing superannuation accounts and gives a total of $179,592.

98. In the light of the above, Ms Nadin's 2015 recollection of events seems flawed both as to sequence and detail. It is not appropriate to accept her evidence to the extent that it suggests (although it does not appear to say explicitly) that she told Mr Wilkins the amount of her superannuation entitlements, and that they were less than the NAB investment account balance in the loan application form.

99. In the course of the review hearing ASIC pursued its complaint about Mr Wilkins' conduct in relation to this loan application on the basis that he knew (because of the detail on the signed 12 June 2010 Company Registration Request) that part of Ms Nadin's superannuation was held in "Military Super". The significance of this was said to be that (i) such a fund was likely to have "defined benefits", (ii) those defined benefits were likely to be restricted from "roll over" to other funds and, (iii) consequently, any "estimated balance" (in the Company Registration Request) and "current cash balance" (in the loan application "investment" asset category) would inevitably highlight the risk of overstatement of the amount that could be rolled over into an SMSF.

100. ASIC did not substantiate these propositions with specific evidence of the nature and extent of members benefit entitlements in the “Military Super” fund. However Mr Wilkins’ Senior Counsel took him, in evidence in chief, to a copy of the statement Ms Nadin had faxed to Sunpac on 7 July 2010. It suggested that there were at least four categories of member benefits within the fund. Those categories, together with their respective stated values, were (i) “member” ($10,478), (ii) “productivity” ($15,635), (iii) “ancillary” (nil) and, (iv) “preserved” ($115,566). Mr Wilkins acknowledged having received this statement shortly after he submitted the loan application. He said that, at the time, he had no understanding of the meaning or significance of the references to “restricted” and “preserved” benefits in the Nadin superannuation statement. Senior Counsel nevertheless elicited from Mr Wilkins that the restrictions on Military Super roll overs were the reason why only the “member” component of Ms Nadin’s statement had ultimately been deposited to the NAB investment account.

101. Against this background, ASIC cross examined Mr Wilkins about the extent of his awareness of the nature of military service superannuation, and the potential significance of “defined benefits”. Mr Wilkins’ responses to this line of questioning were not entirely consistent, and to that extent, somewhat unconvincing. Initially he denied knowing that a military super fund would inevitably have “defined benefits”. He also denied that “defined benefits” would inevitably be inaccessible as a source of roll over funds. Later he conceded that he knew military super was treated differently from “normal” superannuation. He also acknowledged that “defined benefits” were mostly a feature of military superannuation. He agreed that awareness of the military nature of a fund would raise a flag as to whether at least part of it might be a “defined benefit”. He also agreed with a general proposition that to the extent a loan application did not disclose part of a superannuation balance was a defined benefit, it was misleading, although precisely why it was misleading was not explored.

102. Despite Mr Wilkins’ agreement with the last of those propositions, it is not a sound one. I pointed out earlier in these reasons the nature of the information the standard Westpac loan application form requested in relation to the “investments” asset category in the form:- *see paragraph 32 above*. It is not readily apparent that the literal request for the “current cash balance”, in such a personal loan application, required an estimate of what the member might be able to withdraw from the fund, as distinct from a statement of their fund balance.

103. In any event, it is necessary to focus on Mr Wilkins' conduct and knowledge in relation to the specific Nadin loan application. As to that, I have already recorded my scepticism of the accuracy of Ms Nadin's account of her meeting with Mr Wilkins in relation to the loan application. Consistent with that scepticism, Mr Wilkins' evidence was that his general practice was to complete all loan applications by relying on the information the clients had provided to the Sunpac sales representative about the superannuation balance. He said that the information provided to him (typically in either the Company Registration Request or the kind of statement that HFS provided (*see paragraph 80 above*)) did not convey any information about availability restrictions and gave him no means of determining (and he did not see it as part of his function to determine) what component (if any) of a fund balance might include restricted benefits. Specifically referring to the $179,000 amount stated on the 12 June 2010 Company Registration Request that Ms Nadin had signed, Mr Wilkins said that, at the time of completing her loan application he had understood the $179,000 figure was the total of Ms Nadin and Ms Holden's available combined superannuation. Furthermore, despite being challenged about his contemporaneous understanding that knowledge that Ms Nadin had military superannuation would raise a red flag to check whether or not it was subject to defined benefit restrictions, Mr Wilkins insisted that he believed the $179,000 amount was accurate, and had been provided to the Sunpac sales representative by the loan applicants.

104. As Mr Wilkins offered by way of hindsight concession in his cross examination, the practice he had followed in 2010 in relation to accepting the loan applicant's reported superannuation estimate as a reliable indication of the accessible roll over funds, was objectively imprudent – at least if the finance condition in the purchase contract operated solely by reference to approval of the Westpac loan application. If that kind of imprudence had been the substance of the complaint against him, it may have had considerable force. But that kind of imprudence was not the emphasis of the complaint. The complaint was pursued, albeit somewhat ambiguously, on the basis that his contemporaneous state of mind appreciated the overstatement or was at least indifferent to its likelihood. In relation to that complaint, the somewhat unconvincing quality of some of Mr Wilkins' evidence about his contemporary understanding of military super and defined benefit restrictions, needs to be understood against the background of the belatedly raised, and somewhat ambiguously expressed, particulars. It also needs to be assessed in the light of his insistent evidence that he relied on the information in the Company Registration Request. Taking those matters into account, I do not regard the evidence as requiring a conclusion

that when he submitted the hand written loan application Mr Wilkins knew that the NAB investment account amount was overstated, or that he was indifferent to that possibility. Indeed, in his final oral submissions ASIC's Senior Counsel expressed the same view. Although ASIC contended for such a finding, Senior Counsel expressly conceded that contrary findings were indeed available evidentiary conclusions. In my view, for the reasons I have indicated above, the contrary findings were both available and preferable evidentiary conclusions.

THE URSINO LOAN APPLICATION - JULY 2010

105. The details set out in Schedule 2 reveal the contrast between the $120,000 "personal contribution" (and the $140,000 NAB investment account balance shown in the loan application) and the $100,000 superannuation balance subsequently asserted by one of the applicants as the contemporaneous balance of their combined superannuation entitlements.

106. That assertion was contained in a 12 June 2015 statement Mrs Ursino had provided to ASIC. In the statement she said that "in about 2010" only her husband had superannuation, and its amount was "nearly $100,000". According to her, that was the information she conveyed to the Sunpac sales representative (Mr Dona) in the initial interview meeting with him. However, she also said they told Mr Dona that they did not want to "sign up straight away" and the meeting ended with Mr Dona saying he would call them back in the next few days.

107. According to Mrs Ursino's statement, they never heard again from Mr Dona. Instead, about a week later, after she called the Heritage office, she was put through to Mr Wilkins. Thereafter, she dealt only with Mr Wilkins, who came to their home shortly afterwards, in about mid July 2010. Mrs Ursino suggested that during the meeting Mr Wilkins (i) showed them plans for the purchase of the property and, (ii) "had some paperwork" for her and her husband to sign. But she claims she did not read the paperwork, and could not recall what the documents were. She said they told Mr Wilkins that Mr Ursino had "about $90,000-$100,000 in superannuation" and that she didn't have any superannuation of her own. Mr Wilkins asked for them to provide copies of superannuation statements, as well as other supporting information. Later in her statement she says that she was able to find

some of the documents that Mr Wilkins had requested and that they included superannuation statements which she showed him.

