FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v National Australia Bank Limited [2022] FCA 1324

File number:	QUD 54 of 2021
Judgment of:	**DERRINGTON J**
Date of judgment:	7 November 2022
Catchwords:	**CORPORATIONS** – false, misleading or deceptive conduct – whether contraventions of ss 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) – relevant principles – representations to a class of persons – whether representations made – narrations on bank statements – whether representations to be derived from the narration – explanatory notes – Code of Banking Practice – whether representations by the performance of a contract **CORPORATIONS** – *ASIC Act* – unconscionable conduct – relevant principles – statutory unconscionability – whether conduct was unconscionable in all the circumstances – remediation of overcharging – contraventions of ss 12CB and 12CC of the *ASIC Act* **CORPORATIONS** – financial services licence – licence obligations – whether financial services provided efficiently, honestly and fairly – lack of adequate systems – contraventions of s 912A(1) of the *Corporations Act 2001* (Cth) – several overlapping charges
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Corporations Act 2001* (Cth) *Evidence Act 1995* (Cth)
Cases cited:	*ACCC v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709 *ACCC v Productivity Partners Pty Ltd (No 3)* (2021) 154 ACSR 472 *ACCC v Quantum Housing Group Pty Ltd* (2021) 285 FCR

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ACCC v Telstra Corporation Limited [2018] FCA 571

ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 (2021) 287 FCR 388

ASIC v BT Funds Management Ltd (2022) 159 ACSR 381

ASIC v Dover Financial Advisers Pty Ltd (2019) 140 ACSR 561

ASIC v Kobelt (2019) 267 CLR 1

ASIC v MLC Nominees Pty Ltd (2020) 147 ACSR 266

ASIC v Westpac Banking Corporation (No 2) (2018) 266 FCR 147

ASIC v Westpac Securities Administration Ltd (2019) 272 FCR 170

Australian Consumer and Competition Commission v Medibank Private Ltd (2018) 267 FCR 544

Australian Investments and Securities Commission v AGM Markets Pty Ltd (in liq) (No 3) (2020) 275 FCR 57

Australian Investments and Securities Commission v Westpac Banking Corporation (No 2) (2018) 266 FCR 147

Australian Securities and Investments Commission v Australia and New Zealand Banking Corporation (No 3) [2020] FCA 1421

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45

Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd [1955] 2 QB 68

Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim (2012) 83 NSWLR 52

Google Inc v ACCC (2013) 249 CLR 435

McWilliam's Wines Pty Ltd v L S Booth Wine Transport Pty Ltd (1992) 25 NSWLR 723

Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191

Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Robt Jones (363 Adelaide Street) Pty Ltd v First Abbott Corporation Pty Ltd [1997] QSC 210

SAP Australia Pty Ltd v Sapient Australia Pty Ltd (1999) 169 ALR 1

Unique International College Pty Ltd v ACCC (2018) 266

FCR 631
Wright v TNT Management Pty Ltd (1989) 15 NSWLR 679

Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	381
Date of hearing:	1-2 June 2022
Counsel for the Plaintiff:	Mr S Couper QC with Mr S Seefeld
Solicitor for the Plaintiff:	Australian Government Solicitor
Counsel for the Defendant:	Mr N De Young QC with Ms K Brazenor
Solicitor for the Defendant:	Corrs Chambers Westgarth

ORDERS

QUD 54 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937** Defendant

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **7 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. The claims in paragraph 1 of the Originating Application relating to alleged misleading or deceptive conduct, the making of false and misleading representations, and alleged breaches of the *Corporations Act 2001* (Cth) are dismissed.
2. It is declared that in the period from January 2017 until July 2018, the National Australia Bank by its conduct of continuing to charge Periodic Payment Fees to customers in circumstances where it knew that it had no contractual entitlement to do so and omitting to inform its customers as to the wrongful charging or suggest that they review any such fees debited to their accounts, engaged in conduct in trade or commerce and in connection with the supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).
3. The parties are to be heard on what other relief, if any, ought to be granted consequent upon the determinations made in the reasons for judgment published herewith.
4. The parties are to be heard on the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

INTRODUCTION

1 In the period between 20 July 2007 and 22 February 2019, the National Australia Bank (NAB) wrongly overcharged certain of its customers on at least 1,608,575 transactions. The overcharging related to the amounts which NAB debited its customers' accounts for fees for causing periodic payments to be made from their accounts. It has since remedied the overcharging where it has been able to do so, and otherwise relinquished any benefit which it might have derived. To the date of the hearing it had voluntarily, by way of compensation, paid in excess of $8.3 million to affected customers. By the current proceedings the Australian Securities and Investments Commission (ASIC) seeks declarations that during specific periods prior to 22 February 2019, NAB's conduct in relation to the overcharging amounted to misleading or deceptive conduct in contravention of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*), to the making of a false or misleading representation in contravention of s 12DB of the *ASIC Act*, or to unconscionable conduct in contravention of s 12CB of the *ASIC Act*. It also seeks declarations that the conduct had the result that NAB contravened s 912A(1)(a) and (c) of the *Corporations Act 2001* (Cth) by failing to do all things necessary to ensure that its financial services were provided "efficiently, honestly and fairly". Consequential to these, it seeks the imposition of penalties and other relief.

2 The factual circumstances in which the overcharging occurred and NAB's attempts to rectify or remedy it, have been agreed between the parties, and are set out in a lengthy statement of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth). Despite that, as the issues raised in the action turn to some extent on inferences which are to be drawn from the agreed facts, it is necessary to set them out in full, and they appear as paragraphs 4 to 233 hereof. The numerous attachments to the statement of agreed facts are not reproduced, but will be referred to as and when necessary.

3 The hearing proceeded upon those agreed facts and none of the witnesses who swore affidavits in the proceeding was required for cross-examination.

The agreed facts

NAB overview

4 At the date of filing, NAB is one of the five largest listed companies by market capitalisation in Australia.

5 As at close of market on 22 February 2021, NAB's market capitalisation was approximately $81 billion.

6 As at 30 June 2020, NAB's total assets exceeded $866 billion.

7 NAB at all material times held Australian financial services licence number 230686.

Periodical payments

8 For at least the account types referenced in paragraph 9 below, "periodical payments" are recurring payments that are set up by a NAB employee at the request of a NAB customer (being the sending account-holder in the recurring payment transaction). Recurring payments can also be set up by a NAB customer themselves, without the assistance of a NAB employee (for example, using NAB internet banking portal), but such arrangements are not referred to as "periodical payments". Examples of such periodical payments included payments from a customer's savings account to a home loan account to meet monthly mortgage repayments or to a third party for rent.

9 Between (relevantly) at least 20 July 2007 and 22 February 2019 (the Relevant Period), NAB offered the periodical payments service to customers who held (relevantly):

9.1 the 13 personal account types, identified in Annexure C.

9.2 the 7 business account types, identified in Annexure B.

10 At all times during the Relevant Period, NAB had adopted the Code of Banking Practice (as amended from time to time) published by the Australian Banking Association and which applied to NAB's personal banking and business banking accounts.

Relevant customer fees NAB charged for periodical payments

11 The claim made in the proceeding concerns fees charged by NAB for successful periodical payments (PP Fees) that NAB charged to customers who held personal or business accounts (as explained in paragraphs 46-48), including one or more of the accounts identified in paragraph 9 above (the Relevant Accounts) during the Relevant Period.

Establishing a periodical payment at NAB

12 During the Relevant Period, periodical payments could be requested by a customer in a NAB branch or by telephone call or email.

13 Subject to paragraph 14 below, to establish a periodical payment for the Relevant Accounts, NAB's instruction manuals to staff specified that the customer was required to sign a completed Periodical Payment Authority Form (PPA Form) to authorise the periodical payment from their account. A copy of the PPA Form that was in use at all times during the Relevant Period is attached as Attachment 1.

14 In some instances, a separate periodical payment authority (namely, not the PPA Form) was embedded in some loan contracts and used to establish and authorise periodical payments in respect of those loans. However, the number of customers who set up a periodical payment through a loan contract is limited.

15 The relevant process to create a periodical payment during the Relevant Period was as follows (subject to the exception in paragraph 14):

15.1 The PPA Form was typically filled out by a NAB employee, but could also be filled in by the customer, or by the two of them working collaboratively. It could be filled out by hand, or electronically.

15.2 The PPA Form had a section entitled "Periodical payment fee indicator". The options in this section corresponded to the "PP Fee Indicator" which NAB employee was required to select in NAB's Electronic Branch Online Business System (eBOBS) to specify whether the periodical payment in question was subject to, or exempt from, a PP Fee. The PP Fee Indicator was selected when NAB employee was setting up the periodical payment arrangement through a screen in eBOBS titled "Periodical Payment New" (PP Setup Screen). The PP Fee Indicators in use during the Relevant Period were a series of numbers (from 1 to 7) that would set a particular PP Fee or PP Fee Exemption in respect of the periodical payment in question, and are set out in Annexure D.

15.3 NAB employee was to ensure that the correct PP Fee Indicator had been selected for the periodical payment in question (both in the PPA Form and in eBOBS).

15.4 NAB's instruction manuals to staff specified that the customer was required to sign the PPA Form in order to authorise the commencement of the periodical payment from their account.

15.5 Using the contents of the executed PPA Form, NAB employee manually selected a PP Fee Indicator in eBOBS to establish a periodical payment in NAB's systems, either by using a drop-down menu in eBOBS, or by typing the relevant PP Fee Indicator number into eBOBS.

15.6 Once a PP Fee Indicator was set in respect of a particular periodical payment, NAB would charge the corresponding PP Fee (if any) in respect of each occurrence of that payment, unless or until NAB amended the PP Fee Indicator for that transaction (amendment was required to be made manually using eBOBS in the same manner as when the periodical payment was established).

15.7 During the Relevant Period, there was a "help screen" accessible to NAB employees within the PP Setup Screen in eBOBS, which provided an explanation of the PP Fee Indicator when establishing a periodical payment arrangement. There were also similar "help screens" with explanatory information available for all fields in eBOBs for establishing a periodical payment arrangement, which were accessible from within the PP Setup Screen.

15.8 Further, at all times during the Relevant Period, NAB employees and customers could access and review the Personal Fees Guide and the Business Fees Guide, which contained the details of the PP Fees and PP Fee Exemptions.

Customer entitlement to exemptions

16 NAB offered bank accounts to its customers on standard contractual terms and conditions throughout the Relevant Period. NAB's standard contractual terms and conditions provided that NAB was entitled to charge a fee upon each occurrence of a periodical payment, unless a fee exemption applied (PP Fee Exemption).

17 During the Relevant Period, the standard terms and conditions that governed the operation of periodical payments for the personal and business banking accounts that are the subject of this proceeding were contained in the following documents (as amended from time to time):

17.1 general terms and conditions concerning personal and business banking products, being:

17.1.1 the "Personal Transaction and Savings Products Terms and Conditions" (Personal Product Terms); and

17.1.2 the "NAB Business Products Terms and Conditions" (Business Product Terms).

17.2 fees guides concerning personal banking and business banking products, being:

17.2.1 "A Guide to Fees and Charges – Personal Banking Fees" (Personal Fees Guide); and

17.2.2 "Business Banking Fees – A Guide to Fees and Charges" (Business Fees Guide);

(together, the Fees Guides).

18 A summary of the Fees Guides which identifies the PP Fees and PP Fee Exemptions relevant to the fees incorrectly charged in this case to the Relevant Accounts for personal banking and business banking are identified in Annexure B.

19 Subject to paragraph 20, during the Relevant Period, NAB's Fees Guides for the Relevant Accounts provided that NAB was entitled to charge $1.80 for periodical payments to other accounts within NAB, and $5.30 for periodical payments to accounts at another bank / financial institution.

20 NAB's terms and conditions for the Relevant Accounts also provided that customers would be entitled to a PP Fee Exemption for certain transactions during the Relevant Period as follows:

20.1 for personal banking customers, PP Fee Exemptions applied from personal accounts, identified in Annexure C, to certain types of accounts identified in Annexure B; and

20.2 for business banking customers, PP Fee Exemptions applied from certain types of business accounts identified in Annexure B to business loans.

21 During the Relevant Period, where a customer was entitled to a PP Fee Exemption under NAB's terms and conditions, NAB did not have an entitlement to charge the customer a PP Fee.

22 NAB's Personal Product Terms identified the personal accounts from which a periodical payment could be made in a table headed "Product Comparison Table – Features and Benefits" under a section with a heading "Key Information" and a subheading "Account Access". The relevant sending accounts were denoted in this subsection by a "tick" in relation to "periodical payments". A copy of an example extract of NAB's Personal Product Terms during the Relevant Period is attached as Attachment 2.

23 All NAB personal account types from which a periodical payment could be made were entitled to the PP Fee Exemptions specified in the Personal Fees Guide when they met the criteria. The

Personal Fees Guide identified the types of receiving accounts or scenarios in which a customer would either be entitled to a PP Fee Exemption, or would be charged a PP Fee.

24 NAB's Business Fees Guide identified the types of business accounts that were entitled to PP Fee Exemptions for periodical payment arrangements to business loans. Those same business accounts were also identified in NAB's Business Product Terms. The Business Fees Guide specified that they were to be charged $1.80 (for periodical payment arrangements from those accounts to other accounts within NAB) and $5.30 (for periodical payment arrangements from those accounts to accounts at another financial institution).

25 NAB is unable to locate any written or electronic notice provided to customers during the Relevant Period in accordance with its terms and conditions advising that a PP Fee Exemption or PP Fee would be changed (eg removing the exemption entitlement).

26 In the absence of any such notice, customers continued to be entitled to the PP Fee Exemptions or PP Fees that were in place at the time they established their periodical payment arrangement unless the arrangement was amended. If a periodical payment arrangement was amended by changing the sending or receiving account this could have affected the PP Fee Exemptions or PP Fees that applied.

27 The Personal Product Terms for each of the personal banking accounts from 23 May 2008 and the Business Product Terms for each of the business banking accounts from 30 July 2009 (including the Relevant Accounts) contained a term to the effect that customers were required to check their account statements, and to notify NAB of any transactions for which the information recorded was suspected to be, or might be, incorrect. These standard terms are extracted in a table set out in Annexure E.

NAB notification of charges to customers

28 The manner in which periodical payments and any corresponding PP Fees charged were recorded in relevant customer account statements did not change during the Relevant Period and is explained below. Passbook accounts that operated differently are discussed at the end of this section.

29 When NAB charged a PP Fee to a customer, that fee would be shown on the customer's account statement as "Incl Tfr Fee $[amount of PP Fee]" against the transfer of funds transaction.

30 The statement entry relating to the periodical payment also included the following information:

30.1 date of the periodical payment transaction;

30.2 description of the periodical payment transaction utilising information supplied by the customer when the transaction was established;

30.3 the account number of the recipient of the periodical payment; and

30.4 the total amount of the periodical payment transaction in question (including any PP Fee charged).

31 An example of a narration, taken from an account statement for a National Cheque Account (with personal identifying information removed) and referring to a periodical payment made to a non-NAB account for which no PP Fee Exemption applied, is as follows:

Date	Particulars	Debits
20 Jul 2007	Rental 00XXX Ray White Moss Vale	
Incl Tfr Fee $5.30 To *[non-NAB recipient account number]*		1,305.30

32 During the Relevant Period, all account statements for the Relevant Accounts (except Passbook accounts, which are addressed separately below) included the following text:

> ***Explanatory Notes***
>
> Please check all entries and report any apparent error or possible unauthorised transaction immediately.
>
> We may subsequently adjust debits and credits, which may result in a change to your account balance to accurately reflect the obligations between us.
>
> For information on resolving problems or disputes, contact us on 1800 152 015, or ask at any NAB branch.

33 The narrations which appeared on customer bank statements when Relevant Accounts were charged a PP Fee included the text set out in Annexure A under the heading "notification text". A copy of an example bank statement, which has been redacted to remove personal identifiable information, is attached as Attachment 3.

34 The bank account statements did not contain any other explanation of the reason why the PP Fee was charged otherwise than summarised in paragraphs 29 to 31 above or any information about the circumstances in which the customer would be entitled to a PP Fee Exemption or the amounts of PP Fees to be charged in particular circumstances.

35 During the Relevant Period, the bank statements did not include PP Fees in the "Transaction Summary" or "Monthly Transaction Summary" part of the bank statement which (when present) provides to customers a summary of the product-related fees and charges levied against the account.

36 PP Fees were not recorded in the "Transaction Summary" or "Monthly Transaction Summary" sections of relevant account statements during the Relevant Period because these sections of NAB account statements concerned product-related fees, being fees incurred in the daily operation of a particular account product (as set out in section 1 of NAB's Personal Fees Guide and Business Fees Guide).

37 NAB does not consider periodical payments as a "product". They are discretionary transactions arranged at the request of a customer. Fees charged by NAB in relation to discretionary transactions like periodical payments are only recorded by NAB in the body of the account statement against the relevant transaction.

38 The process was different for customers with NAB "Passbook" accounts during the Relevant Period. Passbook account transactions were printed in the customer's passbook when it was presented to a NAB branch, rather than being the subject of account statements sent to a customer. Periodical payments and any corresponding PP Fees that were charged in respect of those payments were printed in customer passbooks in the same format as described above on pages with the following note at the bottom of each page on which transactions could be recorded: "Please check entries before leaving the branch".

Amount charged by NAB for each fee

39 During the Relevant Period, there were potentially two ways in which error on the part of a NAB employee during the process of establishing a periodical payment could give rise to the charging of an incorrect PP Fee to the customer:

39.1 NAB employee selected an incorrect "Periodical payment fee indicator" in the PPA Form; and

39.2 NAB employee entered an incorrect PP Fee Indicator into eBOBS (whether on the basis of an incorrectly completed PPA Form, or otherwise).

40 As a result, from at least 20 July 2007 to 22 February 2019, NAB charged some customers either:

40.1 a PP Fee of $1.80 or $5.30 when they were entitled to a PP Fee Exemption under NAB's standard terms; or

40.2 a PP Fee of $5.30 when the correct fee under NAB's standard terms was $1.80.

41 The incorrect PP Fees charged to customers during the Relevant Period are referenced in paragraph 137 below.

42 An incorrect PP Fee Indicator would not necessarily cause an incorrect PP Fee to be charged because, as set out in Annexure D, some PP Fee Indicators caused the same PP Fee to be charged (for example, PP Fee Indicators 1, 2, 4 and 5). Further, at the stage of making inputs into eBOBS, NAB staff could identify and correct an error in the PP Fee Indicator recorded on the PPA Form.

43 The incorrect charging did not cease entirely until NAB removed PP Fees for all periodical payments on 22 February 2019.

NAB's overcharging of PP Fees

44 During the Relevant Period, NAB charged PP Fees that it was not entitled to charge under its standard contractual terms (PP Fees overcharging). Between 25 February 2015 and 22 February 2019 (Penalty Period), NAB engaged in PP Fees overcharging on at least 195,305 occasions with a total value of $365,454.60 involving 4,874 personal banking customers and 913 business banking customers.

45 Annexure A sets out information on the value and number of occasions on which NAB engaged in PP Fees overcharging during the Penalty Period.

46 For personal accounts during the Penalty Period, Annexure A reflects PP Fees incorrectly charged from NAB Classic Banking, NAB Retirement, NAB Gold Banking-Private and NAB Reward Saver accounts (identified in Annexure C) to:

46.1 the types of accounts identified in Annexure B for personal banking where NAB charged customers $5.30 or $1.80 when it should have applied a PP Fee Exemption (where the charge / fee is identified as "Free"); and

46.2 other accounts at the same or other NAB branch where NAB charged a customer $5.30 when it should have charged $1.80.

47 For business accounts during the Penalty Period, Annexure A reflects PP Fees incorrectly charged from NAB Business Everyday Account ($0 and $10 Monthly Fee Option), NAB

Business Cheque Account (including $0 and $10 Monthly Fee Option), NAB Business Management Account and NAB Farm Management Account (as identified in Annexure B) to:

47.1 business loans where NAB charged customers $5.30 or $1.80 when it should have applied a PP Fee Exemption; and

47.2 accounts at the same branch or another branch where NAB charged customers $5.30 when it should have charged customers $1.80.

48 For the period between 20 July 2007 and 24 February 2015, NAB incorrectly charged customers for PP Fees as follows:

48.1 for periodical payments from some personal accounts, including those identified in Annexure C, that were subject to the Personal Fees Guide to:

48.1.1 the types of accounts identified in Annexure B for personal banking where NAB charged customers $5.30 or $1.80 when it should have applied a PP Fee Exemption (where the charge / fee is identified as "Free"); and

48.1.2 other accounts at the same or other NAB branch where NAB charged a customer $5.30 when it should have charged $1.80.

48.2 for periodical payments from some business accounts, including those identified in Annexure B, that were subject to the Business Fees Guide to:

48.2.1 business loans where NAB charged customers $5.30 or $1.80 when it should have applied a PP Fee Exemption; and

48.2.2 accounts at the same branch or another branch where NAB charged customers $5.30 when it should have charged customers $1.80.

49 The rates at which PP Fees were charged incorrectly at relevant times are approximately as follows:

49.1 Between 20 July 2007 and 31 December 2007, PP Fees were incorrectly charged in relation to 95,388 periodical payment transactions, which reflected 3.17% of periodical payment transactions between 20 July 2007 and 31 December 2007.

