FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2) [2021] FCA 877

File number:	VID 1170 of 2019
Judgment of:	**MOSHINSKY J**
Date of judgment:	2 August 2021
Catchwords:	**CORPORATIONS LAW** – financial services and markets – best interests obligations – responsibilities of holder of Australian financial services licence – obligation of licensee to take reasonable steps to ensure that its representatives comply with the best interests obligations – obligation of licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly – whether the first defendant, a licensee, contravened these obligations
Legislation:	*Corporations Act 2001* (Cth), ss 761A, 766B, 769B, 910A, 911A, 912A, 912C, 912D, 916A, 947B, 961, 961B, 961G, 961H, 961J, 961K, 961L, 961Q *Evidence Act 1995* (Cth), s 140
Cases cited:	*Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 3)* (2020) 275 FCR 57 *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55 *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 131 ACSR 484 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 *Briginshaw v Briginshaw* (1938) 60 CLR 336 *Jones v Dunkel* (1959) 101 CLR 298 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 *Payne v Parker* [1976] 1 NSWLR 191 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 387 ALR 1

Division:	General Division
Registry:	Victoria
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Sub-area:	Commercial Contracts, Banking, Finance and Insurance
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Date of last submissions:	29 April 2021
Date of hearing:	1, 2, 3, 4, 10, 11, 15, 16, 17, 22 and 23 March 2021
Counsel for the Plaintiff:	Ms CM Kenny QC with Mr DJ Snyder, Mr GB Ayres and Mr PE Annabell
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First Defendant:	Mr PD Crutchfield QC with Dr CO Parkinson and Ms S Hogan
Solicitor for the First Defendant:	Gilbert + Tobin
Counsel for the Second Defendant:	Mr D Mence
Solicitor for the Second Defendant:	Assembly Law

ORDERS

VID 1170 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**RI ADVICE GROUP PTY LTD (ACN 001 774 125)** First Defendant
	JOHN DOYLE Second Defendant
ORDER MADE BY:	**MOSHINSKY J**
DATE OF ORDER:	**2 AUGUST 2021**

THE COURT ORDERS THAT:

1. The proceeding be listed for a case management hearing, in relation to the further conduct of the proceeding, on a date to be fixed.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

INTRODUCTION

1 The plaintiff, the Australian Securities and Investments Commission (**ASIC**), seeks declarations, pecuniary penalties and other relief against the first defendant, RI Advice Group Pty Ltd (**RI**) for alleged contraventions of ss 961L and 912A(1) of the *Corporations Act 2001* (Cth) during the period 1 November 2013 to 30 June 2016 (the **Relevant Period**).

2 During the Relevant Period, RI was a subsidiary of Australia and New Zealand Banking Group Ltd (**ANZ**), the holder of an Australian Financial Services Licence (**AFSL**) and conducted a business that included providing financial advice through authorised representatives to retail clients. Further, throughout the Relevant Period, the second defendant, John Doyle, and his company, The Carrington Corporation Pty Ltd (**Carrington**), were authorised representatives of RI.

3 ASIC alleges that, in contravention of s 961L, RI failed to take reasonable steps, at various times during the Relevant Period, to ensure that Mr Doyle complied with each of ss 961B, 961G, 961H and 961J (the **Best Interests Obligations**). Section 961L provides:

> **961L Licensees must ensure compliance**
>
> A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J.
>
> Note: This section is a civil penalty provision (see section 1317E).

4 ASIC also alleges that, during the Relevant Period, RI contravened s 912A(1)(a), (c) and (ca). There is a substantial overlap between ASIC's case that RI contravened s 961L and its case based on s 912A. Section 912A(1) relevantly provided during the Relevant Period:

> **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; and
>
> (ca) take reasonable steps to ensure that its representatives comply with the financial services laws; …

5 It will not be necessary to deal in these reasons with ASIC's case against Mr Doyle as, on the second day of the hearing (which related to issues of liability), Mr Doyle made full admissions

in relation to ASIC's case against him. In brief outline, ASIC's case was that Mr Doyle contravened the Best Interests Obligations in recommending structured financial products known as Macquarie Flexi 100 Trust (**Macquarie Product**) and Instreet Masti (**Instreet Product**) to retail clients. On the fourth day of the hearing, 4 March 2021, Mr Doyle filed a second amended defence reflecting the fact that he had made full admissions. Subsequently, on 23 March 2021, I made a declaration that, on various occasions during the Relevant Period (as set out in a schedule to the order), Mr Doyle contravened s 961Q(1) of the *Corporations Act* in that he contravened the Best Interests Obligations.

6 ASIC's case against RI, in broad outline, is that:

(a) RI knew or ought to have known that Mr Doyle was not meeting RI's advice standards and was not complying with its business rules, such that there was a substantial risk that he was breaching the Best Interests Obligations;

(b) despite repeated warning signs, RI failed to take any significant steps to investigate Mr Doyle until mid-2015, after ANZ reviewed a selection of Mr Doyle's advice files and gave them the worst possible rating on its advice "scorecard";

(c) as a result, ANZ undertook further file reviews, which identified similar issues with Mr Doyle's advice;

(d) even then, RI kept Mr Doyle on as an authorised representative for another year; and

(e) by doing so, RI ensured that Mr Doyle's clients and their funds under management (**FUM**) – also referred to as funds under advice (**FUA**) – would stay with RI; it also ensured that Mr Doyle could keep advising clients where there was a substantial risk that he would breach the Best Interests Obligations.

7 ASIC's case addresses five separate time periods within the Relevant Period:

(a) 1 November 2013 to 31 January 2014;

(b) 1 February 2014 to 14 November 2014;

(c) 15 November 2014 to 3 March 2015;

(d) 4 March 2015 to 18 June 2015; and

(e) 19 June 2015 to 30 June 2016.

8 In response, RI contends, in summary, that:

(a) this is not a case where RI's compliance systems did not work; they picked up that Mr Doyle was circumventing RI's business rules, caused an investigation into Mr Doyle's conduct that identified potential risks of breach of the Best Interests Obligations, and resulted in a remediation program for any affected clients;

(b) from the time Mr Doyle failed his first audit in February 2015, he was placed under close supervision until his authorisation was suspended, and eventually terminated;

(c) ASIC's approach to this case is to ask what, with the benefit of hindsight, RI should have done to ensure that Mr Doyle complied with the Best Interests Obligations;

(d) but the statutory requirement under s 961L is that a financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with the Best Interests Obligations; it does not require the licensee *to ensure* that representatives of the licensee comply with those obligations; it only requires the licensee *to take reasonable steps to ensure* compliance; and the assessment of what is reasonable is not to be undertaken with hindsight bias.

9 For the reasons that follow, I have concluded that ASIC's case against RI is substantially made out. I have concluded that RI contravened s 961L of the *Corporations Act* by failing to take reasonable steps during each of the five periods of time comprising the Relevant Period to ensure that Mr Doyle complied with the Best Interests Obligations. I have also concluded that, during each of the five periods of time, RI contravened s 912A(1)(a) of the *Corporations Act*. Further, it follows from my conclusion in relation to s 961L that RI also contravened s 912A(1)(c) and (ca). Given the level of factual detail involved in this case, it is not practicable to summarise my reasons for reaching the above conclusions in respect of each of the five time periods. The balance of these reasons will be structured under the following main headings:

(a) The pleadings;

(b) The hearing and witnesses;

(c) Factual findings;

(d) Expert evidence;

(e) Applicable provisions and principles;

(f) Consideration; and

(g) Conclusion.

THE PLEADINGS

The statement of claim

10 ASIC's case is set out in its statement of claim save that, in its outline of opening submissions filed in advance of the hearing on liability, ASIC indicated that it did not press the allegation in paragraph 132(a) of the statement of claim. It is relevant to refer in some detail to ASIC's pleaded case because at various times during the hearing and in closing submissions (both oral and written) RI submitted that ASIC's submissions went beyond its pleaded case. It is therefore important to set out the key allegations pleaded by ASIC. I made clear during the hearing that I would hold ASIC to its pleaded case.

11 After referring to the parties, the statement of claim contains a section relating to the Macquarie and Instreet Products. The statement of claim sets out the basic terms of these products. It is alleged that the products were complex and difficult for unsophisticated investors to understand, and that the products constituted risky and speculative investments.

12 Section C of the statement of claim deals with the recruitment of Mr Doyle as an authorised representative of RI. It is pleaded that Mr Doyle began working in the financial services industry in approximately 1967 and that he worked as a financial adviser under the AFSL of Australian Financial Services Limited (**AFS**) between approximately May 1988 and April 2013 (allegations that are admitted). It is alleged that in March and April 2013, RI: identified that AFS would soon surrender its AFSL; developed and implemented a strategy to recruit authorised representatives of AFS to become authorised representatives of RI; targeted Mr Doyle and Carrington for recruitment as authorised representatives of RI; knew that ASIC had imposed additional conditions on the AFSL of AFS as a result of adviser misconduct; and knew that ASIC had raised concerns with ANZ and/or RI about the compliance framework of AFS.

13 It is alleged that RI or ANZ indicated to ASIC that RI would only take on advisers from AFS who met enhanced due diligence standards. It is alleged that, prior to authorising Mr Doyle to be an authorised representative, RI conducted due diligence with respect to Mr Doyle and that, in the course of carrying out the due diligence:

(a) RI obtained a report on Mr Doyle's files prepared by AFS (**AFS report**) that identified deficiencies in the process by which Mr Doyle provided and recorded advice to clients,

including inter alia inadequate investigation of clients' objectives and inadequate recording of those objectives in statements of advice;

(b) on or around 23 April 2013, Ricki-Lee Rundle, an ANZ employee, conducted a review of a selection of Mr Doyle's files;

(c) Ms Rundle identified various deficiencies in respect of Mr Doyle's record keeping and documented advice;

(d) RI sought and received information regarding the financial products in which Mr Doyle's clients were invested;

(e) the information referred to in the preceding sub-paragraph included:

(i) a document dated 29 April 2013 showing that more than 30 of Mr Doyle's clients were invested in earlier issues of the Macquarie Product; and

(ii) a document showing that more than 40 of Mr Doyle's clients were invested in earlier issues of the Instreet Product; and

(f) an ANZ investment research manager reviewed Mr Doyle's book of clients and reported to RI that future approval for Mr Doyle to recommend structured products, including the Macquarie Product, to his clients would require:

(i) a clear demonstration that the product achieves a specific objective and is in the best interests of the client; and

(ii) a "highly recommended" rating from a preferred research provider of ANZ.

14 Section D of the statement of claim deals with the period from 8 May 2013 to 14 November 2014. (On 8 May 2013, Mr Doyle and Carrington were appointed as authorised representatives of RI.) It is alleged in paragraph 19 that it was a condition of RI's authorisation of Mr Doyle that he complete a financial planning knowledge test (**Kaplan test**) within 30 days of the date of authorisation, being 8 May 2013. It is alleged that Mr Doyle took the test on 15 July 2013 and failed it. (As discussed below, RI disputes that it was a requirement that Mr Doyle pass the test.)

15 It is alleged that RI placed new authorised representatives on a program known as pre-vetting (**pre-vetting** or **pre-vetting program**) and that the program had the following features:

(a) within three months of becoming an authorised representative of RI, an authorised representative was required to submit files to ANZ's Advice Assurance Team (**Advice Assurance Team**) for approval;

(b) the files were to relate to each type of advice that was covered by the authorised representative's authorisation and specialist accreditations (**authorisation areas**);

(c) the Advice Assurance Team assessed the files against a scorecard on which advice documents would be rated between 1, indicating "no issues identified", and 5, indicating seven or more "high rated" issues identified;

(d) a file would be approved by the Advice Assurance Team if the file had no "high rated" issues and fewer than three "medium rated" issues;

(e) to pass pre-vetting in relation to a particular authorisation area, the authorised representative needed a result of "approved" for at least two out of three files submitted to the Advice Assurance Team (**minimum pass requirement**);

(f) files that received a result of "not approved" could be re-submitted to the Advice Assurance Team, but re-submitted files did not count towards the minimum pass requirement;

(g) if the authorised representative failed his or her first round of pre-vetting, the authorised representative was to be given formal coaching, after which the authorised representative could submit further files for a second round of pre-vetting;

(h) if the authorised representative failed to pass second round of pre-vetting in relation to a particular authorisation area, the authorised representative was not permitted to provide advice in that authorisation area;

(i) authorised representatives were not permitted to provide any advice documents to clients until the advice had been approved by the Advice Assurance Team; and

(j) RI expected new authorised representatives to pass pre-vetting within three months of authorisation or shortly thereafter.

16 It is alleged in paragraph 23 of the statement of claim that the pre-vetting program did not provide for an authorised representative on pre-vetting to be dealt with under RI's Consequence Management Standard if deficiencies in the authorised representative's advice practices were identified in the course of pre-vetting.

17 In paragraphs 24 to 30, allegations are made concerning Mr Doyle's initial submissions to pre-vetting. At paragraph 25, reference is made to Marie-Aimée Collins, a practice development manager employed by RI. It is alleged that in mid-2013 RI assigned Ms Collins to assist Mr Doyle to prepare files for pre-vetting. The balance of paragraphs 24 to 30 contain factual

allegations regarding the failure of Mr Doyle's files to obtain approval as part of the pre-vetting program.

18 In paragraphs 31 to 42, allegations are made concerning the appointment of a 'paraplanner', who I will refer to as Ms B. (I refer to her as Ms B as serious allegations are made against her in this proceeding, but it is not clear whether she has been apprised of these allegations and thus given the opportunity to respond to the allegations.) It is alleged that in or about January 2014, RI appointed Ms B to provide assistance to Mr Doyle and Carrington with the preparation of files for submission for pre-vetting. It is alleged that during 2014, Ms B and Ms Collins provided extensive assistance to Mr Doyle and Carrington employees with the preparation of files for submission for pre-vetting, and that this was done with the knowledge of RI officers and employees, including:

(a) Darren Whereat (the Chief Executive Officer of RI);

(b) Peter Ornsby (the Senior National Manager – Advice & Operations at RI); and

(c) Graeme Hyland (the Southern Regional Manager of RI).

19 This part of the statement of claim contains factual allegations regarding files submitted by Mr Doyle for pre-vetting and the failure of such files to gain approval. There are allegations that RI did not comply with its own pre-vetting program. In particular, in paragraph 36 it is alleged that on or about 24 March 2014, Mr Hyland asked ANZ's Advice Assurance Team to count a file of Mr Doyle's that had failed the first round of pre-vetting, but passed the second round of pre-vetting, towards Mr Doyle's minimum pass requirement, contrary to one of the requirements of the pre-vetting program.

20 Allegations are also made concerning the number of files that Mr Doyle had submitted to pre-vetting. In particular, in paragraph 37 it is alleged that by 6 June 2014, more than a year after Mr Doyle had become an authorised representative of RI, Mr Doyle had submitted a total of only six files for first-round pre-vetting and only one of these six files had been approved in first-round pre-vetting.

21 After referring to the date by which Mr Doyle obtained clearance from pre-vetting with respect to all relevant authorisation areas (14 November 2014), it is alleged in paragraph 42 that:

(a) Mr Doyle did not pass pre-vetting for more than 18 months after being authorised as an authorised representative of RI;

(b) the above period was far longer than RI expected an authorised representative to remain on pre-vetting;

(c) during the above period, Mr Doyle was not subject to RI's Consequence Management Standard; and

(d) during the above period, RI did not conduct an audit of Mr Doyle's files.

22 Paragraph 43 of the statement of claim, which appears under the heading "Circumvention of advice vetting requirement by Mr Doyle and RI's knowledge thereof", contains important allegations. Paragraph 43 (omitting particulars) is in the following terms:

> During the period from 8 May 2013 until 14 November 2014 in which Mr Doyle was required to submit files to pre-vetting:
>
> (a) RI received regular reports of inflows of funds that Mr Doyle was generating from business he had written as an [authorised representative] of RI;
>
> (b) Mr Doyle was writing large volumes of business on behalf of RI;
>
> (c) RI knew, or ought to have known, of the volumes of business being written by Mr Doyle by reason of its receipt of the above regular reports of inflows;
>
> (d) RI knew, or ought to have known, that there was a discrepancy between the large volumes of business that Mr Doyle was writing and the number and frequency of submissions that Mr Doyle was making to pre-vetting;
>
> (e) by reason of the matters alleged in paragraphs 43(a)-(d) herein RI knew, or ought to have known, that there was a significant risk that Mr Doyle was providing advice to clients without the advice being approved by the [Advice Assurance Team], in contravention of the pre-vetting program; and
>
> (f) notwithstanding the above matters, RI permitted Mr Doyle to continue to write large volumes of business.

23 Paragraphs 44 to 47 of the statement of claim relate to RI's Approved Product List and the Macquarie and Instreet Products. It is alleged that if a financial product was not on the Approved Product List, authorised representatives were required to obtain approval from ANZ before advising clients to invest in that financial product, and that neither the Macquarie Product nor the Instreet Product was on the Approved Product List (allegations that are admitted). It is alleged that, by no later than August 2014, RI knew or ought to have known that Mr Doyle was (or that there was a significant risk that he was) advising clients to invest in:

(a) the Macquarie Product, in contravention of certain conditions of approval with respect to that product; and

(b) the Instreet Product (which had not been approved).

24 Section E of the statement of claim relates to the period February to March 2015, during which a first file review of Mr Doyle's practice was conducted. It is alleged that RI maintained an Advice Assurance Policy under which authorised representatives were required to undergo an advice assurance review once a year, which involved the authorised representative submitting at least five files to ANZ's Advice Assurance Team for review. It is alleged that in February 2015, the Advice Assurance Team carried out an advice assurance review of Mr Doyle's practice, and that this was the first audit undertaken by RI of Mr Doyle since he commenced as an authorised representative of RI. It is alleged that the files the subject of the February 2015 advice assurance review were selected by Mr Doyle, contrary to the Advice Assurance Team's standard file selection process for such reviews. There are factual allegations relating to the report of the Advice Assurance Team following that review, and RI's response to that report (including that, from April 2015, Mr Doyle was once again subject to pre-vetting requirements).

25 Section F of the statement of claim relates to the period May to June 2015, during which ANZ's Advice Assurance Team carried out a second advice assurance review of Mr Doyle's practice. Factual allegations are made relating to the outcome of that review and the period after the review. Paragraph 64, which is similar to paragraph 43 (set out above), is in the following terms (omitting particulars):

> During the period from April 2015 to around mid-June 2015 in which Mr Doyle was once again required to submit files to pre-vetting:
>
> (a) RI received regular reports of inflows of funds that Mr Doyle was generating from business he had written as an [authorised representative] of RI;
>
> (b) Mr Doyle was writing large volumes of business on behalf of RI;
>
> (c) RI knew, or ought to have known, of the volumes of business being written by Mr Doyle by reason of its receipt of the above regular reports of inflows;
>
> (d) RI knew, or ought to have known, that there was a discrepancy between the large volumes of business Mr Doyle was writing and the number and frequency of submissions Mr Doyle was making to pre-vetting;
>
> (e) by reason of the matters alleged in paragraphs 64(a)-(d) herein, RI knew, or ought to have known, that there was a significant risk that Mr Doyle was providing advice to clients without the advice being approved by the MT, in contravention of the advice vetting requirement; and
>
> (f) notwithstanding the above matters, RI permitted Mr Doyle to continue to write large volumes of business.

26 Section G of the statement of claim relates to RI's suspension and termination of Mr Doyle as its authorised representative. This section of the statement of claim refers to RI conducting

both a full review of advice provided to clients of Mr Doyle and Carrington since becoming authorised representatives of RI, and a third file review of Mr Doyle's files. It is alleged that on 22 June 2015, Mr Whereat issued to Mr Doyle a notice of termination of the authorisations of Mr Doyle and Carrington as authorised representatives of RI, with the notice to come into effect on 21 December 2015. It is alleged that on 25 August 2015, Mr Whereat issued Mr Doyle with a notice of suspension of his appointment as an authorised representative and that, under the terms of the notice, he was still permitted to provide advice to existing clients in certain circumstances. It is alleged that Ms Collins subsequently reported to Mr Whereat that Mr Doyle was continuing to provide advice to clients in contravention of the notice of suspension and RI's policies. It is alleged that by October 2015, RI had identified Mr Doyle's advice to clients to invest in the Macquarie and Instreet Products as an area of significant risk. It is alleged that on or about 19 November 2015, RI extended the notice period in the notice of termination so that it took effect on 30 June 2016. Paragraph 76 is in the following terms (omitting particulars):

> During the period from around July 2015 and continuing into 2016:
>
> (a) RI received regular reports of inflows of funds that Mr Doyle was generating from business he had written as an [authorised representative] of RI;
>
> (b) notwithstanding the Notice of Suspension, Mr Doyle was writing significant, albeit reduced, volumes of business on behalf of RI;
>
> (c) RI knew, or ought to have known, of the volumes of business being written by Mr Doyle by reason of its receipt of the above regular reports of inflows; and
>
> (d) RI permitted Mr Doyle to continue to write business.

27 Section H of the statement of claim contains the key allegations against RI that it failed to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations. Each of the paragraphs in this section has a similar structure, but relates to a different period of time. The allegations in this section are as follows:

> 78. By reason of the matters alleged at paragraphs 14-29, 31, 40, 42(c)-42(d) and 43-46 herein, in the period between approximately 1 November 2013 and approximately 31 January 2014 (while Mr Doyle was subject to pre-vetting but [Ms B] had not yet commenced providing substantial assistance to Carrington):
>
> (a) there was a substantial risk that Mr Doyle was not complying with one or more of ss 961B, 961G, 961H and 961J of the Act (**best interests obligations**) in respect of advice to clients;
>
> (b) RI knew, or ought to have known, of that substantial risk;

(c) RI did not take reasonable steps to address that substantial risk; and

(d) RI failed to take reasonable steps to ensure that Mr Doyle complied with the best interests obligations.

Particulars

Reasonable steps that RI should have taken included one or more of the following:

- taking measures to more strictly enforce the requirement to submit all advices to pre-vetting;
- carrying out a more comprehensive review of Mr Doyle's practices and files to determine whether he was complying with RI's policies and the best interests obligations; and
- suspending or terminating Mr Doyle's authorisation as an [authorised representative] of RI, as appropriate, if that review identified serious deficiencies in Mr Doyle's practices.

Further particulars may be provided after the filing of expert evidence.

79. By reason of the matters alleged at paragraphs 14-47 herein, in the period between approximately 1 February 2014 and approximately 14 November 2014 (while Mr Doyle was subject to pre-vetting and [Ms B] and Ms Collins were providing substantial assistance to Carrington):

(a) there was a substantial risk that Mr Doyle was not complying with one or more of the best interests obligations in respect of advice to clients;

(b) RI knew, or ought to have known, of that substantial risk;

(c) RI did not take reasonable steps to address that substantial risk; and

(d) RI failed to take reasonable steps to ensure that Mr Doyle complied with the best interests obligations.