108. The account Mrs Ursino gave in her statement about the events at the first meeting with Mr Wilkins is quite vague about the documents that she says she signed. In particular she simply refers to it as "some paperwork" which she neither read nor even recalls the substance of. However, it is clear that she identified discussion about the selection of the property and examination of the plans as something that occurred in the course of that meeting with Mr Wilkins.

109. Mrs Ursino also said in her statement that "fairly soon after the first meeting" with Mr Wilkins he contacted them and suggested they could purchase another property "outside of your super". Mr Wilkins subsequently came to their home again "in about July or August 2010", and she and her husband then signed further documents, the nature of which she again claimed not to recall.

110. It is clear that Mrs Ursino's recollection is that she only signed contract and loan documents with one person, that she and her husband did so after the first meeting with Mr Dona, and that they had no dealings with Mr Dona after the initial interview with him. The contemporaneous documents appear to contradict her recollection.

111. Those available documents include the following:-

(a) ***19 July 2010***:- There is a signed copy of a purchase contract for the Lot 205 property referred to in the contentious loan application. The purchasers' signatures on the contract have apparently been witnessed by Mr Dona, and not by Mr Wilkins. There is also a building works contract schedule relating to the same property. It has again been signed by Mr and Mrs Ursino, and apparently witnessed by Mr Dona. There are three independent advice acknowledgement forms, all signed by Mr and Mrs Ursino.

(b) ***20 July 2010***:- There is a signed purchase contract relating to a "Lot 90" property in the same street as the 19 July 2010 contract. This contract has again been signed by both Mr and Mrs Ursino, and their signatures apparently witnessed by Mr Dona, rather than Mr Wilkins. There is also a signed work construction contract, which has again apparently been witnessed by Mr Dona. There are also

various independent advice warning acknowledgements, relating to the same property, and all have been signed by Mr and Mrs Ursino.

112. It is also likely that, at the same time as Mr and Mrs Ursino signed the 19 July 2010 purchase contract they also signed the various kinds of authorities and requests that were usually discussed by Sunpac sales representatives during their initial interviews with clients:- *see paragraph 26 above*. That likelihood arises partly from the fact that such an initial interview did occur, and partly from Mr Dona's description of his invariable practice. In his February 2016 statement to ASIC Mr Dona indicated that he always took all of the standard Sunpac documents to the initial client interviews. Those standard documents included the proposed purchase and construction contracts.

113. The likelihood also emerges from communications that occurred shortly after 19 July 2010. For example, on 22 July 2010 Mr and Mrs Ursino received an acknowledgement from HFS, confirming its engagement to establish their SMSF. Such a communication is consistent with their having previously executed the kind of formal request referred to in paragraph 26(e) above.

114. In contrast to the documents that Mr and Mrs Ursino signed on 19 and 20 July 2010, neither of the two handwritten loan applications Mr Wilkins submitted to Mr Holm for the Ursino's on 27 July 2010 was signed. In addition, the Sunpac Loan Tracker document records the 27 July 2010 date as marking Mr Wilkins' first involvement.

115. It is obvious that the available documents cast considerable doubt on the reliability of Mrs Ursino's recollection that she dealt only with Mr Wilkins when she and her husband signed any of the transaction related documents. It is also obvious that the sequence of events suggested by Mrs Ursino, where Mr Wilkins became directly involved with clients in entering into purchase and construction contracts, was quite inconsistent with the known general pattern of Sunpac's business strategy and ordinary procedures. That general pattern involved initial contact with the sales representative and resulted in Mr Wilkins' involvement only after the conditional property purchase and construction contracts had been signed.

116. The available documents did not include a copy of the Company Registration Request. Nor are there copies of any superannuation statements, despite the vague suggestion in

Mrs Ursino's 2015 statement that some such corroborative documents were shown to Mr Wilkins. There is not even clear evidence of the circumstances in which superannuation amounts were subsequently deposited into the NAB investment account (at the end of August 2010).

117. In the circumstances, there is no proper evidentiary basis to conclude that Mrs Ursino's imprecise recollection about having met Mr Wilkins before the loan applications were submitted. Still less is there a proper basis to be satisfied about the accuracy of her claim to have told him that she and her husband had "nearly" or "about" $100,000 in superannuation. The greater likelihood, based on the objectively apparent material, is that Mr Wilkins derived his knowledge of Mr and Mrs Ursino's estimated superannuation balance from the details likely to have been recorded by Mr Dona in the Company Registration Request. There is no evidence of what that amount was. The absence of evidence of that kind is a considerable obstacle to satisfaction that Mr Wilkins knew that the NAB investment account amount balance that he included in the handwritten application was overstated.

CONCLUSION ON THE "OVERSTATEMENT" CONTENTION

118. There is not a proper basis for concluding that Mr Wilkins knew the NAB investment account balances included in the loan applications were overstated (as distinct from mischaracterised). Indeed, in his final oral submissions ASIC's Senior Counsel resiled from any such contention. However both in the course of cross examination, and its submissions, ASIC sought to advance criticism of Mr Wilkins, and to establish his NCP Act s 33 contravention, on the basis of his failure to take steps to establish the authoritative value of the loan applicant's actual (or realisable) superannuation balances. The proposition advanced was that, given the ubiquity of means for superannuation fund members to have online access to their superannuation fund manager and membership statements, Mr Wilkins' apparent failure to make, or to ask the loan applicants to make, an online enquiry involved recklessness on his part about the accuracy of the information.

119. I have already rejected that contention in relation to the Nadin loan application:- *see paragraph 104 above*. I am equally reluctant to accept it in relation to the other applications. The point was never squarely raised, despite the particulars that I required ASIC to provide. Indeed, the whole question of overstatement was raised in only the most

belated manner, and even then, without a clear indication of the way in which the overstatement issue was to be pursued. This was a point that I raised with ASIC's Senior Counsel in closing submissions. His responses, as recorded in the transcript, substantially conceded that the point was being advanced, essentially as an ancillary proposition, to negate any contention by Mr Wilkins that the mischaracterisation of the NAB investment account was not material.

120. This tardiness and imprecision carries a real risk of unfairness to Mr Wilkins, and a consequential difficulty for the Tribunal in being satisfied of either the completeness, or the accurate interpretation, of the available evidence. Part of the risk of unfairness lies in the passage of time, and the difficulty of recreating an accurate understanding of the sequence of events and the materiality of their interrelationship. (A point highlighted in the present matter by the change of focus following ASIC's effective abandonment of the principal basis for the delegate's findings and order in the January 2018 decision.) Part of the risk also lies in the current unavailability of the contemporaneous records. That is a particular deficiency in the present case, having regard to the absence of the Company Registration Request documents and the poverty of the evidence in relation to an authoritative statement of the superannuation balances of any of the individuals to whom the contentious loan applications related.