49.2 In 2008, PP Fees were incorrectly charged in relation to 210,399 periodical payment transactions, which reflected 3.20% of periodical payment transactions in 2008.

49.3 In 2009, PP Fees were incorrectly charged in relation to 207,560 periodical payment transactions, which reflected 3.27% of periodical payment transactions in 2009.

49.4 In 2010, PP Fees were incorrectly charged in relation to 202,750 periodical payment transactions, which reflected 3.31% of periodical payment transactions in 2010.

49.5 In 2011, PP Fees were incorrectly charged in relation to 189,257 periodical payment transactions, which reflected 3.25% of periodical payment transactions in 2011.

49.6 In 2012, PP Fees were incorrectly charged in relation to 166,413 periodical payment transactions, which reflected 2.98% of periodical payment transactions in 2012.

49.7 In 2013, PP Fees were incorrectly charged in relation to 139,004 periodical payment transactions, which reflected 2.66% of periodical payment transactions in 2013.

49.8 In 2014, PP Fees were incorrectly charged in relation to 108,893 periodical payment transactions, which reflected 2.12% of periodical payment transactions in 2014.

49.9 In 2015, PP Fees were incorrectly charged in relation to 95,191 periodical payment transactions, which reflected 1.92% of periodical payment transactions in 2015.

49.10 In 2016, PP Fees were charged incorrectly in relation to 82,416 periodical payment transactions, which reflected 1.80% of periodical payment transactions in 2016.

49.11 In 2017, PP Fees were charged incorrectly in relation to 72,641 periodical payment transactions, which reflected 1.78% of periodical payment transactions in 2017.

49.12 In 2018, PP Fees were charged incorrectly in relation to 37,385 periodical payment transactions, which reflected 1.02% of periodical payment transactions in 2018.

49.13 Over the Relevant Period, PP Fees were charged incorrectly in relation to 1,608,575 periodical payment transactions, which reflected 2.61% of periodical payment transactions over this period.

NAB's identification and investigation of PP Fees overcharging

50 On 5 September 2016, ASIC issued a media release, stating that ANZ would refund $25.8m (plus interest) to 376,570 retail accounts and 17,230 business accounts, on the basis that ANZ had failed to disclose to customers when certain periodical payment fees would be charged. Specifically, the media release stated that ANZ's terms and conditions had defined periodical payments as transactions "to another person or business", in circumstances where ANZ had also been charging fees for periodical payments made between accounts held in a customer's own name.

51 In response to that media release, in September 2016, NAB's consumer banking and business banking Deposits teams commenced a review of periodical payment fees charged by NAB.

52 NAB employees with primary responsibility for the review at this time were:

52.1 Ms Su Jen Lee (Manager, Management Assurance, Deposits);

52.2 Ms Kay Hung (Product Consultant, Business Transaction Accounts);

52.3 Mr John Hur (Product Manager, Business Transaction Accounts);

52.4 Mr Richard Winkett (Head of Product, Business Transactions & Consumer Solutions); and

52.5 Mr Mark Siddall (Senior Legal Counsel).

53 The first step involved a review of NAB's terms and conditions relating to periodical payments and PP Fees.

54 NAB determined that its terms and conditions properly disclosed its PP Fee charges to customers in respect of periodical payments (namely, its terms and conditions did not suffer from the same issues as those experienced by ANZ in respect of periodical payments, as referred to in the 5 September 2016 media release).

55 Subsequently, in September 2016, NAB commenced the second step in the review, which involved sample testing of approximately 25 randomly selected customer account statements recording periodical payment transactions to determine whether PP Fees had been correctly charged in those cases (Sample Testing). NAB concluded its Sample Testing in late October 2016.

56 The Sample Testing identified instances involving both personal banking and business banking accounts where a PP Fee Exemption had not been correctly applied (in other words, the customer's account statement recorded that a PP Fee had been charged in connection with a periodical payment transaction to which a PP Fee Exemption applied).

57 On 25 October 2016, Mr Winkett emailed Mr Brendan White (General Manager, Deposits) (copying Mr Hur and Ms Hung – other members of the Deposits team with responsibility for the review) stating that:

> >> Periodical payments from a NAB business transaction account to a NAB business loan should be transaction fee exempt
>
> >> Bankers need to manually exempt these transactions from PP Fees, we have found evidence of this not occurring
>
> >> Size / # customers impacted is not known at this stage but we do know our F&C back to 2004 had exempt these PP transactions from these fees.

> >> This has been identified during a review Kay has undertaken of disclosures / charging following a recent refund at ANZ.
>
> It is important to note this issue is not as broad as the ANZ event (in that we are comfortable in our disclosures) but will take us a couple of weeks to size the impact.

58 On the same date, Ms Hung created an entry in Riskmart (NAB's event management system) titled "Overcharging of periodical payment fees for business transaction accounts".

59 On 27 October 2016, Ms Sophia Yeung (Graduate, Segment Performance, Consumer Transactions) sent a meeting invite titled "Periodic Payment Fees – Next Steps" to Mr Ryan Buckley (Consultant, Product Management, Consumer Deposits), Ms Hung, Ms Carlene Comfort (Senior Analyst, Deposits Lend & Transactions Support Team) and Ms Lee that stated "Both business and consumers have identified issues relating to PP fee not being exempted as shown on the T&Cs. Let's discuss next steps and possible solutions for both the areas".

60 On 28 October 2016, Ms Lee emailed Ms Jane Francis (Head of Operational Risk and Compliance, Deposits and Transaction Services) and Ms Claire Plummer (Manager, Operational Risk & Compliance, Consumer Lending) stating that:

> … Deposits have identified that for Business Transaction Accounts, periodical payment fees have been charged in scenarios when they shouldn't have been charged due to bankers failing to manually waive fees. We have since determined that periodical payment fees have also been charged on consumer deposit accounts under similar scenarios … We will be expanding the event to also include Consumer Transaction Accounts as the root cause for both issues is the same … Deposits is currently in the process of performing additional analysis to determine number of customers impacted and value of fees which may need to be refunded. A meeting has been organised with Product Support (assisting with the data extraction process) to discuss next steps.

61 Ms Francis responded on the same date stating "It's likely we'll be calling a SERP".

62 Because NAB's Sample Testing identified some instances of customers being incorrectly charged PP Fees, NAB identified at this point in time that there was a risk it was overcharging some other customers for PP Fees.

63 As a result of the Sample Testing by the end of October 2016, some NAB employees were aware that there were instances where PP Fees had been charged in error to some business banking and personal banking customers, (including the employees who were party to the correspondence described in paragraphs 57 to 60 above) and that NAB Deposits team was working to determine the number of customers impacted and the value of PP Fees that needed to be refunded.

64 At the time Ms Francis was responsible for deciding whether to refer the findings of the Sample Testing to NAB's Significant Events Review Panel (SERP), being the body within NAB that, at November 2016, would determine whether an incident was reportable to ASIC under s 912D of the *Corporations Act 2001* (Cth) (Corporations Act).

65 On 7 November 2016, Ms Francis determined not to refer the matter to SERP because:

65.1 NAB had determined that its terms and conditions properly disclosed NAB's approach to charging PP Fees; and

65.2 although the Sample Testing had identified instances where a PP Fee Exemption had not been correctly applied, the extent of any incorrect charging was not known.

66 Ms Francis directed that the decision not to refer the matter to SERP should remain under review as the investigation into the extent of the issue progressed, with a view to considering taking the matter to SERP at a later stage.

67 At that time, NAB believed that the total of all PP Fees charged over the previous four years was only $64,000 in revenue.

68 It was not until 20 June 2018 that the PP Fees overcharging was determined by SERP to be reportable under s 912D of the Corporations Act.

69 On 4 November 2016, Ms Plummer sent an email to Mr Winkett, Mr Gordon Long (Head of Product Management, Domestic Payments), Ms Deanne Keetelaar (General Manager, Transaction Products & Payments) and others stating "Appears overcharge has been happening since March 1999" in the context of outlining the notes taken in relation to a meeting for "PP Charging Issue – SERP".

70 In about December 2016, NAB commenced an investigation for the purpose of determining the extent to which PP Fees had been charged incorrectly, and to ultimately remediate impacted customers. To the best of NAB's knowledge the investigation was commenced at the direction of Ms Keetelaar and / or Mr Long. In around December 2016, Mr Long left NAB.

71 At this time responsibility for the investigation was allocated to NAB's Payments team as the "product owners" of periodical payments.

72 The core investigating team initially comprised three employees from NAB's Payments team. Ms Alida Macalister (Head of Product International Payments and Channels) had day-to-day

responsibility for the investigation and was supported by Ms Hillary Ruffell (Product Manager, Payment Channels) and Ms Blessing Mayowe (Consultant, Payments & Channels) who both reported to her. It did not include Ms Hung or the other NAB staff who initially had primary responsibility for review of periodical payment fees charged by NAB identified in paragraph 52.

73 On 1 December 2016, Ms Plummer sent a meeting invitation to Ms Macalister, Ms Ruffell, Ms Jaime Russell (Senior Consultant, Management Assurance, Deposits & Transaction Services), Mr Winkett, Ms Lee and Ms Francis with the subject "PP charging issue – handover to new Payments resources". Ms Plummer's email relevantly stated:

> With Gordon Long leaving NAB I am keen for you to provide subject matter expert background and context to Hilary and Alida to ensure adequate PP understanding, and remediation is undertaken.

74 Ms Plummer's meeting invite dated 1 December attached "background emails". This included an email chain containing a copy of the email referred to in paragraph 69, which relevantly stated "Appears overcharge has been happening since March 1999". The meeting invitation was for an in person meeting on 13 December 2016 at 11.30am. Ahead of the meeting, Ms Macalister responded to Ms Plummer's meeting invite asking for "dial in details".

75 The General Manager, Payments was ultimately responsible for management of the investigation and had authority to make decisions on proposed courses of action. Ms Keetelaar was in this role in December 2016, when the Payments team took over responsibility for the investigation, and remained in the role until 10 March 2017, when she left NAB. Mr Michael Starkey was in the role in an acting capacity between 11 March 2017 and 23 May 2017. Mr Paul Franklin was in the role from 29 May 2017 to the end of the Relevant Period.

76 Updates on the progress of the investigation were also provided from time-to-time to NAB's Payments Risk Management Forum (PRMF), a risk management committee that convened monthly to discuss and action compliance and risk matters relating to NAB's Payments team. The PRMF was chaired by the General Manager, Payments.

77 At around this time, the investigating team formed the view that the PP Fees overcharging could only affect customers who had established a PP Fee arrangement from 2014.

78 The reason for that view was that those employees believed that the PP Fee structure in operation at the time had been introduced in terms and conditions dated in 2014.

79 NAB's investigation used data extracted from the system that stores certain datasets associated with periodical payments (the Authority Payments Master File) (Master File) to identify instances of incorrect PP Fees.

80 NAB staff who were investigating the issue and developing the process to identify and remediate impacted customers initially identified those customers using two point in time data extracts created by NAB in September 2016 and January 2018.

81 Progress with developing a process to identify and remediate all impacted customers was hampered by limitations in the Master File data. In particular, that data:

81.1 recorded PP Fee Indicators in effect as at the date of extraction, but did not include historical data (namely, about how PP Fees had been charged in the past in respect of particular periodical payments);

81.2 did not record the structure of historical periodical payment arrangements (i.e. Sending / receiving account and payment frequency) to enable NAB to determine whether an arrangement recorded in a Master File extract had been structured differently in the past;

81.3 did not include reliable data showing the commencement dates of the periodical payment arrangements recorded in the data; and

81.4 did not include a full set of data for some periodical payment arrangements.

82 NAB staff investigating the issue did not know it could retrieve the data recording historical periodical payments and related PP Fees charged to customers using NAB's "Statement Transaction" system. This data source was ultimately identified in around February 2019.

83 Because NAB investigating team did not know it could retrieve historical periodical payments as described above in paragraph 82, the investigating team focused on attempting to overcome the limitations in the Master File data. While the investigating team ultimately did develop a remediation methodology utilising the Master File data, it was impacted by most of the limitations described in paragraph 81 above, which the investigating team was not able to overcome.

84 Between the end of October 2016 and January 2017, some of the correspondence between NAB employees about the identification and investigation of the PP Fees overcharging included:

84.1 On 25 October 2016, Mr Winkett advised Mr White through the email described in paragraph 57 above that there was a "new risk / refund event in relation to periodical payment transaction fees" and noted that:

> >> Periodical payments from a NAB business transaction account to a NAB business loan should be transaction fee exempt
>
> >> Bankers need to manually exempt these transactions from PP Fees, we have found evidence of this not occurring.

84.2 On 28 October 2016, Ms Lee advised Ms Francis through the email described in paragraph 60 above that since she was first advised that business transaction accounts had been charged periodical payment fees "where they shouldn't have been", they had also determined that periodical payment fees had been charged on consumer accounts under similar scenarios. Ms Francis responded that "It's likely we'll be calling a SERP".

84.3 On 4 November 2016, a meeting was held between NAB employees in relation to the "PP Charging Issue" and considering a SERP, which included Ms Keetelaar, Mr Long and Mr Winkett.

84.4 On 8 November 2016, Ms Ruffell forwarded an email to Mr Long and Ms Keetelaar which recorded that NAB's revenue from PP Fees for the last four financial years (FY13 to FY16) was "64k an average of $15k per annum". On 14 November 2016, Mr Long sent an email in reply which relevantly stated: "Looking at recent numbers, may as well just waive the fee for all customers going forward. Revenue is not worth trying to control in my view ($30k pa)". Ms Keetelaar replied: "Agreed".

84.5 On 15 November 2016, there was a meeting of the Deposits Risk Management Forum which was attended by a number of NAB employees, including Mr White. The meeting pack provided to the attendees included an update headed "Incorrect charging of Periodical Payment Fees" which stated:

> In response to ANZ's recent periodical payments disclosure issue, Deposits undertook a review to confirm that: a) periodical payment fee disclosures were sufficient b) periodical payment fees charged align to the disclosures. Whilst the review confirmed that the disclosures were adequate, it identified that bankers have failed to follow internal process and waive the periodical payment fees in certain scenarios. For example, when a periodical payment is established from either a Business Everyday Account ($0 and $10) or a Farm Management Account to any NAB Business loan, the periodical payment fee should be exempt. Pending the outcomes of further data/analysis, CRO have determined that a Significant Event Reporting Panel (SERP) is not required for now. Should a SERP be subsequently required, it is acknowledged that this will be under Transaction Product & Payments (and not Deposits) as they have since been confirmed as the Product Owners of Periodical Payments. Deposits will continue working with Transaction Product & Payments to manage the event.

84.6 On 14 December 2016, Ms Plummer circulated action items from a periodical payments meeting to Ms Ruffell, Ms Macalister, Ms Francis, Mr Winkett, Ms Russell and others noting the agreed actions were as follows:

> **Blessing**: Send out 'PP – need to know' awareness comms to frontline in Dec 2016 and again in Feb 2017.
>
> **Sophia**: Contact Carlene Comfort to filter on data that should be exempt from PP, but incurred charges; design a report that can be used regularly to detect any overcharging in the future. Include Blessing in discussions.
>
> **Alida**: Contact Major Refunds Team to extract 18 months of PP data, so we can expand analysis from 6 months to 2 years of data. Obtain any refund recommendations from the team.

84.7 On 15 December 2016, Ms Plummer circulated another email in relation to action items from the same periodical payment meeting and relevantly stated:

> Actions have been amended as per feedback, thank you:
>
> …
>
> Sophia: Contact Carlene for a list of each product code and cycle code, so that the Payments team can better understand how to filter the data in the spreadsheets
>
> …

84.8 On 15 December 2016, Mr Jason Webster (Consumer Products & Services) sent a meeting invitation to Ms Macalister and Ms Mayowe with the subject "Refund PP / DDR discussion", which relevantly stated:

> Note –
>
> We have 2 types of authority payment transactions (DDR's "pull" and Periodic Payments "Push")
>
> My team already have some data available on Periodic payments that we provided deposits team recently, so if a decision is made to refund all these fees, it will be a large Refund.

84.9 On 3 January 2017, Mr Webster sent an email to Ms Macalister, Ms Mayowe and Ms Comfort, which relevantly stated:

> Minutes / actions from December Refund check in
>
> …
>
> 2) Blessing to confirm dates of T&Cs relating to any potential refund
>
> 3) Data: (32Mg file.. If you need it let me know)
>
> -SR67364 P Payments extract as at 30/11/2016
>
> - 196K NAB PP's / 16K Non Nab PP's
>
> - 172K (of 196K Nab ones) had zero fee charged as per excel snapshot below

> 4) Jason to investigate timeframes of how long "Closed PP data" is stored on ledgers
>
> 5) Blessing / Alida to set up next steps meeting once any formal refund has been confirmed.

85 On or around 20 February 2017, a draft of the "Need to Know" article referred to above in paragraph 84.6 was finalised. The article was designed by the investigating team with a view to improving awareness of staff in NAB's retail branches around the application of the PP Fee. However, the article was not finalised and sent to retail branch staff because NAB's Retail Communication Team, which sends communications to retail branch staff, advised that the Need to Know article was not suitable for publication because such articles are reserved for advising retail branch staff of changes relevant to their roles, whereas the purpose of the proposed article was to remind retail branch staff of existing procedures.

86 Between March and May 2017, five months after NAB first identified there was a risk it was overcharging some customers PP Fees, the investigating team sought assistance from other NAB employees to determine whether the task of identifying incorrect PP Fee charges could be assisted by utilising data stored in NAB's Global Data Warehouse system (GDW). In particular:

86.1 On 15 March 2017, Mr Stuart Murray (Senior Analyst, Product Delivery & Support, Customer Products & Services) sent an email to Ms Macalister which explained that sourcing transaction data from GDW may assist with identifying incorrect PP Fee charges and that a resource with GDW expertise would be needed to track down the bulk, if not all, of the data.

86.2 On 20 March 2017, Ms Macalister sent an email to Ms Amber Barrow (Senior Consultant, Management Information, Payments) which stated:

> We are trying to work out who has been overcharged but it seems that no one has the skill set to help us. Can you have a look at the explanation below and let me know where else i should be trying? Is it something you are able to do, or where else do i find this skill set. It must be rocket science!

86.3 On 19 May 2017, Ms Macalister sent an email to Mr Andreas Haggren (Senior Consultant, Data Scientist) which stated:

> We are struggling to find someone with the skills to work out who has been overcharged, and we have been advised that the data should sourced [sic] from actual transaction data via GDW.
>
> …
>
> We would like your guidance on what is actually possible as there seems to be very limited GDW understanding out there.

87 Ms Barrow and Mr Haggren both attempted to identify incorrect PP Fee charges using data sourced from GDW but were unsuccessful.

88 On 17 May 2017, Ms Mayowe and Ms Macalister corresponded about NAB's revenue from PP Fees and whether NAB should cease charging PP Fees, which relevantly included:

> Ms Mayowe: "I think we should re-visit Hillary's idea donating [sic] a specified amount to charity.
>
> I am still working on analysing the revenue for Periodical Payments to see what the effect will be on our revenue.
>
> This is what I've found out so far:
>
> - For the last 4 years we've earned 64k which is an average of $15k per annum for periodical payments made from one NAB acc to another NAB acc ($1.80 per transaction).
> - What I am yet to find out is how much revenue we receive for periodical payments made from a NAB acc to another FI ($5.30 per transaction). Kum is to provide me with data"
>
> Ms Macalister responded: "Blessing, I am agreeing with you now. Maybe no charge for DDs. What do other banks do and does Hillary agree? (good time to get rid of it as we are doing FY18 planning at the moment)."
>
> Ms Mayowe responded: "I'll do some research on how other banks charge for PP's not DD.
>
> - Periodical Payment is a transfer of funds that we make on a regular basis at the customer's request from one account to another specific account.
> - A direct debit is a transfer of funds from a customer's account drawn under a direct debit request you have given a third party.
>
> Hillary is happy to forego the revenue as this will constantly be an issue unless there are system changes to eBobs.

89 On 18 July 2017, Ms Macalister advised the PRMF that the investigating team had not been able to develop a methodology for identifying customers who had incurred incorrect periodical payment fee charges. She proposed to make a donation to charity instead.

90 The PRMF did not accept the proposal to make a charitable donation in lieu of remediation.

91 On 18 July 2017, Mr Nick de Crespigny (GM Risk, Business Lending and Deposits and Transaction Services), who had attended the PRMF meeting on that date, sent an email to Ms Alena Wang (Manager, Operational Risk and Compliance, Deposits and Transaction Services) reporting on the meeting, which relevantly stated:

> Initial view is that we can't extract the data - but there was some disagreement on the call about whether a greater level of effort would allow us to extract the data.

Preliminary estimates of $15k seem very low.

92 The reference in Mr de Crespigny's email to "estimates of $15k" related to the assessment of NAB's annual revenue from PP Fees.

93 Subsequently, at a PRMF Meeting on 27 September 2017, approximately ten months after NAB first identified there was a risk it was overcharging some customers PP Fees, the investigating team presented a paper which described the challenges being faced in obtaining reliable data to determine the extent of any incorrect charges associated with PP Fee Exemptions.