Particulars

Reasonable steps that RI should have taken included one or more of the following:

- the various steps set out in the particulars to paragraph 78 above; and
- from at least August 2014 onwards:
  - investigating the extent to which Mr Doyle had been advising clients to invest in structured products and seeking to address instances where that advice had not been given consistently with the best interests obligations; and
  - taking steps to prevent Mr Doyle inappropriately advising clients to invest in Instreet Products and Macquarie Products.

Further particulars may be provided after the filing of expert evidence.

80. By reason of the matters alleged at paragraphs 14-53 herein, in the period between approximately 15 November 2014 and approximately 3 March 2015 (between Mr Doyle's graduation from pre-vetting and the First File Review):

(a) there was a substantial risk that Mr Doyle was not complying with one or more of the best interests obligations in respect of advice to clients;

(b) RI knew, or ought to have known, of that substantial risk;

(c) RI did not take reasonable steps to address that substantial risk; and

(d) RI failed to take reasonable steps to ensure that Mr Doyle complied with the best interests obligations.

Particulars

ASIC repeats the particulars to paragraph 79 herein, save that reasonable steps would also have potentially included *not* taking Mr Doyle off pre-vetting, and enforcing the requirement to submit all advices to pre-vetting strictly.

81. By reason of the matters alleged at paragraphs 14-61 herein, in the period between approximately 4 March 2015 and approximately 18 June 2015 (between the First File Review and the Second File Review):

(a) there was a substantial risk that Mr Doyle was not complying with one or more of the best interests obligations in respect of advice to clients;

(b) RI knew, or ought to have known, of that substantial risk;

(c) RI did not take reasonable steps to address that substantial risk; and

(d) RI failed to take reasonable steps to ensure that Mr Doyle complied with the best interests obligations.

Particulars

ASIC repeats the particulars to paragraph 79 herein.

82. By reason of the matters alleged at paragraphs 14-76 herein, between approximately 19 June 2015 and 30 June 2016 (between the Second File Review and the termination of Mr Doyle's authorisation as an [authorised representative] of RI):

(a) there was a substantial risk that Mr Doyle was not complying with one or more of the best interests obligations in respect of advice to clients;

(b) RI knew, or ought to have known, of that substantial risk;

(c) RI did not take reasonable steps to address that substantial risk; and

(d) RI failed to take reasonable steps to ensure that Mr Doyle complied with the best interests obligations.

Particulars

Reasonable steps that RI might have taken included, for example:

- completely suspending or terminating Mr Doyle's authorisation as an [authorised representative] of RI in a timely fashion and in any event earlier than 30 June 2016.

Further particulars may be provided after the filing of expert evidence.

28 Sections I and J of the statement of claim relate to contraventions by Mr Doyle and can be put to one side.

29 Paragraph 132 of the statement of claim alleges that RI contravened s 961L. Although ASIC does not press paragraph 132(a), it is convenient to set out the whole of paragraph 132, and then explain why paragraph 132(a) it is not pressed. Paragraph 132 is in the following terms:

> 132. By reason of the matters alleged in paragraphs 78-82 herein, RI contravened s 961L of the Act:
>
> (a) in respect of each contravention by Mr Doyle of ss 961B, 961G, 961H and 961J respectively as alleged in paragraphs 98-101, 109-112, 119-122 and 127-130 herein; and
>
> (b) further or alternatively, in respect of each of the periods alleged in paragraphs 78-82 herein, alternatively in respect of the period from 1 November 2013 until 30 June 2016.

30 The explanation for ASIC not pressing paragraph 132(a) is that ASIC accepts that the fact that an authorised representative has contravened the Best Interests Obligations does not automatically lead to the conclusion that the licensee has contravened s 961L: see *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55 (***AMP Financial Planning***) at [106] per Lee J. In contrast, paragraph 132(b), which *is* pressed, is not tied to or dependent upon contraventions by Mr Doyle.

31 Paragraphs 133 to 135 of the statement of claim relate to s 912A(1) and are in the following terms:

> 133. By reason of the matters alleged at paragraphs 14-82 herein, RI contravened s 912A(1)(a) of the Act.
>
> **Particulars**
>
> Between approximately 1 November 2013 and approximately 30 June 2016:
>
> - there was a substantial risk that the financial services being provided by Mr Doyle that were covered by RI's Licence were not being provided efficiently, honestly and fairly;
> - RI knew, or ought to have known, of that substantial risk;
> - RI did not take reasonable steps to address that substantial risk; and
> - RI failed [to] do all things necessary to ensure that the financial services being provided by Doyle were provided efficiently, honestly and fairly.

134. By reason of the matters alleged in paragraph 132 herein, RI contravened s 912A(1)(c) of the Act.

135. By reason of the matters alleged in paragraphs 78-82 herein, RI contravened s 912A(1)(ca) of the Act.

The defence

32 In its amended defence (**defence**) RI pleads at paragraph 2A that at all material times it had a service agreement with ANZ whereby RI outsourced various functions to ANZ in relation to the provision of financial services covered by RI's AFSL and to carry out its supervisory arrangements, including a series of matters that are set out in the pleading.

33 In relation to the Kaplan test, RI alleges at paragraph 20A that the test: was administered to assist RI to understand Mr Doyle's knowledge; and was not administered on the basis that Mr Doyle was required to pass it as a condition of his authorisation as an authorised representative of RI.

34 In relation to the pre-vetting program, RI denies some aspects alleged by ASIC. RI alleges in paragraph 22(a) of the defence that:

(a) advisers had three months from commencement with RI or being placed on pre-vetting to submit advice to the Advice Assurance Team for review in relation to each of their authorisations;

(b) if no advice was submitted within that time, then the period may be extended for a further three months;

(c) the period within which an adviser submitted advice to the Advice Assurance Team in specialist accreditation areas varied from adviser to adviser, as some advisers did not regularly provide advice to clients in those specialist accreditation areas; and

(d) the Advice Assurance Team considered and reported on one submission at a time.

35 In paragraph 29A of the defence, RI alleges that after 5 December 2013 it provided further coaching and assistance to Mr Doyle and Carrington employees prior to any further files being submitted for pre-vetting, including:

(a) technological and other technical assistance provided by RI's Practice Development Coaches, including David Davine and Graziano Trimboli;

(b) principles-based coaching and guidance provided by Ms Collins; and

(c) paraplanning coaching and assistance provided by Ms B.

36 In paragraph 33 of the defence, RI alleges that during 2014:

(a) Ms B provided paraplanning assistance and coaching to Mr Doyle and Carrington employees; and

(b) Ms Collins provided principles-based assistance and coaching to Mr Doyle and Carrington employees relating to the processes and enforcement of RI's policies and standards.

37 In paragraphs 41A to 41B of the defence, RI alleges that on or about 2 September 2014, Mr Whereat directed Ms Collins to schedule an advice assurance review for Mr Doyle and Carrington following Mr Doyle's pre-vetting approval in key areas, and that Ms Collins subsequently liaised with Brenton Ritchie (Manager of Advice Assurance, ANZ) and flagged Mr Doyle for an advice assurance review to be performed within three to six months, consistent with RI's applicable policies and practices.

38 In relation to the allegations that Mr Doyle was circumventing the advice vetting requirement and that RI had knowledge of this, RI denies the substance of the allegations and pleads as follows in paragraph 43A:

> Further to paragraph 43, RI says that:
>
> (a) at or around 8 May 2013, Doyle had around $76 million in funds under management for clients for which it was using the platform Strategy;
>
> (b) RI used the platform Voyage;
>
> (c) upon becoming an [authorised representative] of RI, Doyle was gradually transitioning the funds under management for clients from the platform Strategy to the platform Voyage;
>
> (d) Doyle was not required to obtain pre-vetting for clients to transition funds from the platform Strategy to the platform Voyage; and
>
> (e) RI's regular reports included the inflow amounts of Doyle's clients into the platform Voyage.

39 As explained later in these reasons, both the Strategy platform and the Voyage platform were operated by the One Path group of companies, which was wholly owned by ANZ. Mr Whereat states in his affidavit that former AFS advisers were required to use their best endeavours to transfer existing funds under management from the Strategy platform, which was being wound down, to the Voyage platform.

40 In relation to the first file review (of February to March 2015), RI alleges that: its Advice Assurance Policy applied to authorised representatives only after they had passed pre-vetting;

and RI's policy was to conduct an advice assurance review between three and six months after an authorised representative had passed pre-vetting.

41 RI alleges that: in or about late March 2015, RI placed Ms Collins and Vincent Vella in Carrington's offices to provide coaching to its employees in relation to RI's processes and practices; and in or about April 2015, Mr Doyle's advice quality assurance review results were reported to RI's Risk Event Forum and then tracked by the committee at its monthly meetings.

42 In relation to the May to June 2015 period, RI alleges that by about 18 June 2015 it engaged and funded Planlogic to:

(a) provide paraplanning resources to Mr Doyle and Carrington to assist in the preparation of advice; and

(b) improve processes and systems used by Mr Doyle and Carrington employees in the preparation of advice.

43 In relation to the allegations concerning RI's suspension and termination of Mr Doyle as an authorised representative, RI alleges that on or about 6 August 2015, RI wrote to Mr Doyle reiterating that all advice needed pre-vetting approval by the Advice Assurance Team prior to being issued to any client; and, in or about August 2015, RI placed Ms Collins in Carrington's offices to monitor client meetings and any advice documents issued.

44 Further, RI alleges at paragraph 74 that:

(a) the extension of the notice period assisted RI's ability effectively to remediate client files, as Carrington's termination may have caused it to become authorised by another AFSL holder;

(b) between June and September 2015, RI had formed the view that as Mr Doyle was an active seller, the preferable exit of him from Carrington was the sale and ordinary transfer of the business to a new owner; and

(c) by at least October 2015, Richard McLean of Frontier Financial Group Pty Ltd (**Frontier**) had expressed to RI his interest in purchasing Carrington from Mr Doyle.

The reply

45 In its reply, ASIC states in response to paragraph 2A of the defence that the services agreements with ANZ did not: alter or diminish RI's obligations under ss 912A and 961L in relation to

Mr Doyle during the period that he was an authorised representative of RI; or transfer any of those obligations, in whole or in part, from RI to ANZ.

46 In relation to paragraph 43A of the defence, ASIC pleads in its reply that:

(a) to the extent that the regular reports that RI received of inflows of funds from Mr Doyle's practice (**Inflow Amounts**) included amounts that were attributable to transfers of funds from the Strategy platform to the Voyage platform (**Transfer Amounts**) in many weekly reporting periods, the Inflow Amounts were significantly higher than the Transfer Amounts, and the sum total of the Inflow Amounts was significantly higher than the sum total of the Transfer Amounts;

(b) RI did not have a documented policy or other decision by which Mr Doyle was exempted from complying with RI's Advice Vetting Standard in relation to advice to clients to transition funds from the Strategy platform to the Voyage platform (**Platform Transition Advice**);

(c) RI's Advice Vetting Standard applied, without limitation, to all advice of authorised representatives of RI that was personal advice (within the meaning of s 766B(3) of the *Corporations Act*) to Retail Clients;

(d) Mr Doyle's Platform Transition Advice was personal advice (within the meaning of s 766B(3) of the *Corporations Act*) to Retail Clients;

(e) by reason of the matters alleged in (b) to (d) above, Mr Doyle was required to obtain pre-vetting approval under RI's Advice Vetting Standard before providing Platform Transition Advice; and

(f) in any event, by reason of the matters alleged earlier in the reply, RI knew, or ought to have known, that:

    (i) Mr Doyle was generating significant volumes of Inflow Amounts that:

        (A) were not attributable to Transfer Amounts; and

        (B) were the result of new business written by Mr Doyle on behalf of RI; and

    (ii) there was a significant risk that Mr Doyle was providing advice to clients without the advice being approved by the Advice Assurance Team, in contravention of the pre-vetting program.

47 In relation to paragraph 74 of the defence, ASIC alleges in its reply that the primary reason why RI elected not to terminate the authorisations of Mr Doyle and Carrington significantly earlier than it did was to retain the benefit of Carrington's book of clients, not to facilitate remediation of Carrington client files.

THE HEARING AND WITNESSES

48 On 5 December 2019, an order was made that there be separate hearings for questions of liability and penalty, with the matters raised by paragraph 8 of ASIC's originating process (in broad terms, orders for a compliance program and a program to remediate clients affected by Mr Doyle's contraventions) to be addressed in the penalty hearing.

49 The liability hearing took place over 11 days, with counsel and witnesses appearing in person (unlike matters last year, which were conducted by video-conference due to the COVID-19 pandemic).

50 ASIC relied on the following lay evidence:

(a) affidavits of eight clients of Mr Doyle; and

(b) two affidavits of Anita Das, a solicitor employed by ASIC.

None of the above witnesses were required for cross-examination.

51 ASIC relied on the following expert evidence:

(a) an expert report and a reply expert report prepared by Sandra Birkensleigh, an expert in governance, risk and compliance in relation to financial services; and

(b) an expert report and reply report prepared by Paul Green, relating to the advice provided by Mr Doyle to certain clients.

Ms Birkensleigh was cross-examined; Mr Green was not.

52 RI relied on the following lay evidence:

(a) an affidavit of Mr Whereat (the CEO of RI during most of the Relevant Period) dated 13 October 2020; and

(b) an amended affidavit of Mr Ornsby (the Senior National Manager – Advice & Operations, also referred to as the National Operations Manager, of RI during most of the Relevant Period) dated 13 October 2020, with the amended version dated 16 March 2021.

Both Mr Whereat and Mr Ornsby were cross-examined.

53 RI relied on an expert report and a reply report of Glendon Unicomb, a forensic accountant with more than 30 years of regulatory experience in senior executive roles at ASIC and nine years' experience in forensic advisory firms. Mr Unicomb was cross-examined.

54 In addition to the documents annexed to the affidavits, each party tendered a large number of documents.

55 I make the following observations about the evidence of the lay witnesses called by RI, Mr Whereat and Mr Ornsby. (I will make observations about the expert witnesses later in these reasons).

56 Mr Whereat was a very good witness. He was clear and precise in his answers to questions. He made sensible concessions during cross-examination, thus enhancing his credibility. To the extent that there were differences between his affidavit and oral evidence, I prefer his oral evidence. I generally accept his evidence.

57 Mr Ornsby did not have a clear recollection of some of the relevant events, including on several important points. This may perhaps be a function of inadequate preparation for giving evidence in the witness box. On several occasions during cross-examination, he seemed reluctant to answer the question, which gave an impression of evasiveness. I will discuss whether or not I accept his evidence in the context of specific factual issues later in these reasons.

58 The hearing was conducted using an electronic court book (**CB**), with each document identified with a tab number. To assist the parties in their consideration of these reasons, I have included references to the CB tab numbers in these reasons.

FACTUAL FINDINGS

RI

59 During the Relevant Period, RI held an AFSL and was wholly owned by ANZ. As at 30 April 2013, RI had a network of approximately 187 advisers who were authorised to provide financial services on behalf of RI, subject to the terms and conditions of their authorisation arrangements.

60 During the Relevant Period, ANZ owned a number of financial advice businesses, which included an internal advice business, ANZ Financial Planning Pty Ltd (utilising salaried

advisers) and other practices. The group of other practices was referred to within ANZ as the Aligned Dealer Group or ADG. The Aligned Dealer Group included:

(a) RI;

(b) Financial Services Partners Pty Ltd; and

(c) Millennium 3 Financial Services Pty Ltd (which itself owned another AFSL forming part of the Aligned Dealer Group, Elders Financial Planning Pty Ltd).

61 In the course of cross-examination, Mr Whereat said that RI derived revenue from fees that it charged authorised representatives such as Carrington and Mr Doyle. He said that, in the case of Carrington, this was less than $20,000 per annum in 2013.

62 In October 2018, RI became a wholly-owned subsidiary of IOOF Holdings Ltd (**IOOF**), following completion of a share sale agreement entered into between companies associated with ANZ and IOOF in October 2017.

Key individuals

63 During the Relevant Period until April 2016, Darren Whereat held the position of CEO of RI. In April 2016, Mr Whereat became the General Manager, Aligned Licensees and Advice Standards at ANZ, and ceased to hold the position of CEO of RI.

64 During the Relevant Period until May 2016, Peter Ornsby held the position of Senior National Manager – Advice & Operations, also referred to as the National Operations Manager, of RI. In this position, he reported directly to Mr Whereat. In about May 2016, Mr Ornsby became the CEO of RI.

65 Mr Whereat and Mr Ornsby were based in the Sydney office of RI and sat next to each other in an open plan environment. Mr Whereat gives evidence (which I accept) that they frequently discussed issues with each other rather than emailing each other; they tended to have informal meetings that discussed the performance of RI's authorised representatives; and Mr Ornsby had oversight of operational matters, but kept Mr Whereat up to date on such matters.

66 During the Relevant Period until February 2015, Graeme Hyland was the Southern Regional Practice Development Manager of RI. Mr Hyland's primary responsibility was to manage the Practice Development Managers (described below) across the southern region, which comprised Western Australia, South Australia, Tasmania and Victoria. Mr Hyland reported directly to Mr Whereat.

67 In February 2015, following Mr Hyland's departure from RI, Danielle Nugent became the Southern Regional Practice Development Manager of RI, and assumed Mr Hyland's responsibilities.

68 RI had around five Practice Development Managers during the period of Mr Doyle's authorisation. They acted as a direct contact between the authorised representative and RI, and also, between RI's authorised representatives and ANZ Wealth as part of the shared service arrangements described below. Marie-Aimée Collins was the Practice Development Manager assigned to Mr Doyle and his financial planning business.

69 Mr Doyle was the principal of Carrington, which traded as Carrington Financial Services. Mr Doyle and Carrington became authorised representatives of RI on 8 May 2013. They were authorised representatives of RI for the whole of the Relevant Period.

RI's shared services arrangements with ANZ

70 In or around August 2012, ANZ Financial Planning Pty Ltd together with the Aligned Dealer Group (including RI) joined ANZ Wealth's 'shared service environment', whereby the Aligned Dealer Group (including RI) outsourced various functions to ANZ Wealth to support the provision of financial services covered by their AFSLs, and to assist in carrying out their supervisory arrangements. In this regard, the members of the Aligned Dealer Group (including RI) entered in Service Level Agreements with ANZ. The agreements were amended from time to time. There are four Service Level Agreements between RI and ANZ (dated August 2012, December 2013, January 2015 and June 2016) in evidence (CB tabs 454, 905, 1762, 2954). While the counterparty to the Service Level Agreements was ANZ, the staff who carried out the majority of the services under the Service Level Agreements were part of ANZ Wealth.

71 The Service Level Agreements entered into with RI covered various matters including the following:

(a) the provision of a program of compliance monitoring and remediation of authorised representatives;

(b) the offer of coaching to authorised representatives and their support staff to support quality advice being delivered to clients;

(c) the provision of end-to-end management of an Internal Dispute Resolution and External Dispute Resolution process;

(d) the provision of reporting and advice on, among other things, key risks to RI, adviser risk assessments, and advice assurance reviews;

(e) the provision of risk and governance management reporting for RI's Board and compliance committees;

(f) reviewing qualifications for new and existing advisers and providing RI with a determination on relevant competency requirements;

(g) the provision of training solutions based on agreed criteria and prioritisation;

(h) the maintenance of policies and procedures on continuing training for advisers;

(i) the provision of Compliance Standards and Business Rules in line with all regulatory and ANZ Wealth risk policies, and communication of those policies to advisers;

(j) the facilitation of the on-boarding and resignation process of advisers for RI;

(k) the provision of a dedicated vetting program designed to ensure that advisers were consistently providing advice at the quality and standards expected of them;

(l) the provision of targeted reviews of advisers upon referral from the Event Working Group or the relevant Risk Forum in accordance with the governance framework, and reporting back to the relevant RI governance forum;

(m) the provision of advice reviews and client remediation recommendations;

(n) research into various investments, including investments requested by advisers, and the provision of an Approved Product List; and

(o) the development and maintenance of various model portfolios.

Relevant ANZ and RI standards

72 Mr Whereat gives evidence, and I accept, that the introduction of the Future of Financial Advice (or FoFA) reforms required an overhaul of RI's policies to ensure it met the new requirements. Between July 2013 and July 2014, RI's processes and procedures were strengthened to seek to ensure the best interests of clients were paramount. This included the release of a new RI standard entitled the "Best Interest Duty and Related Obligations" and the requirement that advisers complete a "Best Interest Accreditation".

73 Mr Whereat gives evidence in his affidavit that, while RI was under ANZ ownership, certain functions were outsourced by RI to ANZ Wealth pursuant to shared service arrangements (including auditing, vetting and research). Mr Whereat also states that RI had its own AFSL and operational structure, over which he had managerial responsibility. I accept this evidence.

The Advice Vetting Standard

74 The evidence includes a copy of RI's Advice Vetting Standard, version 1.1, released September 2013 (CB tab 780). The "owner" of the document, as identified in the "version control" section of the document, was the Head of Compliance, Advice & Distribution, ANZ Global Wealth. This position was held by Stephen Blood. In the "Description" at the beginning of the standard, it was stated that "[v]etting is a key advisory risk preventative control for new and higher risk Advisers". Under the heading "Key Principles", the standard stated:

> - Vetting is a control which prevents the presentation of poor quality advice to clients/customers.
> - Vetting is a quality assurance review, independent of Licensee Management, which assesses whether each Licensee's Standards have been complied with in relation to the production of prospective advice for clients/customers.
> - Vetting also supports the confirmation and/or development of the capability of new and higher risk Advisers to produce advice which meets the Licensee's Standards.

75 The vetting, or pre-vetting, program as outlined in the standard involved the review of a proposed advice document *before* it was presented to the client of the authorised representative. (The terms "vetting" and "pre-vetting" appear to be used interchangeably in the documents.)

76 As this standard is important for several of the issues in the present proceeding, it is necessary to set out its terms at some length. The standard included the following:

> **Introduction**
>
> This Standard forms part of the Compliance Monitoring and Supervision Framework ('the Framework') and outlines how and when the vetting of files should be executed.
>
> This Standard applies to the Licensees under the Framework, including: Millenium3 Financial Services – incorporating Elders Financial Planning ('M3'), RI Advice Group ('RI'), Financial Services Partners ('FSP') and ANZ Financial Planning ('ANZFP').
>
> **Purpose**
>
> The Vetting Program ensures that Advisers are producing advice which meets the Licensee's expected standards prior to being provided to clients.
>
> Pre-vetting assesses all parts of the advice process, up to but excluding the presentation and implementation of advice. Pre-vetting involves the submission of a proposed Statement of Advice and supporting documents (such as the Fact Find, File Notes and Research) to Advice Assurance for review. Advice Assurance will assess the proposed advice and determine whether any issues are present. Any issues will be reported back to the Adviser to correct before presenting the advice to the client.
>
> Pre-vetting is designed for Advisers who have recently joined the Licensee or have increased their levels of authorisation or accreditation. It may also be recommended for Advisers as part of their Adviser Improvement Plan or as part of Consequence

Management if it is determined to be of benefit.