121. Those difficulties are not overcome in the circumstances of the present matter by ASIC's emphasis on the objective appearance of imprudence, on Mr Wilkins' part, in his usual practice of accepting the superannuation balances reported by the sales representatives. The significance of that apparent imprudence would depend on consideration of a number of matters that were not the subject of appropriate consideration in the way the hearing was conducted by the parties. Those matters include assessment of the typical responsibilities and conduct of the Sunpac sales representatives, the apparent reliability of the information they usually obtained and reported to Mr Wilkins, the duration of his usual practice, the extent to which he had previously encountered difficulties in adhering to it and, in relation to the particular loan applications, accurate details of the information that the sale representatives had reported to Mr Wilkins.

122. In relation to the latter point, in the present matter, ASIC either does not (or, in the light of my earlier findings, cannot persuasively) assert that Mr Wilkins was reckless in relation to the superannuation estimate he took into account in three of the contentious loan

applications (Dononvan, Nadin and Chung). In relation to the other two contentious loan applications, the scepticism I have expressed about the reliability of the assertions contained in statements made almost five year after the event means that the complaint of recklessness, in relation to the overstatement of the NAB account balance, rests on criticism of Mr Wilkins' usual practice, essentially involving his acceptance of superannuation cash balance estimates recorded by Sunpac's sales representatives.

123. A finding of recklessness requires an assessment of the relevant person's state of mind. It requires satisfaction of both the person's subjective awareness of the relevant material inaccuracy (or risk of material inaccuracy) and a conscious indifference to it:- per Beach J in *ASIC v Mariner Corporation Ltd* [2015] FCA 589 at [278]. See also *Nguyen and Australian Securities and Investments Commission* [2017] AATA 920 at [118]-[123]. When no complaint has been made about Mr Wilkins' usual practice in relation to a large number of other similar applicants, and when (aside from the question of asset categorisation) the presently contentious loan applications were substantially similar, there is only the merest, and an unsatisfactory, basis for the recklessness findings for which ASIC contended.

124. At one point in its submissions ASIC alluded to a passage in the Tribunal decision in *Coakley and Australian Securities and Investments Commission* [2008] AATA 247 at [191], that relying on unverified information provided by others comes "close" to recklessness. That comment was essentially an aside, expressed in the context of a decision about the appropriate length of a banning order, where the underlying misconduct had clearly been established. Understood in that context, it is by no means an endorsement of the proposition that, in determining a contravention or breach issue that turns on knowledge or recklessness, something short of subjective indifference to the truth of the information can suffice. An imprudent lack of care may come "close" to recklessness, but it remains conceptually distinct. Both the potential factual proximity of the two situations, and yet their conceptual distinction, are illustrated by *R v Banks* [2014] NZHC 1244.

125. That was a case where an unsuccessful candidate in a mayoral election had provided a return of their electoral expenses, and claimed that three donations disclosed in the return were anonymous. In fact the candidate well knew the source of all three donations, and that circumstance led to charges (under the *Local Electoral Act 2001* (NZ) s 134) that he

had submitted a return "knowing that it is false in any material particular". One of the contentious donations had been given to the candidate in a sealed envelope at a pre-arranged meeting. The candidate had subsequently handed the sealed envelope to a staff member who was present at the donation meeting and aware of the donor's identity.

126. The same staff member subsequently prepared the electoral expenses return, and presented it to the candidate for his approval before it was submitted. The candidate approved the return, but without thoroughly reviewing its details, and specifically not the anonymity claimed in relation to the sealed envelope donation. In the light of that evidence, the trial judge said that if the evidence had shown the candidate had contributed to the staff member including the anonymity claim in the return, he would properly be characterised as having knowingly made the false statement. But the trial judge also considered that the actual evidence relating to the sealed envelope donation did not involve reckless indifference to the accuracy of the return. This was because of the reasonable possibility[5] that when the candidate handed over the sealed envelope he believed the staff member fully understood the source of the donation and also believed he had properly disclosed the source in the return.

THE ESSENTIAL NCP ACT S 33 CONTRAVENTION ALLEGATION

127. The evidence clearly demonstrates that Mr Wilkins was engaged in "credit activity" in his role at Sunpac. The evidence also demonstrates, and Mr Wilkins does not dispute, that he "gave" the handwritten loan applications to Westpac. Furthermore, Mr Wilkins was also directly responsible for the "asset categorisation" inaccuracies relating to the asserted NAB investment account balances. Ultimately he made the inevitable concession that the loan applications were, to his knowledge, inaccurate and "false" in the two respects principally asserted by ASIC:- *see paragraphs 22(a) & 22(b) above*.

128. The ultimate dispute between Mr Wilkins and ASIC was whether those inaccuracies resulted in each of the five handwritten loan application documents[6] being "false in a

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[5] Mr Banks did not give evidence in the proceedings. The judge's reference to "reasonable possibility" was therefore addressing the question whether the prosecution had proved its case to the "beyond reasonable doubt" standard. In the present case, Mr Wilkins did give evidence and consistently stated that he relied on, amongst other things, the superannuation cash value estimate reported by the Sunpac sales representatives.

[6] The particulars ASIC provided in response to the Tribunal's direction were exclusively directed at the content of the handwritten loan applications. Mr Wilkins' affidavit and oral evidence also focussed on the content of

material particular" for the purposes of NCP Act s 33. Mr Wilkins also contended that an aspect of the s 33 criterion was that his knowledge had to extend to the materiality of the falsity itself.

129. The reasoning in the delegate's decision about materiality emphasised Westpac's requirement to provide the particular categories of information identified in the loan application, and its insistence on the accuracy and completeness of the information. The reasoning highlighted two respects in which the asserted "investment" account balance would be likely to influence an assessment of the loan risk. They were (i) by indicating an asset potentially available to service (or partially repay) the loan and, (ii) by suggesting an historically successful habit of financial discipline and management. That reasoning was substantially adopted by ASIC in its particulars. In its final submissions, relying on part of the 10 April 2019 amended particulars, ASIC also contended that the omission of any superannuation amount from the handwritten loan application forms was another piece of information that was "false in a material particular".

130. Neither the delegate's decision nor ASIC's submissions addressed the actual meaning, in the sense of the proper construction, of the knowledge and falsity criteria in NCP s 33. Those criteria have a long and varied history of statutory usage. Similar expressions, variously emphasising objective material falsity, and sometimes the requirement of knowledge, have been employed for at least 150 years in a wide range of statutory provisions ranging from UK theft and vehicle registration legislation to Australian legislative provisions dealing with taxation, financial regulation, migration and criminal offences.

131. One of the cases regarded as providing an influential exposition of the expression "false in a material particular" is that of the Full Court of the Federal Court of Australia in *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367; (1992) 34 FCR 348. The case dealt with the scope of ss 14 & 20(1) of the *Migration Act 1958* (Cth). Their effect was to declare as an "illegal immigrant" a person who entered

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those documents. In those circumstances it is not appropriate to accede to the oblique suggestion in ASIC's final written particulars that his conduct in relation to the execution and return of the Westpac "response" form has an additional significance.

Australia after presenting an incoming passenger card that was "false or misleading in a material particular". Mr Dela Cruz was a citizen of the Philippines. He had come to Australia on a visitor's visa granted to him in Manila. On both his visa application, and the incoming passenger card he presented when he arrived in Australia, he had asserted he was "now married". Seven months after his arrival he married an Australian citizen. Two days later he applied for permanent residency, and obtained it in late October 1987. Subsequently, after discovering the falsity of the marital status he had claimed on the incoming passenger card, the Minister determined that Mr Dela Cruz was an illegal alien, with no right to remain in Australia.