94 The PRMF directed that further resources be allocated to attempt to overcome the data challenges.

95 In October 2017, following the PRMF's direction, Ms Mayowe, one of the members of the investigating team was replaced by a more senior consultant, Mr Kris Prasad (Product Transformation Consultant, Payments).

96 Between October and November 2017, Mr Prasad developed a methodology to utilise the Master File data extract obtained in September 2016 to identify the periodical payment arrangements with incorrect PP Fee configurations.

97 On 26 October 2017, Mr Prasad sent an email to Ms Macalister reporting that his analysis (utilising the Master File data referenced above) had found 3,455 out of a total of 196,306 periodical payment arrangements (1.76%) were "overcharged", broken down as follows:

97.1 3,316 periodical payment arrangements were charged $1.80 instead of $0;

97.2 132 periodical payment arrangements were charged $5.30 instead of $1.80;

97.3 9 periodical payment arrangements were charged $5.30 instead of $0.

98 The Master File data that Mr Prasad used did not record any actual fee 'charges'. It recorded the fee configurations that applied to the periodical payment arrangements at the date the Master File extract was obtained, which enabled an inference to be made that incorrect charges had occurred.

99 On 30 October 2017, prior to a PRMF meeting scheduled on that day, Ms Macalister sent a document to the members of the PRMF which contained an amended version of Mr Prasad's analysis in table form. The analysis identified that the forecast annualised revenue from

periodical payment fees exceeded $1.5m. The analysis also identified that the forecast annualised revenue from periodical payment fees overcharged was $509,738.

100 On 27 November 2017, Mr Grant Duthie transferred into NAB Payments team from another team within NAB and took over responsibility from Mr Prasad for progressing the investigation. One of the first tasks assigned to Mr Duthie was to interrogate the reliability of the initial estimate provided to the investigating team of the annual revenue from periodical payments. Mr Duthie also worked with Mr Prasad to peer review his analysis of incorrect charges.

101 On 6 December 2017, over a year after NAB first identified there was a risk it was overcharging some customers PP Fees, Mr Duthie sent an email to Ms Macalister (copied to others) which stated:

> I spent some time with Kris today to run through his analysis, logic, findings and assumptions. So some of the call outs around the customer impact (as at November 2016) of the periodical payments:
>
> * 3,227 customers we believe have been overcharged
>
> * 147k estimated unique remitters (based on unique account names) that have set up periodical payments set up [sic] in eBOBS
>
> * $152k is the estimated amount that customers have been overcharged for periodical payments per annum (1.76% of total periodical payments volume)
>
> * $1.14M is the estimated total revenue NAB earns each year from periodical payments fees.

102 One of the reasons that the overcharged amount was expressed as an estimate was that the Master File data extract utilised for the analysis did not contain reliable data recording the start date of each periodical payment arrangement to enable an assessment of how long an incorrect PP Fee Indicator identified in that data may have been in place for. As noted above at paragraph 83, the investigation team was focused on data recorded in the Master File extract because it did not know it could retrieve the data recording historical periodical payments.

103 In relation to the estimate that NAB's total annual revenue from PP Fees was $1.4m, Ms Macalister sent an email to Mr Duthie dated 10 December 2017 which stated:

> This seems like a lot compared to the estimates Hillary came up with initially.

104 On 15 December 2017, Mr Duthie forwarded an email to Mr Kum Chau (Senior Analyst, Performance Management (Non Traded), Customer Products & Services Finance) containing an analysis Mr Chau had performed in November 2016 to determine that NAB's revenue from

periodical payments averaged $15,000 per annum. Mr Duthie stated that he "…wanted to understand how we calculated this data as well and get any assumptions…".

105 On 19 December 2017, Mr Chau sent an email to Mr Duthie referring to data which "appears to relate to periodical payments where the revenue for FY17 is $1.4m" and stated that he was "trying to get the transaction details for these transactions, which I should hopefully be able to send you later today".

106 On 20 December 2017, Mr Chau sent a further email to Mr Duthie advising that, subject to certain assumptions, NAB's revenue from periodical payment transactions in FY17 was $817,339.20.

107 On 10 January 2018, Mr Duthie sent an email to Ms Macalister which included the following statement regarding the further PP Fee revenue data provided by Mr Chau:

> I have also included Kum Chau's emails with the recent P&L that shows $1.4M associated with PPs and some other misc. Products and then his workings that showed the figure might be closer to $800k.

108 On 31 January 2018, Ms Macalister sent an email to Ms Russell in relation to the "periodic payment remediation", which relevantly stated:

> - someone new has started in the support team (previously Major refunds) who has been able to understand the data better & changed some of the outcomes -around 3000 currently impacted (ie have been overcharged). We are unable to determine historical periodic payments incorrectly charged. - We are unable to tell how long these periodic payments have been in force for and therefore, the total amount that should be repaid to each customer. On an annual basis. It is approx. $152,000 pa. T&Cs were changed in 2014 so payments in place before then were not overcharged. -We propose refunding customers 1 years' worth of fees but some of them may complain because their PPs have been in place longer than that. -we have also identified that all the revenue comes into our PU and is worth approx. $800k pa, declining by 17% pa. Therefore any remediation will need to come out of our cost centre -need to make a decision on how much to remediate customers – max of 3 years??? And will do in in the next few months ...

109 On 5 February 2018, a meeting pack was emailed to the members of the PRMF for a meeting on 6 February 2018. It included the following update in relation to periodical payments:

> Around 3000 currently impacted (i.e. Have been overcharged). We are unable to determine to historical periodic payments incorrectly charged. We are unable to tell how long these periodic payments have been in force for and therefore, the total amount that should be repaid to each customer. On an annual basis. It is approx. $152,000 pa. T&Cs were changed in 2014 so payments in place before then were not overcharged.
>
> Status & Next Steps

> Decision required on how much to remediate customers & which actions will be implemented to prevent reoccurrence.

110 In February 2018, approximately one year and three months after NAB first identified there was a risk it was overcharging some customers PP Fees, Mr Duthie requested assistance from NAB's GDW Production Support team to determine, utilising GDW data, the start date, end date and (where applicable) amendment date of the periodical payments identified in the Master File data as having incorrect PP Fee Indicators.

111 In February and March 2018, an analyst from the GDW Production Support team extracted and provided this information to Mr Duthie.

112 The investigating team believed that the commencement dates supplied by the analyst for periodical payment arrangements that commenced prior to 2014 were unreliable. This affected the approach NAB took to calculating the remediation amounts paid to customers whose periodical payment arrangement commenced prior to 2014. This is explained further in paragraphs 127 and 129 below.

113 On 23 March 2018, NAB employees discovered that the relevant terms and conditions were amended in February 2002 and the PP Fees in operation at that time had in fact been in force since then.

114 As a result, from this time NAB knew that the risk it was overcharging some customers PP Fees existed from at least February 2002.

115 After this discovery on 23 March 2018, the following events occurred:

115.1 On 26 March 2018, Mr Duthie sent an email to Ms Macalister which referred to his understanding that start dates obtained for periodical payment arrangements commencing prior to 2014 were unreliable and stated "Based on the poor data quality here, I don't believe we should be remediating any customer with a pp starting pre-2014". On 29 March 2018, Ms Macalister replied to Mr Duthie's email and said she agreed with this approach;

115.2 On 28 April 2018, members of the investigating team presented a paper to the PRMF stating that: "If a periodical payment commenced before 2014, the arrangement start date is not reliable as it is mixed with the account start date and therefore we cannot calculate refunds for these customers properly. Customers with periodical payments commence [sic] before 2014 will have their fees corrected, but will not be refunded"; and

115.3 On 20 June 2018, Ms Macalister reported on the outcome of the SERP meeting and wrote that: "Action for us to engage Jocelyn Turner who can provide FOS guidelines for remediation of customers, particularly pre 2014 where we cannot reliably calculate the amount. There was a consensus that some attempt must be made to remediate these customers".

116 NAB undertook the steps in paragraph 115 above based on a view that the data available to it about establishment dates for periodical payment arrangements prior to 2014 was unreliable, and so it initially calculated remediation for customers whose arrangement had been in place since prior to 2014 for a maximum period of seven years from October 2011. NAB applied this approach to the design of its "Initial Remediation Program", which is described in more detail commencing at paragraph 121 below.

117 In July 2018, NAB started making remediation payments to some customers impacted by the PP Fees overcharging and writing to impacted former customers of NAB identifying that the customer had been incorrectly charged a PP Fee and asking the customer to nominate an account into which their refund amount could be paid.

118 By February 2019, NAB had identified a potential approach to retrieve the historical periodical payments and related fees charged to customers whereby the data was available from 1 August 2001 to the present from its "Statement Transaction" system. The Statement Transaction data recorded historical periodical payment transactions and the associated PP Fees that had been charged over time (and accordingly, was not affected by the same "point in time" limitations as the data extracted from the Master File).

NAB notifications to ASIC

119 On 4 July 2018, NAB notified ASIC of the PP Fees overcharging by a breach report to ASIC related to those customers within the scope of NAB's Initial Remediation Program, being customers identified from the September 2016 and January 2018 Master File data extracts.

120 On 28 February 2019, NAB informed ASIC that it had identified a potential approach to access the data required to identify all customers who had been overcharged PP Fees in the period from August 2001 and that it was investigating this possibility:

> …as a matter of the highest priority for the purpose of developing a new methodology for undertaking a supplementary remediation program" which was intended to "identify all periodical payments for which a fee was incorrectly charged for the period 1 August 2001 to present, without the need to adopt assumptions as was considered to

be necessary when relying on the data sources used previously.

NAB's remediation to customers

Initial Remediation Program

121 On 13 July 2018, NAB commenced remediation payments to customers (Initial Remediation Program).

122 Payments under the Initial Remediation Program were processed in two tranches. The first tranche of payments was processed on 13 July 2018. The second tranche was processed on 26 October 2018.

123 NAB remediated at least 4,579 customers a total of $688,318.41 under the Initial Remediation Program (including compensatory interest to reflect the "time value of money"). This excludes the amounts that NAB remediated as part of its monthly exception reporting process, which commenced on 28 June 2018 and is described in paragraphs 130 to 132 below.

124 The customers within the scope of the Initial Remediation Program were identified from two point in time Master File data sets extracted by NAB in September 2016 and January 2018.

125 The Master File data was used to design the Initial Remediation Program.

126 The Initial Remediation Program was undertaken on the basis of a number of assumptions.

127 For customers identified as having a periodical payment arrangement with an incorrect PP Fee configuration and whose arrangement had been in place since 2014, NAB assumed that the incorrect fee configuration had been in place since the PP arrangement commenced, even if the arrangement had been amended and the incorrect configuration may have only been in place since the amendment date.

128 For customers identified as having a periodical payment arrangement with an incorrect PP Fee configuration and whose arrangement had been in place before 2014, NAB applied the following approach:

128.1 if the periodical payment arrangement had been amended, it was assumed that the incorrect fee configuration had commenced on the date of that amendment;

128.2 if there were multiple amendments, it was assumed that the incorrect fee configuration had commenced on the date of the most recent amendment;

128.3 if the periodical payment had not been amended, it was assumed that the incorrect fee configuration had been in place since the customer's account was opened; and

128.4 if the date identified by the above process was earlier than 26 October 2011, NAB remediated from 26 October 2011 (reflecting a maximum remediation period of seven years between 26 October 2011 and 26 October 2018).

129 The approach described in paragraph 128 above was implemented due to NAB's understanding that the data available to it about establishment dates for periodical payment arrangements commencing prior to 2014 was unreliable. In around February 2019, in the course of responding to a statutory notice issued by ASIC, NAB identified that its understanding was incorrect and that the commencement date data utilised for the purpose of the Initial Remediation Program was reliable in relation to periodical payments commencing both before and after 2014.

Exception Reporting Process

130 On 28 June 2018, NAB obtained a data extract from the Master File and utilised it to commence an 'exception reporting' process which NAB undertook on a monthly basis.

131 The purpose of the exception reporting process was to identify incorrect PP Fees on a monthly basis, so that these matters could be corrected and impacted customers remediated.

132 NAB prepared the first exception report in July 2018 and continued the exception reporting process until March 2019 (to reflect that NAB ceased charging PP Fees on 22 February 2019).

133 NAB remediated customers a further $10,045.29 during this period for incorrect PP Fee charges identified through the monthly exception reporting process.

Supplementary Remediation Program

134 From at least 28 February 2019, NAB employees were aware they could potentially access the data required to identify all customers who had been overcharged PP Fees, potentially enabling it to remediate customers who were affected by the overcharging as far back as August 2001.

135 On 12 September 2019, NAB sent an email to ASIC confirming that it had finalised the design of a methodology for a supplementary remediation program utilising this data.

136 The objective of the program is to remediate all customers who incurred an incorrect PP Fee charge between 1 August 2001 (being the start date of the available data) and 22 February

2019, and who had not been (or had not been fully) remediated pursuant to the Initial Remediation Program (Supplementary Remediation Program).

137 As at June 2020, NAB had paid or intended to pay remediation in the amount of approximately $2,693,210 (plus compensatory interest) in respect of 1,448,417 transactions for PP Fees charged during the Relevant Period as part of its Supplementary Remediation Program.

138 NAB divided the Supplementary Remediation Program into tranches and payments to impacted customers within the first tranche commenced on 10 December 2019.

139 As at 4 December 2020, NAB had paid $7,714,314.48 under the Supplementary Remediation Program and some payments were still to occur.

140 The total amount of remediation payable by NAB through the Supplementary Remediation Program, in relation to incorrect PP Fee charges between 1 August 2001 and 22 February 2019, is $10,053,767.66 (including compensatory interest). This amount is payable to 70,265 current and former customers.

141 As at 20 April 2022, NAB had paid $8,362,639.54 of the total remediation amount to affected customers.

External assistance

142 By way of an engagement letter dated 3 April 2019, NAB engaged PricewaterhouseCoopers (PwC) to provide assistance with its Supplementary Remediation Program. The objectives of the engagement were stated in an engagement letter in the following terms:

> The objectives of this Engagement Contract are to ensure that NAB's customer remediation program is appropriate, that it is executed correctly, and that NAB has done the right thing by its customers.
>
> In particular, the purpose of the review is to ensure that NAB's methodology for identifying impacted customers is accurate, and that its customer remediation program is properly designed and correctly executed.

143 The scope of PwC's engagement includes reviewing and validating NAB's approach to:

143.1 identifying all incorrectly charged periodical payment fees in NAB's available data;

143.2 quantifying the remediation to be paid to customers for incorrectly charged periodical payment fees, including NAB's methodology for calculating the compensatory interest added to remediation payments; and

143.3 executing the remediation payment process.

144 To date PwC has issued reports stating that it considers:

144.1 NAB's methodology for identifying impacted customers is accurate, and that its customer remediation program is properly designed; and

144.2 NAB has quantified the required compensation payments for customers correctly and made allowance for compensatory interest appropriately.

Unpaid remediation

145 NAB has not remediated all customers who were overcharged PP Fees as remediation payments have not been made to customers in the following circumstances:

145.1 customers who were identified in NAB's Supplementary Remediation Program, are a former customer, and are to be paid remediation less than $20. In those circumstances, NAB has not attempted to make payments and has stated that it intends to pay the amount directly to charity without attempting to contact the customer at the conclusion of NAB's Supplementary Remediation Program; and

145.2 if a remediation amount of $20 or more is due to a current or former customer who does not hold a NAB account into which the remediation payment can be made, and NAB does not receive a response to its attempts to communicate with the customer about their entitlement utilising the contact details NAB holds on file (if any), or does not hold contact details on file. In those circumstances, NAB has stated that it will pay the remediation amount to charity if the amount is less than $500, and to ASIC as unclaimed moneys if the amount is more than $500.

146 ASIC's Regulatory Guide 256 issued on 15 September 2016 says:

> RG 256.135 Where the amount of compensation to be paid to a client is below $20 and the client cannot be compensated without significant effort on your part—for example, because the client no longer holds an account with you—you may instead make a community service payment by paying the amount to an appropriate organisation (which will generally be not for-profit) to fund activities that could be characterised as a community service. You may wish to consult ASIC on which organisations may be appropriate to pay this amount to. You must not profit from the misconduct or other compliance failure.
>
> Note: See Regulatory Guide 100 Enforceable undertakings (RG 100) for further information about community service obligations.

147 If an affected customer contacts NAB after their remediation amount has been paid to charity or to ASIC as unclaimed moneys, NAB has stated that the customer will still be entitled to

payment of the remediation amount. In the circumstance where a customer's remediation has been paid to charity, NAB has stated that it will still remediate that customer.

NAB's systems

NAB's systems and processes in relation to periodical payment arrangements

148 Paragraph 15 above describes the process for NAB staff to create a periodical payment arrangement during the Relevant Period. As noted above, NAB had "help screens" accessible to NAB employees within the PP Setup Screen in eBOBS, which provided an explanation of the PP Fee Indicator when establishing a periodical payment arrangement. Further, NAB staff could review the Personal Fees Guide and Business Fees Guide, which contained the details of the PP Fees and PP Fee Exemptions.

149 Between 20 July 2007 and July 2018, NAB did not have any system or process in place to detect (and if detected, correct) whether a periodical payment arrangement had been established incorrectly.

150 As noted above at paragraph 33 and demonstrated by Attachment 3, NAB's account statements did not advise customers whether a customer was entitled to a PP Fee Exemption, or whether the PP Fee Exemption had not been applied.

151 As noted above at paragraph 132, between July 2018 and March 2019, NAB remediated customers it identified as being incorrectly charged through its monthly exception reporting process.

152 NAB's reliance on monthly extracts of the "point in time" Master File data for this process meant that incorrect PP Fee charging may not have been identified in circumstances including where:

152.1 the underlying periodical payment arrangement was established and then cancelled in the time between monthly exception reports being generated; and

152.2 the incorrect PP Fee charging was identified and corrected in the time between monthly exception reports being generated.

153 NAB admits that the monthly exception reporting process could have been implemented earlier than July 2018 because it relied on the methodology designed by Mr Prasad between October and November 2017 for utilising data extracted from the Master File to identify periodical payment arrangements with incorrect PP Fee configurations.

154 NAB's monthly exception reporting process did not eliminate overcharging of PP Fees. It primarily identified the PP Fee overcharging after it occurred so that NAB could remedy incorrect PP Fee configurations when identified and remediate impacted customers.

155 Prior to 22 February 2019, NAB did not change its systems in relation to the PP Fees to eliminate instances of overcharging of PP Fees.

156 Prior to 22 February 2019, NAB investigated ceasing to charge PP Fees altogether (being the solution ultimately adopted by NAB).

157 On 22 February 2019, NAB ceased to charge customers PP Fees.

158 During the Relevant Period, NAB's systems and processes did not detect or prevent all wrongful charging of PP Fees when it did occur. NAB implemented the exception reporting process during the Relevant Period but, as explained at paragraph 152 above, it may not have identified all incorrect PP Fee charges.

NAB's systems and processes in relation to data

159 As noted above in paragraph 82, NAB staff investigating the issue and conducting the Initial Remediation Program did not know they could retrieve the historical PP Fees charged to customers using NAB's "Statement Transaction" system. The ability to do this was ultimately identified in around February 2019. Because of this when NAB's investigating team developed the Initial Remediation Program the team focused on attempting to overcome the limitations in the Master File data.

160 As at 5 November 2018, NAB's understanding was that there were no data sources available that would have enabled NAB to:

160.1 identify the structure of historical periodical payment arrangements (i.e. Sending / receiving account and payment frequency) to determine whether an arrangement recorded in a Master File extract had been structured differently in the past;

160.2 identify details of historical PP Fee configurations to determine whether an incorrect fee configuration had been configured correctly in the past and vice versa;

160.3 identify reliable commencement dates for relevant periodical payment arrangements commencing before 1 January 2014;

160.4 fill in the gaps in the Master File extracts where data was missing for some periodical payment arrangements.

161 NAB identified the Statement Transaction data as a result of investigations commencing in around January 2019 for the purpose of responding to a question in a statutory notice issued by ASIC.

162 Between December 2016 and February 2019, the employees undertaking the work to identify the customers who were affected by the PP Fees overcharging:

162.1 did not identify the Statement Transaction data, as noted above in paragraph 159. This is partly because they did not have the skills to be able to identify or obtain this data. This is noted in two emails from Ms Macalister dated 4 and 19 May 2017, where she stated that "the payments team does not have the skill to work out who has been overcharged" and that they "are struggling to find someone with the skills to work out who has been overcharged";

162.2 incorrectly thought that the data challenges were insurmountable because they did not identify that the Statement Transaction system could be used to remediate impacted customers and they continued to focus on the Master File data; and

162.3 incorrectly thought that NAB did not have the data to be able to reliably identify the start date of the pre-2014 periodical payment arrangements because they did not identify that the Statement Transaction system could be used to remediate impacted customers and / or because they did not make further enquiries about the data that was available.

163 Through the Sample Testing NAB identified instances of PP Fees overcharging in October 2016, but due to the issues identified in paragraphs 159 and 162 above:

163.1 NAB was not able to commence developing the Supplementary Remediation Program to identify and remediate all impacted customers until around February 2019 (when the Statement Transaction data was identified);

163.2 NAB did not commence remediating affected customers until July 2018, and as at 30 June 2021, NAB continues to remediate affected customers.