Vetting ensures that Advisers are consistently providing advice at the quality and standards expected of them by the Licensee. It also enables the Adviser to better understand the Licensee's requirements when providing advice.

Post-vetting is a compliance review conducted after the implementation of advice. It seeks to determine that the compliance requirements for implementing advice have been met.

Vetting Program

1 When is Vetting Required?

Vetting is applied to Advisers under the following conditions:

- New entrant Advisers immediately after the successful completion of their induction
- Existing Advisers as a result of an Adviser Improvement Plan or Consequence Management
- Existing Advisers obtaining a new authorisation or specialist accreditation (e.g. gearing)

All vetting requires each advice document to be approved before it is presented to a client.

It is important for both Licensees and Advisers to have confidence that an appropriate level of competence can be demonstrated in giving advice across a range of types of authorisations and specialist accreditations. Consequently Advisers need to progress through pre-vetting for each of their specific authorisations and specialist accreditations according to the following groupings:

Authorisation	Accreditation
Risk Protection	Self Managed Super Fund (SMSF)
Superannuation & Investment	Direct Equities
Retirement Planning	Gearing
	Business Insurance
	Other (e.g. Agribusiness)

2 How to submit a file for Vetting

A file is to be submitted for vetting once all the relevant information has been gathered and completed. This would involve meeting the client, undertaking a needs analysis, formulate the proposed strategy and document within the relevant advice document. In addition to the client file, a vetting submission is to also include a vetting checklist (refer to the Appendix – Advice Quality Checklist - Vetting).

The vetting checklist is to be completed by the Adviser and attached to the client file prior submitting to Advice Assurance.

An Adviser is to submit only one vetting submission at a time. This will allow Advice Assurance to provide feedback on the file submission prior to any further submissions. The Adviser is to ensure all learning's from previous vetting submissions is included in all future advice documents.

3 Vetting Outcome

Advice Assurance will apply the "advice quality scorecard – vetting" to the vetting submission. The result of this will then determine the outcome of the vetting submission. The outcome will be one of the following:

Approved

To receive 'approved' the file must not have any "high" rated issues or three or more "medium" rated issues.

Any issues identified must be rectified before presentation of the advice to the client.

In these instances, these files will not generally be required to be re-submitted to Advice Assurance for review and may be presented to the client once any relevant feedback is incorporated into the advice and file document(s).

Not Approved

To receive 'not approved' the file would have at least one "high" issue and/or three or more "medium" rated issues.

Not approved indicates that significant issues have been identified. The issues must be corrected and the file re-submitted to Advice Assurance to confirm that it is in order for presentation to the client.

A re-submitted file which is subsequently approved does not count towards an Adviser progressing off a pre-vetting status.

It is recommended that where vetting is required, that the client presentation appointment is not confirmed with the client until the Adviser has received confirmation that the file meets requirements.

4 Multiple Authorisations or Accreditations

Some advice files may contain advice which covers more than one area of authorisation and/or specialist accreditation. If the Adviser is on pre-vetting for any such areas, the file is to be submitted for vetting.

The areas of advice (e.g. risk insurance or SMSF) will be separately assessed. As a result, a single file submission may result in both 'approved' and 'not approved'. For example: a file contains advice on SMSF and risk insurance. Both areas will be considered separately when determining a vetting outcome. Therefore it is possible that the file receives 'approved' for SMSF and 'not approved' for risk insurance.

5 Adviser Improvement Plan

If an Adviser is required to be subject to pre-vetting as a result of an Adviser Improvement Plan resulting from a compliance review or for some other reason, such as a Management Direction it is possible that the pre-vetting requirement will be limited to a particular authorisation or specialist accreditation.

For example if the significant issues all relate to the provision of risk insurance advice, the pre-vetting condition will be limited to the risk insurance authorisation.

However, if the significant issues were more fundamental or general in nature, pre-vetting may be required for all authorisations and specialist accreditations.

6 Clearance

Advisers are required to be given a clearance from vetting by Advice Assurance for each of their authorisation and or specialist accreditation areas. To receive clearance the Adviser needs to achieve 'approved' for at least **two, out of three, submissions**.

If clearance is not achieved after three submissions, the Adviser is to receive formal coaching and development from their Practice Development Manager. This will usually involve the Practice Development Manager reviewing the specific issues and coaching the Adviser to better understand the issues and associated compliance requirements ("supervisor coaching").

Following the supervisor coaching session, the Practice Development Manager is to notify Advice Assurance that the Adviser may commence a second phase of pre-vetting.

To receive clearance from the second phase of pre-vetting, the Adviser will also need to achieve 'approved' for two out of three submissions. If this is not achieved within the second phase of pre-vetting, the Adviser may not provide further advice in the relevant area. Advice Assurance will provide recommendations to Management of the Licensee.

If the Adviser has not received clearance following the second phase of vetting and that Adviser is a new entrant to both the Licensee and to providing personal advice to retail clients, then that Adviser will be afforded a third phase to achieve a clearance from prevetting. If clearance is not provided following that third phase Advice Assurance will provide recommendations to Management of the Licensee.

7 Vetting Feedback

The Vetting outcome (application of the scorecard) and areas for development will be recorded by the Advice Assurance Vetting Officer (AAVO) in a formal report. This report will be sent via email to both the Adviser and their relevant Practice Development Manager for review. It is the responsibility of the Adviser to incorporate the relevant feedback into the advice document and/or provide the relevant information.

These reports can also be used to support any coaching and development that is required.

8 Vetting Period

Advisers have three months from commencement with the Licensee, gaining a new accreditation or being placed on pre-vetting (*as the case may be*) to submit advice for review in relation to each of their authorisations and/or specialist accreditations. If no advice is submitted within that time then it may be extended for a further three months. An extension will be granted by Advice Assurance if the Practice Development Manager confirms that advice within the scope of the authorisation or specialist accreditation is expected to be submitted within the next three months (i.e. there is relevant advice in the pipeline).

If no such advice is submitted within the first three months, or approved extension, then the relevant authorisation or specialist accreditation may be withdrawn for lack of use. Such a decision shall be taken jointly by the Head of the Licensee and the Head of Compliance.

9 Vetting of files post implementation of advice (post vetting)

Post vetting is not mandatory and is only considered on a risk based approach. If post vetting is required, the Adviser will be contacted and requested to submit a file that was a part of their vetting program. The file requested will need to be successfully implemented and complete.

There is no requirement to meet a certain standard for post vetting. This process is to ensure that Advisers understand the implementation of advice processes. Issues identified through post vetting will be considered by the Practice Development Manager to provide further coaching & development and will help form part of the Adviser profile.

(Errors in original; Underlining emphasis added.)

77 Mr Ornsby gave evidence in his affidavit and orally that RI generally expected authorised representatives to pass through vetting in their core areas of authorisation within the first six months of them submitting advice documents.

78 During cross-examination, Mr Ornsby was asked questions about the sentence underlined in the extract from the standard set out above. It was put to him that there were two conditions to an adviser being afforded a third phase, namely that the adviser is both a new entrant to the Licensee (i.e. RI) and to providing personal advice to retail clients. Mr Ornsby said that the standard did not cater for the scenario where the adviser was a new entrant to the Licensee but had already provided financial advice. He also said, during re-examination, that this aspect of the standard was probably "unintended – or mis-written" as "almost any business that joins RI is someone who has actually provided advice in the past".

79 The standard had an appendix headed "Advice Quality Checklist – Vetting". The appendix was arranged as a table. The table contained 21 rows, each setting out a particular requirement, a rating for that requirement (low, medium or high) and general guidance in relation to the requirement. By way of example, item 3 was as follows:

The client's risk/investor profile has been appropriately documented in accordance with Licensee approved tools and advice documents.	High	A client's relevant personal circumstances should include the appropriate determination and consideration of the client's tolerance for risk in regards to financial product advice. The risk profile should accurately reflect the facts gathered, and the final recommendations should mirror the risk profile of the client. It is important that the *final* risk profile, as determined by the adviser, be appropriate for the client. There may be inconsistencies in file documentation, between the risk profile identified by the fact find, the recommended risk profile in the SOA and the

		risk profile that was actually implemented (based on asset allocation). In these cases, it is important that the 'final' recommended risk profile be determined notwithstanding the inconsistencies, and an assessment made [as] to whether this final risk profile is appropriate for the client – considering their relevant personal circumstances. Additionally, the risk profile should be determined using the approved licensee tool, to ensure that the outcome or final risk profile for the client is in alignment with the licensee view. Common issues include: - Not undertaking the risk profiling process properly (i.e. not using the information gathered as part of the fact find or information is inconsistent). - Not recommending or implementing based on the risk profile (i.e. making recommendations contrary to the client's risk tolerance). - Indicators of the adviser overly driving the risk profile process, skewing results (i.e. risk profile is what the adviser wanted it to be, or changed due to client instructions without explanation). - Arithmetic errors and miscalculations in using the risk profiling tool.

80 By way of further example, item 9 was as follows:

The advice is appropriate for the client. Post FoFA- The advice is likely to be in the best interests of the client. *This requirement does not apply to "hold" product recommendations*	High	The advice must be fit for purpose and satisfy the client's relevant circumstances. For advice given post FoFA, if a reasonable person would think that the advice would have been likely to leave the client in a better position (at the time the advice is provided), it is likely that the adviser has acted in the best interests of the client. The concept of leaving the client in a better position is not necessarily confined to a monetary improvement, but can encompass such things as a person's preparedness for the future, susceptibility to risk or having access to certain product features or services. Leaving the client in a better position does not include improvements that are not important or otherwise have no value to the client, taking into account the scope of the advice.

		The Best Interests Standard provides several examples of how this may be demonstrated.

The reference to "FoFA" is to the Future of Financial Advice reforms, which are discussed later in these reasons.

81 Item 15 was as follows:

Products recommended were on the Approved Product List or they were recommended with documented approval from Research.	High	If an adviser recommends a product that is not on the licensee's approved product list, they will need to ensure that they have the appropriate authorisations and approvals to provide the advice. If an advice provider is unable to recommend products outside their approved product list, and they need to do this to meet their legislative obligations, the adviser must decline to provide the advice.

The Advice Assurance Standard

82 The evidence includes a copy of RI's Advice Assurance Standard, version 1.0, released October 2013 (CB tab 815). The "Version control" section of the document indicates that the "owner" of the document was the Head of Compliance, Advice & Distribution in ANZ Global Wealth (that is, Mr Blood). The standard was described as follows:

> The Licensees have established a set of consistent, expected standards to assist with its representatives' understanding of their obligations in providing financial services in an efficient, honest and fair manner. These standards are aligned and designed to satisfy the Licensees' legislative and regulatory obligations under Financial Services Laws (s 912A(1) Corporations Act 2001).

83 Pursuant to this standard, a formal advice assurance review was to be conducted at least once per year, and involved a review of at least five client files.

84 This standard is also important for several issues in the proceeding. It is therefore necessary to set out its provisions at some length. The standard stated in part:

> **Introduction**
>
> The Licensees have established a set of consistent, expected standards to assist with its representatives' understanding of their obligations in providing financial services in an efficient, honest and fair manner. These standards are aligned and designed to satisfy the Licensees' legislative and regulatory obligations under Financial Services Laws (s 912A(1) Corporations Act 2001).
>
> While underpinned by regulatory requirements, it is recognised that the consistent

provision of quality advice by competent and professional advisers is core to ensuring valuable and ongoing customer relationships.

The advice assurance review program emphasises and is conducted on the following principles:

- **Assurance:** Identify and manage potential issues that have the ability to adversely impact customers, ANZ or you.
- **Transparency and objectivity:** A transparent methodology which provides clear and impartial views of the advice you provide.

Purpose

Our mission is to provide an engaged and trusted service that seeks to proactively minimise risk to our clients and business through consultative training and collaboration, advice assurance, incident management and solid reporting.

Advice Assurance Program

The Advice Assurance Review tests appropriateness of advice and results from regular reviews are a key indicator of the overall quality of our financial planning services. They help us to identify if and where we need to make improvements and provide additional training and development.

Improvements to the Advice Assurance Review process, including a new Advice Quality Scorecard, commenced in June 2013.

The two main types of reviews that form the advice assurance review program include:

1. **Compliance Reviews:** A formal review using a sample of client files to assess the capabilities of the adviser to consistently and demonstrably meet the Licensee's expected advice standards.
2. **Risk Based Reviews:** Targeted reviews conducted to supplement the information gained during Compliance Reviews or through other monitoring and supervision activity. The results will further influence the training and support measures needed to assist the adviser in meeting ANZ's standards.

2. How often am I subject to an advice assurance review?

You are subject to a formal advice assurance review at least once per year. You may also be subject to further reviews outside of your advice assurance review. These are known as 'Risk Based Reviews'.

As a part of the pre review planning conducted by an Advice Assurance Officer, they will notify you via telephone and email to confirm your advice assurance review date and location.

3. What does an advice assurance review consist of?

An advice assurance review can be broken down into 4 key components:

1. **Pre-Review Planning** - this is where a profile of the planner is developed by investigating previous issues, common advice strategies and products recommended by the planner, training records, authorisations and accreditations, the planners business model and performance.

2. **File assessment and review** - this is where the Advice Assurance Officer will visit your office on the appointed day of review. They will review the files and apply a risk weighted scorecard which will identify potential areas of risk and rate them accordingly to the potential size of the risk.

3. **Root Cause analysis and Adviser Improvement Plan** - where issues have been identified, we will work with the planner to understand the root cause to the issues, and provide recommendations designed to help you improve capability and professionalism.

4. **Compliance Review reporting and finalisation** - a report will be developed outlining any findings within the advice assurance review and provide client remedial and planner development recommendations.

4. How many files will be looked at in an advice assurance review?

A minimum of five files will be requested and reviewed as a part of your advice assurance review.

5. What files may be requested for a review?

As a part of the pre review planning, an Advice Assurance Officer will select a minimum of five files to form the advice assurance review. These files will be selected from the sale of product or advice since the date of your previous advice assurance review.

For example, if your previous advice assurance review was held on 30 March 2012, all sales of products and advice since 30 March 2012, could form a part of your review.

The Advice Assurance Officer will aim to select a sample of files that best represents the type of advice you provide. Therefore, the files selected could cover a range of strategies, products and advice types within your authorisation and accreditations.

6. What is the scorecard used in an advice assurance review and how does it work?

The advice assurance review is conducted using a risk weighted scorecard. A scorecard will be completed for each file which is reviewed and captured in the Compliance System.

The scorecard is designed to emphasise the following:

1. **Assurance:** Able to provide assurance to ANZ that regulatory and expected requirements have been met as a minimum, and that potential issues and risks are identified

2. **Transparency and objectivity:** Conducted under a transparent, objective methodology and assessment criteria, which provides clarity and a common understanding of quality advice

3. **Risk sensitive:** Is risk based to focus on the severity and impact to the client and on the quality of advice provided.

Scorecard Rating

The requirements are rated in terms of the risk of not meeting the standard – 'high', 'medium', and 'low'. Given the quality of advice focus, the overarching intention

(where possible) is that 'medium' weighted issues are related to processes and procedures, whereas 'high' weighted issues have a relatively direct impact on the quality of advice provided to the client.

The assessment for each requirement will result in one of four possible responses:

> '**Yes**': There is demonstrable evidence on file that the advice has materially met the expected requirement
>
> '**Observation**': The requirement has been met but correct procedures have not been followed. An observation equates to an immaterial finding and does not impact the Advice Quality Rating.
>
> '**No**': There is insufficient evidence on file that the advice has met the expected requirement
>
> '**Not applicable**': The requirement was not applicable.

Refer **Appendix A** for a copy of the 'Advice Assurance Review Scorecard'.

7. Will I be provided with a score/rating and how is it calculated?

The scorecard is applied to each file reviewed. The number of issues identified and the risk weighting associated with each will be used to determine your Advice Quality Rating. Please refer to the following for the advice quality rating criteria:

	Adviser Quality Rating
Advice Quality Rating	**Total number of issues identified**
1	▪ No issues identified
2	▪ Low rated issues or ▪ 1 – 3 medium rated issues or ▪ 1 high rated issue
3	▪ 4 – 6 medium** rated issues or ▪ 2 – 3 high rated issues
4	▪ = or > 7 medium** rated issues or ▪ 4 – 6 high rated issues
5	▪ = or < 7 high rated issues

** If a planner rates 5 mediums this equates to 1 high. The mediums are replaced if you have 1 or more highs originally.

Example 1: 5M + 1H = 2 H = Advice Quality Rating of 3
Example 2: 5M + 0H = 5M = Advice Quality Rating of 3

A minimum of three files must be reviewed in order to determine an advice quality rating. For reviews of 2 or less files, no advice quality rating will be provided.

An advice quality rating is not formally captured in the system until the Final Report has been generated. (Refer to question 9)

(Errors in original.)

85 Subsequent sections of the standard were arranged under the following headings:

(a) What happens after the Advice Assurance Officer reviews the files?

(b) Will I receive any documentation outlining the findings of my advice assurance review?

(c) Will I be required to complete any actions post my advice assurance review?

(d) Am I able to appeal the outcome of my advice assurance review?

86 An appendix to the standard set out an "Advice Assurance Review Scorecard". This was arranged as a table comprising a list of requirements, with a rating (low, medium or high) and general guidance in relation to each requirement.

The Consequence Management Standard

87 The evidence includes a copy of ANZ's Consequence Management Standard, version 1.0, with a release date of April 2013 (CB tab 515). The standard applied to the Aligned Dealer Group Licensees within ANZ Global Wealth's Advice and Distribution business units. (This included RI.) The standard set out guidelines and principles that Licensees would need to apply when advisers failed to meet their compliance obligations. Further, the document stated that "[c]onsequence management is mandatory as it promotes responsible adviser behaviour as well as a respected compliance culture within the ANZ Advice & Distribution network".

88 Under the heading "Key principles" the document stated:

> Guiding principles governing this standard are:
>
> - Consequences should be relative to the nature and extent of the issues.
> - Advisers should be informed of and understand the potential consequences of their failure to meet expected standards of behaviour and compliance.
> - Advisers should be given the opportunity to provide a response to the issues before a decision is made.
> - Remediation will generally be the Licensee's agreed preferred [action] in consultation with the head of Compliance or his delegate.

89 As Mr Ornsby explained during his oral evidence, the words "remediate" and "remediation" could potentially apply to correcting files or paying compensation to clients, or both.

90 Under the heading "Purpose", the standard stated:

> The purpose of this consequence management standard is to ascribe accountability for advisers whose adherence to the Licensees' standards is below that required and create an increased risk for the licensees and ANZ. Unacceptable behaviour includes non-compliance with licensee policies and related standards. Consequence management must be consistently enforced to reduce risk and encourage adviser behaviour consistent with those policies and procedures that promote a professional network.
>
> Poor compliance practices may lead to regulatory breaches as well as provision of poor quality advice to clients. Impacts could include financial, regulatory and reputational damage in addition to customer dissatisfaction and complaints.

91 The standard contained a section headed "Means of identifying", which dealt with means of identifying issues. There was also a section headed "Consequence Management Committee", referred to as the "CMC". This committee was established within ANZ Global Wealth's Advice and Distribution business units; its role was "to consider and determine appropriate consequences for serious misconduct". The standard stated that the CMC would meet monthly and more often if required. The membership of the CMC was as follows:

Managing Director Global Advice and Distribution	Chair
Head of Practice Based Financial Planning	Member
Head of Advice Delivery	Member
CEO RI Advice Group	Member
CEO Millennium3	Member
CEO Financial Services Partners	Member
Head of Risk Wealth Advice & Distribution	Member
Head of Compliance, Complaints & Professional Standards	Attendee
Head of Aligned Licensees Risk	Attendee

92 In his capacity as CEO of RI, Mr Whereat sat on the CMC.

93 The standard had a section headed "Range of potential consequences", which stated:

> Licensees [e.g. RI] may apply a range of remediation and disciplinary actions depending on the severity of the issue. They include:
>
> - File remediation e.g. compiling new file notes
> - Client remediation e.g. issuing the appropriate disclosure documents
> - Additional monitoring and supervision
> - Practice management and support or coaching
> - Re-training
> - Re-reviews within 3-6 months
> - Licensee front line adviser panel managers to monitor remediation actions
> - Restriction of authorisation
> - Pre-vet advice
> - Post-vet of advice
> - First warning letter
> - Second and final warning letter
> - Non qualification for adviser awards and annual conference
> - Enforcement of adviser indemnity for any financial losses
> - Suspension of authorisation

- Termination of advice authority
- Report to relevant external authorities e.g. ASIC and Police in their jurisdiction where warranted

94 The standard included an "Advice Assurance review matrix" as follows:

Compliance Review Rating	Remedial actions/Consequences
1	There would generally be no consequences
2	- File or/and client remediation if required - Adviser Improvement Plan
3	- All of the above as applicable for 2 - Assessment of re-training needs
4	- All of the above as applicable for 3 - Re-review within 3 – 6 months - Pre-vet or other monitoring assurance as determined by the nature of issues - First warning letter - Referral to Consequence Management Committee for decision on appropriate consequences
5	Referral to the Consequence Management Committee to determine appropriate consequences which may include any or all of the consequences referred to above as well as: - Second and final warning letter for repeated misconduct Suspension or termination of authority depending on severity of issue and whether they are repeated incidents

RI Advice Procedures and Policies

95 In June 2012, RI issued a document titled "RI Advice Procedures and Policies", which was Section 3 of a manual of policy documents (CB tab 443). This document was subsequently re-issued in September 2014 (CB tab 1475). Mr Ornsby said during cross-examination that this was an adviser-facing document; in other words, it was addressed to advisers and set out standards they should comply with.

96 The June 2012 version of the document referred to RI's Approved Product List at p 37:

> **RI Approved Product List**
>
> The RI Approved Product List lists all approved investments that are available for Authorised Representatives to use within an advice document. These investments have been comprehensively researched by the RI Investment Research team and approved formally by the Investment Selection Committee (Selcom). Authorised Representatives must only recommend investments that are listed on the current Approved Product List. The use of non-recommended investments should be limited to exceptional circumstances and must first be approved by a member of the RI Investment Research team in writing. A suitable disclaimer must be added to the written recommendation.
>
> **Authorised Representatives are not permitted to recommend products which are not included on the Approved Product List unless specifically approved through the non-recommended approval process**.