132. At first instance there was evidence that marital status would be a relevant consideration in the assessment of a visitor visa application (as an indication of the applicant's good faith and likelihood of leaving Australia at the end of the visa period) but would not be considered at the point of entry to Australia. The latter was because, on presentation of an apparently valid visa, a person would automatically be permitted to enter. This evidence led the first instance court to consider that (a) much of the information on the incoming passenger card was sought only for statistical, rather than migration or customs decision, purposes and, (b) mere marital status (as distinct from meaningful information about the underlying relationship) was not informative for any migration related decision making.

133. On appeal, the Full Court of the Federal Court took a quite different view. That is evident from the following passages of the appeal judgment (at 110 ALR 367, 371):-

> *The expression "false in a material particular" appears in many statutes, both in this country and overseas. It has been discussed in R v Lord Kylsant [1932] 1 KB 442 ; Murphy v Griffiths [1967] 1 WLR 333 ; R v Mallett [1978] 1 WLR 820 ; R v M [1980] 2 NSWLR 195 ; R v Brott [1988] VR 1. In the last mentioned case, Brooking J pointed out that the concept is well understood. As his Honour said at 11: "an assertion that a document is false is to be taken as an assertion that it is false in a material particular." The term "material" requires no more and no less than that, the false particular must be of moment or of significance, not merely trivial or inconsequential.*
>
> *Section 20(1) does not apply to statements that are merely false or misleading; there is the added requirement that the statement must be false or misleading in a material particular. In the context of s 20(1), a statement will be false or misleading in a material particular if it is relevant to the purpose for which it is made: see Jovcevski v Minister for Immigration, Local Government and Ethnic Affairs (Lockhart J, 12 October 1989, unreported). A statement will be relevant to that purpose if it may - not only if it must or if it will - be taken into account in*

> *making a decision under the Act as to the grant of the visa or entry permit in respect of which the statement is made.*
>
> *For present purposes, it is sufficient to say that a statement made to an immigration official by a person seeking to enter Australia, which conveys a false or misleading impression of the person or of his or her circumstances, would be false or misleading in a material particular. Immigration officials are entitled to seek and to be told the truth about a person applying to enter Australia, so that they may be in a position to evaluate the application made to them. They may consider it desirable to ask further questions about the subject matter of a statement made to them and, with answers to further questions, the statement may be more useful. But it does not follow that, without further questions, the statement is not material in the sense in which that word is used in s 20(1).*

134. In a later passage (at 110 ALR 367, 372) the Full Court disagreed with the significance the first instance decision had placed on the evidence about the practical irrelevance of the passenger card falsity at Mr Dela Cruz's point of entry to Australia. The Full Court said this:-

> *The question is not whether the statement in the application for a visa played any part in the decision made at the terminal to grant an entry permit, which it did not, for it was not before the officer. Nor is the question whether that officer was concerned about the marital status of Mr Dela Cruz, who had arrived with a visitor's visa. The issue is whether the statements, both of which were made in formal documents required to be lodged by persons seeking to enter Australia, were false or misleading in a material particular. That must be a matter for objective assessment. So far as the stated knowledge of the maker of the statement is concerned, … the falsity is to be determined objectively. The statement may be false or misleading in a material particular whether or not the person knew that the statement had such a character. In the context of the Migration Act, it could hardly have been intended that the status of an entrant who has made a false or misleading statement, whether knowingly or innocently, would depend in a particular case upon whether the migration officer actually turned his mind to that statement or whether, if he did so, it was thought necessary to seek further information from or about the applicant.*
>
> *The issue is simply whether marital status was a relevant fact — which it was as it concerned a significant aspect of Mr Dela Cruz's personal circumstances and was inquired of both in the application form for the visa and in the incoming passenger card — and whether the statements as to marital status were false and misleading — which in this case they were.*

135. The emphasis of the reasoning *Dela Cruz* is that the "material particular" criterion is synonymous with relevance. At the same time the reasoning both disavowed "mere falsity" as material, and used language that described "marital status" as a "significant" (and not merely permissibly relevant) consideration. For that reason, the wider meaning given to "material particular" in *Dela Cruz* might be regarded as going beyond the

circumstances the case involved. But the wider interpretation was regarded by the Full Court as consistent with the earlier cases. It has been approved in subsequent decisions.

136. One of those earlier decisions, *Murphy v Griffiths* [1967] 1 WLR 333, although it highlights the difference between conceptual relevance and practical significance, can also be regarded as one where the falsity was indeed "material" (in the sense of having determinative significance) rather than merely involving a "relevant" matter. The circumstances were both unusual, and yet understandable. They involved a statutory requirement, under the *Road Traffic Act 1960* (UK), for all vehicles to have been tested for, and to have a test certificate of, their, roadworthiness. The vehicle in question had been tested four months earlier and found roadworthy, but the tester had overlooked providing a certificate. Two days after being stopped by police and found not to have a certificate for the vehicle, the owner presented the police with a test certificate. It was dated seven days earlier. In fact the vehicle had been re-tested, and again found roadworthy, but the certificate had been backdated by five days. That backdating was the reason why the tester was charged with having issued a certificate that was "to his to his knowledge false in a material particular". The prosecution failed at first instance, on the basis that because the statutory form of the certificate did not require it to state the date of the test, the date could not be regarded as a material particular. In the Court of Appeal Lord Parker CJ acknowledged that the first instance court had clearly regarded the situation as one where there were significant mitigating circumstances. But he was emphatic that the first instance decision was wrong. His Lordship said this (at [1967] 1 WLR 333, 336):-

> *The date of issue was false; it was clearly false to the knowledge of the defendant, and the only question was whether it was false in a material particular. One has only got to realise that the date of issue is of great importance in that it determines the date of expiry of the test certificate, namely, 12 months hence, to make one. realise that the date of issue is of the highest importance.*

137. The importance of the case is that the knowledge requirement did not have to extend to subjective awareness of the materiality of the false statement. In the particular circumstances of that case the tester would hardly have been able to have contested that knowledge. But in the later case of *R v Mallett* [1978] 1 WLR 820 there was clear distinction between mere relevance and knowledge of materiality. The case involved a motor vehicle dealer who had falsely described the hirer in a hire purchase agreement as a company director of eight years standing. That false statement resulted in the dealer

being convicted of an offence (under the *Theft Act 1968* (UK)) of having produced a "document … required for an accounting purpose" that was "to his knowledge … false … in a material particular". The dealer challenged his conviction on the basis that the information about the hirer's status was immaterial to any accounting purpose. But the English Court of Appeal held that the purposive limitation in the statutory offence only related to the document itself, not to the false information, and specifically approved the trial judge's jury direction that "material" meant only "an important matter, a thing that mattered" or "an important respect".