164 Until 22 February 2019 NAB continued to charge PP Fees and continued to cause harm in instances where it charged customers incorrectly for those fees.

165 NAB's systems and processes did not result in NAB identifying and remediating, during the Relevant Period, all customers affected by wrongful charging of PP Fees.

Harm

166 NAB customers who incurred the PP Fee charges referenced in paragraph 137 above suffered financial loss and inconvenience because they were required to pay PP Fees that NAB was not entitled to charge.

167 NAB implemented the Initial Remediation Program and the Supplementary Remediation Program to address the financial loss and inconvenience to customers.

168 NAB has not compensated all customers who were incorrectly charged PP Fees for the reasons set out in paragraph 145 above.

169 Payments under the Supplementary Remediation Program are continuing. As at 17 September 2021, remediation totalling $1,698,337.30 (including interest) had not been paid to 18,220 affected customers because of the matters described at paragraph 145.

170 A total of 72 of the affected customers referenced in paragraph 169 above incurred incorrect PP Fee charges in the period between 1 January 2017 and 28 June 2018 (being the date NAB obtained a data extract from the Master File which it utilised to commence the exception reporting process). These 72 customers were charged a collective total of $1,610.10 incorrect PP Fees during that period.

NAB's investigation of solutions to address incorrect PP Fee charging

171 In September 2017, Ms Macalister presented a paper titled "PP Refund Discussion Paper" to the PRMF.

172 The paper detailed the current status of NAB's investigations into the periodical payment issue. Under the sub-heading "Our Actions" the paper noted the potential system changes and associated costs that could be involved, in the following terms:

> …
>
> 2. Investigation into implementing a systems fix to prevent PP fees being charged to the excluded accounts would be costly ~$1.5M(High level estimate. (Requires EBOBS systems)
>
> 3. If we were to remove the fee altogether we would still require a PP to remove from ebobs and change process for bankers etc. – Still need to investigate what the requirements would cost.

173 In this context, the reference to requiring a "PP" was a reference to the need to submit a "Project Proposal" to request a change to NAB's systems rather than being a reference to a periodical payment.

174 As stated in paragraph 99 above, on 30 October 2017 Ms Macalister sent a document to the members of the PRMF which contained an amended version of Mr Prasad's analysis of incorrect PP Fee charging. The document also included a section headed "Eliminate root cause", which stated:

> Systems fix - $1.5m
>
> Charge the same fee across the board or remove fees entirely.

175 On 13 November 2017, Ms Macalister sent an email to Mr Robin Lim (Head of Product Management, Product Management, Simple Home Loans), copied to Ms Russell, which stated:

> Hi Robin
>
> We have identified that some customers who have set up a periodic payment through their banker have been overcharged. This is because the banker must manually choose between 3 fees & they make errors.
>
> The fee codes are
>
> Nil fees when the payment is to an eligible mortgage product
>
> $1.80 when the payment is to another NAB account
>
> $5.30 to a non-NAB account.
>
> We have identified that the biggest source of error is when customers have been charged $1.80 but should not have been charged at all. These $1.80 fees are pointed to your PU.
>
> Due to the amount of time it has taken us to work with the poor data available, we will arrange the customer remediation activities so that we act as quickly as possible. However, we need support from you on 2 counts:
>
> Agreement to pay the refunded amounts – we believe around $15000
>
> Agreement to waive fees going forward to prevent further error.
>
> I will book a meeting with you to discuss, as there is a fair amount in this.
>
> Alida

176 At the time the investigating team believed that some of the revenue from PP Fees was attributed to NAB team in which Mr Lim worked, but it was subsequently confirmed that all of the PP Fee revenue was attributed to the Payments team.

177 Mr Lim asked for further information before making his decision and copied Ms Sandra Redwood (Manager, Management Assurance, Home Lending) and Ms Kristy Clucas (Product Manager, NAB Mortgages, Customer Products & Services) into the correspondence.

178 On 15 November 2017, Ms Clucas, in responding to the email chain referred to above at paragraph 175, relevantly asked "Is there any way the fee exemption can be automated and / or removing the fee for nab to nab PP's?" Ms Macalister responded stating, relevantly:

> Yes it could be automated but at a cost of $1.5m last time it was quoted so not likely to get up. The scant information we have shows declining fee income as customers move to self-serve.
>
> I expect there is some element of ingrained banker behaviour that needs to be shifted – when a new loan is established they should not set up these payments on behalf of customers. I do agree with you, under our simplification agenda these fees should be removed to prevent [sic] because no amount of banker training will remove the incidence of further errors/remediations.

179 On 29 November 2017, Ms Macalister sent an email to Mr Duthie and Mr Rohan Browne (Product Manager Payments Channels, Domestic Payments and Channels) reporting that Mr Franklin had requested an investigation into the possibility of moving customers with periodical payments onto internet banking. This would have enabled these customers to "self-serve" recurring payments themselves via NAB's internet banking platform without incurring any fees, thereby eliminating the potential for them to be charged PP Fees in error.

180 Separately, Ms Macalister's email referred to the proposal to cease charging PP Fees and stated:

> Raise PP for the change? What is the lead time, is it a matter of just setting the fee to zero? May be able to get $$$ to do this from the Deposits fee simplification project.

181 Ms Macalister's email also referred to the possibility of retiring periodical payments altogether, noting the following considerations (among others):

> ○ Is it possible to remove the option from eBOBS? What other alternative is available if customers do not have internet access? This may not be feasible
>
> ○ Do a RAT survey to get a view from bankers of how they use this product
>
> …
>
> ○ Transition customers to online direct debit, will require communications & some sort of data upload
>
> ○ (may be possible to get $$ for this activity from the $25m product simplification bucket).

182 In the first week of December 2017, Mr Duthie worked together with Ms Lisa Shay (Senior Analyst, Business Initiatives, Deposits & Transaction Services) to prepare a "Project Brief" regarding the proposed removal of PP Fees for consideration by NAB's "Triage" team (PP Fee Removal Brief). "Triage" was the name of a team within NAB that considered funding

requirements for proposed internal projects. On 4 December 2017, Mr Duthie sent an email to Ms Shay which described the following requirements of the project:

> We would be looking to move all the Periodic Payment fees to $0 for all transactions in both personal and business customer segments.
>
> We would be looking to remove the Periodical Payment (Authority) fees, which is different to the Periodical Transfers that customers can execute in IB without charge. I need to better understand the infrastructure differences between the IB and eBOBs Periodical Payment/Transfer to understand if the technology infrastructure is similar or completely different.

183 By 6 December 2017, the PP Fee Removal Brief had been submitted to NAB's "Triage" team for assessment and allocated Project Proposal number 50940.

184 The brief described the "Proposed Solution" as follows:

> All existing Periodical Payments for personal and business customers to be updated to have a Periodical Payment fee of $0.
>
> All new Periodical Payments for personal and business customers to have a Periodical Payment fee of $0.
>
> When a Bankers [sic] set up a new Periodical Payment or amends an existing Periodical Payment they will no longer be required to input an [sic] Fee Exemption Reason or Fee Exemption Authority.
>
> System validation to stop Bankers from selecting the fee amount to apply to any existing or new Periodical Payment
>
> …
>
> Also, request to update the Periodical Payment Authority form and upload this form to digital

185 On 11 December 2017, Mr Duthie sent an email to Mr Glen Smart (Consultant, Change, Delivery and Workforce Planning, Business Enablement) requesting assistance to set up a Retail Advisory Team or "RAT" Survey in relation to periodical payments.

186 NAB's Retail Advisory Team is comprised of a number of experienced staff from different banking divisions who provide feedback in relation to various front-end banking issues by responding to survey questions.

187 Mr Duthie's email stated that the purpose of the RAT Survey was to:

> …investigate customer and banker behaviour around periodical payments set up with the help of NAB/bankers via the Periodical Payments Authority form. The reason is that we are about to remove all fees associated with periodical payments for all consumer and business segments as part of the Deposits Fee Simplification initiative underway.

…

> We don't want to prevent bankers from helping customers set up periodical payments on eBOBS, but we do want to remove the ability for bankers to charge fees to prevent instances of overcharging.

188 Mr Duthie's email set out a number of questions to be included in the survey including:

188.1 "Why do customers set up periodical payments in branch?"

188.2 "Do these customers have access to Internet Banking and online channels to set up a periodical payment?"

188.3 "Would it be problematic if we removed the ability to set up banker assisted Periodic Payments and ask customers to set up a recurring payment through Internet Banking instead?"

188.4 "Will customers likely notice if NAB removes all fees associated with periodical payments?"

189 On 14 December 2017, a Periodical Payments Triage session occurred. After the Triage meeting Mr Duthie emailed Ms Shay stating that he would "…be working on developing a business case to secure funding/engaging with the various divisions to be impacted in the interim".

190 On 15 December 2017, Mr Duthie communicated the outcome of the 14 December Triage meeting to Ms Macalister. Mr Duthie relevantly advised Ms Macalister that:

> Just an update from triage yesterday:
>
> - Triage said the Periodical Payments PP was a reasonably straightforward delivery on the lower end of $100k (of which $50k was for eBOBS changes, $10k for testing and possibly $20k if PBOP requires changes)
> - Triage suggested to get $100k of funding just in case
> - We could slot this change into one of the monthly enterprise releases for eBOBS giving us more flexibility on the delivery date
> - No specific delivery timeline was given…

191 At this time, Mr Duthie was also seeking to verify the total revenue generated by PP Fees. Mr Duthie's email to Ms Macalister provided an update in this regard, relevantly stating that:

> …I'm planning on meeting up with Kum Chau to validate finance's numbers early next week. Hoping we can work out the difference with Kris' numbers shortly.

192 As explained in paragraph 104 to 106 above, Mr Chau had initially determined through analysis performed in November 2016 that NAB's revenue from periodical payments averaged $15,000

per annum, but subsequently communicated to Mr Duthie on 19 and 20 December 2017 that revenue from periodical payments was substantially higher than this.

193 On 19 December 2017, Mr Duthie sent an email to Mr Smart, which relevantly stated:

> I've done a bit more research into the total revenue from Periodical Payments with the help of Finance and we believe there is more than originally estimated. In the situation where we don't remove all fees, I was hoping to present another question to bankers around how we might simplify/cut down the fees to make it easier for bankers/customers.

194 Mr Duthie informed Mr Smart that he had added an additional question to the RAT Survey as a result, namely:

> If NAB were to continue with some fees for periodical payments, how might we simplify and cut down these fees to make it easier for bankers and customers.

195 On 10 January 2018, Mr Duthie sent an email to Ms Macalister suggesting a process for adding new payment frequencies to internet banking. In this regard the email stated:

> Last month we discovered that IB only allows 4 frequency types: weekly, fortnightly, monthly and quarterly. We decided to put a proposal forward to add additional frequencies into IB. I'll meet with Lisa Shay next week to start putting together a proposal for Triage but attached is a draft so far…

196 Mr Duthie's email also included analysis which showed the degree of customer demand for periodical payment frequencies that were not available in internet banking. His email also included "research" about the fees other banks were charging in relation to periodical payments. Mr Duthie also stated:

> If NAB can provide a more comprehensive suite of payment frequencies on IB then there is really no excuse for customers to complain about fees or reason for NAB to stop charging the fees.

197 In the same email, and as explained at paragraph 107 above, Mr Duthie also stated:

> I have also included Kum Chau's emails with the recent P&L that shows $1.4M associated with PPs and some other misc. Products and then his workings that showed the figure might be closer to $800k.

198 On 12 January 2018, Ms Macalister sent an email to Mr Duthie instructing him to go ahead with preparing a proposal for Triage to add additional payment frequencies to internet banking and stating:

> I am surprised how high the revenue is, in this case we will probably not want to remove fees but this will be an interesting discussion to have with Paul. Perhaps there might be appetite to have a uniform low fee – say 50c for all transaction types which will reduce errors going forward? (however, this will result in a massive revenue decrease in the short term, just can't win!)

199 On 16 January 2018, Mr Smart sent the results of the periodical payments RAT Survey to Mr Duthie.

200 Later that day, Mr Duthie sent an email to Ms Macalister with a "[s]ummary of the main findings" of the survey, which relevantly included the following:

- Most PPs in branch are set-up for older customers that refuse to have IB
- Safe custody uses this product to set up fees (so we can't remove the product from ebobs)
- Bankers don't like filling out the authority form (but I don't think we can do away with it given the amount of errors)
- All bankers are referring customers in the first instance to IB to set up their PPs
- Most bankers find the current PP set-up process reasonable
- Most bankers agree that keeping the fees are reasonable.

201 The RAT Survey also included responses from retail branch staff expressing views that:

201.1 retail branch staff were encouraging customers to establish periodical payments using internet banking, which gave the customer more control and did not involve a fee; and

201.2 some customer groups still required assistance to establish staff-assisted periodical payments, particularly elderly and rural customers, and those customers would be adversely affected if periodical payments were no longer available.

202 Mr Duthie told Ms Macalister that he would:

> …look into how we might reduce the fee to $0.5/transaction based on our chat last week and assess what cost this would have.
>
> I'm also keen to workshop how we might improve the authority form to guide bankers and eliminate mistakes if possible.

203 On 29 January 2018, Mr Duthie sent an email to Ms Macalister attaching copies of a "Project Proposal to uplift PP frequencies in IB" (Internet Banking Uplift Brief), and a spreadsheet headed "Scenario Modelling: Periodical Payment Branch Fees" which Mr Duthie described as setting out "the cost scenarios for changing the fees for PPs" (Cost Modelling Spreadsheet).

204 The Internet Banking Uplift Brief described the "proposed solution" of the project as follows:

> Uplift the available periodical payments frequencies in NAB Connect Desktop and Mobile as well as Internet Banking Mobile and Desktop to also include:
>
> - Four weekly

- Last day in each month
- Last week of each month
- Bi-monthly
- Half-yearly
- Yearly

205 It explained that by making these changes NAB could "reduce the number of banker-assisted transactions, reduce transactional errors, migrate more customer [sic] to online channels and reduce the number of annual FAIR complaints and reimbursement costs".

206 With respect to the Internet Banking Uplift Brief, Mr Duthie relevantly advised Ms Macalister that:

- Triage viewed the potential cost to make this change of between $250k to $500k across all digital channels IB/NABC desktop/mobile.
- Adam Dineen however viewed the cost as closer to $1M.
- It will be up to the Digital Delivery Centre to provide next level costing, which will require us to source $5k of funding in order to get the assessment. Lisa Shay wanted me to follow up on sourcing this funding as soon as possible as I believe the wait time for digital is long.
- The change was not seen as architecturally significant, mostly impacting digital and with no large program impacts and open for an enterprise monthly release.
- If you think this proposal is worthwhile, let me know and I will go ahead and source some funding to see it move forward.

207 The Cost Modelling Spreadsheet set out analysis relating to six alternate scenarios for the charging of PP Fees and the associated flow-on effects on the number of customers utilising periodical payments (described as "Y.O.Y Customer Uplift %") and PP Fee revenue. The six scenarios were as follows:

207.1 "Scenario 1: No Fee Change @ Current 13% YOY decline", resulting in total revenue of $804,346.00;

207.2 "Scenario 2: Fees halved @ -5% customer uplift", resulting in a revenue loss of $360,386.09 compared to scenario 1;

207.3 "Scenario 3: Flat $0.6 Fee Change @ 3% customer uplift", resulting in a revenue loss of $589,275.67 compared to scenario 1;

207.4 "Scenario 4: Flat $0.3 Fee Change @ 9% customer uplift", resulting in a revenue loss of $720,795.86 compared to scenario 1;

207.5 "Scenario 5: No Fees at 12% customer uplift", resulting in a revenue loss of $904,346.00 compared to scenario 1; and

207.6 "Scenario 6: Raise fees to flat $5 @ 13 to – 20% customer declines YOY". This was described as a "revenue gain" of -$69,981.32 compared to scenario 1.

208 In his email to Ms Macalister, Mr Duthie stated that he was "leaning towards scenarios 2 ($0.9 and $2.5) or 3 ($0.6) as the right path moving forward that balances NPS and incentives for customers to move to IB".

209 On 31 January 2018, as noted above at paragraph 108, Ms Macalister sent an update email to Ms Russell which relevantly stated:

> Grant has taken the reins on this now, here is a quick summary –
>
> …
>
> we have also identified that all revenue comes into our PU and is worth approx. $800k pa, declining by 17% pa…
>
> …
>
> in terms of preventing future recurrence, we considered removing the fees altogether but this was when we thought the revenue was minimal. Plus the technology costs came back at $300k at triage and $1M from Adam Dineen. Plus banker RAT survey said they liked the fee because it encourages customers to self-serve.

210 On or about 20 February 2018, Mr Franklin met with Ms Macalister and Mr Duthie and informed them that he wished to proceed with funding for the internet banking uplift project.

211 On 2 March 2018, Ms Russell emailed Ms Macalister seeking an update on developments with the periodical payments investigation. Ms Macalister replied on the same day relevantly stating that:

> …Paul wants us to uplift the payment frequency options in Internet banking to include 4 weekly, yearly and a few others which customers can only get through the banker-assisted Periodical Payment process. Grant is going through the SaMC process to get an estimate for this now.
>
> Lastly, we need to work out how we prevent errors from occurring in future. One option still on the table is to waive the fees altogether – this issue is still outstanding.

212 On 23 March 2018, after NAB employees discovered that the relevant terms and conditions were amended in February 2002 as referred to above at paragraph 113, Mr Duthie sent an email to Ms Macalister which stated:

> I'm thinking we should switch off the fees across the board ASAP so we can start containing this. Can the Journeys team help us on this front or should I be pushing

ahead with our own project of $100k?

213 On 23 March 2018, Ms Macalister sent an email to Mr Simon Wirth (Business Lead, TP&P Billing and Pricing Transformation, Transaction Products and Pricing) which stated:

> We want to get rid of the periodic payment fee. Is this already on your radar or should we try to push ahead under our own steam.

214 At that time Mr Wirth was involved in coordinating a broader NAB project known as the "Fee Simplification Project". The objective of the Fee Simplification Project was to remove or consolidate a large number of fees applicable to NAB products and services in order to simplify NAB's fee structure and drive a better customer experience.

215 Mr Wirth confirmed in response to Ms Macalister's email dated 23 March 2018 that "it was on our radar" and asked who Mr Duthie should "work with to progress".

216 On 3 April 2018, Ms Christine Houle (Senior Consultant, Business Execution – Deposits and Transactions Services) sent an email to Ms Macalister attaching a spreadsheet containing recommendations as to whether certain fees should be removed through the Fee Simplification Project. Under a heading "Nov 18 Removal (Keep, Discuss, Remove)" the spreadsheet recorded the status of PP Fees as being "Remove".

217 On 11 April 2018, Ms Houle sent an email to Mr Duthie, which relevantly stated "Just confirming the decision to remove the Periodical Payments related fees as part of fee simplification". Mr Duthie emailed Ms Macalister asking for her assistance, who responded stating "…we will deal with all of decisions at GM level. Product managers do not have the authority to do this themselves".

218 On 2 May 2018, Ms Ruffell sent an email update to Ms Macalister in relation to the Fee Simplification Project, which relevantly stated:

> The Fee Simplification project believes they have secured funding through Journeys to complete the simple changes and including simple technology requirements. Their funding has been reduced so they are looking at their options.
>
> The project is working in phases.
>
> Phase 1 is reviewing and consolidating the [sic] as many fees as possible.
>
> Phase 2 will look at the option of the branch assisted fee and what fees would fit this style of consolidation.
>
> What are your thoughts on the following
>
> …

> Periodical Payments – A one off fee of $15 to establish, and no further fees.
>
> …
>
> This product is in decline and I don't want to remove the fee completely as the RAT survey indicates bankers like the fee- Promotes IB discussion free option for customer.

219 Ms Macalister sent an email in response to Ms Ruffell that day which relevantly stated:

> I agree with the establishment fee approach, should it be for establishment or amendment (ie anytime a banker needs to get involved). We know that bankers waive it a lot of the time, having a fee gives them a chance to use it as a deterrent or be a 'great guy' to their customer so that works. I am unsure what the amount of the fee should be – it would be good to have a single price point for a whole lot of over the counter transactions to make it easier to understand. $5 seems to [sic] low but $10 or $15 sounds about right

220 On 3 May 2018, Ms Ruffell sent an email to Mr Franklin (copied to Ms Macalister and others) attaching a document titled "Fee Simplification Review Paul Overview HJR" and stating "Here is an overview of the Projects Proposed fee consolidation/removal for November timeline. These will be the focus of the Friday meeting at 10am".

221 The attached document contained a spreadsheet headed "Fee Simplification – Fees for agreement Nov FY18", which included the following comments regarding the status of PP Fees:

221.1 under a heading 'Impact/ Revenue & Other': "Still to be determined I have advised the Fee Simplification team Product require further time to review and determine this product Strategy. Our thoughts are charge Establishment / ammendment [sic] fee of ~$10/$15";

221.2 under a heading 'Product Manager': "Your thoughts please Paul".