…

> RI has incorporated into its administrative processes regular checks to ensure that Authorised Representatives adhere to the use of products on the Approved Product List. The AFS Licensee will also monitor the content and scope of the Approved Product List on a regular basis to ensure that it remains relevant, accurate and up to date.
>
> Monitoring of the compliance of the use of the Approved Product List includes the review of commission statements, as well as the review of client files.
>
> (Emphasis added.)

A similar statement appears in the September 2014 version of the document.

97 The ANZ Wealth Research Team was responsible for maintaining RI's Approved Product List, being the list of products that the ANZ Wealth Research Team had researched and determined authorised representatives of RI were permitted to recommend to their clients, subject to the consideration of the suitability of the product in meeting a specific client need.

98 Where a financial product was not on RI's Approved Product List, the policy and procedures required authorised representatives of RI to request approval from the ANZ Wealth Research Team and RI before advising clients to invest in that financial product. The process of an adviser requesting to recommend a non-approved product to their client was largely the responsibility of the ANZ Wealth Research team under the shared service arrangements between RI and ANZ.

The period before 8 May 2013

The Strategy and Voyage platforms

99 Prior to 8 May 2013, Oasis Funds Management Ltd (**Oasis**), which was owned by the OnePath group of companies, commenced to offer a product badged "Strategy". The OnePath group was wholly owned by ANZ. Oasis was the product issuer and administrator, while Strategy Portfolio Ltd was the distributor. The Strategy platform was a 'wrap service' that drew all client investments together around a central cash account, enabling the administration of retirement savings (as all buying, selling, reporting and maintenance of investments held in clients' accounts occurred in one place). The Strategy platform was used by advisers licensed through AFS, as well as advisers from several other dealers or licensees. In other words, Strategy was a product provided by the OnePath group that AFS and its authorised representatives were able to offer to their clients.

100 Another product offered by the OnePath group was the Voyage platform. The Voyage platform was used by RI and served a substantially identical purpose to the Strategy platform. Strategy and Voyage were located in the one trust and had the same trustee.

101 Mr Whereat gives evidence (and I accept) that: as part of ANZ's recruitment strategy (discussed below), it sought to recruit AFS advisers on terms that required the advisers to use their best endeavours to transfer existing funds under management from the Strategy platform, which was being wound down, to the Voyage platform; and RI had negotiated with Oasis to provide Voyage clients with lower ongoing client fees than Strategy clients.

ANZ considers how to retain FUM (March 2013)

102 In or around March 2013, AFS (i.e. Australian Financial Services Limited), a financial advice business, collapsed, and RI implemented a strategy to actively recruit advisers and practices from AFS to join RI. This included the recruitment of Mr Doyle and Carrington. Mr Whereat was generally aware of and involved in discussions with ANZ Wealth employees regarding the strategy to onboard good businesses which were on the market as a result of the collapse of AFS.

103 In a document dated 22 March 2013 (CB tab 551), which takes the form of a PowerPoint presentation, ANZ considered a strategy to retain FUM on the Strategy platform that were the subject of advice by AFS advisers. The document noted that, as at 11 March 2013, the total FUM in Strategy products was $1.04 billion; of this, $677 million, or 65%, was "controlled" by AFS advisers. The document noted that AFS had attempted several sale processes over the previous few years, most recently coming to financial terms at a dealer level with BT. The document stated "We", that is, ANZ, "understand that AFS has substantial financial liabilities, both institutionally and to its own advisers". It was stated that the BT commercial arrangement had experienced issues through the due diligence process and, in light of this, several institutions were aggressively approaching AFS advisers directly with financial offers. The document indicated that the majority of AFS FUA was now "at significant risk of migration to competitor platforms". The executive summary then stated:

> This paper considers how we might best retain our current Strategy FUA through a proposed recruitment of quality or high value AFS planners into our aligned advice networks.

104 The document then set out two alternative scenarios. Following those pages, the document set out a "Recommended Retention Proposal" that involved making offers to selected AFS advisers on certain terms. The document then stated as follows:

> It is acknowledged that ANZ Wealth Advice & Distribution will undertake the following prior to adviser acquisition:
>
> (i) Execute appropriate adviser due diligence prior to adviser practice acquisition to ensure ANZ Wealth is appropriately protected from any on-boarding risks;
>
> (ii) Obtain legal sign off on the proposal and engage legal on the implementation of the proposal.

105 Another document in evidence is an RI document headed "Recruiting Summary – AFS" (CB tab 553), which is in the form of a PowerPoint presentation. The index to the Court Book indicates the document is dated 15 April 2013. The first page contained an overview of AFS. The second page outlined the strategy, which included: "Utilise the instability within AFS to target only their high calibre businesses". Under that statement, it was stated: "Consider top 10% of advisers with established businesses and high FUA". The next page outlined "Where we stand today" and gave a summary of the progress of discussions with AFS's authorised representatives. It was stated that RI had concluded discussions with ten firms (15 authorised representatives) that had accepted a non-binding offer. It appears that Carrington was one of these firms. Later in the document, on a page headed "Profile of businesses", key details were set out regarding several firms, including Carrington. The table on that page contained the following details in respect of Carrington:

(a) Practice revenue - $1.1 million;

(b) Total FUA - $80 million;

(c) FUA in Strategy (i.e. the Strategy platform) - $58 million;

(d) Approximate annual inflows - $5 million; and

(e) Upfront payment - $180,000.

106 In oral evidence, Mr Whereat said he was probably aware at the time (i.e. in about April 2013) of the figures in (b) and (c) above.

107 The upfront payment referred to an amount RI would pay to the firm to secure its agreement to join RI. Mr Whereat states in his affidavit (and I accept) that the landscape of the financial services industry at the time meant that it was necessary for RI to offer a sign on bonus to AFS

advisers, including Mr Doyle, as an incentive to become authorised representatives of RI as opposed to another AFSL-holder.

108 On a page headed "Checkpoint – Next steps" the following appeared:

> Strictly adhere to RI onboarding process
>
> – Audit of every adviser to verify qualifications
> – Audit of practice P&L
> – Review last compliance and audit reviews
> – Vet every Statement of Advice for an initial period

109 Further details of RI's onboarding process were set out on subsequent pages of the same document. On a page headed "Controls within the initial due diligence phase", a series of steps was set out, including a review of five files of the practice.

110 The next page of the document, headed "Controls within the Adviser Appointment phase", set out a series of steps including: "RI requires all advisers to complete Knowledge / Competency testing via Kaplan".

111 The last page of the document contained a chart with a timeline of the various workstreams associated with onboarding advisers. This showed a number of the steps being completed in only a matter of days. (ASIC relies on this evidence to suggest that the process was rushed.)

RI's offer to Carrington (March 2013)

112 By letter dated 26 March 2013, signed by Mr Ornsby on behalf of RI, RI made a formal offer to Mr Doyle in relation to Carrington joining RI (CB tab 528). The key commercial terms outlined in the letter were as follows:

> - $6,000 Practice fee (inc AR fee)
> - $2,000 per additional Authorised Representative (AR)
> - $0 XPlan software fees
> - RI's discounted PI insurance program ($3,300 per annum per Authorised Representative)
> - RI Advice Group will pay a $180,000 upfront payment on the date of appointment. This would be subject to a 3 year claw back period if you resigned from the RI Advice Group within 3 years. The formula for the claw back is as follows:
>
> (i) Within the first 12 months: 100%
>
> (ii) After 12 months: 50%

(iii) After 24 months: 25%

(iv) After 36 months: nil

- A $20,000 marketing allowance payable on the date of appointment

> **RI Advice Group will provide a 30bps incentive for any external funds under advice of existing clients transitioned to the OnePath platforms of Frontier and Voyage**. This incentive excludes term deposits on OneAnswer. This incentive is in place for funds under advice transitioned up to 30 June 2013, and based upon further qualification of the grandfathering provision of FOFA, this may be extended to 30 June 2014. The Statements of Advice for this business will be developed by the RI Advice Group paraplanning team at no cost to your practice for the periods aligned to the transition incentive. This would be subject to the development and implementation of a transition project plan.
>
> (Emphasis added.)

113 As indicated in the part of the above quotation emphasised in bold, RI offered to pay Carrington an incentive of 30 basis points for external FUA transitioned to the Voyage platform. Mr Ornsby accepted in cross-examination that this did not apply to rollovers from Strategy to Voyage; these were not considered "external" funds.

114 The letter also referred to further steps that needed to be completed as part of the application process, including completion of an RI Advice Group Practice Application form and RI Advice Group Authorised Representative Application forms.

115 On 4 April 2013, Mr Doyle signed a copy of the letter, adding the words, "Subject to a resolution on the group insurance".

116 On or about 7 April 2013, Mr Doyle completed RI's Practice Application form on behalf of Carrington (CB tab 540).

117 On or about 13 April 2013, Mr Doyle completed RI's Authorised Representative Application form (CB tab 3170).

RI carries out due diligence (April to May 2013)

118 In April and May 2013, RI carried out due diligence in relation to Carrington.

119 On or about 23 April 2013, Ricki-Lee Rundle (an Advice Assurance Officer at ANZ Wealth) completed a review of five of Carrington's files. She prepared a five-page file note of the review (CB tab 651). She noted that all the files reviewed were paper based, and that the files were "very well organised and of a good standard". In the note, Ms Rundle provided an overview of each file and the issues she identified. In respect of all five files, an issue was that the reviewer could not identify within the file whether the Financial Services Guide (**FSG**) had

been given to the client or the version that was given. With respect to several files, an issue was that the reviewer could not locate file notes on the client file. For several files, an issue was that the advice document did not contain known consequences or implications for the advice given – reference was made in the note to the requirement in s 947B(3) of the *Corporations Act*. In relation to two of the files, an incorrect premium had been noted.

120 Ms Rundle's note stated on the last page:

> John's [i.e. John Doyle's] advice seems thorough, well documented and researched. However, there are certain areas that may need further investigation under RI policies and processes, if John decides to pursue RI as his licensee, such as:
>
> - The ability to recommend a direct property, investment property through the SMSF ([name omitted] file)
> - The potential for conflict of interest within the realms of the Practice eg Carrington financial Services – Legal Services, Loans Manager/Department, Buyers Advocate. The advice documents do not contain any disclosure of 3rd party payments if applicable, not sure if the adviser profile has the listed entities noted. The legal services set up the Trust Deed for the [name omitted] SMSF, Buyers Advocate – helps with property purchases and the Loans area – helps with restructure, consolidation and set up – the advice document names Home Mortgage Account.

121 In the course of carrying out due diligence with respect to Mr Doyle, RI obtained a copy of a report prepared by AFS on 14 March 2013 reviewing two client files (CB tab 525). The report related to Mr Doyle's client files for a couple, who I will refer to as Mr and Ms S, and an individual, who I will refer to as Ms M. The report identified a number of deficiencies in both client files. For example, in relation to the file for Mr and Ms S, and specifically the section on the Statement of Advice (**SoA**), the report answered "No" to the questions: "Does the SOA clearly state the recommendations being made?" and "Does the SOA clearly state the basis of the recommendations being made?" In the accompanying comments, the review stated:

> Clients goals and objectives are generic, ensure this section is tailored to the clients needs and wishes as discovered during the initial meeting. Best practice would be to state the goals in the clients words.
>
> (Errors in original.)

122 In the section dealing with a "Replacement Product Advice Record" (for Mr and Ms S), the report contained the following comments:

> In the superannuation comparison the rollover amount is incorrectly stated. The total funds the client has is $55,404. You have stated that two of the accounts [Mr S] has have balances of $55,404 and therefore the rollover amount is $110,808.

123 In relation to "Application Forms", the report included the following comment:

> Your file indicates you have transferred [Ms S]'s Sun super account to a Strategy super account. Your advice did not address nor recommend this.

124 In the section headed "Additional Comments", the reviewer stated: "With regards to Risk, a full risk analysis should have been undertaken." After further detailed comments, the reviewer stated:

> Client goals and objectives need to be reflect conversations had during client meetings. Best practice is to then have goals and objectives in the clients words. The recommendations and strategy formulated would then address these goals, concerns, etc…
>
> (Errors in original.)

125 Under the heading "Remedial Action", the reviewer stated:

> Prepare an updated Statement of Advice to incorporate the recommendation to transfer [Ms S]'s superannuation benefits to Strategy and provide a comparison. In addition an updated comparison of Andrew's super should also be undertaken with the correct transfer balance and the inclusion of the Australian Super fund.

126 The result of the file audit in respect of Mr and Ms S's file was "Appropriate – Not documented".

127 The tenor of the comments in relation to Ms M's file was similar.

128 On 26 April 2013, Ms Rundle completed a due diligence report in respect of Carrington, and provided it by email to Ms Collins (CB tab 650).

129 On 29 April 2013, Ms Collins provided the report to Mr Ornsby, Mr Hyland and others.

130 On 7 May 2013, a document headed "Compliance Review Statement" was completed (CB tab 691). This set out the substance of the review of Carrington conducted by Ms Rundle on 23 April 2013, as referred to above. Further, under the heading "Additional Information", it was stated that a view of Carrington's most recent audit "reflects strong adherence to the incumbent licensee compliance requirements". The document then stated:

> **Remediation Plan:**
>
> No formal remediation plans are required but the business must comply to the RI Advice Prevet policy, Knowledge Test requirements and use of Foundation SoA's for all clients receiving financial advice.

131 The document concluded with a statement that, subject to RI completing the standard pre-authority checks, and these being signed off, RI "may proceed with providing John Doyle with an Authority to provide financial advice under the RI Advice Group Pty Ltd AFSL". The

document was signed by Mr Blood, the Head of Advice Compliance at ANZ Wealth, and dated 8 May 2013.

132 The evidence includes a document headed "Authorised Representative Appointment Checklist – John Doyle (RI St Kilda Road)" (CB tab 696). This is a two-page standard form document, which has been completed by hand. The signatures at the foot of the first page are dated 8 May 2013. In the section headed "Step 1 – Application Review", a number of matters are listed. One of these is "Knowledge Test conducted and results received". In respect of this item, the words "within 30 days of notice" have been written, and, under the heading "Satisfactory", neither "Yes" nor "No" has been ticked. The implication is that Mr Doyle would need to complete this item within 30 days. Further down the page, under the signature of the Manager of Operations & Payments, the words "subject to knowledge test completed – 30 days" have been written. This tends to confirm the implication. The form has also been signed by Mr Ornsby.

RI and ANZ review Carrington's FUM (April to May 2013)

133 In late April and early May 2013, RI and ANZ obtained information from Carrington about its FUM and, in particular, the products in which Carrington's clients had invested.

134 On 29 April 2013, Ms Collins sent an email to Jason Coggins of OnePath attaching information received from Carrington (CB tab 631). This showed investments in the Instreet Products (CB tab 632).

135 On 1 May 2013, Mr Coggins sent an email to Ms Collins and others attaching "the review of the John Doyle Book" (CB tab 654). Mr Coggins stated in his email:

> A summary of the key findings is provided below. The review splits the review into the following segments:
>
> 1. **Non-Approved Products with a positive Mercer Rating**. In these instances, we have no concerns regarding the quality of investments.
>
> 2. **Non-Approved Products with a "low" or "no rating" from Mercer**. Over time, we would expect the Authorised Representative to recommend a switch to strategies referenced on the RI Advice APL. The overall exposure to these strategies is estimated to be less than 7% of the total book.
>
> 3. **Illiquid strategies**, including exposure to unlisted property, mortgage funds and agriculture products. Approximately 7% of the portfolio is exposed to these strategies. **We note that as a percentage basis this is slightly higher than that of a higher quality portfolio but with some of these strategies "performing" and of moderate quality**.
>
> 4. **Structured Products**. Future approval for new FUM of these products will

require (i) *a clear demonstration that the strategy achieves a unique, specific objective / best interest of the client* and (ii) *a highly recommended rating from a preferred research provider*. The current weight to structured investments is approximately 5% of the value of the book.

This list does not include the references to direct equities. These investments must adhere to the RI Advice Direct Security Policy.

Overall, the CIO Research Team has no significant concerns regarding the quality of the book. The book is mostly represented by high quality, stock-standard managed fund investments. **Approximately 12% of the portfolio is exposed to illiquid strategies and structured products, including unlisted property and mortgage funds. Again we would note that this is a moderate exposure on a relative basis and as a percentage of the total book**.

For those funds not referenced on the RI Advice APL, the Authorised Representative must apply for a Waiver via the non-approved product request process. This process is managed via XPlan and provides a mechanism to meet the best interests of the client at all times.

(Emphasis in original.)

136 Attached to the email was a document relating to Mr Doyle headed "Investment Research Review" (CB tab 655). This is dated 1 May 2013 and was prepared by Mr Coggins. It contained a series of tables of products arranged by category. Table 4 related to "Structured Products" and listed the Macquarie Product. The FUM relating to this product were $3,210,000.

The period 8 May 2013 to 30 October 2013

RI appoints Carrington and Mr Doyle as authorised representatives (8 May 2013)

137 On 8 May 2013, RI appointed Carrington and Mr Doyle as authorised representatives, subject to certain conditions.

138 The appointment of Mr Doyle was set out in a letter dated 8 May 2013 from Mr Whereat, as CEO of RI, to Mr Doyle headed "Authorisation Notice" (CB tab 692). The letter stated in part:

I am pleased to advise that the Licensee [i.e. RI] has authorised you to operate as its Representative from 8 May 2013.

RI Advice Group Pty Ltd has authorised you as an Authorised Representative subject to the following conditions being met:-

1. Meeting the conditions of the pre-vetting policy. Please read … the enclosed pre-vetting policy document for conditions and procedures, and refer to the pre-vetting case studies should you choose the case study option.

2. The return of a satisfactory Australian Federal Police Clearance Certificate.

3. Completion of the Kaplan Knowledge test within 30 days of this notice.

Failure to meet the conditions above may render the removal of your Authorisation.

> Please acknowledge that you understand these conditions by signing and returning the attached duplicate of this notice to our Practice Development department.

139 As indicated in this letter, from the date that Mr Doyle became an authorised representative of RI, he was subject to pre-vetting in accordance with RI's vetting policies. The vetting process pursuant to RI's policies and standards was engaged in by the adviser with the supervision and consultation of their Product Development Manager.

140 The letter attached a number of documents, including a "signed Representative Deed". This was a deed between Mr Doyle and RI titled "Individual Representative Deed", a copy of which was in evidence (CB tab 687).

141 The appointment of Carrington was set out in a letter of the same date, 8 May 2013 (CB tab 689). One of the attachments to that letter was an "executed Principal Authorised Representative Agreement and Principal Representative Deed". A copy of that deed was in evidence (CB tab 707).

Requests for approval of the Macquarie and Instreet Products (April to June 2013)

142 In April to June 2013, there were communications relating to the Macquarie and Instreet Products, which were not on RI's Approved Product List. These communications, which related to Carrington's ability to recommend the products, commenced even before Carrington became an authorised representative of RI (on 8 May 2013).

143 During cross-examination, Mr Whereat accepted that the Macquarie and Instreet Products were not on RI's Approved Product List because of complexity and risk.

144 In relation to the Macquarie Product, on 12 April 2013, George Katrantzis of Macquarie Bank Ltd emailed Mr Whereat (CB tab 717) referring to Carrington, and noting that Carrington had "been using one of our products, Macquarie Flexi 100, over the last few offers and are looking to use again in the current offer". The email stated that Carrington had advised that the product was not on RI's Approved Product List, which was "causing some frustration as they were able to use it under their previous Dealer Group". The email attached relevant documents relating to the product and stated that it would "be great if we (and Carrington) can get some clarity around being able to use this solution".

145 On 19 April 2013, Mr Whereat responded to the email, stating that the product had been sent to "research", that is, the Research department, to review its suitability.

146 Further emails were exchanged about this matter during May 2013. It seems that the discussions about this matter involved not only Mr Whereat, but also Mr Ornsby. In an email to Mr Whereat dated 24 May 2013, Mr Katrantzis indicated that he had spoken to Mr Ornsby "a couple of times" about the matter.

147 It seems that, in mid-June 2013, the Macquarie Product was approved (so as to permit Carrington to recommend it to its clients). The evidence does not include a document explicitly granting approval, but reference to such an approval is made in an email from Mr Coggins to Mr Doyle dated 17 June 2013 (CB tab 2519) and in an email from James Beckman (of Carrington) to Mr Ornsby and Mr Coggins dated 8 October 2013 (CB tab 839).

148 In relation to the Instreet Product, in June 2013 a decision was taken *not* to approve this product. The evidence includes an exchange of emails between Instreet, OnePath and Carrington on 16, 17 and 18 June 2013 (CB tab 2519). The first of the emails in this chain is an email dated 16 June 2013 from Instreet to Mr Coggins. The email stated that Instreet had received a call from Carrington, who were "concerned that the Instreet Mast investment had not been approved by RI". The email requested confirmation if this was the case, and offered to meet to discuss, with the aim of obtaining approval.

149 On 17 June 2013, Mr Coggins sent an email to Mr Doyle in the following terms:

> Good morning John,
>
> We have decided against approving the InStreet product.
>
> The team has assessed the complexity of the product and believe it to be high enough that clients will struggle to understand the product, how it works, etc.
>
> I would also caution against comparing two different products. Structured products are inherently complex and each share many different characteristics, return drivers, etc.
>
> One of our ongoing concerns is the advice risk around these products – it is clear that clients do not fully understand the risk, and hence are only ever going to be suitable for a few (if any) client segments. I am aware of a listed litigator funder in Australia that is starting a Class Action on a specific type of structured product issued from 2006 to 2008. While this has nothing to do with ANZ or RI Advice, **we must be cognisant of these developments**. From what I've heard in the market, the Class Action will focus on (i) was a structured product suitable for clients and (ii) if a hurdle is set at or above the long-term return of equity markets, how relevant are the products.
>
> Our recent experience on Mason highlights the extreme [importance] of undertaking thorough research. We spent some time looking at the product (internally and through insights from our preferred research relationships) and were surprised that the hurdle rate was so high. This was not documented by the external rating, which awarded an investment grade rating despite the hurdle of approximately 15% (nearly double the long term return on equity markets!)

> I understand you may be disappointed with this review. However, RI Advice has approved the Macquarie Product for your business. For next year, I would encourage you to discuss directly your requirements around end of financial year planning with Research – and we can go source the best strategy that meets your needs.
>
> (Emphasis in original.)

Kaplan test (July 2013)

150 The evidence includes an email dated 17 July 2013 (CB tab 757) with the Kaplan test results for Mr Doyle. The results indicate that Mr Doyle did not achieve the pass mark for four out of seven modules. Specifically, he did not achieve the pass mark for modules 1, 2, 4 and 5. The feedback for these modules was that Mr Doyle was "Not Yet Competent".