138. Two more recent decisions illustrate a similar approach. In *R v Brott* [1988] VR 1 a solicitor had attested a director's signature on a corporate lease guarantee that had not in fact been signed in front of him by one of the directors. Without deciding whether or not either (i) the signature was in fact genuine (and implicitly assuming that the solicitor believed it to be genuine) or, (ii) the guarantee would have been effective if the signature was in fact genuine, a majority in the Victorian Court of Appeal held that the solicitor had forged the document. This was because it was false in a material particular. Murphy J said that the purpose of the attestation was to induce the lessor to grant the lease confident in his ability to enforce the guarantee against the directors, should the need arise, and that "there could be no other purpose in the attestation" (at [1988] VR 1, 5). Brooking J more explicitly addressed the submission that the false attestation could not be material, and thus the document could not be a forgery, because it did not go to the validity of the guarantee and was extrinsic to it. His Honour said (at [1988] VR 1, 10)

> *A forged instrument is one that purports, on the face of it, in some material thing to be that which it is not: R v Ritson (1869) LR 1 CCR 200; R v Roberts (1886) 12 VLR 135, at p. 142. In an attempt to draw the distinction between the falsification of a document (which is forgery, given the necessary intent) and the making of false statements in the document or concerning it (which is not), appellate courts have often said, and juries are often instructed, that a forged document is one which tells a lie about itself as opposed to a lie about something extrinsic*

139. Later (at [1988] VR 1, 14) Brooking J said:-

> *A document which purports to have been signed by one man when in fact another signed it tells a lie about itself. So does a falsely dated document: the date must, of course, be material, but if the reason for choosing that date is to defraud this requirement will occasion no difficulty: R v Wells [1939] 2 All ER 169, at p. 172; 27 CAR 72, at p. 78. A document tells a lie about itself if it falsely purports to have been made in a certain place; as always, the requirement of materiality must be satisfied, but this is not to be determined by reference only to considerations of legal effect. A document tells a lie about itself if it falsely purports to have been*

executed in a certain manner. Once again, the falsity must be material, but there is no difference in principle between materiality by reason of legal significance (as with the added seal in R v Collins (1844) 1 Cox CC 57) or materiality by reason of commercial or other practical significance. If the intention is to defraud, and the falsification may reasonably be regarded as having a tendency to bring about the intended result, the falsification is material.

140. Although Brooking J used the expressions "materiality" and "intention to defraud", a proper understanding of what His Honour said conveys that he was using the word "material" to convey only that the falsity had a relevant purpose. His Honour's use of the expression "intent to defraud" was similarly only seeking to convey the idea of an intention that the false statement should be accepted, and acted upon, as if the false particular were true.

141. In *R v Maslen* (1995) 79 A Crim Rep 199 the statutory offence (in what was then *Crimes Act 1900* (NSW) s 178BB) was making or publishing a statement the person "knows to be false or misleading in a material particular" with intent to obtain a financial advantage. The circumstances involved an attempt to negotiate the sale of rights to an industrial process owned by a company of which one of the defendants was a director. There were two contentious statements. The first was a statement by the director that he was a $2.5 million creditor of the company. The second statement was a false claim, by another person involved in the negotiations, that he was the company's USA marketing manager. This statement was alleged to have been made for the purpose of that person securing a commission associated with part of the proposed transactions.

142. The point unsuccessfully taken in the appeal in relation to the first statement was that the trial judge's jury direction had wrongly characterised a matter as "material" if it was "important". Hunt CJ regarded the complaint as unfounded, given the reasoning in *Dela Cruz*. His Honour went on to express himself in a way that was analogous to the approach of Brooking J in *R v Brott*:

> *The directions would clearly have been understood as meaning that the particular statement had to be important to the use to which it was intended that the statement be put. It may perhaps have been preferable if the judge had expressly expanded that direction in the way I have suggested in relation to the relevance of the statement to the object sought to be achieved by making it - that is, whether the particular said to be false was objectively capable of inducing the provision of the relevant financial advantage.*

143. The appeal in relation to the second statement succeeded. The statement itself was inherently of doubtful relevance in the negotiations. More importantly, the commission

arrangement to which the charge related had been made after the contentious statement. In those circumstances Hunt CJ said it was "difficult, if not impossible, to find any evidence which established that the financial benefit sought by the appellant in making the statement was to obtain the commission payable by the company."

144. The reasoning in *R v Maslen* is therefore consistent with the approach taken in *Dela Cruz*, and demonstrates that the question is not whether the false "material particular" played a causative part in the actual decision to grant any particular loan. Nor is the question whether the person knew of the materiality of the error in the statement. Rather the question is whether, viewed objectively, the false "material particular" was significant and permissibly relevant to the loan decision making process. That way of enquiring what constitutes a "material particular" for the purposes of NCP Act s 33 undermines the force of the submissions made on Mr Wilkins' behalf in asserting the immateriality of the statements about the NAB investment account balances in each of the contentious loan applications.

145. Mr Wilkins contended that the "false in a material particular" criterion in NCP Act s 33 was not satisfied merely by demonstrating that the erroneous information was of a material type. The substance of the submission was that the only erroneous information of which Mr Wilkins was aware was the mischaracterisation of the NAB investment account amount as a "***My … savings … and other account***" asset, rather than superannuation. This mischaracterisation was then said to be immaterial for two reasons. The first was that the totality of the information conveyed to Westpac that the amount represented the loan applicant's intended SMSF roll over. The second was that Westpac's past treatment in granting other similar loans (and its similar subsequent agreement to loans to SMSF corporate trustees) itself indicated the immateriality of the source of the intended contribution to the purchase.

146. As the details summarised in Schedule 2 indicate, Mr Wilkins was correct in saying that in each of the contentious loan applications the investment account balance was the only apparently practicable source of the contemplated "personal contribution". That reality undermines the force of one aspect of the materiality reasoning originally advanced by ASIC - that the investment account balance was material because of its capacity to influence a favourable assessment of the future serviceability of the loan:- *see paragraph 129 above.* But the other aspects of the reasoning favouring characterisation of the

investment account balance as material are sound. Westpac's requirement to provide bank account information, and its emphatic insistence on the accuracy of that information (*see paragraph 34 above*) cannot be the ultimately conclusive determinant of the objective importance of every piece of information in the loan application. But the emphasis can properly influence that characterisation. Similarly, the fact that a loan applicant can demonstrate a history of apparent credit obligation compliance, and financial management resulting in the accumulation of savings additional to employer funded superannuation, is likely to be an important consideration in the assessment of a loan application of the type involved in the present matter. In the course of his cross examination Mr Wilkins substantially conceded that proposition. He identified three main things that were inherently likely to influence the assessment of such a loan application. They were (i) the extent of the applicant's financial commitments, (ii) the loan security and, (iii) the loan applicant's credit history. Those matters were broadly consistent with information contained in a statement one of Westpac's senior executives (with responsibilities for mortgage credit and banking risk) provided to ASIC in 2016.

147. It follows that the emphasis Mr Wilkins' submissions sought to place on the false information in the contentious handwritten loan applications as merely a matter of asset mischaracterisation wrongly attempts to deflect attention away from both the actual contents of the information in the loan applications and the statutory wording. In the light of the statutory wording, it is no answer to the falsity of the NAB investment account balance to say that Mr Holm knew superannuation funds were intended to be used to fund the personal contribution. The statement about the NAB account balance was literally and objectively false.