222 Subsequently, Mr Duthie prepared a document dated July 2018 and titled "Product Portfolio Review – Periodical Payments", which he sent to Ms Macalister by email on 27 July 2018. The Product Portfolio Review contained the following three alternative "product management" recommendations for periodical payments and set out indicative costings for each of them:

> Product management recommendation one:
>
> - Uplift the IB Periodical Payment front-end/back-end systems to support all frequencies, improved notifications and confirmation screens (cost ~$0.5M)
> - Off-sale product and manage to decline, contingent on Mortgage agreement. Continue to allow Safe Custody until exit ($TBA)
> - Monitor banker-assisted Periodical Payment fees monthly for errors, continue fee refunds until off-sale (cost ~$30k/year)

Product management recommendation two:

- Introduce a flat establishment fee across all Periodical Payments set-up by bankers and remove variable fee/payment (cost ~$0.2M)
- Monitor banker-assisted Periodical Payment fees monthly for errors, continue fee refunds until variable fee removal (cost ~$30k/year)

Product management recommendation three:

- Migrate all Periodical Payments to same back-end system as IB (including loans) thereby removing all fees (cost ~$2M)
- Decommissioning of Authority Payment System ($ TBA) The system is different to the IB scheduling system, contingent on Safe Custody/DDR exit, Mortgage acceptance.
- Monitor banker-assisted Periodical Payment fees monthly for errors, continue fee refunds until fee removal (cost ~$30k/year)

223 The Product Portfolio Review also set out examples of feedback regarding periodical payments provided by retail staff via the RAT Survey and, in a section headed "Executive Summary", included the following statement regarding retail staff feedback:

> Banker feedback indicates that customers setting up banker-assisted Periodical Payments do not like using IB & have limited access to Internet facilities. These concerns are misaligned with NAB's digital strategy, especially given branches provide Internet Banking facilities and bankers are available to guide and support customers.

224 On 9 October 2018, Ms Kristy Baldwin (Head of Business Execution, Deposits & Transaction Services) sent an email to Mr Franklin, with the subject line "D&TS Fee Simplification opportunities in FY19", which relevantly stated:

> You may have heard the good news; we have secured $1m growth funding to deliver Fee Simplification in FY19… We are keen to review this and prepare a simple business case to take to CDC ASAP with our proposal to remove X fees in FY19, so we can secure funding and get to work.
>
> …
>
> In the first instance, we want to target the removal of low hanging fruit / fees customers complain a lot about.

225 On 20 December 2018, NAB advised ASIC (in response to a question posed by ASIC regarding what solutions NAB was investigating to ensure that no customers were incorrectly charged a PP Fee in future):

> ..Since the submission of NAB Letter to ASIC on 5 November 2018, NAB has formally approved and allocated funding to remove all fees for Periodical Payment transactions. Fees will be removed for both new and existing Periodical Payment arrangements.
>
> As we explained in NAB Letter, the process to 'switch off' the fee is complex because

> it is hardcoded into legacy mainframe systems. System specialists and delivery teams are currently identifying the specific steps and changes to technology systems required, including regression testing required to ensure the change is correctly implemented.
>
> Once the technology systems specialists and delivery teams have confirmed the approach, our objective is to remove the fee in 2019. The manual exception reporting process will continue until the Periodical Payment fees have been successfully removed.

226 On 30 January 2019, Ms Houle emailed an invite to Ms Macalister and Mr Duthie for a meeting on 1 February 2019, which stated:

> Hi, this is to walk you through the requirements for the Periodical Payment fees removal. Apologies for the short notice…technology is waiting for this document to complete their assessment.

227 The invite attached a draft document prepared by Ms Houle titled "Business Requirements Specifications – Periodical Payment Fees Removal". This document set out, among other things, an overview of the requirements of the project, a summary of what actions needed to be taken to meet those requirements and a risk assessment.

228 In an introductory section headed "Project Overview" the document stated:

> 1.1 Project Background
>
> …
>
> Overcharged arrangements are due to banker error when identifying appropriate fees. The current fee charging structure could be considered complex given the various account charging scenarios. Therefore the most appropriate solution to addressing overcharging is to remove all periodical payment fees.
>
> This information has been communicated to ASIC and we have since committed to them that we will remove all periodical payment fees in early 2019.
>
> This project is part of the Fee Simplification program which notably aims at rationalising the overly complex Business Banking fee landscape, building trust with customers through less, more simple fees, and improving fee transparency.
>
> Due to urgency, the first phase of this project focuses on a quick technology solution wherby [sic] all the Periodical Payment fees will be set to zero ($0).
>
> 1.2 Document Purpose
>
> The purpose of this document is to specify the business requirements associated with the fee rationalisation for the Periodical Payment product.
>
> The objectives are:
>
> obtain confirmation from stakeholders that the business requirements have been accurately captured and communicated to stakeholders and,
>
> to consequently proceed a technical assessment of the design, development and testing of the solution.

229 On 1 February 2019, Ms Macalister and Mr Duthie met with Ms Houle. Amendments to the document were agreed between them on the same day and a final version was approved by Ms Macalister.

230 In an email to Ms Macalister and Mr Duthie on the same day Ms Houle explained that the following steps needed to occur following approval of the Business Requirements Specifications document:

> 1. Send document to Michael in order to obtain the technology assessment - CH
>
> 2. Communicate changes to be made to the Fees and Charges guides (to Lisa and Tara) - CH
>
> 3. Work with Grant on internal collateral changes – CH
>
> 4. Technology Design, Development and Testing project phases – Michael and feedback from business throughout – CH to Project manage
>
> 5. Implementation – BVT – Grant/Alida

231 On 14 February 2019, Mr Michael Chan (Manager, Engineer – Account Servicing Management, Account Management, Technology & Operations) sent an email to Mr Duthie and Ms Houle confirming that the required technology "clearance / approvals" had been provided and the project implementation had been scheduled for 22 February 2019.

232 On 22 February 2019, NAB ceased to charge customers PP Fees in the circumstances described above.

233 On 28 February 2019, NAB clarified its previous response to ASIC in relation to certain aspects of the process to "switch off" the fee, which is described above at paragraph 225. Relevantly, NAB stated:

> … To expedite the regression testing associated with this change three people were assigned to the regression testing and it took four business days to complete. At the time of the First Letter, this project had not been scoped. The person who provided the information underlying the adjacent statement (Alida MacAlister) [sic] understood that the fee was hardcoded into the Authority Payments system such that the programming code would need to be rewritten to remove the fee and more extensive regression testing would be required due to this coding change.

The issues raised

234 From the claims advanced by ASIC in this matter the following issues arise:

(a) Did NAB engage in misleading conduct by charging PP Fees in circumstances where it had no contractual entitlement to do so?

(b) Did NAB engage in misleading conduct by the language it used in customer account statements in relation to the charging of PP Fees in circumstances where it had no contractual entitlement to be paid the amount deducted?

(c) Did NAB engage in unconscionable conduct by incorrectly continuing to charge PP Fees when it knew that those fees were not payable, or when it failed to inform its customers of the overcharging for the period from January 2017, or, alternatively, from October 2017 until July 2018?

(d) If any of the above are answered positively, did NAB fail to comply with the financial services laws in contravention of s 912A(1)(a) and (c) of the *Corporations Act*?

(e) If any of the above are answered positively, should declarations be made in relation to the contravention?

Claims for false or misleading representations

235 ASIC's initial claim was that NAB's conduct in incorrectly charging the PP Fees and including them on the customers' statements of account constituted misleading or deceptive conduct under s 12DA of the *ASIC Act* or false or misleading representations under s 12DB. Those sections provide as follows:

> **12DA Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.
>
> …
>
> **12DB False or misleading representations**
>
> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> …
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy …

236 Essentially, ASIC's claim in this respect can be discerned from the terms of the declaration which it submitted should be made. They are as follows:

> [That] between 20 July 2007 and 22 February 2019 (Relevant Period), including on 195,305 occasions between 25 February 2015 and 22 February 2019 (Penalty Period), on each occasion of charging or notifying the customer of the charging of a PP Fee, and in doing so representing in trade or commerce that it had a contractual entitlement

to do so when it did not, the Defendant (NAB) on each occasion it made a representation:

1.1 made false and/or misleading representations in connection with the supply or possible supply of financial services concerning the existence or effect of a condition, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act;

1.2 engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act; and

1.3 breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*.

237 NAB denied that it had engaged in any false, misleading or deceptive conduct in contravention of ss 12DA or 12DB.

Relevant principles in relation to ss 12DA and 12DB

238 Despite the commonality of expressions in ss 12DA and 12DB, these two provisions are directed at different matters. Section 12DA is more broadly directed at conduct which is misleading or deceptive, whereas s 12DB prohibits the making of false or misleading representations. Although there is a slightly different description of the nature of the impugned conduct, it is generally accepted that, in their employment in these provisions, there is no material difference between the concepts of "false or misleading" and "misleading or deceptive", which are effectively synonymous: *ASIC v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147; [2018] FCA 751 at [2263] (Beach J); *ASIC v MLC Nominees Pty Ltd* (2020) 147 ACSR 266; [2020] FCA 1306 at [47] (Yates J).

239 The essential question in their application is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to it into error, informing an erroneous assumption or conclusion about some fact or matter: *ASIC v Dover Financial Advisers Pty Ltd* (2019) 140 ACSR 561 (*Dover*); [2019] FCA 1932 at [98] (O'Bryan J), and the cases cited therein; *ACCC v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73, 81 [39]. It is generally accepted that the following subsidiary matters are relevant:

(a) the question of whether conduct is misleading or deceptive requires an objective standard which the Court must determine for itself: *Dover* at 586 – 587 [98];

(b) there must be a real and not a remote chance or possibility of its doing so: *Dover* at 586 [98]. The test is not whether that possibility is more or less than 50%: *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 [14] (*Dukemaster*);

(c) conduct which merely causes confusion or uncertainty or wonderment is not, of itself, misleading: *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 87 [106] (*Campomar*);

(d) it is not necessary to prove an intention to mislead or deceive;

(e) it is unnecessary to prove that the conduct in question actually misled or deceived any person;

(f) the conduct must be considered as a whole and in context, and it is inappropriate to "select particular words or acts which although misleading in isolation do not have that character when viewed in context": *Dukemaster* at [10].

240 Where, as in the present case, allegations of false, misleading or deceptive conduct are advanced by reference to members of a class of persons rather than by reference to one or more specific individuals, the question of whether the conduct was, or was likely to be, misleading or deceptive must be objectively determined by reference to the hypothetical ordinary and reasonable member of the class: *Campomar* at 85 – 87 [103] – [105]; *Google Inc v ACCC* (2013) 249 CLR 435, 443 [7]. As was said by O'Bryan J in *Dover* at 587 [99], citing *Campomar* at 84 – 87 [101] – [105] the question must be determined:

> … at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful…

241 This issue had been previously considered by Beach J in *Australian Investments and Securities Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 in addressing the manner of ascertaining whether misleading or deceptive conduct under s 12DA towards a class of people had occurred. His Honour observed at 282 – 283 [2264] – [2266]:

> [2264] Second, where the issue is the effect of conduct on a class of persons rather than identified individuals to whom a particular misrepresentation has been made or particular conduct directed, the effect of the conduct or representations upon ordinary or reasonable members of that class must be considered. This hypothetical construct avoids using the very ignorant (or gullible) or the very knowledgeable (or astute) to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful. The objective characteristics that one attributes to ordinary or reasonable members of the relevant class may also differ depending on the medium for communication being considered. There is scope for diversity of response both within the same medium and across different media.
>
> [2265] Third, in considering the hypothetical ordinary and reasonable member of the relevant class, one considers the dominant message conveyed. The question is whether there is a real rather than a remote possibility of the member of the relevant class being

> misled or deceived by the relevant conduct or statement. In the present context, does the relevant conduct or statement have a tendency to lead persons of the relevant class into error?
>
> [2266] Fourth, conduct that exploits the mistaken views of members of the relevant class may be misleading or deceptive or likely to mislead or deceive and may not be corrected by any obscure fine print, whether in content, size or location, that sets out the true position.

242 The process of ascertaining the "dominant message conveyed": *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, 653 – 654 [45]: involves the notional "cause and effect" relationship between the conduct complained of and the state of mind of the relevant person or classes of persons who experienced it: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25]. There must be a sufficient nexus between the impugned conduct and the consumer's misconception or deception. This was made clear in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1, 14 [51] where it was said:

> … The characterisation of conduct as "misleading or deceptive or likely to mislead or deceive" involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer's state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation. …

243 Both parties here accepted the case as one in which NAB had made representations to a class of persons rather than to the customers individually and, accordingly, it should be dealt with on that basis. It follows that an assessment is required of the objective acts and representations of NAB and of how they would be perceived by the ordinary and reasonable members of the class of customers: *ACCC v Coles Supermarkets Australia Pty Ltd* at 81 – 82 [43].

Were misrepresentations of the kind alleged made?

244 As NAB concedes that it was not contractually entitled to make the relevant charges in certain specified instances, ASIC alleges that on each occasion it made them and notified its respective customer it had done so, it expressly or impliedly represented that it was contractually entitled to do so, which representation was misleading within the meaning of the Act. Despite the overly broad terms of the relief sought by ASIC, it clarified that it was only asserting that the relevant conduct occurred when NAB wrongly charged a PP Fee by either charging one when it was not entitled to by the terms of the account, or by charging an amount in excess of that which it was entitled to. NAB contests ASIC's construction of the effect of its conduct.

245 It was commonly accepted in relation to all the issues under consideration that, at all relevant times, NAB was acting in the course of trade or commerce or in connection with the supply or possible supply of financial services.

Charging a fee

246 NAB submitted that the mere act of incorrectly charging fees to the accounts of its customers when not permitted by the account terms or merely charging more than it was entitled to, did not amount to misleading or deceptive conduct. Without more, the mere charging of a fee constituted by the debiting of an account was said to be incapable of conveying any representation to the customer who would not even be aware of its having occurred.

247 The submission should be accepted. The "charging" occurs when NAB deducts the purported fee from the balance of the amount which it records in its ledger as being owed to the customer. Before that deduction is communicated to the relevant customer it cannot amount to a representation, nor can it mislead that person. This was largely accepted by Mr Couper QC for ASIC in the course of oral argument, with the result that attention was focused on that part of the claim based on the narrations.

The narrations in the customers' statements of account

248 The central misrepresentation on which ASIC relied was the alleged effect of the recording of the charging of the PP Fees in the customers' account statements. It was said to have been made by the delivery to the customer of a statement of account with narrations indicating that the PP Fee had been charged. The narrations were in the following form:

> Incl Tfr Fee $[amount of PP Fee]

249 ASIC submitted that the narration was an implied representation that NAB was or had been entitled to debit the customers' accounts in the identified amounts in accordance with the terms and conditions on which the account operated, and that this was misleading because no charge, or a lesser one only, was payable. The issue is whether the communication of the account statements amounted to a representation that the right to make the charge in fact existed.

Context

250 The meaning or effect of the narrations are ascertainable only in the textual and circumstantial context in which they appeared. In the process of making factual determinations about this issue, less relevance is usually accorded to those circumstances which are more temporally distant from the occasion when the substantive act of representation is said to have occurred.

The maintenance of the account

251 The general relationship between the bank and its customer (aside from the specific terms of the account) is also important. Upon contracting with a customer, almost invariably the bank commences to maintain an internal record of the transactions occurring on the customer's account and informs the customer of the details of that record by issuing regular statements. Those statements purport to identify all the financial occurrences which affect its balance and the amount of its balance from time to time, the balance at the time of issue, the crediting of any interest, the deduction of any fees, and any transfers into and from the account.

252 ASIC submitted to the effect that, it might generally be assumed that, in the absence of any agreement to the contrary, customers would expect that the bank would have arranged its affairs in a way that would ensure that it would charge fees only in accordance with its contractual entitlements, and in particular, that it has arranged its computerised automated alterations to the account to operate in accordance with the terms and conditions on which the account was opened, and that when it deducts an amount from the balance and records it in a statement, the statement would accurately record the transaction involving their rights *inter se*. This approach fails to take into account some features of the banker / customer relationship and invests in the reasonable hypothetical customer an expectation of perfection.

The terms and conditions relating to the payment of PP Fees

253 According to the agreed facts, a PP Fee arrangement was put in place upon a customer's request for that service, and the formulation of the arrangement was recorded in a written agreement with the bank. A form would be completed by the customer alone or in consultation with a bank officer, and signed by the customer. The customer thereby authorised the making of the periodic payments and associated fees in accordance with the terms and conditions on the form which they acknowledged they had read. Unless a box was ticked which indicated that no charge would be payable, there were several ways in which a PP Fee might be paid. The terms and conditions on the second page of the form provided that a fee of $1.80 could be charged in relation to a periodic payment to another NAB account and that a fee of $5.30 could be charged where the payment was made to an account operated by another bank. The conditions authorised the bank to make the relevant debits to the account.

254 It may be assumed that when the PP Fee arrangement was made the customer would become aware of whether they had agreed to pay a fee for a particular periodic payments from their account. There was no suggestion that the content of the form used to establish the PP Fees

was known only to the bank. The evidence of the contractual relationship indicates the contrary.

The representations to be derived from the narration

255 By their very nature, bank statements received by customers merely record the dealings which the bank claims have occurred in relation to the account, whether they be debits, credits, transfers or the deduction of fees. There is no *a priori* assumption that each of the recorded transactions had in fact or in law occurred in accordance with the customer's authority or in accordance with the terms and conditions of the account. For example, it may well be that the person who had caused a particular transaction to occur had fraudulently secured access to the account for that purpose. The bank statement does no more than record and inform the customer of the bank's understanding of the existence of the transactions identified and, perhaps, of their conformity to the terms of the agreement. It does not purport, nor may it be implied to be, an absolute warranty of these things. Such an implication could not reach the standards of clarity required by a penal statute.

256 In relation to the transactions in question, the narrations record the transfer of funds from the customer's account to another account on a specified date, and an identifier of the entity or person to whom it was made. It also records a reduction in the amount standing to the credit of the customer in the account consequent upon the making of the payment. As part of the narration the words, "Incl Tfr Fee $[amount of PP Fee]", indicates that a fee had been charged in relation to the transfer to which the entry referred. It can be assumed that customers would expect that a fee might be charged in respect of a service which the bank had provided and, by the narration, the bank indicates that it has indeed charged the specified amount. The charge is confirmed by the reduction in the balance of the account.

257 The critical issue is whether, in the circumstances, the statement impliedly asserts the legitimacy of the transaction. It is clear that there is no express assertion to that effect. There is also nothing in the language of the narration to justify any such implication. Whilst the reference to a "fee" suggests that it is an amount that is due from the customer, it is not necessarily an assertion that it was correctly debited by the bank to the account. No submissions, other than by way of broad assertions, were made by ASIC that any implication arose from the terms of the narration.

258 As the narrations themselves contain no express or implied statements of NAB's contractual entitlement to charge PP Fees, a proposition justifying such an implication must find support

from other sources in order to be sustained. The only possible factor would be the extraneous circumstantial context and no suitable submission has been made in that respect. The necessary conclusion is that the narrations only recorded that the fee had been charged to the customer's account in respect of the particular transaction. That same analysis can be expanded to cover all the narrations in respect of all recorded transactions such that the statement can be taken only as a record of the actual transactions which NAB understood to have occurred on the account.

259 It is, perhaps, possible or even reasonable to regard the narrations as representations which reflect NAB's assertion of its belief as to the veracity of the transactions on the account. However, that was not part of ASIC's case and there is no need to ascertain whether such a representation was, in fact, made save that there is no evidence of the absence of a belief, which would be necessary to a misrepresentation.

The "Explanatory Notes"

260 The foregoing is supported by other aspects of the statements of account. First, a passage at the foot of each account statement (although it did not appear in passbook accounts) tended to negate any suggestion that the information contained in it was warranted to be accurate or that it accorded with the contract terms. It read as follows:

> **Explanatory Notes**
>
> Please check all entries and report any apparent error or possible unauthorised transaction immediately.
>
> We may subsequently adjust debits and credits, which may result in a change to your account balance to accurately reflect the obligations between us.
>
> For information on resolving problems or disputes, contact us on 1800 152 015, or ask at any NAB branch.

261 The first sentence expressly acknowledges the possibility of errors in the transactions recorded or that the transactions recorded were not authorised or justified. That is a not insignificant indication that the statement did not purport to provide more than the details of the dealings which actually occurred as the bank understood the position. Its reference to the existence of potentially "unauthorised" transactions is contrary to the notion that the recorded activity necessarily accorded with the customer's legal rights and entitlements. The bank's request for the customer to check that the transactions were authorised, predicates its not warranting that they were contractually justified and, in this respect, it also impliedly calls upon the customer

to have regard the terms and conditions on which the account is operated. The request to check plainly includes reference to the PP Fees which concern a facility that was especially requested.

262 The second sentence of the Explanatory Notes reinforces the conclusion that the statement of account did not purport to be an accurate record of the state of the account or of its compliance with the rights and obligations of the parties. It expressly afforded the bank the opportunity to correct any errors in the debit or credit items and thereby adjust the balance appropriately.

263 It is relevant that the passage headed "Explanatory Notes" was at the foot of the last page of the bank statement and amongst other information relating to government charges imposed on the account. Although the words, "Explanatory Notes", were in bold and enlarged type, the words following were in a relatively small font. Whilst it could not be said that the specific clause on which NAB relied was prominent, neither could it be said that it was hidden. Neither party made much of the prominence or otherwise of the clause.