151 Mr Whereat said in cross-examination that the Kaplan test was predominantly used to identify training opportunities and that it was not a requirement that the adviser take the test before being authorised by RI. Mr Whereat also noted that the pass rate was set above 50 per cent.

Other facts relating to the period from 8 May 2013 to 30 October 2013

152 The evidence includes a bundle of three vetting reports in relation to proposed advice in respect of a client of Carrington who I will refer to as Ms H. In summary, the proposed advice was not approved on the first two occasions it was submitted, and was approved on the third occasion. The relevant documents are as follows:

(a) On 19 August 2013, a letter was sent to Mr Doyle by Jason Adolphe, Advice Assurance Officer, Compliance, ANZ Advice & Distribution (CB tab 771). I note that, although signed by Mr Adolphe of ANZ, the letter was on RI letterhead, and that this is true of many of the letters from ANZ's Advice Assurance Officers in evidence in the proceeding. The letter stated that that proposed advice document in relation to Ms H had not been approved and identified issues regarding the advice. In respect of five requirements, the advice rating was stated to be "No", which I take to mean that the advice did not meet the requirement. For example, in relation to one of the requirements, the vetting report stated:

Requirement	**Rating**	**Issue**
Recommended asset allocations are consistent with the agreed risk profile, or with explanation.	No.	The SoA does not demonstrate how the recommended investments align with the client's risk profile. The client's risk profile is stated as Moderately Conservative and the SoA needs to show how the investments align with this and provide explanations if there are any significant variances.

Under the heading "Next Steps", Mr Doyle was requested to complete remediation actions and resubmit updated documentation for further review. It was also stated: "The advice document **MUST NOT** be presented to your client(s) prior to final approval being provided from Advice Assurance". This was consistent with the structure of the pre-vetting program, as described above.

(b) On 30 August 2013, a further letter was sent by Mr Adolphe to Mr Doyle in relation to the proposed advice to Ms H (CB tab 776). This stated that the advice was "not approved" after resubmission. The letter identified two requirements that were not satisfied. The letter included the same wording regarding resubmission of the advice and not providing the advice to the client prior to final approval.

(c) On 19 September 2013, Mr Adolphe sent a letter of that date to Mr Doyle regarding the proposed advice to Ms H (CB tab 799). This letter stated that the advice was approved.

153 On 26 August 2013, Ms Collins sent an email to Carrington regarding files submitted to pre-vetting (CB tab 2464). Ms Collins's email forwarded an email from Dusan Cikos, an ANZ Advice Assurance Vetting Officer, listing 10 files that Mr Doyle had submitted for pre-vetting over the previous few weeks. Ms Collins's email to Carrington stated:

> Apologies for the delay in relaying the information you requested regarding the files submitted for pre vetting on John's [i.e. John Doyle's] behalf to date.
>
> As you can see from the email below I have just received the information.
>
> Further to our discussion last week, please note none of the files listed below have received pre vetting approval as they were submitted with either insufficient, out dated, incomplete or lack of supporting documentation as per the requirements outlined in the attached policy.
>
> May I kindly request your assistance in ensuring all the files are re submitted for pre vetting with the relevant supporting documentation, to avoid any repercussions when John's files are officially reviewed by the Compliance team further down the track.
>
> Much obliged for your cooperation regarding this matter.

154 On 29 August 2013, Ms Collins held a meeting with Mr Doyle to discuss pre-vetting. A note of the meeting appears in an extract from Ms Collins's time recording spreadsheet (CB tab 3065). The document records that Ms Collins held a four-hour meeting on 29 August 2013 with Mr Doyle and others. The following comments were recorded in relation to the meeting.

> Follow up meeting to discuss Pre-vet policy requirements and obligations. John Doyle expressed his disatisfaction at the process. Threatened to resign if a comprimise was not reached. I suggested organising a meeting or teleconference with someone from the compliance team to address his concerns.

(Errors in original.)

It is apparent from this document that Mr Doyle expressed dissatisfaction with the pre-vetting program.

155 On 4 and 5 September 2013, there were email communications within ANZ and RI raising concern as to whether Mr Doyle had provided advice documents to clients that had not been approved as part of the pre-vetting process (CB tab 784). On 4 September 2013, Ms Rundle (of ANZ) sent an email to Ms Collins (of RI) with the subject "John Doyle Files submitted [for] pre vetting to date". The email stated:

> Hi Marie-Aimee,
>
> Did any of these files get presented to the clients without being prevetted??
>
> What about Daniel did he present files before having them prevetted?
>
> Thanks
> Kind regards,
> Ricki-Lee Rundle

156 Ms Collins responded by email on 5 September 2013:

> I can confirm that Daniel did not issue any SOA during his time with Carrington FS.
>
> Have been unable to confirm if any of John Doyle's SOAs have been presented to his clients. He was not forthcoming with this information after I reiterated his obligations under the Pre Vet policy.
>
> Marie-Aimée Collins

157 The evidence does not make clear who the "Daniel" referred to in these emails was. It may be a reference to Daniel Muscat, who was a participant in the meeting on 29 August 2013. It appears from the above email exchange that, as early as September 2013, Ms Collins was aware of concerns as to whether Mr Doyle was presenting advice documents to clients that had not been approved as part of the pre-vetting program.

158 During cross-examination, Mr Whereat said that he was not aware in September 2013 that Ms Collins had asked Mr Doyle whether he was circumventing pre-vetting and he had not been forthcoming with her. However, when it was put to Mr Whereat that, if Ms Collins was having concerns with Mr Doyle it was likely that she would have raised these in one of the regular fortnightly meetings Mr Whereat had with Ms Collins, Mr Hyland and Mr Ornsby, Mr Whereat answered: "I would say that's fair". In light of that answer, it is possible that Ms Collins did raise with Mr Whereat a concern that Mr Doyle was circumventing pre-vetting

in about September 2013. However, I am not able to reach a concluded view on whether or not that occurred.

159 On 12 September 2013, Ms Collins sent an email to Mr Blood (Head of Compliance, Advice & Distribution, ANZ Global Wealth), copied to Ms Rundle, regarding concerns with Mr Doyle (CB tab 792). The email stated:

> Hi Stephen
>
> I trust this email finds you well.
>
> Thank-you for taking the time to return my call last week regarding the concerns I raised about John Doyle (Carrington FS Principle AR).
>
> Further to our telephone conversation, Ricki-Lee kindly agreed to meet with John Doyle and Prachi Marfatia (Carrington FS Practice Manager) on Monday 9th September.
>
> The following matters were raised with John and Prachi during our meeting:
>
> - Pre advice vetting policy and process ;
> - SOAs submitted for pre vetting without relevant supporting documentation;
> - Carrington FS website and other marketing material;
> - Specialist Accreditation requirements;
> - Foundation SOAs;
> - Strategy to Voyage SOA
> - RI PFP documents and Risk Profiling;
> - FDS.
>
> The firm and professional manner in which Ricki-Lee [Rundle] handled John [Doyle] (who by his own admission can be rather difficult to deal with at times), her vast knowledge and experience and her willingness to assist in finding solutions to the issues raised, proved invaluable during our meeting.
>
> As a result, Ricki-Lee and I have devised a list of items to be actioned and remediated by John and his team and I will monitor these closely and keep her informed of future developments.
>
> I would like to take this opportunity to thank-you for allowing Ricki-Lee to assist me at such short notice and to gratefully acknowledge Ricki-Lee's team effort in dealing with John Doyle.
>
> Much obliged to you and your team.
>
> M-A
> Marie-Aimée Collins

160 The evidence includes a bundle of three vetting reports in respect of proposed advice to a client of Carrington, who I will refer to as Ms B. The documents are:

(a) A letter dated 3 October 2013 from Rob Williams, an ANZ Advice Assurance Officer, to Mr Doyle (CB tab 827). This letter stated that the proposed advice was not approved, and provided details of the issues identified and the remediation required. There were four requirements that were not satisfied.

(b) A letter dated 16 October 2013 from Mr Williams to Mr Doyle (CB tab 837), stating that the proposed advice was "Not Approved after resubmission". Again, four requirements were assessed as not satisfied.

(c) A letter dated 5 December 2013 from Mr Williams to Mr Doyle (CB tab 907), stating that the proposed advice had been approved.

161 During October 2013, there was discussion between personnel at RI and ANZ as to whether to grant approval for Carrington to recommend the November 2013 offer of the Macquarie Product (CB tab 840). Approval had been sought by Carrington in an email from James Beckman (of Carrington) to Mr Ornsby (of RI), Mr Coggins (of ANZ) and others dated 8 October 2013. On 14 October 2013, Mr Ornsby sent an email to Mr Coggins asking whether a "waiver" could be provided "on a client by client basis". Mr Coggins responded to Mr Ornsby by email dated 28 October 2013:

> Hi Pete,
>
> Did you get a chance to speak to Darren regarding this?
>
> 50 clients seems like a large exposure to a specialised, niche product? I am not familiar with the practice or their clients – so I can't make an outright call that this is appropriate.
>
> To manage this, we could set much stricter limits – Assertive and Aggressive Investors, maximum 10% allocation.
>
> Let me know how you want to proceed.
>
> Jason

Attached to that email were a number of documents pertaining to the November 2013 offer of the Macquarie Product.

162 On or about 30 October 2013, the November 2013 offer of the Macquarie Product was approved subject to certain conditions. The evidence includes an email of that date to Mr Beckman from Shaun O'Malley, Investment Research Manager at OnePath (CB tab 845) in the following terms:

> I have liaised with Peter Ornsby and RI Advice on this request.

We are comfortable approving the use of the product under the following circumstances:

- The maximum weight to this investment (as well as existing structured investments) must not comprise more than 5% of a balanced investor's portfolio and 10% for an assertive and aggressive investor.
- In each recommendation, you must clearly articulate in the SoA why the strategy is suitable for the client and aligns to the individual needs of the client, their objective and risk tolerance. The CIO and RI Advice are of the view that the product will only be suitable for a minority of investors.
- This approval is limited to the Australian Equity Price Index option.
- Can you please advise RI Advice and the Research Team of the list of clients who will be recommended the Macquarie Flexi 100 Product.

In recommending the strategy to the client, please ensure that the following disclosures are made:

- The SoA must note the % value of any performance cap. This must mention that in accepting this recommendation investors acknowledge that there may be instances where they will not share all of the upside should the underlying market exposure perform strongly.
- The SoA should also note that investors do not receive the dividend yield of the market and instead receive a lower fixed rate over the full term of the investment. Investors receive no income if they exercise the walk away option.
- The SoA should clearly articulate why a gearing strategy is suitable for the client's individual investment objectives, needs and risk tolerance.

Please note:

- * The waiver is valid for **18 months** and needs to be kept on the client's file (we will extend in line with the term of the product).
- * In any written communication with the client (and the SOA), please note the following disclosure: "***Please note [Product Name/s] is not currently listed on RI's Approved Product List. However, based on your circumstances, needs and objectives – we have received approval from our Research team for this product to be retained/invested in.***"

Let me know if you need anything clarified.

(Emphasis in original.)

163 The email was acknowledged by Mr Doyle on the same day. Mr Doyle's email was copied to Mr Ornsby and others.

164 Mr Whereat was asked during cross-examination whether there were any controls in place to monitor compliance with the conditions attached to the approval of the November 2013 offer of the Macquarie Product. He gave the following evidence:

You're not aware, are you, of any controls within RI to monitor that Mr Doyle was

actually complying with the conditions which Mr O'Malley attached to that conditional approval?---So, again, the control for the [off-APL product] was the waiver process, first of all – first and foremost, which you mentioned had been done. The second part was the audit.

... In order for the audit to pick up whether those conditions had been complied with, one of the five files would have to be a Macquarie November 2013 product, wouldn't it?---That's right.

Yes. And apart from that audit, there were no other controls that you're aware of within RI to pick up whether Mr Doyle was complying with those conditions?---That's right.

That was unsatisfactory, wasn't it?---We would – in terms of automating a process for off-APL processes, it's my understanding. The APL construct, each product has a – its own unique code. They all go through the commission system, the DMS system. They all – so I'm unaware of even today a process that automates that. The checks and balances for those products are generally done via the best interest duty, so in terms of the audit and the review process.

Yes. But as we've established for the audit process, one of the files that was selected would have to be in relation to the structured product, otherwise it would not get detected that Mr Doyle had recommended that product?---That's right. So one of the processes for the selection in the files is the AAO will go through and try and pinpoint a number of files. So they may take input from the practice development manager. They may take input from the commissioner statements. So it's not a complete - - -

Who is the … [AAO]?---Sorry, the auditor.

Right?---So it's not a completely arbitrary process where you're picking five random files out of 700. It is more targeted than that.

…

No. And so that was a gap, then, in the – in RI's compliance system not having a control to follow up whether Mr Doyle complied with those conditions?---Any – well, again, it's generally captured through the waiver process, the best interest duty and the audit process. So, collectively, they would generally pick up those issues. What I haven't seen, even today, and, certainly, back in 2013 and 2015, is an automated process that will identify the - - -

Yes?--- - - - issue that you're speaking about.

Yes. All right. So just to go over this then, as we've established the audit of the five files wouldn't necessarily pick up whether one of those conditions had been complied with, would it?---Not absolutely, no.

No. Because one of those files that related to the products would have to be the subject of that audit?---That's true.

Yes. Now, what was the other one that you mentioned that would possibly pick them up?---The waiver process? So we - - -

Yes?--- - - - know there's an off-APL process. So there are many products that are suitable to clients in - - -

So the waiver process – just for clarification - - -?---Yes.

- - - is the application to the CIO for a waiver. And Mr O'Malley is coming back and saying, "Yes, these are approved but subject to these conditions"?---That's right.

> So – but within RI, there was no control, was there, to pick up whether those waiver conditions had been satisfied?---That's right.

The first period (1 November 2013 to 31 January 2014)

165 I will now address each of the periods identified in the statement of claim.

166 The date, 1 November 2013, is not in itself significant in terms of the factual events, but it is the first day of the Relevant Period for the purposes of ASIC's statement of claim. The selection of this date as the commencement of the Relevant Period would seem to relate to limitation period issues, rather than a particular event.

167 As at 7 November 2013, Mr Doyle was still subject to the pre-vetting program. This is indicated in an email of that date from Mr Ornsby to Peter King (of RI) (CB tab 875). That email included a table setting out the "Current Prevet Status" of a number of authorised representatives, including Mr Doyle. The table indicates that Mr Doyle had not yet met the pre-vetting requirements.

168 On 5 December 2013, Mr Adolphe (of ANZ) sent an email to Mr Hyland (of RI) with the subject "Vetting – Coaching Required – John Doyle" (CB tab 908). Mr Adolphe's email stated:

> Hi Graeme,
>
> We regret to advise that John Doyle has not achieved clearance from vetting in the areas of Risk Protection advice and Superannuation & Investment advice following more than three (3) submissions. As per the Advice Vetting Standard, we require 2 out of three submissions to be Approved to achieve clearance and in this instance none of three (3) submissions for Risk protection advice and Superannuation & Investment advice were Approved.
>
> In light of this outcome, we request that appropriate coaching and development be provided to this adviser in the areas of Risk protection advice and Superannuation & Investment advice. This may include an analysis of the issues identified, education on Licensee policies and standards and collaboration with the adviser's support staff or paraplanners.
>
> **Note:** Whilst the adviser is on 'Supervisor Coaching' status, the adviser is not to submit any files for vetting. Following the coaching session, you will need to notify Advice Assurance at advicevetting@anz.com that the Adviser may commence a second phase of vetting.
>
> Please advise when the required coaching and development has been completed and we will commence the next phase of vetting for the adviser.
>
> Should you have any queries in relation to this process please do not hesitate to contact me, or refer to the Vetting Standard for more information.
>
> …
> Regards,

Jason Adolphe

169 The email from Mr Adolphe to Mr Hyland was forwarded by Mr Hyland to Ms Collins on the same day, 5 December 2013 (CB tab 908). The email stated:

> Hi MA
> Please give me a call to discuss before I go back to Jason [Adolphe].
> Thanks
> Graeme

It is not clear whether the information in the 5 December 2013 email was communicated to Mr Doyle.

170 Although the email dated 5 December 2013 from Mr Adolphe indicates that Mr Doyle was to go onto coaching and was not to submit any files for vetting, this does not seem to have been put into practice. Over the next month or two, as detailed below, Mr Doyle continued to submit proposed advice documents for vetting, including in the practice areas referred to in the 5 December 2013 email.

171 On 17 January 2014, Carrington provided an invoice to RI for the 30 basis points incentive payment in respect of external funds transitioned to the Voyage platform (CB tabs 937, 938). The invoice attached a spreadsheet that set out details of client rollovers to the Voyage Superannuation Master Trust. The spreadsheet indicated that a number of clients had transitioned from another fund to Voyage. The rollover amounts were substantial. For several clients, the rollover amount was in the range of $300,000 to $500,000. The incentive payment claimed by Carrington was $7,758.70 (including GST). The invoice was emailed by Carrington to RI on 17 January 2014 (CB tab 936). One of the recipients was Ms Collins. She forwarded the email within RI, requesting that it be checked and processed.

172 During cross-examination, Mr Ornsby accepted that an external rollover into Voyage would require the adviser to give the client an SoA. He was asked whether he carried out any reconciliation to see whether the invoices Mr Doyle was rendering for external rollovers were the subject of an advice that had gone through pre-vetting. Mr Ornsby said that he did not. I take these answers to apply to RI more generally, not just Mr Ornsby personally (given the absence of evidence of any such reconciliation).

173 It is convenient to note at this point that ASIC contends that documents such as the invoice and spreadsheet referred to in the preceding paragraph raised a question as to whether Mr Doyle was providing advice to clients outside of the pre-vetting program. Under the pre-vetting

program, Mr Doyle was not permitted to provide any advice document to a client unless the document had first been approved. Further, the email dated 5 December 2013 (set out above) stipulated that Mr Doyle was to have coaching and was not to submit any files for vetting (at least in the areas of Risk Protection advice and Superannuation and Investment advice).

174 During cross-examination, Mr Whereat conceded that a deficiency with the vetting process was that, if the adviser did not comply with the requirement to submit advice documents for vetting, the process would not pick up if an adviser was recommending products not on RI's Approved Product List:

> And so there was then a gap in your [compliance] process, wasn't there, because advisers could put clients into these structured products which did not go through pre-vetting? ---That's right. So again, we would acknowledge that enhancements could be made to the vetting process back in 2013; those changes were made in 2016. The vetting process had a reliance upon – the vetting process had a reliance upon the adviser adhering to the standard. The audit process – so this is post – post-vetting – would have picked up whether there was products being used that were not on the APL and a waiver had not been approved.
>
> Well, to that point, that would only be if the five files selected included those structured products – one of the five files included the structured products?---That's right.
>
> If it didn't include one of the structured products, the audit team wouldn't pick it up? ---That's right.
>
> Yes. So given the importance of the vetting standard, it was a significant defect, wasn't it, in the compliance standard that Mr Doyle could put these clients into these products without having this advice vetted?---The – with Carrington operating outside of the standard, those changes needed to be made, which have been made.
>
> In 2016?---In 2016. The process that you're referring to, clearly our evidence earlier would be that we would – we needed to make those changes to close down those particular deficiencies as you used them.

The second period (1 February 2014 to 14 November 2014)

Chronological summary of facts relating to this period

175 On 21 February 2014, Carrington provided an invoice to RI for the 30 basis points incentive payment in respect of external funds transitioned to the Voyage platform (CB tabs 967, 968). The invoice attached a spreadsheet with details of the client rollovers to the Voyage Superannuation Master Trust. The incentive payment claimed by Carrington was $9,876.13 (excluding GST).

176 Despite the email dated 5 December 2013 indicating that Mr Doyle was not to submit any files for vetting (while he was on "supervisor coaching"), it seems that files continued to be submitted and considered under the pre-vetting program. The evidence includes a letter dated

24 February 2014 from Mr Williams (of ANZ) to Mr Doyle stating that a proposed advice document that had been submitted on 20 February 2014 was rated "Not Approved" (CB tab 971). The letter set out four requirements that had not been met, and provided comments in respect of those requirements. The advice type was stated to be "Risk Protection, Superannuation & Investment", the same areas of practice referred to in the 5 December 2013 email.

177 In February 2014, RI engaged Ms B, a paraplanner, to assist Mr Doyle and Carrington with the preparation of client files. Ms B was a consultant to, rather than an employee of, RI.

178 On 28 February 2014, Carrington sent Ms Collins an email attaching proposed advice documents for two clients (CB tab 981). (Earlier versions of the documents had been rejected under the pre-vetting program.) On the same day, 28 February 2014, Ms Collins forwarded the email to Ms B and stated:

> The attached client files need to be fine-tuned at your earliest convenience before being submitted / resubmitted to prevet.
>
> Will call you this afternoon to discuss.

179 Ms B responded by email, asking whether there was "pre vet feedback" for either file. I take this to refer to comments from ANZ's Advice Assurance Officers on earlier versions of the documents.

180 Ms Collins forwarded Ms B's email to Martin Lin of Carrington on the same day, stating:

> Hi Martin
>
> As I am currently out of the office, are you able to action [Ms B's] email below, please.
>
> As discussed, [Ms B] will be fine tuning the files already submitted to the Prevet team and producing the new SOAs until the prevet process is successfully completed.
>
> If you have any queries regarding this matter, may I kindly request that you contact [Ms B] directly on [number omitted] please.
>
> Much obliged.

181 One of the issues raised by ASIC is whether the role of Ms B went too far and so was inconsistent with the purpose of the pre-vetting program, which was designed to assess Carrington's competence in preparing advice documents.

182 In March 2014, RI issued an authorisation to Prachi Marfatia and Jonathan Rado, Carrington staff members. Subsequently, in October 2014, RI issued an authorisation to another staff member, Jeevan Intherarasa.

183 On 3 March 2014, Mr Adolphe (of ANZ) sent an email to Ms Collins (of RI) with the subject "Vetting – Coaching Required – John Doyle" (CB tab 991). The email is in similar terms to the email from Mr Adolphe to Mr Hyland dated 5 December 2013 referred to above. The email dated 3 March 2014 stated:

> Hi Marie-Aimee,
>
> We regret to advise that John Doyle has not achieved clearance from vetting in the areas of Life Risk advice and Superannuation & Investment advice following at least three (3) submissions. As per the Advice Vetting Standard, we require 2 out of 3 initial submissions to be Approved to achieve clearance. In this instance 0 of 5 initial submissions for Life Risk advice and Superannuation & Investment advice were Approved.
>
> In light of this outcome, we request that appropriate coaching and development be provided to this adviser in the areas of Life Risk advice and Superannuation & Investment advice. This may include an analysis of the issues identified, education on Licensee policies and standards and collaboration with the adviser's support staff or paraplanners.
>
> **Note:** Whilst the adviser is on 'Supervisor Coaching' status, the adviser is not to submit any files for vetting. Following the coaching session, you will need to notify Advice Assurance at advicevetting@anz.com that the Adviser may commence a second phase of vetting.
>
> Please advise when the required coaching and development has been completed and we will commence the next phase of vetting for the adviser.
>
> Should you have any queries in relation to this process please do not hesitate to contact me, or refer to the Vetting Standard for more information.
>
> Regards,
> Jason Adolphe

184 The above email was forwarded by Ms Collins to Mr Hyland on 4 March 2014. Mr Hyland then sent an email to Ms Collins asking what the email meant, and stating that he would take the matter up with Angelo (a reference, it would seem, to Angelo Mascolo, the Manager of Advice Assurance at ANZ Global Wealth).