148. The proposition that Mr Holm knew of the intended use of SMSF funds goes only to Mr Wilkins' understanding of the materiality of the statement's falsity to the ultimate loan approval decision. But, as I have endeavoured to show in the earlier discussion of the cases dealing with the "false in a material particular" criterion, that is not the correct approach. That approach requires answers to two questions:- (i) was the information important / permissibly relevant to the document's purpose and, (ii) was the falsity material (i.e., important / relevant) to the acceptance of the document. In encouraging negative answers to either of those questions Mr Wilkins faces considerable difficulty. As to the first, an affirmative answer is required – given the matters to which I referred in paragraph 146 above. As to the second, even accepting that Mr Holm knew of the intended resort to

SMSF fund balances and had requested it be identified as an existing investment bank account balance, the fact remains that such a request was to falsify the information included in the standard application form. Although Mr Wilkins asserted an understanding that Mr Holm's role was to approve the loan applications, it is unrealistic to contemplate that Mr Wilkins believed Mr Holm had an unrestrained subjective discretion in that regard. Rather, he would have been constrained, and understood by Mr Wilkins to be constrained, by Westpac's internal policies and procedures. In that regard, Mr Wilkins was clearly aware of the standardised form of the loan application, and the acknowledgements it required. The evidence also tends to show Mr Wilkins knew there was some kind of automated assessment process within Westpac The request / instruction that Mr Wilkins said Mr Holm made to him must have conveyed that, for the purposes of the Westpac approval processes, the characterisation of the personal contribution funds in the application form itself was an important / relevant consideration. Otherwise, to paraphrase the language of Murphy J in *R v Brott*, Mr Holm's request made no sense at all.

149. A similar point can be made by considering the omission of superannuation balances from the loan applications. That omission should properly be construed (in the light of the acknowledgement of completeness the form required) as a positive statement that the applicants had no superannuation fund balance. In the ordinary circumstances of a borrowing by individuals for domestic purposes, the value of their superannuation balances would probably be regarded as immaterial – essentially because no part of the superannuation balance would ordinarily be available to the loan applicant until they reached retirement age. Consistent with that view, and despite the enquiry in the standard Westpac form, neither Mr Wilkins in his evidence, nor the statement of the Westpac executive to which I referred earlier, referred to a loan applicant's superannuation balance as an influential, let alone material, factor in the assessment of such a loan. Similarly, neither ASIC nor Mr Wilkins' Senior Counsel was able to offer an explanation for the hypothesised materiality of an applicant's superannuation balance.[7]

[7] It is possible to envisage situations where the superannuation balance might be significant. One such example is where the balance has a significant value, and is probative of the loan applicants having a historically significant discretionary income from which they made superannuation contributions significantly above the amount of either (i) the superannuation guarantee percentage requirement or, (ii) the concessional limit for tax deductible contributions.

150. However, in each of the contentious loan applications the applicant's superannuation balance roll over was intended to be the source of the "personal contribution" to the transaction. Consequently the omission of any reference to the superannuation balance amount in each of those applications was a significant falsity. It was one of which Mr Wilkins was aware. It was also a material falsity, at least because it tended to emphasise the falsity involved in the NAB investment amount claim.

THE BANNING ORDER DISCRETION

151. It follows from the above that Mr Wilkins did contravene NCP Act s 33. Consequently, there is a basis for making a banning order under NCP Act s 80. The questions are whether such an order should be made and, if so, what should be its duration.

152. The principles to be applied in answering both questions are not in doubt. They are outlined in Regulatory Guide 218 Licensing: Administrative action against persons engaging in credit activities. The fundamental principle is that the discretionary power should be exercised consistently with the apparent purposes of the NCP Act and with regard to the proper discharge of ASIC's various statutory functions. A significant aspect of those considerations is the promotion of confidence in the competence and honesty of those involved in performing credit activities. As expressed both in Regulatory Guide 218, and in the cases to which it refers (see especially *Australian Securities and Investments Commission v Adler & Ors* [2002] NSWSC 483; (2002) 42 ACSR 80, 97-99) the intended purpose of a banning order is preventive, rather than punitive, and in its preventative function, is directed at promoting public confidence in the regulation and functioning of the credit market and the conduct of those operating in that service market:- *Farley and Australian Securities Commission* [1998] AATA 495; (1998) 16 ACLC 1502, 1521. Regard to that public interest may inevitably require orders with consequences that can only be perceived as punitive by the person affected:- see *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [37] & [52]. Conversely, there is also an element of public interest in securing the ongoing industry participation of people who have the qualifications, competence, experience and motivation to adhere to the standards imposed by "credit legislation":- *Story v National Companies and Securities Commission* (1988) 6 ACLC 560 at 581.

153. Regulatory Guide 218 suggests a broad conceptual distinction between circumstances involving (i) dishonesty and fraud or serious incompetence and irresponsibility, (ii) less serious instances of dishonesty, incompetence, financial harm or risk to consumer confidence and, (iii) contraventions primarily characterised by lack of care rather than dishonesty, especially where the person has otherwise been competent and compliant, and particularly where their clients have not been shown to have suffered consequential losses. Within that general distinguishing structure, banning orders in the third category, if they are to be made at all, are suggested to be subject to a maximum period less than three years. In the first category of conduct, the suggestion is that the appropriate exercise of the discretion is to make a banning order for a minimum of 10 years.

154. It is reasonably apparent from the three year banning period in ASIC's 31 January 2018 banning order that it was primarily influenced by the serious deception findings the delegate made, and involved characterisation of Mr Wilkins' conduct (in allegedly deceiving Mr Holm) as intentionally dishonest. Notwithstanding the substantial abandonment of any similar contention in the review hearing, in its final submissions ASIC nevertheless sought to uphold the appropriateness of the original three year banning period. This was based on propositions that Mr Wilkins:-

    (a) was not to be believed in his (admittedly belated) explanation that Mr Holm had requested or instructed him to include the rollover amount as an investment asset in the contentious handwritten loan application forms

    (b) had disingenuously sought to convey the impression that the SMSF nature of the loans, and inaccurate financial information included in the loan applications, had not been a matter of concern to Westpac (as evidenced by the bank's willingness to proceed with substitute transactions to the corporate trustees) and should be regarded as inconsequential

    (c) should be characterised as either incompetent or unreliable (in relation to his future compliance with credit legislation) because of his acquiescence to Mr Holm's request, and the appearance that there were occasions when he had not only submitted pre-signed or unsigned loan applications but had also asked loan applicants to sign only the execution pages of the Westpac "response" version of their loan applications

(d) had been motivated by the commission payment entitlements involved in the arrangements between Westpac and Sunpac

(e) had been responsible for serious financial detriment to both the loan applicants and Westpac

(f) had failed to appreciate the seriousness of his misconduct and lacked insight into the harm that his contravening conduct had caused to Sunpac's loan applicant clients.

155. I have already rejected ASIC's contention that Mr Wilkins should not be believed about his belated explanation of the reason why he changed his practice and included the NAB account balance in the "savings" asset category in the handwritten loan applications. I did so notwithstanding the scepticism that Mr Wilkins' imprecise prior explanations, and questionably accurate recollections, properly attracted. As a consequence of that acceptance of the substance of Mr Wilkins' explanation, the fact that it only clearly emerged at a late stage has no particular ongoing significance. Furthermore, any significance that the recency of the explanation might otherwise be thought to have is diminished by the corresponding impact of ASIC's own belated change of emphasis:- *see paragraph 58 above*.