264 Mr Couper QC for ASIC submitted that the Court might judge the efficacy of the Explanatory Notes by reference to the persistence and continued practice by NAB of overcharging its clients without complaint or correction from the customers. He posited that, if the notes had the effect contended for by the bank, it is unlikely that the overcharging could have continued to the extent that it did.

265 There is some force in that submission but it is diminished by the fact that a charge for such a service is common and may well be expected by customers generally so that their advertence to the point would be affected by only their knowledge or recollection of the absence of the provisions for such a charge in the contract: and the likelihood of such general knowledge or recollection was probably very low. At least, it was not proved to be high.

266 On the agreed facts NAB was itself unaware of systemic overcharging of the PP Fees until it conducted a specifically targeted investigation after becoming aware of similar difficulties occurring at the ANZ Bank. Further, there is nothing in them which identifies the frequency with which NAB customers had reviewed their accounts and drawn errors to the bank's attention. Having regard to the extent to which customers may have assumed the reasonable expectation that a fee would be payable for such a service and for that reason not have made a complaint, there is not sufficient evidence to draw the inference for which ASIC contends.

The contractual terms and conditions

267 NAB correctly submitted that the terms and conditions of the several accounts in respect of which the statements were issued were a part of the circumstantial context in which to construe the meaning of their content. However, as it is an open question whether their presentation to the customer may have been separate in time and circumstance to the issuing of the statements of account, their impact on the issue might be limited. On the other hand, there is nothing to suggest that the customers were not possessed of copies of the terms and conditions of their accounts or that they were not available to them on any occasion for which they were required. To the extent that any of these matters remain open, the onus of proof on ASIC is telling.

268 Set out in Annexure E to the Statement of Agreed Facts were a number of sample terms and conditions relating to the several types of customer accounts operating in the Relevant Period and which are the subject of these proceedings. The terms and conditions included a statement noting that it was important that the customer read them and, specifically, those clauses which imposed a specific obligation on the account holder to check their account statements and report any transactions which they suspected were unauthorised or which may have been incorrect. The terms which followed included one which imposed an obligation on the customers to check their statements of account. Whilst the precise wordings of those obligations altered between the several iterations of the terms and conditions, the effect was substantially the same. An example appeared in the terms and conditions of several accounts from 1 September 2011 to 29 May 2019, which read as follows:

> **4.18 You must check your statements**
>
> Without limiting any part of these terms and conditions for your account, you must promptly review your statement of account to check for and tell NAB of any transaction recorded on your statement that you suspect for any reason that you did not authorise or for which the information recorded is incorrect. Failure to promptly report unauthorised transactions may increase your liability.

269 Its effect is similar to that of the first two sentences of the Explanatory Notes. It, too, acts as an indicator that the bank statements were not intended to represent the true state of the rights and obligations between the parties, and raised the possibility that transactions which might be included on the statement may not have been authorised by the customer. To that extent it negates the presence of the representation on which ASIC relied. Even more relevantly, it was in effect implied in the parties' contract itself that the statements of account might be subject to error and that customers should protect their interests against that possibility by checking its details.

270 It might be questioned whether it would be likely that ordinary customers would call to mind all the terms and conditions of their contract when they received a monthly statement, and that the relevant clauses might not be drawn to their consideration when noting the entries in the statements and that their recollection of the terms and conditions might lessen over time. Nevertheless, they were exhorted to read them and, specifically, those imposing an obligation to check their account statements and report inaccuracies. It cannot be said that their attention was not reasonably directed to it or that it was buried within a many other clauses. On any reasonable view, the presence of a clause such as cl 4.18 is an important contextual matter negating the suggestion that the statement of account represented that it recorded absolutely the actual transactions which occurred on the customer's account.

The Code of Banking Practice

271 ASIC sought to rely upon the contextual circumstance that NAB had purportedly adopted the Code of Banking Practice (the Code) during the period in which the overcharging conduct occurred. It included the following statements:

> **Our key commitments and general obligations**
>
> We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.
>
> …
>
> **Compliance with laws**
>
> We will comply with all relevant laws relating to banking services

272 ASIC identified that certain of NAB's account terms and conditions documents also referred to the Code of Banking Practice in terms of or similar to the following:

> NAB has adopted the Code of Banking Practice and relevant provisions of the Code apply to the accounts, cards and services included in this booklet, if you are an individual or a small business customer (as defined by the Code).

273 It submitted that this adoption of the Code by NAB constituted a commitment to act in accordance with its contractual obligations to customers. In particular, it submitted that it was an overarching representation to its customers that NAB would not deduct money from a customer's account unless it was entitled to do so, including an implied particular representation that it would not charge fees without a legitimate contractual mandate. In relation to the representation that the bank would comply with "all relevant laws relating to banking services", unfortunately ASIC did not identify which law was not complied with

merely because NAB's statements recorded the deducting of fees in circumstances where they were not payable or not payable to the extent charged.

274 NAB initially complained that ASIC had not relied upon the Code or its relevance in its Concise Statement. That observation was correct and it might be expected that it should have been identified as a circumstance on which ASIC intended to rely. Nevertheless, recent authority suggests that Concise Statements are to be distinguished from pleadings and are not required to contain all the grounds, matters, facts or arguments on which a party intends to rely: *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388, 401 – 402 [140] – [154]. As it turned out, NAB was able to respond adequately. It submitted that its commitment to act fairly and reasonably towards its customers and to consider the contract between it and the customer in doing so, did not represent that it would not take the customers' money unless it was entitled to do so. It further submitted that there was no representation that no error would ever be made in respect of bank fees charged.

275 The circumstance invoked might well be part of the context if it were relevant, but the argument misses the fundamental point that a later failure to meet a commitment, if indeed that occurred, does not constitution a misrepresentation when it was first made. To the extent that it might be argued that it was a continuing representation, it then becomes a question whether its content amounted to a representation of perfection and absence of honest error despite the complexity and multiplicity of transactions between the parties. It would represent the absence of dishonest or perhaps gross carelessness, but those are not alleged here. But they, by contrast, demonstrate the practical difference which in the busy world of commerce a reasonable person would not construe the Code's terms to be an undertaking of absolute perfection by management and all staff in dealing with customers.

276 Further on this issue, the parties' submissions were not relevantly directed to the more important feature, that is, whether the alleged representation on which the prosecution was brought, was made. It may well be that the bank's allegiance to the Code does amount to some indication that it will comply with the terms and conditions of a contract between it and the client, but that is irrelevant to the question of whether any relevant representation was made by the statements of account. As has been observed, the terms and conditions of the contract and of the accounts themselves negate any representation that the statements were warranted to reflect the true position between the bank and customer. Rather, by the terms of their agreement they mutually accepted that the document may contain inaccuracies in that respect.

277 In addition, the statement by the bank that it will act fairly and ethically towards the customer and that it will comply with all relevant banking laws is vague and general in relation to the conduct with which this matter is concerned. Whatever it may suggest, it is certainly not a representation that no errors or mistakes will occur in the dealings between the parties. A party may well act fairly, reasonably and in an ethical manner, whilst still erring in the performance of a contract.

278 It is also far from self-evident that a customer who is considering a statement of account would have in mind that the accuracy of the entries is guaranteed because the bank has publicly stated that it would be bound by the terms of the Code. It is even unclear whether and to what extent the ordinary bank customer might be aware of the content of the Code. Although it is a document with which many banking lawyers have some familiarity, even they might have difficulty recalling that it contains an undertaking by a bank who has adopted it that it will comply with all relevant banking laws. Further still, if it is assumed that a customer was aware of those matters, it remains unlikely that they understood that some relevant banking law imposed an obligation on a bank to maintain its accounts with its customers correctly.

279 In summary, whilst NAB's commitment amounts to a representation of some description which, in some circumstances, may impose a significant liability on it, that is not relevant in the present case. The commitment and its effect are too vague and too remote from the practicalities of the delivery of the statements of account to give guaranteed verification of what appears from the narrations.

The dominant message conveyed

280 The "dominant message conveyed" by the narrations in the statements of account was that the PP Fees were amounts which were deducted by NAB for effecting the periodic payments requested by the customer in accordance with its claim of its contractual right. Even if it can be said that they reached the level of representing that NAB believed that the fees were payable, which is doubtful, they did not amount to a statement that they were so in fact. The terms and conditions of the contract and of the notices on the statement as well as the practicalities of the circumstantial context defeats any inference that the narrations carried an assertion as to their veracity and accuracy.

Representations by the performance of a contract

281 Mr De Young QC submitted that the present case fell within that class of case where a plaintiff failed to draw the making of a representation from another party's purported but deficient contractual performance. This is a different matter. He submitted that the courts have regularly rejected that relevant representations could be found in the purported performance of a contractual obligation. Given the foregoing conclusion it is not strictly necessary to consider these cases, but it is appropriate to do so out of respect for the careful submissions made in relation to them.

282 First, in *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, the New South Wales Court of Appeal held that where a contract of employment provided that an employer owed an obligation to provide a safe system of work, the entry into the employment contract did not, of itself, amount to engaging in misleading or deceptive conduct if the employee was subsequently injured by an unsafe system. In particular, the agreement to provide a safe system of work did not amount to a warranting that the system existed. In *McWilliam's Wines Pty Ltd v L S Booth Wine Transport Pty Ltd* (1992) 25 NSWLR 723 (*McWilliam's Wines v Booth Transport*), Giles J rejected the proposition advanced by McWilliam's Wines that, by presenting tankers for loading with McWilliam's Wines in the purported discharge of its obligations under a contract for the carriage of that wine, the carrier (Booth) represented that the tankers were in fact free from any relevant contaminants or otherwise fit for the carriage of wine in all respects. In particular, reliance was placed on the observations of Giles J at 727:

> Given the careful provision in the *Trade Practices Act 1974* (Cth) for statutory warranties in relation to the supply of goods and services, it may be doubted that malperformance of a contract for the supply of goods and services was intended to constitute misleading or deceptive conduct in contravention of s 52 because the purported performance carried with it a representation that it was proper performance.

283 His Honour (at 729) rejected the proposition that that "purported performance of a contract necessarily involves, in the absence of disclosure to the contrary, that the contract is being or has been properly performed". He subsequently said that, in the ordinary course, by the entry into and performance of a contract the parties merely represent that the legal rights and obligations *inter se* are regulated by the terms of that contract.

284 In *Robt Jones (363 Adelaide Street) Pty Ltd v First Abbott Corporation Pty Ltd* [1997] QSC 210, the plaintiffs sought damages from the developer, the builder, the glass subcontractor, and various architects who had performed work on a multi-story office building. They had suffered loss and damage as a result of the propensity of installed glass windows to shatter regularly,

but unexpectedly. Inter alia, the plaintiffs claimed damages for misleading or deceptive conduct in respect of which it was alleged that by the provision of the final certificate, the developer "represented that the execution of the works had been complied with in accordance with the specifications", that by completing the building and handing it over the builder represented that it had been constructed in accordance with the terms of the contract, that by supplying and installing the glass the suppliers had represented that it was fit for purpose, and that by supplying the final certificates the project architects represented that the works were completed in accordance with the specifications. White J dismissed these causes of action and adopted the approach of the majority in *Wright v TNT Management Pty Ltd* that the purported performance of a contract did not necessarily involve, in the absence of evidence to the contrary, a representation that the contract has been properly performed.

285 These authorities do not assist in the present matter where the impugned representations are not said to arise solely from the purported act of contractual performance. Rather, they are alleged to arise from what NAB had asserted about its deductions of the PP Fees; namely that it was entitled to make them. Further, the making of the narrations in the statements of account were not, or were not said to be, the performance of any particular term of the parties' agreement whereby the purported performance could be said to constitute a representation. Nor in the terms and conditions of the contract was there any provision by which the bank undertook to make accurate narrations in the statements of account. As demonstrated above, the contrary is true.

286 Moreover, that is not the representation relied upon by ASIC. The representation is alleged to arise from the form of the account statement and the words used to identify the transactions on the account. Whilst that may be conduct in the course of the performance of the bank's obligations under the agreement, there is no reliance on that factor as the foundation for the making of the representation. This alone distinguishes this case from the attempts to raise misrepresentations through contractual performance which were rejected in the above authorities.

287 The mere fact that the conduct in question occurred in the course of the contractual relationship does not, itself, shield it from amounting to a misrepresentation as to the contracting parties' rights and obligations: *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 QB 68 at 76 – 77 (Devlin J), as considered in *Wright v TNT Management Pty Ltd* at 691 (McHugh JA). See also *McWilliam's Wines v Booth Transport* at 727 – 729

(Giles J). That, however, does not affect the issue as to whether in fact there has been a misrepresentation.

Cases with factual similarities

288 ASIC sought to fortify its case by reliance upon a number of other cases involving generally similar factual circumstances, in particular the decision of Moshinsky J in *ACCC v Telstra Corporation Limited* [2018] FCA 571. There, his Honour acceded to the parties' agreement that the presence of erroneous entries in statements of accounts issued and sent by Telstra, amounted to misleading representations. Whilst it might be accepted that his Honour would necessarily be satisfied of the foundation for any determination, that the orders were made by consent had the consequence that the allegation of misleading conduct was not exposed to forensic analysis or testing, and the full factual circumstances of the alleged representations are not apparent from the decision.

289 Similarly, ASIC relied upon the decision of Murphy J in *ACCC v Optus Mobile Pty Ltd* [2019] FCA 106. There, his Honour made declarations that Optus, by recording the making of certain erroneous charges in the accounts sent to customers, had made false and misleading representations in contravention of s 12DB(1)(b) of the *ASIC Act*. Again, however, the determination was based on the parties' agreement and no independent assessment or evaluation was conducted by the Court.

290 There is, also a significant distinction between those cases and this, not the least of which is that they concerned the inclusion of apparent charges in documents which purported to be accounts stated and which were accompanied by a demand for payment, perhaps implying that the details were asserted to be accurate. Neither of these characteristics exist in the present case.

291 ASIC further invoked the recent decision of Beach J in *ASIC v BT Funds Management Ltd* (2022) 159 ACSR 381 (cited as *ASIC v Westpac Banking Corporation (Omnibus)*), where his Honour made declarations that the respondent bank had contravened s 12DB(1) by making erroneous representations that insurance fees had been properly deducted from the accounts of members who held certain policies of insurance in circumstances where those fees were not properly deducted. Again, as a result of the circumstances of that case, because the contraventions were agreed upon by the parties, there was little discussion of the precise issue under consideration in this case. Further, the factual circumstances of that case were considerably different from those of the present case.

292 None of these authorities are of any assistance. Necessarily, the determination of whether conduct constitutes a representation is confined by the specific factual circumstances in which it occurred. Here, those circumstances include the nature of the statements of account and the narrations, the Explanatory Notes, the terms and conditions of the contracts between the customers and NAB, and the complexity and multiplicity of detail involved in the production of the statements which, in a practical understanding, would not support an expectation of its accuracy. There are clear distinctions from the cases on which ASIC relied and great care should be taken in relying upon consent determinations, especially where the applicant is a regulator and any agreement as to statutory contravention might well have been motivated by extraneous factors.

Conclusion on the making of misleading representations

293 The position remains that the dominant message conveyed by the PP Fee narrations was no more than that NAB had deducted PP Fees from the customers' account as a fee for the provision of the service of effecting a periodic payment from the account. There was no representation that they were, in fact, due. It follows that ASIC has not established that by making the PP Fee narrations NAB engaged in misleading or deceptive conduct in breach of s 12DA of the ASIC Act, or that it made false or misleading representations in breach of s 12DB.

Unconscionable conduct

294 In the Originating Application ASIC sought, *inter alia*, a declaration that by its conduct from around January 2017 until July 2018 whereby NAB continued to charge PP Fees to customers in circumstances where it knew that it had no contractual entitlement to do so or, alternatively, by its conduct whereby it failed to inform its customers of the wrongful charging of fees or suggest that they review their accounts, it engaged in unconscionable conduct in contravention of s 12CB(1) of the *ASIC Act*. In its written outline of opening, it made a subordinate claim to the effect that if NAB had not engaged in unconscionable conduct throughout the period identified, it did so in the more limited period between October 2017 and July 2018. In broad terms it alleged that NAB engaged in unconscionable conduct by continuing to charge customers PP Fees from January 2017 when it knew those fees were not payable, and the inappropriateness of that conduct increased from October 2017 when it became aware of the general nature and extent of its overcharging.

295 The substance of NAB's response was based upon its claim that it had limited knowledge of the circumstances of the erroneous overcharging, including details as to the number of persons

who were being improperly overcharged and the occasions on which it was occurring. These matters, so it submitted, had the consequence that its conduct in continuing to overcharge some customers could not be characterised as unconscionable.

The legislation and principles of unconscionable conduct

296 Section 12CB of the *ASIC Act* relevantly provides:

> **12CB Unconscionable conduct in connection with financial services**
>
> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person…;
>
> …
>
> engage in conduct that is, in all the circumstances, unconscionable.

297 By the operation of s 12CB(4)(a), the scope of s 12CB(1) is not limited by the unwritten law relating to unconscionable conduct.

298 For the determination of whether any conduct is unconscionable under the Act, s 12CC provides a non-exhaustive list of factors to which consideration might be given. It is not necessarily determinative that any or all of them be present. Their purpose is to assist in explaining the scope of unconscionable conduct to which the Act applies: *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709 [63].

299 There is no need to add to the rapidly expanding jurisprudence on statutory unconscionable conduct and, in any event, no ground was raised which required any departure from what has already been authoritatively decided. It suffices to refer to the erudite analysis of Beach J in *Australian Investments and Securities Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 117 – 121 [362] – [379] from which the following principles can be discerned:

(a) Neither the boundaries nor content of the equitable doctrine of unconscionability defines or limits the scope of statutory unconscionable conduct.

(b) The requirement in s 12CB that the evaluative judgment is to take place in "all the circumstances" necessitates a close consideration of the facts in light of the factors identified in s 12CC. That said, an atomistic approach, which only considers each of the factors separately, is inappropriate.

(c) The application of an appropriate value construct to the evaluation of conduct requires that attention be paid to the "values explicitly or implicitly enshrined in the text, context

and purpose of the *ASIC Act*, the *Corporations Act* and any other relevant statutory framework". That, however, does not exclude the relevance of societal or community values to the determination.

(d) Section 12CB imposes a normative standard of conduct which the section itself marks out in relation to the supply or possible supply of goods and services. It is the task of the court to apply that standard to the circumstances of the particular case.

(e) The judicial exegesis of "moral obloquy" should not be a substitute for the words of s 12CB. At best, statutory unconscionability may accommodate a flavour of it in the sense that it means more than "unjust", "unfair" or "unreasonable".

(f) The underpinning values and conceptions in s 12CC(1) are fairness and equality, asymmetry of power and information, a lack of understanding or ignorance of a party, the risk and worth of the bargain, and good faith and fair dealing: *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 265 – 276 [259] – [306].

(g) Unfair conduct does not, alone, amount to unconscionable conduct, even if establishing its presence is a step along the way to demonstrating unconscionability where it results in the exploitation of a person's vulnerability and amounts to unjustifiable self-interest. Similarly, establishing hardship is not alone sufficient although it, too, may constitute a step in the evaluative process.

(h) The actual state of mind of the alleged contravener is relevant to the question of whether they have engaged in unconscionable conduct, although it should not be the sole focus. What is required is a broader evaluation of the behaviour, including its causes and reasons for it, and its effects or likely effects.

(i) Industry practice is a relevant consideration, although it is far from determinative.

(j) The boundaries and content of any applicable statutory regime beyond that of the *ASIC Act* and the *Corporations Act* is an important contextual matter.

(k) It is not necessary to show that a person who is subject to the alleged conduct is under a disadvantage or that any particular person has been disadvantaged by conduct (s 12CB(4)(b)). Further, an inequality of bargaining power does not automatically lead to the conclusion that one person is in a position of substantial disadvantage, nor does it establish that the party which enjoys the superior power acts unconscionably by exercising it.

(l) In the technical application of s 12CC(1) it is necessary to consider each of the non-exhaustive matters set out in s 12CC(1) to the extent to which each might be relevant. It is inappropriate to focus on one or more of those matters to the exclusion or unjustifiable expense of others.

(m) Conduct which attracts the operation of s 12CB is assumed to be of sufficient seriousness to warrant the imposition of a pecuniary penalty. That perspective is not irrelevant to the construction and application of ss 12CB and 12CC(1).

300 The articulation of a number of the above principles from Beach J's reasons was helpfully provided in ASIC's written submissions.

301 In those submissions it also referred to the relatively recent decision of the Full Court (Allsop CJ, Besanko and McKerracher JJ) in *ACCC v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133. In analysing the reasons for judgment of the High Court in *ASIC v Kobelt* (2019) 267 CLR 1 it held (at 152 – 153 [78] – [81]) that the High Court had clarified that statutory unconscionability did not require the existence of any "form of pre-existing disability, vulnerability or disadvantage of which advantage was taken". The Full Federal Court went on to observe (at 153 – 155 [87] – [90]) that, in the statutory context, "unconscionable" means "doing what should not be done in good conscience" which is a concept derived from doing what is right and that is not limited to protection of the vulnerable. Nevertheless, conduct which is unconscionable must be so serious as to warrant censure for the purpose of deterrence by means of the imposition of a civil penalty, and so the concept ought not be given "a too loose or diffuse construction". The Full Court adopted what had been said in *Unique International College Pty Ltd v ACCC* (2018) 266 FCR 631, 667 at [155] to the effect that an essential concept of unconscionability was seriousness, "often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worth of criticism" albeit that none of those terms was definitional. It also emphasised (at 154 [88]) the passage from *Unique International College Pty Ltd v ACCC* at 667 [155] on the nature of what is unconscionable:

> … It is a serious conclusion to be drawn about the conduct of a business person or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden on proof.