185 In response, Ms Collins sent an email to Mr Hyland on 5 March 2014 stating:

> In a nutshell, keep doing what I've been doing i.e coach John's staff re advice process and prevet all client files by providing extensive and detailed feedback prior to John submitting them to the Pre-Vet team for review. It is an extremely time consuming and painstaking exercise.
>
> Please note I have been doing the same for [name omitted] with thankfully, more successful results to date.

186 Despite Mr Adolphe's email of 3 March 2014 stating that, while Mr Doyle was on "supervisor coaching" he was not to submit any files for vetting, it seems that Ms B assisted Carrington to prepare advice documents for submission for vetting.

187 On 12 March 2014, Ms B sent an email to Mr Lin (of Carrington), copied to Ms Collins, providing revised versions of certain advice documents (CB tab 1007). The revised documents were attached to the email. It seems that the changes made by Ms B were extensive, as she describes the attached documents as the "rewritten" PFP (i.e. Personal and Financial Profile) and SoA. Ms B stated in the email that she had replicated "some" information from Mr Lin's SoA and had "added in further information from xplan and additional research that I have done". In the email, Ms B responded to various points raised in "Pre vet feedback", presumably feedback that had been provided on a previous draft of the advice. Ms B's email included the following statement (in response to the fourth point raised in the pre-vet feedback):

> We have now changed the life/TPD recommendation to stay with VicSuper as there was no evidence to support the change to a new provider was in the best interest of the client.

This indicates that Ms B made not only stylistic but also substantive changes to the proposed advice documents.

188 On 24 March 2014, Ms Rundle sent an email to Mr Mascolo and Brenton Ritchie (both of ANZ) raising a concern regarding Mr Doyle (CB tab 1025). In the course of the hearing of this proceeding, senior counsel for ASIC referred to this as the "Houston we have a problem" email. The email first dealt with an unrelated authorised representative and then stated in relation to Mr Doyle:

> The other item I wanted to mention that really alarms me is Carrington Financial Service – John Doyle RI St Kilda Road, he also is on prevetting still, however I did overhear that John is number 1 for inflows into OnePath something like 26 million since starting, how does one do this if he is on prevetting still???? Again I am sure there may be use of RoA's.
>
> Houston we have a problem!!!!!

The reference to "RoA's" is to Records of Advice, which I infer is a record or file note of oral advice.

189 The evidence does not include any response to Ms Rundle's email.

190 The evidence includes an email exchange between Ms B and Mr Lin (of Carrington) on 3 April 2014 regarding a client file (CB tab 1060). In the first email in the chain, Ms B attached the SoA "with changes as requested". Ms B's email stated:

> Please do NOT make any changes to this document, if you would like further changes please call me to discuss.
>
> Have a read over it and I will start to collate the other information that you need to send to pre vet.

191 This email supports an inference that Ms B was helping Carrington to obtain approval for advice documents under the pre-vetting program. Mr Lin responded with an email on the same day, stating that "we have an issue here" as he had too many reports to finish. He asked whether the pre-vetting program could be paused for one to two weeks. Ms B sent an email in response on the same day. Ms B's email stated:

> Martin,
> I have actually done all the work for you.
> The only thing you will need to do is the file note (and I will tell you what needs to be included) and the calculations for the salary sacrifice tables that we included in the SoA (I assume this just needs to be attached to the email).
> You should be able to just add the file note and calculation to my email and forward to pre vet.

192 This email tends to confirm that Ms B was making substantive changes to draft advice documents, and that this was done to assist Carrington to have the documents approved under the pre-vetting program.

193 On 6 May 2014, Mr Adolphe sent an email to Mr Doyle and Mr Lin, copied to Ms Collins (CB tab 1098). Mr Adolphe's email forwarded his earlier email of 3 March 2014 to Ms Collins (set out above) regarding Mr Doyle not achieving clearance from pre-vetting in the areas of Life Risk advice and Superannuation and Investment advice. Mr Adolphe's email of 6 May 2014 stated:

> I acknowledge receipt of a vetting request for [client names omitted].
>
> Please note that we are still waiting on confirmation from Marie-Aimee Collins that the required coaching has been completed before we can proceed with any more vetting requests on behalf of John Doyle.
>
> Once we have received confirmation from Marie-Aimee that the coaching has been provided we can proceed with further vetting.

194 On the same day, 6 May 2014, Ms Collins responded by email to Mr Adolphe:

> I can confirm that I have provided coaching and conducted a high level review of the [client name omitted] file.

If you have any queries regarding this matter, please do not hesitate to contact me.

195 Following this email, ANZ's Advice Assurance Officers reviewed a number of proposed advice documents submitted by Carrington for vetting. This may be regarded as the second phase of the pre-vetting program, to adopt the terminology used in section 6 of the Advice Vetting Standard (set out above).

196 On 13 May 2014, Mr Adolphe sent an email to Mr Doyle stating that proposed advice documents for particular clients had been approved (CB tab 1121). The clients were the same clients as referred to in Ms B's email to Mr Lin of 3 April 2014 referred to above. In other words, the documents that were approved by Mr Adolphe had been prepared by, or at least with substantial assistance from, Ms B.

197 On 2 June 2014, Mr Mascolo (of ANZ) sent to Mr Ornsby an email listing the RI advisers who were on pre-vetting (CB 1149). The email indicates that Mr Doyle was still on pre-vetting, having commenced pre-vetting on 8 May 2013 (the date he was authorised by RI). The email also indicated that, since commencing pre-vetting, Mr Doyle had submitted *six files* by way of initial submission. On its face, this was a surprisingly low number given the size of Mr Doyle's practice. It was a requirement of the pre-vetting program that each advice document be approved before being presented to the client (see section 1 of the Advice Vetting Standard, set out above). Thus, if Mr Doyle had been complying with this requirement, he had provided advice documents to (at most) six clients in the period of more than a year since 8 May 2013. I say "at most" because this assumes that all six submissions were approved, whether on initial submission or on subsequent submission.

198 On 6 June 2014, Ms Collins sent an email to Carrington confirming that Mr Doyle was still on pre-vetting (CB tab 1153). This email was sent in response to a query by Mr Lin. Ms Collins's email stated:

> In reply to Martin's query regarding John's pre-vet status, please find attached a spreadsheet detailing the information you requested.
>
> Since joining RI Advice ***over a year ago***, John has only submitted 6 files to be pre-vetted. As per the attached RI Vetting Standard, the requirement is to get **2** files approved (i.e not required to be re-submitted) per category (i.e super and investments, risk protection, SMSF, direct equities etc). The only file to date which has been approved at the first attempt was for clients [names omitted]. The remaining **5** others were all required to be re-submitted.
>
> As you can see we still have a long way to go before obtaining pre-vet clearance in all categories.

> It is therefore imperative that we work closely with [Ms B] to submit as many files as possible in the next 3 weeks to get over this hurdle before the end of this financial year as we are now under the intense scrutiny of the Compliance team.
>
> Your urgent attention to this matter would be greatly appreciated.
>
> (Emphasis in original.)

199 I note that the one file that was approved on its initial submission (as referred to in Ms Collins's email) was the file in respect of which Ms B had substantial input, as referred to in her emails to Mr Lin of 3 April 2014 (see above).

200 It is apparent from Ms Collins's email dated 6 June 2014 that, as at that date, Mr Doyle had still not obtained clearance (as referred to in section 6 of the Advice Vetting Standard) in respect of *any* practice areas.

201 The evidence includes an SoA to clients, who I will refer to as Mr and Mrs A, signed by Mr Doyle and dated 12 June 2014 (CB tab 1160). The advice recommended that the clients invest in two series of the Instreet Product, namely, Instreet Masti ASX Series 36 and Instreet Masti Euro Stoxx Series 38. Mr Doyle recommended that Mr and Mrs A purchase 50,000 units in each series, which would provide $100,000 of equity investment exposure in total. As discussed above, the Instreet Product was not on RI's Approved Product List, and Carrington's application for approval of the product had been rejected. It seems, therefore, that Mr Doyle was recommending products to clients that had not been approved by RI, and that he was providing SoAs to clients that had not been submitted for pre-vetting as required by the pre-vetting program. (There is no evidence to suggest that this SoA was submitted for pre-vetting and, given that it recommends a product not on RI's Approved Product List, it may be inferred that it was not submitted for pre-vetting.)

202 On 16 June 2014, Ms Rundle sent an email to Mr Ritchie (of ANZ) in relation to Mr Doyle (CB tab 1193). Ms Rundle forwarded her email of 24 March 2014 (the "Houston we have a problem" email) and stated:

> I hope you had a good weekend.
>
> With everything going on in the media with CBA - I want to make sure my backside is covered, below is an email I sent yourself and Angelo [Mascolo] in March about John Doyle - RI St Kilda Road, I notice he is still on prevetting and he has been with us for 12 months and I find it concerning that he is still on prevetting but has such large inflows to OnePath.
>
> I noticed there [are] a few for RI St Kilda Road on prevetting.
>
> Thanks

203 Again, the evidence does not include any response to Ms Rundle's email.

204 The evidence includes a bundle of three vetting reports in relation to proposed advice in respect of a client of Carrington who I will refer to as Mr G. The relevant documents, which are in a similar form to the vetting reports referred to above, are:

(a) On 17 June 2014, a letter was sent by Babar Jamil, Advice Assurance Vetting Officer, Compliance, ANZ Advice & Distribution to Mr Doyle (CB tab 1201). This stated that the proposed advice document in relation to Mr G had not been approved and identified issues regarding the advice. Detailed comments were provided.

(b) On 1 July 2014, a letter was sent by Mr Jamil to Mr Doyle (CB tab 1263). This stated that the proposed advice document in relation to Mr G had not been approved, and provided comments on issues.

(c) On 18 July 2014, a letter was sent by Mr Jamil to Mr Doyle (CB tab 1299). This stated that the proposed advice document had been approved after resubmission.

205 The evidence includes documents that indicate that Ms B played a substantive role in the preparation of advice documents for Carrington in relation to Mr G (the client referred to in the preceding paragraph). The relevant documents are:

(a) On 2 July 2014, Ms B sent an email to Ms Collins in relation to the vetting result for Mr G's file (CB tab 1267). The email chain starts with an email from Mr Jamil to Carrington (copied to Ms Collins, Mr Ornsby and others) dated 1 July 2014 attaching the vetting report in relation to Mr G's file and stating that the SoA was not approved at that stage. That email was then forwarded by Ms Collins to Ms B. Ms B then sent the following email to Ms Collins on 2 July 2014:

> I spoke to Jamil [i.e. Mr Jamil of ANZ] [and] have clarified a couple of points that I was unsure about.
>
> Find below my commentary for you to give to Martin [Lin] about the second pre vet feedback on Friday.
>
> I have made a file note (see attachment) and included a comment about the conversation with the client about how there has been no change in circumstance since the last face to face meeting – I have attempted to make the file note look legitimate (date, stated it was a phone conversation, discussion about client etc). I have also made dot points on what pre vet require in regards to file notes to get this over the line. (<u>This should cover issue 1</u>).
>
> <u>Issue 2</u> – pre vet is looking for evidence of why Zurich and OnePath were chosen over other products? <u>this is where they should be using risk researcher</u>. E.g. cheaper? better product? Stronger definitions? can be owned by SMSF?

Martin will need to provide reasons (in file note)/research as to why he picked the products he did as opposed to others.

Issue 3 - Catholic super is currently unitised and will reduce with age, however Jamil wants fixed cover with Catholic super to be considered. Jamil personally went on the Catholic super website and the client can get $429,105 life and TPD cover (more than the recommended) for less than the recommended cover. He wants evidence on file of the research (I have attached this). He wants discussion in the SoA of the cost comparison (which I can make) and he also wants a discussion to take place with the client surrounding this (file noted) - Catholic super can offer more cover for less than the recommended Zurich cover, what is the benefit of the recommended Zurich cover v the fixed cover (higher sum insured) with Catholic super. My thought is to link this back to the client wanting a SMSF (but observation 3 below needs to be strong as well as the reasoning in Issue 2 above).

Issue 4 A – Evidence of asset selection surrounding the shares (still never seen this but Jamil tells me that all RI advisers do this). Anyway he wants a reason why they have been selected e.g. they have franked dividends? have had good returns? selection is based on a methodology (that Carrington use)? He wants a comment in the SoA regarding this.

Issue 4 B – I will add the suggested comment into the SoA

Issue 4 C – I will make a comment in the SoA, however we do need to confirm will sal sac be made in line with the recommended investment options? will shares [bought] with these funds? Added to the cash fund? Other?

Observation 1 – Needs to be evidence on file when the new FSG is given

Observation 2 – I will amend

Observation 3 – I think this is vital in tying the advice together, he wants detailed notes surrounding the discussion with the client about the client directed SMSF, why does the client want a SMSF what was involved in the conversation? Does the client [understand] the responsibility and cost involved?

Let me know if you need further clarification, Martin definitely needs to send the file note to us for checking once completed. I also need to make additional comments in the SoA based on his file notes/research.

(b) Attached to the above email was a draft file note prepared by Ms B, as follows:

Friday 4 July 2014

Phone conversation with [Mr G] to discuss the following:

- [Mr G] currently on school holidays (shows you are actually having a conversation with the client, possibly add something else generic - what he is doing these school holidays)
- Discussed with [Mr G] that the last time we met in person was on 29th November 2013 in which we completed the PFP, since some time has passed I wanted to confirm that there [have not] been major changes to his circumstance.

  [Mr G] confirmed that there was no change to his circumstances since then.

- I did replicate the PFP into xplan after the client meeting, to make it easier to read (for admin staff), the original signed PFP dated 29/11/13 is on file.
- Reasons why Zurich and OnePath products [were] selected? They also want to see alternative insurance options that were not considered. Some discussion about Catholic super has been included in the SoA about unitised cover.
- Discussion about the difference between Zurich life/TPD (recommended) and Catholic super life/TPD fixed cover.
- Reason why shares were selected.
- Discussion surrounding why the client is wanting a SMSF. Make sure points are details – eg. what client knows about SMSF, the discussion that took place, does the client realise the responsibility and cost involved?

These points above need to be written as if a phone conversation (either real or not) takes place on 4th July

Part of ASIC's case is that the above file note was a false document in that it purported to be a file note of a conversation between Mr Lin and Mr G that did not occur. (The file note is dated 4 July 2014, being two days *after* the date it was sent by Ms B.) However, another possible interpretation is that the file note indicated the type of conversation and file note that should take place and be prepared. Given the seriousness of the allegation, I am inclined, in the absence of further evidence on the matter, to adopt the latter interpretation. I should also note that I do not consider the characterisation of the file note one way or the other to be determinative of any issue in the case.

(c) On 15 July 2014, Ms B sent an email to Mr Lin, copied to Ms Collins (CB tab 1286) attaching an amended SoA for Mr G. Ms B's email stated, in part:

> Further to our phone conversation, I did send you a file note for [Mr G] the other day and included some wording and also dot points on what was required to be discussed by prevet (highlighted in red). You have not used this. I have since copied your information into my template – please note that this is not my responsibility going forward, you do need to make the file notes look legitimate and not just note a couple of dot points on a page. in my file note I have included a date and have also added notes in regards to the other issues that you overlooked.
>
> In regards to the risk researcher information that you have provided this does not show why OnePath trauma was chosen. I have included some text in the SoA showing some benefits of OnePath trauma the PDS will support this information.

This email again indicates that Ms B was playing a substantive role in the preparation of advice documents.

(d) On 16 July 2014, Mr Lin sent an email to Advice Vetting at ANZ in relation to Mr G's file (CB tab 1290). The email attached a revised draft of the SoA for Mr G and sought approval for the advice. Also attached was a file note prepared by Mr Lin of a conversation with Mr G on 4 July 2014 (CB tab 1291). The file note was in the same format as the draft prepared by Ms B; some of the wording was the same and some was different. The evidence does not establish whether or not such a conversation in fact took place.

206 On 3 August 2014, Mr Doyle sent an email to Ms Collins with the subject "Pre-Vetting & More" (CB tab 1329). Among other things, Mr Doyle was very critical of the pre-vetting program (which still applied to him):

> Pre – Vetting is a farce & to still being compelled to send Statements of Advice to people who from their action or inaction appear "Amateurs" in the real world of meeting new & prospective clients, notwithstanding reviewing "old & long time clients" is disgraceful & is not acceptable.
>
> I have only been in this industry for 50 years, (having joined the Life Insurance industry in June 1967) plus Carrington Financial Services has been active since May 1988, so we do believe we know a little about the industry we work in & service.
>
> (Errors in original.)

207 In August 2014, RI commenced assisting Carrington with the sale of its business. In the process of determining a valuation of the business, certain discrepancies were identified as to Carrington's commission revenue. It seems that the usual process was for all commission revenue to be paid to RI in the first instance and then passed on to Carrington (less any amount RI was entitled to retain). In light of this process, Mr Hyland sent an email on 7 August 2014 to Brokerage at RI (CB tab 1339) requesting details of Carrington's revenue in certain areas. In particular, he sought details of Carrington's revenue from the Macquarie Product and the Instreet Product.

208 On 8 August 2014, ANZ Wealth requested Instreet to provide a complete breakdown of the revenue (upfront and ongoing) per client for Series 36 and 38 of the Instreet Product and the dates the revenue was forwarded to RI for Carrington. Instreet provided this information in the form of an Excel spreadsheet (CB tab 1360) on the same day. The spreadsheet includes the details of 43 investors, with details of the size of the investments in the Instreet Product (in most cases $50,000). In each case the adviser was "John" (presumably a reference to John Doyle). The email attaching this information was copied to Mr Hyland.

209 On 8 August 2014, ANZ Wealth sent an email to Mr Hyland (copied to Ms Collins) with monthly reports of Carrington's commission revenue in respect of the Macquarie Product (CB tabs 1346, 1354). The reports covered the period from July 2013 to June 2014.

210 On 11 August 2014, Mr Mascolo (of ANZ) sent an email to Mr Whereat, Mr Ornsby and Mr Hyland with the subject "Prevet Status Reporting – RI Advice" (CB tab 1363). The email attached an Excel spreadsheet, described in the email as the latest Vetting Status Report as at 8 August 2014. The spreadsheet set out details of the advisers currently on vetting. As explained in the email, the spreadsheet was designed to provide "more visibility" regarding advisers currently on vetting and their current status in each area of advice. The email stated:

> Where advisers have not provided any files for more than 3 months in the outstanding advice areas (please refer to tab *No submissions 3 months*), we ask that you investigate these further and determine if advice has been provided. Where an adviser has provided advice and not submitted these to Advice vetting, then you will [be required] to raise an incident and copy me (angelo.mascolo@anz.com) into the communication.

This indicates an awareness of the risk that advisers on pre-vetting may have been providing advice that had not been approved to clients.

211 The attached spreadsheet (CB tab 1364) included Mr Doyle as one of the advisers on pre-vetting as at 8 August 2014. The spreadsheet recorded that, since he commenced pre-vetting (on 8 May 2013) he had provided five initial submissions and four re-submissions, and had obtained approval for one file. These figures may not be accurate, however, as the evidence includes more than one approval by this date (as set out above). In any event, what was clear from this document was that Mr Doyle was still on pre-vetting some 15 months after he became an authorised representative of RI.

212 On 21 August 2014, a meeting took place at Carrington's premises in St Kilda Road, Melbourne between Mr Doyle, Mr Whereat and Ms Collins. A document headed "Meeting Agenda and Action Items" is in evidence (CB tab 1450) and indicates that the meeting ran (or was schedule to run) for 1.5 hours. One of the agenda items was pre-vet issues. The document records:

> **PreVet issues:**
> - M-AC [Marie-Aimée Collins] to liaise with PreVet team, [Ms B] (paraplanner), Christelle Huet, Prachi Marfatia and get James Beckman to assist Martin Lin;
> - M-A to email sample file note and Compliance Tips and Hints to Carrington FS staff.

It was thus clear to Mr Whereat that Mr Doyle was still on pre-vetting at this time.

213 On 25 August 2014, Mr Doyle obtained clearance from vetting for two practice areas, namely Superannuation and Investments advice and Risk Protection advice (CB tab 1487). It may be inferred that he had, by this stage, achieved the requirements set out in the Advice Vetting Standard for these two practice areas. However, this was only achieved through the substantial assistance of Ms B in the preparation of the advice documents. It followed from Mr Doyle's clearance that he was no longer required to submit advice documents in these two areas to vetting prior to presenting them to clients. Mr Doyle was still required to submit proposed advice documents in the area of Retirement Planning advice for vetting. In addition, vetting clearance was still required for any Specialist Advice accreditations, eg SMSF, Direct Equities, Gearing and Business Insurance. Mr Doyle was referred to the Advice Vetting Standard for more information.

214 On 27 August 2014, Ms Collins sent an email to Mr Whereat and Mr Hyland forwarding the email referred to above regarding Mr Doyle achieving clearance in the two practice areas. This indicates that Mr Whereat was aware of Mr Doyle's pre-vetting status at this time.

215 Mr Whereat gives evidence in his affidavit that throughout the period from May 2013 to late August 2014, he was not aware, and no one ever raised with him, that Mr Doyle was not submitting all statements of advice to the Advice Assurance Vetting Team for pre-vetting in accordance with RI's policies and standards. I accept this evidence, which was maintained during cross-examination.

216 On 2 September 2014, Mr Whereat sent an email to Ms Collins in response to her email of 27 August 2014. Mr Whereat stated:

> We should move towards scheduling an audit, now that a couple of key vetting areas have been reached and he has been with us for 12 months.

217 Mr Whereat's reference to scheduling an "audit" would seem to be a reference to an advice assurance review as referred to in the Advice Assurance Standard (set out above). During cross-examination, Mr Whereat said that the policy at the time was to conduct an audit (or advice assurance review) within three months of clearing pre-vetting, and then to move to an annual audit cycle.