156. Once Mr Wilkins' primary explanation for his contravening conduct is viewed as having been prompted by Mr Holm's self-interested irregular conduct, his conduct in relation to the contents of the five contentious loan applications is to be seen as distinctly aberrant. It is significantly different from the known pattern of his previous dealings with Mr Holm and Westpac.

157. ASIC's second criticism of Mr Wilkins, that he relied on the fact of Westpac's subsequent loans to the corporate trustees to minimise the significance of his conduct, takes matters somewhat out of context. The particular criticism was directed at the contents of Mr Wilkins' December 2018 affidavit and the 28 August 2018 statement responding to ASIC's particulars. At the time of both of those documents ASIC's position involved the two assertions (of intentional deception of Westpac and the contrived presentation of the individual loan applicants as the borrowers, rather than disclosing the corporate trustees as the true borrowers) that it abandoned at the hearing:- *see paragraph 18 above*. Whilst the latter of those assertions remained an apparently live consideration, it was a

reasonable response to, and deflection of, those aspects of ASIC's complaints, for Mr Wilkins to point to the fact that Westpac did subsequently approve loans to those trustees.

158. In any event, whatever significance might otherwise attach to the contents of Mr Wilkins' August 2018 particulars statement, it needs to be assessed against both his affidavit and his oral evidence. His affidavit contains an essentially factual, albeit condensed, account of what was involved in what he called the Westpac "loan re-documentation process". A fair reading of that account does not justify it being characterised as reflecting adversely on Mr Wilkins' conduct in relation to the contentious loan applications. A similar observation applies to Mr Wilkins' oral evidence. In the transcript passages ASIC cited in its submissions, Mr Wilkins repeatedly acknowledged Westpac's concern about the way its policy guidelines and practices had been defied – but by Mr Holm, rather than by Mr Wilkins personally.

159. There is some merit in ASIC's criticism of Mr Wilkins' acceptance of Mr Holm's request / instruction in relation to the treatment of the NAB account. Notwithstanding the arguable possible logic of categorising the roll over amount in a way that illustrated its availability to fund the purchase and construction costs (*see paragraph 61 above*) Mr Holm was already aware of that pattern of funding from previous transactions, and the legal advice that Mr Wilkins had sent him. No change to the content of the loan application forms was necessary to perfect Mr Holm's understanding. Furthermore, compliance with the instruction required inserting demonstrably untrue information in a document that the loan applicants were required to sign, and declare as complete and correct in every respect. Hence, viewed objectively, Mr Holm's request / instruction made no sense. The fact that Mr Wilkins complied with it, betrays his lack of insight at the time, and does tend to detract from confidence about his likely future conduct.

160. That lack of confidence is only increased by the troubling evidence of (i) variable practices in relation to the use of loan applications that had been signed in advance by loan applicants, (ii) Mr Wilkins' claim that his "loan writer" role was that of a scribe in re-presenting, in the loan applications, financial information that had been gathered by the Sunpac sales representatives and, (iii) clients being asked, at least in some instances, to sign only the execution pages of Westpac's "response" forms. The concern prompted by the first and third of those matters is somewhat offset by (i) the absence of evidence that Mr Wilkins was responsible for whatever extent of "signing in advance" that did occur and,

(ii) the appearance that the only arguably significant inaccuracies in the loan applications he submitted related to the five contentious loan applications. The concern prompted by Mr Wilkins' self-description of his role as a scribe needs to be understood against the reality that there are numerous examples (evident in the content of the loan applications he submitted, and in the available Loan Tracker records) of instances where he sought further information and supporting documentation from loan applicants. In those circumstances, and against a background where none of these matters was squarely raised, either in the delegate's decision or in the particulars, it is not appropriate (for the purposes of the current proceedings) to regard them as significant additional considerations influencing the exercise of the discretion.

161. On the other hand, it is an overstatement to regard Mr Wilkins' compliance with Mr Holm's request / instruction as meaningfully, and adversely, informative about his general competence. The irregularity that is the focus of ASIC's complaint involves only five of a large number of loan applications. To that obvious contrast must be added due regard to Mr Wilkins' qualifications, and his significant history in the credit industry. When no significant criticism of Mr Wilkins has been substantiated (in the present proceedings) in relation to either his qualifications or his other credit activities, adverse conclusions about his competence and likely future compliance, are not justified.

162. The criticism that Mr Wilkins was motivated by the commission payment arrangements between Westpac and Sunpac does not withstand analysis. It is inherently inconsistent with ASIC's disavowal of any contention that Mr Wilkins had a deceptive intention in relation to the contents of the contentious loan applications. Sunpac (and presumably Mr Wilkins indirectly) was entitled to commission on approved loan applications. When the facts clearly establish that many loan applications had been approved prior to the contentious applications, it is difficult to see any rational basis on which commission entitlements relevantly influenced Mr Wilkins' conduct in relation to the five contentious loan applications.

163. The contention that Mr Wilkins was responsible for serious financial detriment to the loan applicants must be regarded as an oversimplification of a complex business strategy and investment assessment decisions. As will be apparent from my brief description of both the business strategy (*see paragraph 24 above*) and the particular properties to which the contentious loan applications related (*see paragraph 33 above*), the transactions involved

risk at various points. However, the evidence does not show that Mr Wilkins had any role in the loan applicant's contractual decisions. In each instance the loan applicants had solicitors to advise them in relation to the transactions. So far as the evidence reveals, in each instance the contractual arrangements appear to have been subject to finance "sufficient to complete". There may be reasons to question whether the appearance of available independent and informed advice (as well as the arguable lack of obligation to proceed with contractual arrangements in the absence of approved finance "sufficient to complete") corresponded with the practical reality of the way the business strategy was pursued. But those reasons, though acknowledged by both Senior Counsel to exist, were not explored in the evidence, and certainly were never developed as specific criticisms of Mr Wilkins. Against that background, it is an oversimplification to contend that Mr Wilkins' treatment of the NAB account balances, or his arguably imprudent quantification of the potential roll over amounts, were responsible for the loan applicant's losses. It is more likely that the client losses were related to either errors in (or changed circumstances affecting) the estimated valuations of the properties, the projected construction cost and timing, the forecast returns from the rental of the completed properties and, perhaps, the delays that appear to have resulted from Westpac's investigation of Mr Holm's conduct (and the subsequent "re-documentation" of the Westpac loans as borrowings by the SMSF corporate trustees). It has not been shown that any of those matters culpably involved Mr Wilkins.

164. The contention that Mr Wilkins' conduct caused financial detriment to Westpac was based on the proposition that, but for the false information, Westpac "may not have proceeded with the loans". This contention does not withstand analysis either. The probable reality is that, if Mr Wilkins had not acceded to Mr Holm's request, the contentious loan applications would have been submitted in the same form as the many previous similar loan applications, and would have been approved in the same way as had those previous applications. In any event, the reality is that Westpac proceeded with loans to the corporate SMSF trustees. There is no substantiated reason to conclude that Westpac regarded those loans as unprofitable transactions. If they proved to be unprofitable, the basis for attributing a causal responsibility to Mr Wilkins' conduct is not readily apparent.