302 A similar approach was adopted by Gordon J in *Stubbings v Jams 2 Pty Ltd* (2022) 96 ALJR 271, 284 [58], where her Honour held that the matters referred to in s 12CC assisted in evaluating whether the conduct in question was so outside of the societal norms of acceptable commercial behaviour as to warrant condemnation for being offensive to conscience. Her Honour continued:

> A court should take the serious step of denouncing conduct as unconscionable only when it is satisfied that the conduct is "offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society".
>
> (Footnotes omitted).

303 The seriousness of the conduct required was described by Stewart J in *ACCC v Productivity Partners Pty Ltd (No 3)* (2021) 154 ACSR 472, 491 [66] where, after considering the several reasons for the decision in *Kobelt*, his Honour said:

> From the above analysis it is apparent that all the judges in the majority regarded statutory unconscionability as setting a normative standard of conduct and that conduct in breach of that standard must be well outside the bounds of what is generally seen to be moral, right or acceptable commercial behaviour; it is not "equity-lite"; it is conduct that on some real and substantial ground is offensive to conscience.

304 In the context of transactions between a bank and its customer in which there was a risk of overcharging, the observations of Allsop CJ in *Australian Securities and Investments Commission v Australia and New Zealand Banking Corporation (No 3)* [2020] FCA 1421 (*ASIC v ANZ (No 3)*) are relevant to the identification of standards of normative behaviour. He said (at [13] – [14]):

> [13] The importance of the banking system in Australian social and commercial life need only be stated. Reliance by customers on the integrity and good faith of their bank is at the heart of social and commercial life in this country. It is highlighted in general life from advertising by banks and by community expectations. Despite all other features, the banker and customer relationship is at the heart of the economic system. It is a relationship based on contract, but, as the Code of Banking Practice reveals, it is founded on trust and good faith in a commercial sense.
>
> [14] It would shock any customer to know that his or her bank took and was continuing to take his or her money in fees when it knew that there was a risk that it had no authority to do so, and without thereafter coming to a view that it did have that authority. This would be especially the case if the customer knew that, upon a view that the terms would be changed in the ordinary course of business, no decision would be made to stop taking the fees because that was difficult and would lead to other fees about which there was no risk not being charged. The customer might well consider that he or she had not been treated fairly and in good faith in those circumstances. But, of course, in their position the customers were not privy to that...

305 The opening sentence of paragraph [14] is especially pertinent to the assessment of the character of NAB's conduct in the present case.

Whether NAB's conduct was unconscionable in all the circumstances?

306 It is appropriate to commence with an overview of the circumstances in which NAB's conduct occurred.

The general nature of the banker / customer relationship

307 The legal relationship between banker and customer is that of a debtor and creditor, though that must be assessed against the more contextual background referred to by Allsop CJ in *ASIC v ANZ (No 3)*. There, his Honour recognised that the contractual relationship was founded upon the expectation of good faith and integrity of banks. That conclusion was, in part, supported by the manner in which banks advertised themselves and, in particular, by their claimed adherence to the Code of Banking Practice. The force of this view is very persuasive. Though it may be difficult to rely upon NAB's public claim to allegiance to the Code for the purposes of determining whether a misrepresentation was made, it is certainly relevant when ascertaining whether it engaged in unconscionable conduct. Its public assertion that it would comply with the Code is likely to have the consequence of promoting its reputation as a fair and honest participant in the banking industry. It could not be seriously suggested otherwise and there is no reason why it should not be held to that standard when the quality of its conduct is to be evaluated.

308 Further, and again at a relatively high level of generality, banks are financial service providers to their customers who purchase those services. It is the banks that organise and maintain the procedures involved in the contractual relationship. They offer their several types of accounts and the terms on which they are prepared to provide them. It is not irrelevant that such contracts are described as contracts of adhesion in respect of which there is little, if any, room for customers to negotiate terms. The banks must be aware of the terms of their offers and, in the usual course, are able to ensure adherence to them by themselves and their customers. In Australia, a privileged position is accorded to the four major banking institutions and, as the agreed facts reveal, NAB is a substantial corporation with total assets exceeding $866 billion. Plainly, it would have the financial capacity to acquire and develop the computer and technical facilities required to maintain its accounts with its customers to a relatively high degree of accuracy. But that is not to say that it is to be expected that all mistakes or errors will be eliminated. It is inevitable that in the course of any business which involves the participation

of humans, errors may occur with the result that a customer is either undercharged or overcharged. Realistically, faulty data might be accidently introduced into the bank's computer systems, regardless of the exercise of a high level of care.

309 Conversely, as has been mentioned, customers are usually provided with the terms and conditions of the accounts which they operate. There is no suggestion that this usual practice did not occur in this case. In particular, a customer is given adequate opportunity to have regard to those terms and conditions to ascertain whether any deductions or charges made to their accounts fall within the scope of their contract. It is especially relevant that the terms and conditions of the relevant types of account imposed upon the customer an obligation to undertake a check of the transactions which the monthly bank statements recorded. As has been explained, the statements of account also exhorted the customer to undertake this task.

310 Therefore, as between NAB and its customers, it should generally have been understood that the bank was in a position to and would maintain a recording of the account balances, but that is not to say that it could not be expected that errors in the maintenance of the account might occur, most likely through human error. Moreover, the customers were contractually obliged, or at least specifically requested, to participate in ensuring the accuracy of the transactions referred to on their statements.

311 This is the context in which the relevant conduct occurred, and the issue here is not whether NAB's systems were insufficient to prevent the occurrence of the PP Fee overcharging, but whether the character of its conduct, in continuing to charge the fees once it knew that it was occurring, was unconscionable.

NAB's knowledge

312 An important aspect is NAB's knowledge of the nature and extent of the overcharging which had occurred. A conclusion that its conduct was unconscionable is not unavailable merely because it was not appraised of all instances of it and the identity of the customers' accounts in respect of which it occurred. ASIC's case in this respect was that from January 2017, it had sufficient knowledge it was occurring and took no steps to prevent it. ASIC did not suggest that NAB was required to cease the practice only when it became fully informed of the circumstances, though that implicitly underpinned NAB's submissions.

313 The agreed facts state that, in September 2016 and as a consequence of publicity in relation to overcharging of PP Fees by the ANZ Bank, NAB undertook an assessment of its charging

practices. Unlike the ANZ Bank, the terms and conditions of NAB accounts did make provision for the charging of such fees. Nevertheless, in late October 2016, NAB employees reviewed a random sample of 25 customer account statements in respect of which periodical payment transactions had been made. It revealed instances of overcharging of PP Fees so that, at that time, NAB became aware of a risk that it was improperly charging or overcharging. It then conducted an investigation as to its nature and extent.

314 It is unclear what steps were immediately taken but by early November 2016, its officers were of the opinion that the total amount of such overcharging during the previous four years was $64,000. However, it is apparent from the agreed facts that in around December 2016 the bank had no clarity as to the scope of the overcharging or the length of time during which it had occurred. At that time, there was a suggestion that it had been occurring since 1999, and others believed that it may have commenced in 2014. It is fair to say that whilst the bank was aware of such overcharging, it was unaware of its extent.

315 The ensuing investigation was hampered by an apparent lack of its employees' ability to interrogate NAB's stored information. Several personnel had ceased their employment with it and it was necessary to develop appropriate processes to identify the required information. It became clear that those who were investigating were unaware of the ability to retrieve particular source data which was stored on the bank's computers and this lack of knowledge substantially remained until October 2017.

316 According to the agreed facts, during the currency of NAB's investigation, attention was focussed on ascertaining how human error had resulted in the overcharging and on ensuring that it did not occur in the future. Attention was also directed to why its personnel were unable to formulate a method of searching its electronic data so as to reveal the nature and extent of the overcharging. It was only on 26 October 2017, that an analysis of the so called "Master File" could be performed, and it revealed overcharging in respect of 3,455 of the 196,306 periodic payment arrangements within a particular period. Shortly thereafter it was calculated that the annual revenue from such wrongful charging was around $500,000, though in December that figure was reduced to $152,000.

317 The investigations continued, and in late March 2018 it was determined that the wrongful charging had been occurring from at least 2002, rather than from 2014 as had previously been thought.

318 It was not until about July 2018 that NAB commenced remediation payments to customers whose accounts had been wrongly debited, and that it notified ASIC of the overcharging. It was also at about that time that it implemented an "exception reporting" process which was able to identify and correct PP Fee overcharging on a monthly basis. Once it was detected, the customers' accounts were corrected.

319 It would seem that NAB was either unable to put in place an accurate system for debiting accounts with PP Fees, or the process was too complicated and, on 22 February 2019, it ceased charging PP Fees altogether.

320 In late February 2019, NAB informed ASIC that it had identified a system for accessing the necessary data to identify all instances of PP Fee overcharging since August 2001.

321 This chronology discloses that NAB's knowledge increased incrementally over time and during the course of its inquiries, but it was aware from sample testing in October 2016 that its relevant systems were defective. Certainly, it was unaware of the degree of the wrongful charging, but it knew that its systems had the consequence of debiting amounts from customers' accounts in its favour when it had no contractual right to do so. It also knew that it did not know the date from which this such wrongful debiting of accounts had begun, the extent to which it had occurred, or the total amount which it had received either in total or on an annual basis. It is true that from time to time it formed a belief as to its extent but that was short-lived as the ongoing investigations revealed an ever greater number of occurrences.

322 By January 2017, once the matter had been brought to its attention and it had had the opportunity to understand what was occurring, it generally knew that its systems were overcharging some customers by an unknown nature and extent, but possibly greater or much greater than the known instances. This is self-evident given the results of its continued investigations and the increasing amount of resources which it must have applied to that task. Although it was not fully aware of some features, its then actual knowledge is relevant to unconscionability. In particular, it continued the operation of the then current system knowing that it was causing debits to be made to some accounts in the absence of any entitlement to do so. It is not difficult to conclude that its customers who were wrongly charged would, at least, be surprised that a bank would do so. As Allsop CJ said in *ASIC v ANZ (No 3)* at [14], "It would shock any customer to know that his or her bank took and was continuing to take his or her money in fees when it knew that there was a risk that it had no authority to do so, and without thereafter coming to a view that it did have that authority". In this case there was more

than a risk of NAB's deducting fees without any entitlement. It was known that it was doing so. The only uncertainty was its extent.

323 To this it may be added that a fair inference can be drawn that the affected customers were unaware of it. Had they been aware, it is probable that they would have made a justifiable complaint.

Attempts to ascertain the extent of the overcharging and other inquiries

324 NAB sought to emphasise its attempts to investigate the nature and extent of the PP Fee overcharging. It may be accepted that it undertook prolonged and continuing investigations to identify the course and size of its wrongful actions and did so in good faith, but that is not of great significance to this issue of unconscionability. ASIC's case is not that the problem of overcharging was not adequately investigated. Rather, it is that once NAB became aware that it was wrongly overcharging its customers and, although it did not know its extent, it continued to do so, or, alternatively it failed to inform them of it.

325 Although in its written submissions NAB stressed the several steps taken by it in the investigative process as described in the statement of agreed facts, those facts reveal that its course was slow and tended to be *ad hoc*. This may have been a consequence of the departure of several persons who had relevant expertise and the difficulty of their replacement with people of sufficient capacity. Although substantial additional resources were applied in July 2017 after the extent of the difficulties in interrogating the bank's stored data was realised, the investigation remained sluggish, under-funded and generally lacked direction. Further, although substantial time was spent on ascertaining the reason for past overcharging, very little if any consideration was given to preventing it from continuing. From time-to-time, the idea was floated that it cease charging PP Fees altogether, but that was not acted upon until February 2019.

326 ASIC submitted that the Court should infer that NAB could have more quickly ascertained the full extent of the overcharging had more resources been applied at an earlier stage. NAB submitted that there was no evidence from which such an inference could be drawn and, in particular, that ASIC had not identified how that may have been achieved. This particular issue arises because, until October or November 2017, NAB's employees were unable to determine how to analyse the bank's Master File data, which had been obtained in September 2016, in order to identify the overcharging. The agreed facts reveal that in October 2017, one of the members of the investigating team was replaced by a more senior consultant, a Mr Prasad who

developed a methodology to utilise the data in a way which would reveal its extent, at least in respect of a period of time.

327 It can be inferred that the Master File data had always been available and all that was required was the employment of a person with sufficient ability to analyse it suitably. Further, NAB was always in possession of the terms and conditions of its relevant accounts relating to the years from 2002 and a proper analysis of them would have revealed the potential for overcharging having occurred in relation to them. As it was, their existence was not discovered until March 2018. Although there is no evidence of how they were eventually uncovered, it is reasonable to infer that they were always in NAB's possession and could have been located by a suitable search. By paragraph 113 of the agreed facts it is apparent that the existence of obligations to pay PP Fees in the terms and conditions of certain accounts was a fact which could always have been ascertained because the information was within the bank's control.

328 It should thus be concluded that the nature and extent of the overcharging was something which was always reasonably within the ability of the bank to ascertain much earlier than it did so. Although, in the circumstances in which the matter came to light, it perceived the extent of the overcharging to be limited, the true position was always within its power to ascertain more readily. Its approach to the revelation that it was wrongly debiting its customers' accounts was to conduct an investigation with a level of resources commensurate with what it perceived to be the size of the problem, without proper regard to the potential enlargement of the wrong. As the revealed extent of the overcharging increased, so did the amount of resources and expertise which were devoted to the investigation which was only reactive rather than proactive in the interests of its customers whom may have been found to be wronged. This may have been attractive to it financially in saving investigation costs and perhaps discovering further liability but once its wrongful, even if unintentional, conduct was revealed, its conscience should have impelled it to investigate and remedy any such further wrong with suitable energy. For many issues which might confront a financial institution, the approach which NAB adopted might have a sound commercial or business-like foundation. Here there is an important distinction in that the issue at hand involved continuing a wrong of unknown potential and until at least July 2018, NAB was generally aware that it did not know of its nature and extent. Given its capital value, it could not be suggested that it did not have the resources to discover these things more quickly.

329 In this way it promoted its own interests over those of its customers by continuing its then current practice of charging PP Fees while its investigations continued, knowing or it should have known that by doing so it could well be continuing to make wrongful charges on an unascertained number of customers. It chose not to cease charging such fees or advise its customers that overcharging may have occurred and that they should review their accounts in that respect.

330 It sought to support the reasonableness of its conduct by constant reference to the relatively small rate at which the overcharging occurred. It submitted that during the Relevant Period, that is, from 20 July 2007 to 22 February 2019, the overall rate of overcharging was 2.61% of all PP Fee transactions and that during that time the annual rate fluctuated between 1.01% and 3.31%. In its written submissions it proudly claimed, without any explanation as to why it should not have done so, that it charged PP Fees correctly between about 97% and 99% of the time. It added that, in respect of the period which is the subject of ASIC's unconscionability claim, the annual error rate was even lower than the average over the Relevant Period, being 1.78% and 1.02% respectively. Reducing the extent of the relevant overcharging to a proportion of the total number of PP Fee arrangements has a distorting effect. It relevantly occurred in relation to more than 3,455 arrangements and on more than 1.6 million occasions. Even if that was a small percentage of the overall number of arrangements or transactions it was, of itself, far more than trivial or minimal. The submission that its overcharging was *de minimis*, should be rejected.

331 Whilst the fact that overcharging was occurring at those reduced rates may have made detection more difficult, it does not alter the fact that NAB was aware that its systems were, or might well have been, incorrectly overcharging some customers and was prepared to allow it to continue. It might have prevented it from continuing, or at least minimised it by informing its customers to check their accounts. It submitted that to expect it to do so was unreasonable in the circumstances where the arrangements in respect of which overcharging occurred were, on one analysis, 3,455 out of 196,000 such arrangements. No clear explanation was given by NAB as to why requesting its customers to check their accounts was not appropriate merely because overcharging was occurring in relation to a small proportion of its large number of periodic payment arrangements. It might be that it perceived that the reputational damage caused by inevitable publicity might outweigh the benefit to be obtained. Such an approach would have focussed on its own interests over those of its customers who were suffering the unauthorised debiting of their accounts. Moreover, the central point is whether its continuing

to charge the fees or its failure to inform its customers was unconscionable in all of the circumstances. Impediments to its making such disclosure may have some peripheral or practical relevance to that question, but they are far from pivotal: *Australian Consumer and Competition Commission v Medibank Private Ltd* (2018) 267 FCR 544, 624 [336] *per* Beach J.

332 This issue of NAB's failing to inform its customers is related to the subject matter of s 12CC(i) of the *ASIC Act* concerning the extent to which a service supplier unreasonably failed to disclose to the recipient any intended conduct that might affect the recipient's interests. Here, NAB was aware that its systems were incorrectly charging PP Fees to some customers when it had no entitlement to do so but it did not take any step to prevent that from occurring. It allowed the system to continue despite its necessary expectation that PP Fees could well be wrongly charged. It was not reasonable for it to fail to inform its customers of that possibility. It could have done so, it could have prevented the continuation of overcharging of some customers, and that there was more than a minimal number of persons who were adversely affected by the erroneously operating system. In this way it was acting unconscionably.

333 In this analysis of whether conduct was unconscionable, a standard of perfection is not required, though whether a course of conduct is reasonable in all the circumstances is a relevant metric. The element of reasonableness includes whether the defendant knew or ought to have known that it might have done wrong to a customer and may be continuing to do so. It also includes the practicality of remedial action, but in the light of the party's knowledge of that feature of wrongdoing.

NAB's consideration of alternative solutions

334 NAB also submitted that during the Relevant Period and the period between January 2017 and July 2018, it considered alternative methods of preventing overcharging. Those included moving customers to self-serve internet banking where the fees would not apply, or charging a single upfront payment as an establishment fee rather than a fee per service, or implementing a process to remove PP Fees from its systems altogether. Again, whilst the consideration of a diversity of solutions can be an appropriate approach to business problems, here the fundamental issue was NAB's failure to adopt any of them, and this resulted in the continued wrongful overcharging. Although it searched for the nature and extent of historical overcharging, it nevertheless permitted it to continue to some extent. It is noteworthy that the prospect of waiving all PP Fees as an answer was raised within the bank on 17 May 2017 and

again in November to December 2017. Though it was then seen as a reasonable response by a number of bank officers, it was not adopted until 22 February 2019. Further, the bank regularly assessed the revenue it made annually from PP Fees, and it is difficult to accept that the loss of revenue from that source was not a significant reason for failing to adopt it. No other difficulty with the proposal appears from the agreed facts.

NAB's remediation of the overcharging

335 NAB submitted that the character of its conduct in continuing to overcharge some customers is ameliorated because it undertook a process of repaying the overcharged amounts to customers and made further payments to them on account of the loss of use of the funds. These programs related to the overcharging for a period of about 19 years from August 2001 to February 2019. The Initial Remediation Program involved two tranches of payments which were made on 13 July 2018 and 26 October 2018. They compensated at least 4,579 customers in the amount of $688,318.41 (including compensatory interest) and related to overcharging for the period between 26 October 2011 and 26 October 2018. The second tranche of payments, referred to by NAB as its "Supplementary Remediation Program" was directed to compensating all customers who had been overcharged between 1 August 2001 and 22 February 2019, if they had not already been compensated. The bank has calculated that the total amount payable by it under both its programs was $10,053,767.66 and that as at 28 April 2021, it had paid $8,278,578.58 of this amount. It implemented a further remediation program, referred to as the "exception reporting process", on 28 June 2018 which operated to detect current overcharging on a monthly basis. As at 22 February 2019 when it ceased charging PP Fees, it had paid out $10,045.29 to customers under this program. All but 72 persons who were overcharged in the period between 1 January 2017 and 28 June 2018 had been repaid, and the total amount to be refunded to those persons was $1,610.10.

336 As was inevitable, NAB has been unable to locate a number of former customers to whom amounts are owing. In many cases the amounts are relatively small. It has paid those small amounts to charity and amounts still owing to former customers over the sum of $500 have been paid to ASIC as unclaimed funds.

337 There was little explanation as to how these subsequent remediation programs affected the issue of whether its continued overcharging or its failure to warn customers that it might be doing so, was unconscionable. After all, it was legally obliged to pay compensation and it is a matter more relevant to penalty than guilt. A general intention at some time to repay any

customer who had been overcharged, may ameliorate the wrong of still permitting customers to be overcharged, but it is difficult to identify when NAB formed that intention. It is known that the first remediation program commenced on 13 July 2018 but there was simply no other evidence that it occurred before that time. Of course, that it was virtually obligatory dampens the virtue of this step.

338 Nevertheless, it remains appropriate to take into account that, although it continued to overcharge certain customers' accounts when it knew that it had no entitlement to do so, it subsequently took steps to compensate them.