218 On 4 September 2014, Ms Collins sent an email to Mr Whereat (copied to Mr Ritchie (of ANZ) and Mr Hyland):

> Further to your email, please note that I have liaised with Brenton Ritchie and flagged John Doyle for an Advice Assurance review, as requested.

219 On 3 and 4 September 2014, there was an exchange of emails between Mr Hyland and Ms Collins relating to Mr Doyle (CB tab 1488). The context was an email from Raman Bhalla of ANZ Wealth, suggesting that Ms Collins join Simone Mildren for a meeting at Mr Doyle's office to discuss issues his office was having with OnePath's M1 website. Referring to that suggestion, Ms Collins sent an email to Mr Hyland on 3 September 2014:

> FYI below.
>
> Btw, I'm busy for the rest of my life and am therefore unable to attend a joint meeting with Simone Mildren. No one from OnePath volunteers to be my bodyguard when I have to deal with JD's foul temper and vitriolic vernacular regarding numerous other contentious matters on a daily basis, so I fail to see why I should be shielding Simone! If anyone should attend, it should be the OnePath BDM.
>
> My reply to Raman: "Welcome to the REAL world… toughen up, Princess!"
>
> Not Happy Jan! ☹

220 Mr Hyland responded by email to Ms Collins:

> I agree, the Onepath BDM should attend the meeting, not you. Do you want me to instruct that this happens.
>
> Also not happy Jan

221 Ms Collins sent a further email to Mr Hyland indicating she would tell Simone that she (Ms Collins) had other appointments which she was unable to reschedule. Mr Hyland then sent a further email to Ms Collins on 4 September 2014:

> This conference call is making me very angry.
>
> Also, it has hit the fan with Carrington. I have messages to ring Christelle, Prachi and John Collins
>
> Will call them after the conference call

222 It is unclear from the materials what conference call was being referred to by Mr Hyland. A short time later, Ms Collins sent an email to Mr Hyland:

> I have endured a continuous and relentless tirade of abuse from John Doyle via email and over the phone since Monday about:
> - OnePath technical issues;
> - Pre-Vet process;
> - Michael Peters' email.
>
> All of which are beyond my control.
> I am at the end of my tether! ☹

223 On 3 September 2014, Michael Peters (Head of Lending, M&A, Advice & Open Market, ANZ Wealth) sent an email in connection with the possible sale of Carrington's business (CB tab 1483). The email was copied to Mr Hyland. Mr Peters referred to an earlier note of 2 June

2014 in which he had stated Carrington's recurring revenue to be $1.38 million. Mr Peters noted that Mr Doyle had responded that the recurring revenue was above $1.7 million. Mr Peters stated that updated figures were provided by Carrington on 20 June 2014 and the primary difference was SMSF advice fee revenue of $276,000 and revenue relating to the Macquarie and Instreet Products. Mr Peters stated that, after further work, "Macquarie/Instreet was confirmed as being in the RI Advice records at $158k". This email indicates that Carrington was receiving commission revenue of approximately $158,000 per annum from the Macquarie and Instreet Products, and that this revenue was included in RI's records.

224 As at September 2014, Ms B was continuing to provide paraplanning assistance to Carrington. On 4 September 2014, Ms B sent an email to Carrington with extensive comments on a proposed advice document (CB tab 1486). Later on the same day, in the same email chain, Ms Collins sent the following email to several staff members at Carrington:

> May I kindly request that you liaise with each other to rectify the various action items raised by [Ms B] in her feedback below.
>
> We cannot continue spending precious time addressing the same issues repeatedly in every client file submitted to [Ms B] for feedback, with minimal improvement.
>
> Please note, the assistance provided by [Ms B] is way above the call of duty and is not provided to any other practice.
>
> As such, it is only fair that every effort should be made to follow her instructions meticulously and ensure the issues identified in previous files are not replicated in subsequent files.
>
> Your urgent cooperation regarding this pressing matter would be very much appreciated.

225 On 5 September 2014, Ms B sent an email to Mr Lin (of Carrington) (CB tab 1489), copied to Ms Collins. Ms B's email was sent in response to an email from Mr Lin, attaching a draft SoA. Ms B responded:

> I've had a look at the SoA for [name omitted]. Unfortunately I will not be doing any work on this plan until you review it and ensure that it meets the standard of work suitable for pre vet. **It's not my job to re-write every plan for you**.
> Please refer to the previous plans that we have completed for guidance.
> You MUST:
> - have a one off approval to make recommendations in regards to ESSSuper.
> - Provide an insurance recommendation and product.
> - And only make one recommendation to the client and not multiple recommendations.
>
> Please review and then send back to me.
>
> (Emphasis added.)

226 The above email is another indication that Ms B had been providing substantial input in the preparation of Carrington advice documents.

227 Mr Whereat gives evidence (and I accept) that in mid-2014 ANZ were performing preliminary due diligence on the Carrington business with a view to potentially purchasing it; these discussions also considered a potential leaseback of Carrington by ANZ and/or RI to a consortium of Carrington staff (comprising Ms Huet, Ms Marfatia and Mr Lin), with a long-term view for those staff to purchase the business. Mr Doyle had earlier engaged a broker, John Collins (Principal, Black Pearl Private Clients Pty Ltd) to assist with the sale of Carrington.

228 On 11 September 2014, Mr Hyland sent an email to Mr Peters (of ANZ), copied to Mr Whereat and Ms Collins in relation to the possible sale of Carrington's business (CB tab 1500). The email is significant because it indicates that Mr Hyland had thoroughly examined Carrington's commission revenue for the period 1 July 2013 to 30 June 2014 and that Mr Whereat was made aware of the extent of that commission revenue. Mr Hyland's email was as follows:

> I wish to advise that I have completed a thorough analysis of the revenue for Carrington's from 1/7/2013 to 30/6/2014. I have checked the DMS commission reports with the bank account information that they provided us and I have come up with the following figures:
>
> | | |
> |---|---|
> | Adviser Service Fees – Ongoing | $420,596 |
> | Brokerage/Investment Ongoing | $277,270 |
> | Risk Insurance Ongoing | $279,117 |
> | Fees – Ongoing | $10,500 |
> | SMSF Fess (sic) – Ongoing – please refer to the attached spreadsheet | $596,096 |
> | **TOTAL ONGOING** | **$1,583,579** |
>
> I have checked every SMSF client in relation to the monthly fees paid to RI Advice and the fees paid directly to Carrington Financial Services. You can see from the spreadsheet that all of the amounts in red are the fees that have been paid directly to them. There are 91 SMSFs that have not been transferred to RI Advice. I am meeting with John Doyle next Tuesday morning and I will be instructing him that these funds must be transferred to RI immediately and I want to see an action plan with dates when each plan is transferred etc. (by the way, this has taken me hours to do!)
>
> I have had John Collins [from Black Pearl Private Clients Pty Ltd] chasing me all week to meet with me and John Doyle on Tuesday to go through the numbers and then for us to proceed with the next steps in due diligence etc.
>
> Therefore, would you please review the numbers and if [you] are comfortable with them, I would like to forward the SMSF spreadsheet to them with my revised recurring revenue numbers so that they can prepare for my meeting.
>
> Please give me a call tomorrow to discuss.

229 In response to the above email, Mr Whereat sent an email on the same day asking: "Are we still facilitating a sale internally??". Mr Hyland responded to Mr Whereat by email on the same day explaining that three Carrington staff members wanted RI to buy the business and lease it back to them and "John Doyle wants to sell ASAP". Mr Hyland said that he was meeting with Carrington next week "to discuss the numbers around their recurring revenue" and that, if they did not agree with his numbers, he would not proceed any further.

230 The evidence includes examples of Ms B providing substantial assistance to Carrington in the preparation of advice documents for submission to pre-vetting in the period September to November 2014 (CB tabs 1517, 1543, 1551, 1650).

231 On 7 October 2014, Ms Collins sent an email to a staff member at Carrington referring to the period of time the firm had been on pre-vetting (CB tab 1553):

> As discussed at our last meeting and again during my conversation with John [Doyle], Prachi [Marfatia] and Christelle [Huet] this morning, in view of the fact that the pre-vetting process has been an ongoing issue for the past ***19 months*** and should have been resolved within the first ***3 months*** of Carrington FS joining RI Advice, may I kindly request that you prioritise this matter please.
>
> Please note, SOAs need to be submitted for pre-vetting as a matter of urgency this week so if the feedback received from the Pre-Vet team requires amendments to the SOAs, this can be done well before [Ms B] goes on leave on Thursday 16th October.
>
> Would you be kind enough to carbon copy me when you email the SOAs to [Ms B] please.
>
> (Emphasis in original.)

232 On or about 14 November 2014, Mr Doyle achieved clearance from pre-vetting in respect of the remaining practice area. He therefore ceased to be on pre-vetting. However, as discussed below, he was placed on pre-vetting again on or about 31 March 2015.

Financial reports

233 The evidence includes a number of different financial reports that were provided to personnel at RI or ANZ during (all or part of) the period 1 February 2014 to 14 November 2014. These reports are relevant to the issue of RI's awareness of the extent to which Carrington and Mr Doyle were giving advice to clients while still on pre-vetting. The types of reports that are in evidence are as follows:

(a) reports detailing transfers from the Strategy platform to the Voyage platform (**Voyage Subfund Transfer reports**) – an example is provided by a covering email dated 23 June 2014 (CB tab 1207) attaching an Excel spreadsheet (CB tab 1208);

(b) reports detailing the weekly inflow of funds into the Voyage platform in relation to the RI "Dealer Group", arranged by "Adviser Party" (**Weekly Inflow reports**) – an example is provided by a covering email dated 1 July 2014 (CB tab 1260) attaching an Excel spreadsheet (CB tab 1261);

(c) reports headed "Oasis Platform – Cashflow by Subfund by Adviser" (**Oasis Platform Cashflow reports**) – an example is provided by a covering email dated 23 October 2014 (CB tab 1607) attaching several spreadsheets including, relevantly, CB tab 1609.

234 Having identified the different types of reports that are in evidence, I note the following additional facts and matters about those documents.

235 The Weekly Inflow reports were provided to Mr Whereat and Mr Ornsby on a weekly basis. For example, the evidence includes an email chain ending with an email dated 1 July 2014 (CB tab 1260). The email chain shows the Weekly Inflow reports being provided to Mr Whereat and Mr Ornsby on a weekly basis for weeks "37, 38 and 39" on 17 June 2014, 24 June 2014 and 1 July 2014 respectively. Another example of these reports being provided to Mr Whereat and Mr Ornsby on a weekly basis is an email chain ending on 12 August 2014 (CB tab 1367).

236 The Weekly Inflow reports were arranged by "Adviser Party", that is, the individual authorised representative (such as Mr Doyle) and showed the weekly inflow of funds, and the year-to-date inflow of funds, attributable to the authorised representative. I note the following:

(a) On 1 July 2014, Francesca Lim of OnePath sent an email to Mr Whereat, Mr Ornsby and others at RI (CB tab 1260) attaching the Weekly Inflow reports for week 39. In the covering email, Ms Lim stated that total inflows for the week were $16.02 million "with John Doyle the top writer of the week with $1.45m". The attached spreadsheet (CB tab 1261) showed inflows relating to Mr Doyle as being $36,188,345 for the year-to-date and inflows of $1,449,047 for the week.

(b) On 12 August 2014, Ms Lim sent an email to Mr Whereat, Mr Ornsby and others at RI (CB tab 1367) attaching the Weekly Inflow reports for week 45. In the covering email, Ms Lim stated that total inflows for the week were $12.02 million "with John Doyle the top writer of the week at $2.12m".

237 In cross-examination, Mr Whereat said that the Weekly Inflow reports were capturing, incorrectly, movements of funds from Strategy to Voyage. Mr Whereat said that the transfers from Strategy to Voyage made up the vast majority of the inflows.

238 In his affidavit, Mr Whereat states that the purpose of the flow reports (which I take to be a reference to the Weekly Inflow reports) was to assess the flow of funds across the RI business and they were not used as part of an adviser's compliance or vetting. I accept that evidence.

239 Mr Ornsby gives evidence in his affidavit that: the purpose of the Flow Reports (which I take to be a reference to the Weekly Inflow reports) was to assess overall gross inflows across the RI business; they were not intended to be (nor did they perform the function of) a compliance control; the Flow Reports were merely one category of many reports he received to assist RI to assess overall business performance (although, for the reasons set out later in his affidavit, they were not considered to be a particularly precise or absolute measure of that performance). I accept that evidence.

240 The evidence includes an Oasis Platform Cashflow report for the period 1 October 2013 to 30 September 2014 (CB tab 1609). This was emailed by Ms Lim to Mr Ornsby and another person at RI on 23 October 2014 (CB tab 1607). The report showed that, in respect of Mr Doyle and the Voyage platform, the year-to-date inflows totalled $48,085,358 and the Current FUM were $91,148,744.

The third period (15 November 2014 to 3 March 2015)

241 On 27 November 2014, Ms Collins sent an email to Mr Doyle relating to a "Platinum Club study tour" (CB tab 1694). The email, which was copied to Mr Whereat and others, congratulated Mr Doyle on being among the top ten RI practices nationally "as announced by Darren Whereat during his presentation this morning". (RI had about 100 practices at this time, so this placed Carrington in the top 10 per cent.) The email stated that, as had been discussed, Mr Doyle's eligibility to attend a Platinum Club study tour in Hong Kong was subject to achieving a rating of between 1 and 3 in his upcoming advice assurance review in January 2015. (This review was subsequently deferred until February 2015.) Ms Collins asked Mr Doyle to familiarise himself with that policy and the scorecard forming part of that policy in preparation for the review.

242 In February 2015, ANZ carried out an advice assurance review of Carrington (the **First Advice Assurance Review**).

243 On 6 February 2015, Amanda Rockliff of ANZ sent an email to Mr Ornsby in relation to Mr Doyle (CB tab 1769) with the initial results of the First Advice Assurance Review. The email stated:

> Peter just a heads up the guys have reviewed the extra files for John Doyle and he is a 5 rating ie high risk (9 highs, 22 mediums and 5 lows)
>
> The guys are drafting the report up as we speak, and this is only files from November 2014 onwards plus files selected by the adviser.
>
> The debrief has not occurred yet so will be scheduled with the adviser sometime next week.
>
> Clearly an issue with this [adviser's] business.
>
> Amanda

244 On 9 February 2015, Jon Scukovic of ANZ sent an email to Ms Rockliff and Hayley Carless at ANZ in relation to Mr Doyle (CB tab 1773). The email attached a draft report from Mr Doyle's First Advice Assurance Review and stated, in part:

> Currently the outcome is sitting at a rating 5 with 9 High rated issues, 22 Medium rated issues and 5 Low rated issues. There are also a number of observations that have been identified on his files.
>
> Key issues and concerns I have with the audit is the fact that the 8 pre-selected files that were selected prior to John's audit were not considered as part of the review. John had 11 files available on the day for us to select from. **Out of the 8 files pre-selected files, none have gone through prevet with advice provided to clients while John was on prevet**.
>
> Discussion between Brad Allen, Maree-Aimee and John Doyle of an exemption provided by Brenton Ritchie on all files while John was on prevet was the reason he was unwilling to consider the pre-selected files on the day of audit. No evidence of this exemption in writing and discussions with Brenton indicate that this exemption was not granted, waiting on Brenton to provide this response in writing.
>
> In addition to the issues identified on the files, there is also concern that one of the pre-selected files (Cox) and one of the reviewed file (Eeles) make specific recommendations for the client to consider purchase of an investment property in Doncaster East (within SMSF), further investigation into this issue is required with a potential target review to be considered.
>
> (Emphasis added.)

245 On 9 February 2015, Mr Ritchie (of ANZ) sent an email to Mr Scukovic (of ANZ) (CB tab 1777). The email responded to the query raised in the above email:

> As discussed, this potential agreement is new to me.
>
> Whilst at times over the past 12 months John Doyle was a topic of conversation with M-A regarding his vetting progress and what she was doing to assist him through vetting, I do not recall any agreement, verbal or written that files for John Doyle's review would be only sourced from November onward files. I have checked through my emails and cannot locate anything indicating an agreement along these lines either.
>
> From my perspective, knowing what was evidenced behind the scene regarding Carrington's being a high revenue producing practice compared with their minimal vetting submissions, it is extremely unlikely that I would have agreed to a reduced scope for file selection in an AQR, to the point where I am positive that I would not

have agreed to anything along those lines.

246 On 24 February 2015, there was an exchange of emails between Mr Scukovic, Mr Whereat and Mr Ornsby (CB tab 1798). Mr Ornsby sent an email to Mr Scukovic (copied to Mr Whereat):

> We understand that post the review of four files for John Doyle, his [current] rating for this review would be a 5. As a matter of urgency can you please send through the current findings as we do need to hold a broader discussion between John and our CEO, Darren Whereat, this afternoon.

247 Later on the same day, Mr Whereat sent an email to Mr Ornsby and Mr Scukovic, stating that he echoed Mr Ornsby's request. Mr Whereat continued:

> I need to have a conversation with John [Doyle] today, knowing that he is a fail and we need to immediately work towards resolving. There is also a commercial need for me to talk to him today so I would very much appreciate the draft report, just for my purposes only to allow me to steer the conversation.

248 On 3 March 2015, a letter was sent by Mr Scukovic (of ANZ) to Mr Doyle on RI letterhead setting out the results of the First Advice Assurance Review (CB tab 1819). The outcome of the review was an advice quality rating of 5 (that is, the worst possible rating under the Advice Assurance Standard). The letter stated that the advice assurance review "ensures your advice is consistent with regulatory requirements and our licensee standards". The letter included the following summary of the recommendations in the attached report:

> **Keep Doing**
>
> - Good consideration of concessional contribution caps when formulating recommendations including a small buffer to ensure client does not exceed caps.
>
> **Start Doing**
>
> - Ensuring all files have a completed RI Licensee approved risk profile questionnaire completed on file where investment advice has being provided.
> - Ensuring all files have a completed … client acknowledgement PFP on file.
> - Ensuring all required documentation is signed by client in appropriate timeframe and retained on file.
> - Enduring all files demonstrate adequate research and a reasonable investigation into client's existing products when formulating recommendations including product switches.
> - Ensuring files have documented evidence clients have received and understand supporting documents such as FSG and PDS at relevant timeframes throughout the advice process.
> - Completing clear and concise file notes of client discussions, outcomes and understandings at each stage of the advice process.

Stop Doing

- Providing recommendations to [clients] without following the RI licensee guidelines for gearing recommendations without documented approval on client file.
- Providing investment advice to SMSF fund and members where there is no investment strategy or trust deed established or recorded on client file.

Audit Note: The files provided for this review were selected by John Doyle on the 2nd of February 2015. This is outside of the standard file selection process for ANZ Global Wealth Advice Assurance; preselected files from Advice Assurance Officer's list were unable to be provided by John Doyle on the day of audit.

(Emphasis in original.)

249 The attached report contained an analysis of five client files, with detailed comments regarding requirements that had not been met. The report also set out remedial actions that were required to be carried out in relation to the five files. On the last page of the report there were a series of recommendations. These were as follows:

The Adviser Improvement Plan process aims to:

1. Identify and address the root cause of higher risk issues occurring
2. Provide appropriate support for you to develop professionally as an Adviser
3. Prevent any higher risk issues from happening again

The recommended support options are tabled below.

Support Option	Recommended actions	Responsibilities
Vetting (as coaching)	All advice subject to Vetting	All advice documents to be submitted to Vetting officer for review.
Review and confirm policy requirements	Written confirmation that requirement has been reviewed and understood (incl. assessment where appropriate) - RI SMSF – Limited Recourse Borrowing Arrangement - Engage and understand client policy - RI Best Interest Standard - Margin Lending Policy - The RI Advice Process – PSM Section 2 & 3.	Supervisor to walk through with adviser prior to advice documents being submitted for vetting.
Compliance coaching	One-on-one compliance coaching session remotely or in person	Compliance coaching session to be provided by supervisor as appropriate

The fourth period (4 March 2015 to 18 June 2015)

250 On 5 March 2015, Mr Doyle sent an email to Mr Whereat and Mr Ornsby complaining about the First Advice Assurance Review report (CB tab 1829). The email stated in part:

> This audit Report is "Bulltish"& not acceptable under any consideration.
> We have been "Ambushed" in no uncertain terms.
> Can we organise a telephone hook up to go through quickly @ 8.00 am tomorrow (Friday).
>
> My alternative action is to seek a legal injunction for a stay of proceedings until we get back from Vietnam.
>
> We are extremely disappointed with the process outcome as it is as far away from reality as "Flying to the Moon without a Rocket".
>
> Just a waste of our time & resources.
>
> @ the recent SMSF Conference - Peter Kells from ASIC & so many other Speakers all highlighted the need to get – "The Advice & Strategy Right".
>
> Not one of the Speakers focussed on the - idiotic process that is driving AnZ.
>
> (Errors in original.)

251 By email dated 6 March 2015, Mr Doyle provided a more detailed response to the matters raised in the report (CB tab 1832).

252 In late March 2015, the Platinum Club study tour took place in Hong Kong. As a result of the outcome of the First Advice Assurance Review, Mr Doyle was not eligible to attend the Platinum Club study tour at RI's cost. However, he was already booked to fly to Hong Kong for personal travel before the tour, and decided to attend the tour at his own cost. Mr Whereat and Mr Ornsby met with Mr Doyle in Hong Kong.

253 On 23 March 2015, Mr Whereat provided an RI Quarterly Board Update at the ADG Single Governance Board Meeting (CB tab 1863). The minutes of that meeting record that he advised the Board that all Practice Servicing Assessments (a key component of RI's monitoring framework) would be completed by the end of March and that one business, being Mr Doyle, was "identified from this process as potentially requiring Management to undertake further investigation on its business practices".

254 In late March 2015, Ms Collins met with Carrington to discuss a remediation plan to address the matters raised in the First Advice Assurance Review report.

255 At about this time, Vincent Vella of RI became involved to assist Carrington in working through any issues with the remediation required by the First Advice Assurance Review report. Mr Vella had previously provided training to Carrington staff on the use of Xplan, which was a web-based system for managing client data, investment projections, portfolios, risk and reporting.