165. There is force in ASIC's contention that Mr Wilkins failed to appreciate the seriousness of his conduct in relation to the falsity in the contentious loan applications. He was inclined to emphasise his understanding of Mr Holm's decision making responsibility, and what he

apparently perceived as the practical imperative, or at least the practical convenience, of acceding to Mr Holm's request / instruction. But whatever lack of appreciation Mr Wilkins has had, is likely to pale to the point of insignificance in the light of the adverse focus that has been brought to bear on him as a result of the delegate's decision, and the ordeal of these proceedings. Mr Wilkins cannot now be in any doubt about the proposition that the false content of the loan applications he submitted was not capable of justification and should never have occurred.

166. That last proposition needs emphasis. No-one engaged in any credit activity should be under any misapprehension about the honesty and accuracy that NCP Act s 33 requires. It is not for anyone conducting businesses providing credit assistance to arrogate to themselves subjective judgements about the materiality of the information contained in the documents they submit. The declarations of accuracy and completeness required in standard form loan applications of major financial institutions (and other credit providers) may appear formulaic and routine. But they mean what they say. Any significant failure to appreciate that reality, and to observe the requirement of scrupulous honesty underlying it, is likely to merit the sanction of a banning order. That sanction is appropriate in Mr Wilkins' circumstances.

167. However, as I have indicated, Mr Wilkins' contravention was both aberrant (compared to his known conduct in relation to a large number of similar loan applications) and prompted by what appears to have been the self-interested misconduct of Mr Holm (at least in relation to Westpac's internal requirements). In those circumstances, whilst a banning order is appropriate, its duration should be significantly shorter that the three years involved in the 31 January 2018 decision. A banning period of 18 months, operating from the same date as the 31 January 2018 decision, is the appropriate length of the banning order that should be made.

I certify that the preceding 167 (one hundred and sixty - seven) paragraphs are a true copy of the reasons for the decision herein of Mr P W Taylor SC, Senior Member

..............................[SGD]...

Associate

Dated: 22 August 2019

Date(s) of hearing:	**15, 16 and 17 April 2019**
Counsel for the Applicant:	**A Cheshire SC**
Counsel for the Respondent:	**R Newlinds SC**
	S Cleary

	C	D	F	H	I	K	L	M	N	O	P	Q	R	S	T	V
3	**Schedule 1:- Loan "Preamble", application, contract and SMSF details**															
4																
5	**Loan Preamble and Application - Home, I'vstment & Equity Loans**						**Contracts**							**Document Dates**		
6							**Land purchase**		**Construction**		**Price**	**Contribution**		***SMSF Trust / Trustee documents***		
7	***Name***	*"Preamble"*	***Application***	***Amount***	***Stated Purpose***		***Date***	***Price***	***Date***	***Price***	***$ Total***	***Own $***		*incorporation*	*SMSF Deed*	*PropDecTru*
8																
9																
10																
11	Donovan, W & L	3-Jun-10	undated	180,000	prchs & constrct I'vstmnt propty		27-May-10	125,000	27-May-10	170,000	295,000	120,000		1-Jun-10	1-Jun-10	25-Oct-10
12	WBC_response form		18-Jun-10	180,000	erect dweling for rental / resale											
13	Holden & Nadin	6-Jul-10	12-Jun-10	210,000	prchs & constrct I'vstmnt propty		12-Jun-10	125,000	12-Jun-10	212,000	337,000	135,000		22-Jun-10	22-Jun-10	30-Jul-10
14	WBC_response form		2-Aug-10	210,000	erect dweling for rental / resale											
15	Ghazawy	20-Jul-10	unsigned	220,000	prchs & constrct I'vstmnt propty		1-Jul-10	129,000	01-Jul-10	212,000	341,000	127,000		15-Jul-10	15-Jul-10	23-Aug-10
16	WBC_response form		23-Jul-10	220,000	erect dweling for rental / resale											
17	Chung & Lay	26-Jul-10	unsigned	200,000	prchs & constrct I'vstmnt propty		20-Jul-10	129,000	20-Jul-10	189,000	318,000	125,000		29-Jul-10	29-Jul-10	13-Sep-10
18	WBC_response form		3-Aug-10	200,000	erect dweling for rental / resale											
19	Ursino	27-Jul-10	unsigned	220,000	prchs & constrct I'vstmnt propty		19-Jul-10	129,000	19-Jul-10	212,000	341,000	120,000		5-Aug-10	5-Aug-10	3-Oct-10
20	WBC_response form		30-Jul-10	220,000	erect dweling for rental / resale											

	C	D	E	F	G	H	I	J	L	M	N	O
3	**Schedule 2:- Loan application asset details & subsequent receipts // "Fast Loan" amounts**											
4												
5	**Application Details**					**Asset details in Loan Application**						
6	***Applicant***	***Date***	***Amount***	**Contribution**		**Real estate**	**Bank a/cs**		**Investmnts**	**Mtr Vcles**	**"Other" assets**	
7				***Own $***			***Total***	***NAB***	***(super'n)***		***Total***	***cash***
8							***(inc saving)***	***(I'vmnt)***				
9												
10	Donovan, W & L	undated	180,000	120,000		430,000	131,000	130,000	0	35,000	160,000	not stated
11	WBC_pca_version	18-Jun-10	180,000			430,000	131,000		0	35,000	160,000	
12	Holden & Nadin	12-Jun-10	210,000	135,000		0	181,000	179,000	0	50,000	90,000	not stated
13	WBC_pca_version	2-Aug-10	210,000			0	183,684		0	50,000	90,000	
14	Ghazawy	undated	220,000	127,000		530,000	146,000	140,000	0	109,000	190,000	not stated
15	WBC_pca_version	23-Jul-10	220,000			530,000	146,000		0	149,000	150,000	
16	Chung & Lay	undated	200,000	125,000		1,740,000	140,000	130,000	0	20,000	860,000	not stated
17	WBC_pca_version	3-Aug-10	200,000			2,500,000	10,000		130,000	20,000	100,000	
18	Ursino	undated	220,000	120,000		650,000	140,000	140,000	0	80,000	120,000	not stated
19	WBC_pca_version	30-Jul-10	220,000			1,014,000	140,000		0	80,000	120,000	

	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE	AF	AG	AH
5		**Actual (at time of Loan Application)**						**NAB Account**				**loan to SMSF Trustee**			**Fast Loan**	
6		**Own**	**NAB a /c**	**Superannuation**		**Other / Cash**		**NAB a/c**				***Date***	***Amount***		***Date***	***Amount***
7		***c'tbtn***		***Appl'cnt s'mnts***	***ASIC claim***			***Date***		***Deposit***						
8		***to p'chase***						*opened*	*deposit*	amount						
9									*(major)*	(total)						
10		120,000	0	130,000	130,000			14-Oct-10	15-Oct-10	99,521		6-Dec-10	178,500		10-Mar-11	33,000
11						0										
12		135,000	0	225,000	205,000			16-Sep-10	3-Nov-10	97,025		11-Jan-11	210,000		31-Aug-11	42,116
13						0										
14		127,000	0	80,000	80,000			17-Aug-10	18-Aug-10	74,743		7-Jan-11	220,000		23-Oct-11	64,000
15						-15,000										
16		125,000	0	130,000	100,000			8-Oct-10	5-Jan-11	89,259		8-Jan-11	196,000		27-Apr-12	45,000
17						10,000										
18		120,000	0	100,000	?			25-Aug-10	26-Aug-10	97,331		24-Dec-10	217,000		1-Feb-11	40,836
19						0										