NAB's conduct was unconscionable

339 NAB's conduct in continuing to overcharge in circumstances where it knew that it was wrongfully doing so constituted unconscionable conduct. Although customers should remain aware of the terms and conditions of their account, it is a notorious fact, fortified by the absence of customers' complaints as to the wrongful practice, that many people generally look to the bank to maintain a correct and reliable record of the dealings, subject to the possibility of reasonable unknown error. Although this does not absolve customers from their obligation to check their statements, the bank is in a superior position to know what transactions have occurred and the validity of the charges it makes. In an Australian context, banks are generally regarded as honest and ethical participants in the financial services industry and especially those who claim adherence to the Code of Banking Practice would accept this to be so. Further, having effective control of a customer's account, a bank can cause unjustified debits to be made in its accounts which it presents to its customers as *prima facie* correct, at least to the extent to which it believes that to be so and absent some unknown error. No doubt, banks will usually operate accounts only in accordance with the customer's mandate and the terms of the contract, but that is not always the case as the present circumstances reveal. Accordingly, they bear some serious responsibility to correct their inadvertent errors disadvantaging their customers which they have caused and to do so with reasonable speed. A necessary corollary is that it would strike at the very heart of a stable banker / customer relationship were a bank knowingly to debit its customers' accounts without entitlement.

340 In this case, by January 2017, NAB had determined that its systems for debiting PP Fees were causing unauthorised deductions to be made from some customers' accounts. That this was occurring had generally come to light in October 2016. At that time, there was limited knowledge of its extent, but it was accepted that investigation needed to be made. It was aware

that it did not know its extent, although an indication that it may have been happening since 1999 suggested it could have been extensive. It also knew that it was experiencing difficulties in analysing its own data, which created obstacles to achieving a precise understanding of the extent of the problem.

341 Consequently, from January 2017, its continuing to use its system despite knowing that it would be making unauthorised debits to the accounts of some customers, was not merely unjust or unreasonable. It approaches serious apathy towards those of its customers who would be adversely affected by its continued conduct. It also knew that it could prevent its continuance, but made the decision not to do so. To exacerbate its fault, it was also aware that its customers were generally unaware of the overcharging but failed to inform them at once. Again, it had the capacity to do so and to advise them to review their statements which had the real possibility of providing it with a clearer picture of the extent of overcharging and an appreciation of the accounts on which it was occurring. Rather, it took advantage of the customers' continuing lack of knowledge, and acted in its own self-interest by continuing to operate a system which it knew wrongfully deducted sums from its customers' accounts.

342 This conduct fell so far below the standards required of a bank's obligations to its customers that it was unconscionable. It was neither proper nor right according to ordinary commercial values in Australian society, and it was offensive to conscience.

343 ASIC's alternative case was that NAB's unconscionable conduct commenced from about October 2017. Its basis is that by then further resources had been devoted to the investigation and the extent of the PP Fee overcharging had become clearer.

344 Early in the investigation, NAB realised that those conducting it did not have the technical skills to interrogate the bank's stored data. It was sometime before more resources and more highly skilled persons were engaged. Following that, a report was produced on 26 October 2017 which disclosed that there had been overcharging in relation to 3,455 PP arrangements and that in relation to 3,316 of them, a fee of $1.80 was being wrongly charged when no fee at all was payable.

345 It may have been that its mindset in considering whether it should cease charging PP Fees or inform its customers merely continued at this point. It may also have been that it had become aware that its revenue from wrongfully overcharging these fees was substantially more than first estimated. Whatever the case may be, it maintained its practice of charging them knowing

that, in some instances, it would be doing so without entitlement and without informing its customers. In light of those matters supporting ASIC's first ground of unconscionability, given its increased knowledge at this later time of the extent to which it was incorrectly deducting PP Fees, its continued use of its then defective system was particularly culpable. It is exacerbated by its increased knowledge of the true circumstances. The material before the Court does not indicate why, other than in its own interests, it continued its practice despite its level of knowledge. That may be because there is nothing that would justify it. It may be accepted that it was focused upon ascertaining the extent of its overcharging, and was hampered by its inability to utilise its own data, but its delay in being able to fully inform itself provides no exculpation for its continued wrongful conduct.

346 In the result, ASIC is entitled to a further declaration that NAB's conduct in the period from October 2017 to July 2018 in continuing to charge PP Fees and doing so without informing its customers, was unconscionable.

347 Although it is not necessary to decide, in the context of s 12CB it may be that businesses who even unintentionally wrongly cause harm to their customers, have a serious obligation to take all reasonable steps to avoid its continuance, even if some of the steps might cause some disadvantage to themselves.

Licensee Obligations

348 ASIC also asserted that NAB had contravened s 912A of the *Corporations Act* in the provision of its financial services to its customers whom it wrongly charged or overcharged. Relevantly, that section provides:

> **912A General obligations**
>
> (1) A financial services licensee must:
>
> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> …
>
> (c) comply with the financial services laws;

349 The purpose of subparagraph (1)(a) was identified by Allsop CJ in *ASIC v Westpac Securities Administration Ltd* (2019) 272 FCR 170, 210 [173]. After identifying the expression "efficiently, honestly and fairly", his Honour held:

> The provision is part of the statute's legislative policy to require social and commercial

> norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction, but nevertheless an abstraction to be directed to the "infinite variety of human conduct revealed by the evidence in one case after another." (See Gummow WMC, "The Common Law and Statute" in *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) at 18-19.) By the phrase itself, emphasis must be given to substance over form and the essential over the inessential in a process of characterisation by reference to the stated norm: *Attorney-General (NSW) v Perpetual Trustee Company (Ltd)* (1940) 63 CLR 209 at 226-227 (per Dixon and Evatt JJ); and Gummow WMC, ibid. Care needs to be taken that phrases used by judges in individual cases, in which they explain and articulate their views as to the success or failure in satisfying the norm in s 912A(1)(a), do not become rules to apply as defaults for the proper process of characterisation by reference to the words used by Parliament as to whether a body of conduct satisfied or failed to satisfy the norm.

350 In *ASIC v AGM Markets Pty Ltd (in liq) (No 3)* at 148 [506], Beach J concluded that the expression "efficiently, honestly and fairly" requires that licensees:

> … go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

351 His Honour continued (at 148 [507]) and construed the expression as requiring competence in providing advice and in complying with relevant statutory obligations, but recognised that the boundaries of the phrase and its elements are incapable of clear or exhaustive definition. The concept of "efficiency", so his Honour held (at 148 – 149 [508]), requires that a person is adequate in the performance of their duties, produces the desired effect and is capable and competent. The word, "honestly", was not used in the criminal sense, but a failure to act in that way comprehends conduct which is morally wrong in a commercial sense. When used with the word, "fairly", it requires parties to be more than not dishonest, but to be ethically sound. However, he accepted (at 150 [519]) that the compendious expression may well pick up some aspects of social and commercial norms.

352 On Beach J's analysis, the standard imposed by s 912A(1)(a) may be unintentionally breached, and its contravention is generally a matter of objective analysis, though evidence of the actual intention of the alleged infringer may sometimes be relevant: *ASIC v MLC Nominees Pty Ltd* (2020) 147 ACSR 266, 276 [51].

353 Despite there being some suggestion to the contrary, it is generally recognised that the expression "efficiently, honestly and fairly" is a compendious one. Neither party in the present case submitted that this issue needed to be resolved for the purposes of this case.

354 The other essential concept relating to s 912A(1)(a) is the meaning of "necessary to ensure". It was accepted by both parties that what is "necessary" will depend on the context in which

the word is used: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 56 – 57 [8], 65 [46]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 223 [162]. It is used, as NAB submitted, "for the purpose of dividing compliant conduct from non-compliant conduct, with a view to sanctioning the latter". In that respect, it is relevant to heed the observations of Beach J in *ASIC v AGM Markets Pty Ltd (in liq) (No 3)* at 150 [523] that the section contains "a licensee disciplinary command such that a breach thereof might sound in revocation of the AFSL, conditions being imposed on the AFSL or a pecuniary penalty being imposed". Therefore, whilst the section contains a generalised norm of behaviour which is flexible enough to cover a wide variety of circumstances, it should be applied in a way which is respectful of its purpose and the significant consequences which might ensue for a licensee.

ASIC's claimed contravention

355 ASIC's allegations as to the contravention of s 912A(1)(a) were advanced at a high level of abstraction and in various permutations. Although NAB submitted that these generalised claims were not properly particularised by ASIC, there is no suggestion that it was denied any request for particularisation. Nor did it seek an order from the Court that further particulars be provided.

356 By paragraph 3 of the relief sought in its Originating Application, ASIC's claim in this respect is that NAB contravened the section by:

(a) imposing PP Fees on customers during the Relevant Period when it had no contractual entitlement to do so; (the 3.1 Claim)

(b) failing, during the Relevant Period, to have adequate systems and processes to:

  (i) ensure that wrongful charging of PP Fees did not occur;

  (ii) detect wrongful charging of PP Fees when it did occur; and

  (iii) identify and remediate customers affected by wrongful charging of PP Fees; (the 3.2 Claim)

(c) during the period from about January 2017 to July 2018:

  (i) continuing to charge PP Fees to customers in circumstances where it knew that it had no contractual entitlement to do so; and / or

  (ii) failing to inform its customers of its wrongful charging, or suggest that they review the PP Fees charged to their accounts.

(the 3.3 Claim).

The imposition of PP Fees which were not payable – the 3.1 Claim

357 A mere incorrect imposition by a banker on a customer of a fee which is not payable pursuant to their agreement does not, of itself, amount to a contravention of this section. It does not require commercial perfection whereby any possibility of error or mistake is eliminated. It is most unlikely that the legislature intended that the imposition of penalties could be incurred merely because, from time to time, employees mistakenly enter data into the bank's computers. Even the extended period of overcharging does not, by itself, speak of a contravention of s 912A(1)(a). Ultimately, ASIC did not seriously advance the 3.1 Claim either in its written or oral submissions and it was generally subsumed into the other grounds.

The lack of adequate systems – the 3.2 Claim

358 Its case in relation to NAB's lack of adequate systems to prevent wrongful charging, its detection, or its identification and remediation of customers when it occurred, was that, given the extensive overcharging which occurred and the period of time during which it occurred, it must necessarily follow that NAB had not put in place systems which were adequate to prevent the identified events from occurring. NAB submitted that ASIC had not provided any evidence of the systems or processes, if any, which it had in place, or of their adequacy, although that is not fatal its case. If this were a single case of overcharging or of a limited number of instances, it might well have been necessary for ASIC to establish the manner in which NAB's systems were inadequate to achieve their purpose. However, that is not this case. There was a complete failure of the systems and processes which was evidenced by significant, constant and persistent overcharging occurring undetected for a number of years as NAB has admitted. That over 1.6 million instances of overcharging occurred in relation to more than 3,400 accounts self-evidently discloses the inadequacies. Moreover, even when the overcharging was detected, the systems were insufficient to enable the bank to prevent further occurrences or to detect precisely where past overcharging had occurred.

359 NAB submitted that this does not establish that it did not have appropriate processes in place to prevent overcharging since the overcharging was the result of human error at the time of the establishing of the PP Fee arrangements on the accounts. It also submitted that the error rate of 2.61% of all PP Fee transactions was low despite that it was the equivalent of more than one in every fifty transactions. It further submitted that its employees had resources to guide them in their establishment of periodical payment arrangements and PP Fees which included a "help

screen" within eBOBS regarding PP Fee Indicators, and the relevant Fees Guides which contained details of the PP Fees and exceptions. It claimed that ASIC had not established any inadequacies with these systems and processes.

360 These submissions may have some force if the instances of overcharging or other default were numerically limited, but they have little validity in these circumstances where the consequences were multitudinous, systemic and enduring. The evidence relied upon by NAB does not support the existence of any adequate systems or processes. Rather, it merely disclosed a system which was excessively susceptible to human error and having the consequence of extensive harm, that was difficult to recognise, detect and arising from a single human error: the fault was not in the human error itself, but in the system which did not prevent it or reasonably deal with its consequences.

361 The material before the Court shows further that there was an absence of any checking of the entry of account information relating to the payment of PP Fees into the relevant computer system. That appears from NAB's own internal report from its General Manager of Payments which, in 2018, identified that, in relation to the entry of data for PP Fee arrangements, there "were no known controls on set-up (e.g. four eye check) nor were there control checks completed by the Bankers once the fee was established". It is not irrelevant that it also referred to the extent to which arrangements for compliance with the relevant regulatory obligations were not adequate. It said, "Inadequate controls in place to implement such exemption scenarios that relied on manual processes." Although the controls and the manner in which they were inadequate are not explained, it is obvious in these circumstances.

362 In this context, it is also relevant that paragraph 149 of the agreed facts provides:

> Between 20 July 2007 and July 2018, NAB did not have any system or process in place to detect (and if detected, correct) whether a periodical payment arrangement had been established incorrectly.

363 This is a partial admission by NAB of the inadequacy of its systems and processes. However, it is further evident from the facts that at any time prior to 2018, there were no systems in place which were capable of detecting faults of this kind. It took an extended period of time for its investigating officers to detect such instances from the bank's stored information.

364 However there is a difficulty with ASIC's case in this respect in that it is cast in specifically limited terms. It charged that s 912A(1) was breached if NAB did not have systems in place to, *inter alia*, "ensure" that wrongful overcharging did not occur, which was said to result in

the conclusion that its services were not been provided efficiently, honestly and fairly. However, such a conclusion does not necessarily follow from the foregoing. It may be undoubted that though s 912A requires the financial licensee to conform to high standards of commercial morality and ethics, it does not require standards of absolute perfection. It is most improbable that the legislature could have intended that the provision of banking services, which necessarily involve human interactions, must be completely free of error or mistake. Therefore, whilst it may be necessary for a bank to have in place systems to ensure that systemic overcharging of fees does not occur, it is quite another thing to suggest that the systems and processes must ensure that no overcharging ever occurs. It is the latter which is the subject of ASIC's allegation in relation to s 912A and, for that reason, it cannot be sustained.

365 If it be relevant, it can be concluded that the evidence established that NAB's systems, if it had any, were inadequate to *ensure* that wrongful charging of PP Fees did not occur. It can also be inferred that it did not have any adequate systems in place to prevent systemic overcharging but, as has been mentioned, that was not ASIC's case.

366 Otherwise it might be accepted that NAB did not have adequate systems in place to detect wrongful charging of PP Fees. Such a system would appear to be necessary to ensure the expeditious detection of fault and repayment of funds and that too would be relevant to whether s 912A has been satisfied.

367 The charge in relation to the 3.2 Claim also relied upon NAB's inadequate systems to reimburse customers affected by wrongful charging. NAB submitted that whether or not it had adequate systems to do this was beyond the scope of s 912A(1)(a) because the obligation imposed relates only to the provision of financial services, and the meaning of the expression, "provide a financial service", given by s 766A of the *Corporations Act*, does not refer to remediation in respect of a financial service that is no longer being provided. It further submitted that, as a matter of construction, the effect of s 912B excludes any consideration of remediation arrangements in respect of s 912A. Section 912B(1) provides:

> If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives.

368 NAB's submission in the latter respect relied upon the application of the principle of statutory construction that Acts be read as a whole so that each section should be read consistently and harmoniously with the other provisions: *Project Blue Sky v Australian Broadcasting Authority*

(1998) 194 CLR 355, 381 – 382 [70]. However, its difficulty is that there is no inconsistency or want of harmony in construing s 912A(1)(a) in a way whereby the conduct which might contravene it includes the absence of any suitable and timely arrangements for providing compensation for loss suffered by breaches of any relevant obligation. It is the totality of consequence of the actions of the financial services licencee resulting from the causing of harm and the existence or otherwise of systems for the provision of timely compensation which should be considered in determining whether the services have been provided efficiently, honestly and fairly. The fact of the loss causing event should not be considered in isolation.

369 Section 912A(1)(a) imposes a broad and overarching obligation in relation to the provision of financial services and, in that context, there is nothing which renders it inappropriate to take into account the absence of a suitable system of compensation as an element in concluding that a service was not provided efficiently, honestly and fairly in the circumstances created by the licencee. In the obligation to read a statute as a whole there is no requirement that the sections must form a patchwork of mutually exclusive provisions or in a way that their fields of operation abut precisely with each other. Further, as ASIC submitted, s 912B is confined to the provision of services to retail clients which indicates that it obviously does not intend to "cover the field" in relation to the matters contained in it. Additionally, s 912A applies in relation to any financial services law and to defaults in relation to the financial services provided, whereas s 912B is limited to obligations under Chapter 7. This too is a strong indication that s 912B was not intended to impede s 912A's scope.

370 For the purposes of s 912B, NAB did not identify with any precision the relevant obligations under Chapter 7 to which the alleged compensation regime was intended to apply in the present case. Here, the remediation was not for or in respect of a breach of any statutory obligation, but for the mistaken and wrongful debiting of customers' accounts which gave rise to common law claims against it.

371 It follows from the foregoing that there is nothing in s 912B(1) which would exclude the proposition that in order for a financial services licensee to provide its services efficiently, honestly and fairly, it must have in place some arrangement to ensure that any overcharging that occurred be remediated.

372 NAB also submitted that the issue of remediation was not relevant to the provision of a financial service for the purposes of s 912A(1)(a) because it was only an issue which could arise after the financial service had been provided and that, in this context, the service was the making of

payments on behalf of customers so that, at that point, the service was complete. Unfortunately, there was little analysis by either party of the precise nature of the service to which s 912A would apply in this case. In any event, the submission was misconceived. It would be an unduly restrictive reading of the section if the "service" referred to excluded the steps to be taken if a service has been defectively performed. A "service" is not merely the performance of an act, but includes the terms of the arrangement under which the act is performed, for example that it should not be done with gross negligence. There is merit in the view that unless and until the service has been provided in full and properly according to the arrangement, it has not been provided.

373 Consequently, the existence or otherwise of a reasonably suitable remediation program for reimbursement can be relevant to whether a financial service has been provided in accordance with s 912A.

374 Despite that, for the reasons referred to above, ASIC's 3.2 Claim otherwise fails.

The s 912A claim based upon unconscionable conduct – the 3.3 Claim

375 ASIC finally submitted that its charge that NAB contravened s 912A was founded upon the same allegations that gave rise to the unconscionable conduct charge, namely that it improperly continued to charge PP Fees when it knew that it had no entitlement to them and failed to inform its customers of the possibility of overcharging or suggest that they review their accounts. In circumstances where it has been concluded that its continuing to do so constituted unconscionable conduct, it must have also failed to do all that was necessary to provide its services to its customers efficiently, honestly and fairly. Section 912A(1) imposes a substantially less stringent test than s 12CB of the *ASIC Act* and this was appropriately acknowledged by Mr De Young QC on behalf of NAB.

376 For the reasons given that it engaged in unconscionable conduct, *ipso facto*, it did not do all things necessary to provide the financial services to its customers whom it overcharged, efficiently, honestly and fairly. Once it was aware that its systems were wrongly charging PP Fees to some clients who had no obligation to pay them, it was neither competent nor ethical to continue to charge them and to fail to inform them or advise them to review their accounts. Neither could it be said to be fair or honest. Compliance would require suitable remedial action to be undertaken with appropriate urgency once aware of the wrong it had done.

377 The 3.3 Claim is limited to the period from January 2017, when NAB became aware that there was significant overcharging, to July 2018, when it commenced its remediation programs and exception reporting, and, subject to what is said below, ASIC has made out the grounds to support a declaration of the contravention of s 912A in relation to this period.

Claim under s 912A(1)(c)

378 ASIC also made a claim pursuant to s 912A(1)(c) which was derivative upon any findings that NAB had contravened of ss 12CB, 12DA or 12DB of the *ASIC Act*. It was submitted that those sections were within the scope of the expression, "financial services laws", as used in s 912A(1)(c) with the result that any contravention of them also amounted to a contravention of that latter section as well. Section 761A of the *Corporations Act*, which provides definitions of words and phrases for the purposes of Chapter 7 in which s 912A is located, defines the expression, "financial services laws", as including a provision of Division 2 of Part 2 of the *ASIC Act*. Each of ss 12CB, 12DA or 12DB are within that Division and Part. It follows that NAB's contravention of s 12CB, being the prohibition against engaging in unconscionable conduct, also amounts to a contravention of s 912A(1)(c).

Several overlapping charges

379 ASIC was successful in arguing that the same facts that supported the charge of unconscionability of NAB's conduct applied to its other charges, though unconscionability involved a different measure or characterisation of the conduct. The basis of that success means that NAB is found liable upon several items for the same conduct in relation to different forms of legislation directed to the same purpose, consumer protection, where the added claims are based on no further culpability. The same culpability merely meets the different description of offences contained in separate statutory provisions designed to be adequate to catch different forms of misconduct within their purview. This result is undesirable, and although it was perfectly valid to bring the claims in the alternative as a precaution, the question whether all should be pursued to finality should now be considered by ASIC.

380 These matters and the scope of any further relief, including the imposition of any penalties, should be stood over to a further hearing.

Costs

381 It is appropriate that the parties be heard upon the question of costs.

I certify that the preceding three hundred and eighty-one (381) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 7 November 2022