256 On 31 March 2015, Ms Collins sent an email to Mr Whereat and Mr Ornsby (copied to Mr Vella) (CB tab 1875). The email stated:

> Hi Darren and Pete
>
> Further to the email trail below I have spoken with John Doyle and have also had numerous discussions with Prachi Marfatia and Christelle Huet. I would like to express my concerns regarding the following:
>
> - John has not read the attached report in full and was not fully conversant with all the remedial actions he is required to initiate, including mandatory remedial actions and prevetting requirements until I raised these issues with him. I attempted to go over the whole report with him but he repeatedly interrupted me and eventually ended the call abruptly;
> - John has instructed Prachi and Christelle to complete all remedial actions on his behalf including diary notes as well as missing information and the Risk Profile Questionnaire in PFPs even though neither one of them attended the client meetings;
> - When I broached this matter with John, he stated that he would mail PFPs to clients to get them to complete the Risk Profile Questionnaire and other missing information as he did not have the time to meet with them;
> - John stated that he would not be contacting the affected clients for the sole purpose of initiating remedial actions. He plans to do so when the affected clients are scheduled to be reviewed in due course;
> - John would like another Advice Quality Assurance review scheduled before 27th April 2015 when he is due to travel overseas.
>
> During our telephone conversation I explained the following to John:
>
> - I am required to check and submit all supporting documents for each and every remedial action, to the Advice Quality Assurance team;
> - The Remedial Action Plan cannot be signed off until ***all*** remedial actions have been completed;
> - His request for another Advice Quality Assurance Review is unable to be considered until ***all*** remedial actions in the current Remedial Action Plan have been completed and signed off.
>
> From my observations, John seems oblivious to the severity of his current predicament and is unwilling to change his processes, opting instead to delegate his responsibilities to his staff.
>
> I have drafted the attached reply to John's email. May I kindly request that you review my proposed reply and advise if it meets with your approval before I send it please.
>
> I await your guidance on the course of action to follow regarding this matter.
>
> Much obliged.
>
> M-A
> Marie-Aimée Collins

257 The reference to the "attached report" appears to be to the First Advice Assurance Review report of 3 March 2015.

258 On 31 March 2015, Ms Collins sent a detailed email to Mr Doyle relating to the remediation required as a result of the First Advice Assurance Review (CB tab 2370). The email emphasised, in clear and direct terms, the remediation requirements. The email indicated that, starting immediately, all advice documents were to be submitted to a vetting officer for review. Thus, from this time, Mr Doyle was again subject to the pre-vetting program.

259 Mr Doyle responded by email of the same day. His response included:

> Hi MA, Your points are noted.
> Please trust me that clients of 20 years+ - who are School Principals or Senior Managers, do not require help with assessing their risk profile.
> We will request each client @ their review to complete the PFP Document & returned signed to our office in a timely fashion.
> We have always - even in pre RI days - given our new prospects & existing clients a FSG, plus we always include one in every SOA.
> You are welcome to check with any client - who will confirm this.

260 This email was forwarded by Ms Collins to Mr Whereat and Mr Ornsby. On 2 April 2015, Mr Whereat sent an email in the same chain to Ms Collins and Mr Ornsby (copied to Mr Vella):

> Hi team,
>
> Please watch John's processes carefully, especially with his ['] **do not require help with assessing their risk profile'** comment. Clients are not advisers and he can't delegate risk profiling to each client, no matter how intelligent they are
>
> Let's talk a bit next week, on where [to] with this.
>
> (Emphasis in original.)

261 On 2 April 2015, Ms Collins sent an email to Mr Whereat and Mr Ornsby (copied to Mr Vella):

> Hi Darren and Pete
>
> Vince and I met with the Carrington FS operations team yesterday afternoon. John was not present at the meeting despite being invited to attend. We walked the staff through the steps John is required to complete as per his Remedial Action Plan, including:
>
> - completing new RI PFPs with all relevant information and Risk Profile Questionnaire;
> - detailed file notes;
> - conducting relevant research, calculations and quotes to fulfil best interest obligations;
> - producing compliant SOAs via Xplan;
> - submitting all files for pre-vetting until otherwise instructed.
>
> Vince and I also devised a training plan to assist the staff. They stated they have received ample training to date but admitted that their efforts to adhere to the best

business practices the Pre-Vet team, [Ms B], Vince and I have strived to implement have been thwarted by John's instructions to do otherwise.

During our meeting the Carrington FS operations team also expressed the following concerns:

- Staff morale is at an all-time low and they are all actively seeking alternative employment options;
- An alarmingly high staff turnover (I can attest that 8 employees with whom I have had direct dealings have resigned since Carrington FS joined RI Advice 2 years ago);
- John's mental faculty to perform his professional obligations has noticeably declined over the past year;
- John's client meetings with clients are brief (Quoted verbatim: "15 minutes at best and sometimes 30 if client's wife is attractive") hence the lack of file notes and bare minimum information in PFPs. Clients' needs and objectives and their risk profile is determined by John with minimal input and consultation with the clients;
- staff have been instructed to complete RI PFPs on his behalf, produce RI SOAs and other supporting documentation to meet RI compliance standards and obligations, for new clients only and ***not*** for existing clients. Please note Vince and I raised this matter with Graeme Hyland both verbally and in writing on several occasion last year and we were led to believe that a 'gentleman's agreement' was reached and that this matter would be resolved over time;
- Staff are put under duress to:
  - produce file notes on John's behalf, populate missing information in PFPs and make assumptions to fill the gaps even though they were not present during client meetings;
  - conduct client meetings on John's behalf;
- Attempts to bring John's lack of accountability for his shortcomings to his attention are met with angry and erratic outbursts and threats to terminate their employment.

John's decision not to attend yesterday's meeting is yet another example that the numerous attempts Vince and I have made to date to remedy his flawed processes and educate his staff, have been hindered by his total disregard for adapting and adhering to RI's compliance standards as well as meeting his legal obligations.

If you have any queries regarding this matter, please do not hesitate to contact me.

Kind regards

M-A
Marie-Aimée Collins

262 Mr Doyle's results of the First Advice Assurance Review were recorded in Mr Whereat's CEO Report dated April 2015 (CB tabs 2076, 2071). The report identified that Carrington was on the "Compliance Watch List" and recorded: "Key adviser failed last review. Remediation is underway and due in May. Marie-Aimee Collins is monitoring remediation progress on a weekly basis."

263 Mr Whereat gives evidence in his affidavit (and I accept) that from about April 2015, he and Mr Ornsby were engaged in discussions as to the ongoing authorisation of Mr Doyle and the options to suspend or terminate Mr Doyle.

264 On 30 April 2015, the outcome of the First Advice Assurance Review was discussed at the monthly RI Risk Forum. (CB tab 3063). Various material was circulated in advance of this meeting for discussion (as was common practice), including a Vetting Report (which identified that Mr Doyle had been placed back on vetting for consequence management), RI's "On Watch List", a supervisory mechanism used by RI to monitor advisers and provide an enhanced level of support (which included Mr Doyle as a result of the findings of the First Advice Assurance Review) and the RI Risk Report which noted, among other things, that "[t]he increase in a number of the high and medium rated issues for the period was 'skewed' by the results from John Doyle's advice assurance review in February 2015" (CB tab 1955). In the period after April 2015, the issues relating to Carrington continued to be tracked at RI Risk Forum meetings. From around mid-2015, Mr Ornsby became actively involved in meetings of the RI Risk Forum.

265 Also on 30 April 2015, a meeting of the Consequences Management Committee took place (CB tab 1959). Mr Whereat attended the meeting by telephone. The minutes of the meeting record the following in relation to Mr Doyle:

> Darren Whereat stated that the adviser is on leave until 6 May 2015. Darren Whereat intends to do a "deeper dive" into the business while he is away.
>
> In addition to the recommendations contained in the audit report (remediation, vetting, re-review within 3 months once clearance is met, coaching), the Committee determined a decision will be made within four weeks as to whether the adviser will be responsive to changing his processes or be terminated.

266 On 4 May 2015, Mr Ornsby sent an email to Ms Rockliff of ANZ regarding the proposed "deeper dive" into the business of Carrington (CB tab 1972). Ms Rockliff responded to Mr Ornsby by email on 5 May 2015:

> Pete can you set up a meeting for us to discuss what it is you require here as I have some concerns regarding this adviser and his responses to our previous findings etc (if he [can't] admit he has issues it is very hard to assist or change)
>
> Please include Hayley and Alexis in the meeting. Can I assume he is still selling his business so is this to get it ready for sale? Also can you confirm what the requirement here is we have 2 review outcomes both concerning, I don't want to do a deep dive and find the same thing then we haven't moved.
>
> [Let's] discuss so that we are clear on the outcome here.
> Amanda

267 On 7 May 2015, a meeting was held between Mr Ornsby, Alexis Salerno (of ANZ) and Ms Carless (of ANZ). The email was subsequently summarised in an email dated 18 May 2015 sent by Ms Salerno (see below). The email referred to the possibility of suspension of Mr Doyle's authority.

268 On 15 May 2015, Danielle Nugent (who had joined RI in February 2015) prepared a file note relating to Carrington (CB tab 2019). Mr Whereat gives evidence (which I accept) that the purpose of the file note was as a discussion tool for a meeting scheduled with Mr Doyle on 11 June 2015, which was the day after he returned from overseas. The file note is five pages in length and contains an overview of the Carrington business and outlines steps that could be considered to "de risk" Carrington in the immediate term. The file note referred to the possibility of initiating a review of the "off vetting period", that is, the period between mid-November 2014 and the end of March 2015. The file note referred to a series of steps that could be taken including, ultimately, the possibility of termination. In a section of the file note headed "Practice Financials & Overview", the following information was set out:

- Practice Recurrent revenue is approx. $1.5m, ($560 recurring trail from risk)
- Gross Revenue including NB is $2.01m to end April

As at 15/05:

- Profitability to RI: $715,867
- Total clients: 4000, 2183 active
- Total SMSF structures: 240
- Total FUA: $135m ($66m One Path)
- Insurance Premium in force $93k

269 During cross-examination, Mr Whereat said the figure for profitability to RI ($715,867) was incorrect and that was certainly not the profitability to RI for the Carrington business. Mr Whereat said that ANZ received fees from funds under advice on its platforms, but this did not come back to RI.

270 The above extract indicates that, at this time, Carrington had total funds under advice of $135 million (of which $66 million was in OnePath). This represented a large increase from the funds under advice in May 2013, as Mr Whereat accepted during his oral evidence.

271 In a section headed "Future direction", the file note stated in part:

> Carrington is a significant asset with a substantial contribution to the RI regional portfolio, and has significant profitability to the ANZ Group through One Path FUA and One Answer In Force Premiums.
>
> It appears commercially prudent to consider how we can strip the advice risk out of

> this practice, assist the syndicate to explore how they could acquire this impaired asset and set it up for growth and sustainable contribution to the region.

The reference to the "syndicate" in the above passage was to a syndicate comprising current management (Prachi Marfatia and Christelle Huet) and a previous staff member, Martin (presumably Martin Lin).

272 On 18 May 2015, there was a meeting of the Risk & Compliance Board Committee (CB tab 2033). The meeting was attended by Mr Whereat. The papers for the meeting included a Risk and Compliance Report for the period 1 January 2015 to 31 March 2015. This included a section on "Key Controls Testing", which stated in part:

> Key controls testing status is as follows:
>
> - Prevetting – This control is rated ineffective in that it can be circumvented. The Prevet team distribute a listing of advisers on vetting each month, however, as this listing is not validated by ANZFP or M3, we cannot confirm that advisers on prevet are not writing business without submitting to Prevet for clearance. Actions to address this gap are:
>   - Reinforce requirement to check listing to confirm advisers are not writing business without prevet clearance
>   - AAO schedule will now also include advisers on prevetting
>   - Consider how we can include this as part of the supervisory framework
> - Supervisory frameworks are currently ineffective as the framework for ANZFP is still being developed and the framework for ADGs is currently being reviewed by 2nd Line Risk. Testing of these controls will commence upon approval from 2nd Line Risk that the frameworks are adequate.

273 The papers for the meeting included a report on the Consequence Management Committee for the period 1 January 2015 to 31 March 2015. This listed advisers that had been considered at meetings of the Consequence Management Committee in that period. In relation to Mr Doyle, the report stated: "Remediation, vetting, coaching, termination to be considered".

274 On 18 May 2015, Ms Salerno sent an email to Mr Ornsby and Ms Carless summarising the meeting held on 7 May 2015 (CB tab 2034). The email was copied to Mr Whereat. The email stated:

> Hi all
>
> Apologies for the delay in putting together this summary of our meeting held on 07/05/2015
>
> Present: Peter Ornsby, Alexis Salerno, Hayley Carless (by phone)
>
> Summary:

- John is away overseas for 4 weeks.
- His remediation completion has been extended to 18/05/2015
- There is a concern that the remediation may not be done by 18/05/2015
- Jon Scukovic completed the AO review.
- There is a concern that JD will complete the remediation but may then lapse and will have issues again.
- Doyle sees ~ 15 clients per day
- PO not concerned with advice but rather the framework/process underpinning it
- Doyle's 2 parapalanners have recently left.
- There is a risk that the other 2 key people within the office may also leave.
- If all remediation has not been completed by 18/05/2015, RI will look to issue a letter of censure to John Doyle.
- Subject to confirmation of successful completion of outstanding remediation by 18/05/2015, Pete will speak with Mel Toomey regarding consideration of suspension of John's authority.
- Pete confirmed that Mel Toomey has the AR deeds relevant to process.

Actions:

1. Hayley to speak with Jon Scukovic regarding provision of remediation and provide an update. Confirm if all remediation has been submitted and completed sufficiently.
2. Hayley to speak with Jolie regarding file selection (10 files to be reviewed from the last 12 months – a broad scorecard is to be applied) – This is currently underway.
3. PO to look at option of external paraplanners assisting in preparation of SOA e.g. Deb Foale
4. 10 file targeted review to take place before the end of June 2015.
5. AS [Alexis Salerno] to raise issue as an incident. Done.
6. Check CMC [Consequence Management Committee] outcome.

Any questions please let me know.

275 On the same day, Mr Ornsby sent an email correcting or clarifying two matters:

A couple of items,

1) In regards to John [Doyle] seeing 15 clients a day, this one a one off example. He does see about 4-5 clients in a day

2) In regards to advice, our examples so far reflect that the key issue that requires addressing is documenting advice

276 On 19 May 2015, a meeting of the Consequence Management Committee took place (CB tab 2035). Mr Whereat attended the meeting. In relation to Mr Doyle, the minutes stated:

Darren Whereat advised that remediation is currently with the AAO [Advice Assurance Office] for validation.

Darren Whereat has commissioned a "deep dive" of 10 files. He is planning to meet with the adviser on 11 June 2015, the adviser's first day back from leave. RI has drafted a set of conditions which the adviser will be required to agree to.

As indicated in the above extract, at about this time Mr Whereat commissioned a further review of Mr Doyle's files (the **Second Advice Assurance Review**).

277 On 21 May 2015, Mr Scukovic sent an email to Ms Salerno and Ms Carless (copied to Mr Ornsby and Ms Collins) in relation to Mr Doyle (CB tab 2040). The email stated that all remediation actions from the First Advice Assurance Review report had been "satisfactorily provided, checked and completed". Mr Ornsby forwarded the email to Mr Whereat on the same day, stating: "Remediation for Carringtons is good so far".

278 On the same day, Mr Whereat responded to Mr Ornsby, copying in Ms Nugent. Mr Whereat stated: "Great news. Hurdle one over. This indicates the business can meet the standards".

279 On 26 May 2015, Mr Whereat sent an email to Mr Doyle (CB tab 2065). After noting that remediation of the five files had been completed, Mr Whereat stated that the First Advice Assurance Review had identified "systemic issues" and that he (Mr Whereat) was required "to delve deeper to ensure the correct practices" had been applied across the business. Mr Whereat stated that he had requested that a further ten files from Mr Doyle's practice be reviewed. Mr Whereat provided details regarding the conduct of that file review.

280 On 5 June 2015, Mr Whereat received an email from Adrian Caspar (Advice Assurance Officer, ANZ Wealth) attaching the draft report for Mr Doyle's Second Advice Assurance Review. The report indicated that Mr Doyle had failed a review for the second time, identified "a significant number of areas that required improvement", and set out mandatory remedial actions for each client file reviewed by ANZ's Advice Assurance Team. Mr Whereat gives evidence (which I accept) that he recalls reading the report around this time and that the contents of the report reinforced his view that there were poor advice documentation processes within Mr Doyle's practice and that RI's response should continue to be focused on automating and building rigorous document processes.

281 On 10 June 2015, Mr Caspar sent an email to Mr Whereat, copied to Mr Ornsby and others in relation to "John Doyle Target Review – Systemic Issue Summary" (CB tab 2085). The email set out a summary of an internal (advice assurance) overview report. This would appear to be the report on the Second Advice Assurance Review. Mr Caspar's email contained the following summary:

> Systemic Issues:
>
> 1. Failure to demonstrate meeting the Safe Harbour Steps and in turn demonstrate

Best Interest being met.

2. Failure to complete the require risk profiling process, including appropriate discussions pertaining to an agreed approach for couples and SMSF's.

3. Failure to comply with gearing in SMSF requirements, including the provision of accurate cash flow analysis, medium term projection, strategy risks, exit strategies and overall consideration of appropriateness to the clients situation.

4. Lack of research on file to support the replacement and selection of products recommended.

5. Failure to clearly define advice, services and fees relevant to the licensee and other departments of the business. Poor separation of services and billing.

6. All files contain the same ultimate solution of implementing a SMSF strategy with a limited recourse lending facility. Therefore, all clients, irrespective of age and demographics are considered high risk takers from a risk profiling perspective.

7. Some cases of rolling out of defined benefit funds, some of which hold a defined benefit pension option. Poor consideration is given to the scenario of retaining and taking up the DB pension in full. This scenario should have been modelled versus the alternative SMSF strategy and a "detailed risk commentary" included. A need to take the implemented risks in order to meet the clients objectives cannot be established.

8. In some files we note a rollover from a current super fund to a new retail super fund under advice of RI St. Kilda Road. Then within a short period, we have further advice to rollover to a SMSF. At each point a fee is charged. The benefit of the original rollover is lost as the strategy was not followed through. The initial step cost the client more than should they have retained that structure and moved to a SMSF directly. Justification for advice cannot be verified as a result.

282 On 11 June 2015, a meeting took place between Mr Whereat, Ms Nugent and Mr Doyle. Mr Whereat informed Mr Doyle that unless he agreed to engage paraplanning services he would be terminated.

283 On 16 June 2015, a meeting of the Consequence Management Committee took place (CB tab 2107). Mr Whereat attended the meeting. In relation to Mr Doyle, the minutes record the following:

> Darren Whereat advised that he met with the adviser last week. The "deep dive" has confirmed what he had suspected, namely, that there are issues with the advice process and building a defendable file.
>
> Darren Whereat informed the adviser that unless he outsources paraplanning (at his own expense), he will be terminated. The adviser has agreed to this. The outsourced paraplanning team will also rebuild the adviser's advice process, aligning it to RI requirements.

284 On 18 June 2015, Mr Caspar (of ANZ) sent a letter on RI letterhead to Mr Doyle with the report on the Second Advice Assurance Review (CB tab 2120). The heading of the letter included:

"Advice Quality Rating: N/A (5 Equivalent)". I note that 5 was the worst possible rating under the Advice Assurance Standard. The letter stated that "[d]uring the review we identified a significant number of areas that required improvement" and that a comprehensive remedial action plan had been developed. The letter enclosed a detailed report, indicating that five files had been reviewed. The report included several pages of mandatory remedial actions.

285 At about this time, RI and Mr Doyle engaged an external paraplanning service, Planlogic (also referred to as Plan Logic), to assist Mr Doyle and Carrington to implement a compliant advice process and implement the steps required as part of the remediation required in the Second Advice Assurance Review report. Planlogic was a business owned by Philip Volk, who was another authorised representative of RI.

286 On 18 June 2015, Mr Volk sent an email to Mr Whereat and Ms Nugent outlining a proposal to assist Carrington to address the issues that had been identified (CB tab 2123). The email referred to a meeting that had taken place that day with Mr Doyle and his team. Mr Volk made the observation that Mr Doyle was "the most irascible individual I have met in a long time".

The fifth period (19 June 2015 to 30 June 2016)

287 On 19 June 2015, Ms Nugent sent an email to Mr Whereat in relation to "Carrington – discussion with MAC" (CB tab 2126). I infer that the reference to MAC is to Marie-Aimée Collins. Ms Nugent reported on a discussion she had had with Ms Collins that morning. Ms Nugent's email set out a series of concerns with Carrington and Mr Doyle relating to lack of engagement, lack of resources and lack of consequence. Her comments included: "Despite [Philip Volk's] process suggestions, JD [i.e. John Doyle] has made it clear he will not change his approach – the team need to make the changes around him to make this initiative work". Ms Nugent outlined a number of suggestions, including that RI put Mr Doyle "on notice of Termination (even if we can't yet issue it)".

288 On 22 June 2015, Mr Whereat sent an email to Mr Doyle (CB tab 2131) and a letter giving notice of termination (CB tab 2132). The letter, which was headed "Notice of Termination", was in the following terms:

> I formally give notice that Rl Advice Group is exercising its rights pursuant to clause 16.7 of the Principal Authorised Representative Agreements in respect of The Carrington Corporation Pty Ltd to terminate those agreements. I note that termination pursuant to that clause takes effect at the end of a period of six months from the giving of this notice, being **21 December 2015**, or at such other time as agreed with you. If it is to our mutual interests to shorten the notice period, we are happy to explore with you whether we can agree an alternative date of termination sooner than six months

hence. Again, please contact me to discuss how we can best facilitate an orderly transition out of the business for you.

It is important that we remind you that by giving this notice you are not absolved of any of your duties under either of the Principal Authorised Representative Agreements or your Individual Representative Deed. All of those obligations remain in force during the notice period, and many of the obligations, including in relation to confidential information, continue beyond the termination of those Agreements and Deed.

We refer you to the Agreements and Deed for full details of your ongoing obligations during the period of notice and after effective termination, but note in particular that you must:

a) Act at all times in accordance with RI's procedures and guidelines, and comply with all reasonable directions given to you by RI;

b) Maintain strict confidentiality over the details of clients and client flies, and not use or disclose that information, or any other confidential information, for any purpose other than in the specific performance of your duties as an Authorised Representative of RI;

c) Make available to RI at any reasonable time the client files, accounts, books and records of the business; and

d) Act efficiently, honestly and fairly, and in full compliance with all applicable laws and regulations, in the delivery of financial services to clients.

We trust that you will faithfully and diligently comply with all of your obligations under the Agreement, Deed, and at law. Naturally, RI takes the protection of its business interests seriously and will take all steps necessary to ensure that those interests, and the interests of clients, are fully protected.

289 Clause 16.7 of the Principal Authorised Representative Agreement between RI and Carrington (CB tab 707) gave RI the right to terminate the agreement by giving six months' written notice of termination to Carrington. This right was additional to the other rights of termination conferred on RI by the agreement.

290 Mr Whereat's email of 22 June 2015 to Mr Doyle was in the following terms:

Further to our recent meeting and subsequent discussion concerning the findings from your 2nd Advice Assurance Review, I wish to reiterate the importance of making the necessary changes to your advice process and broader business. I understand the first steps to achieve this outcome have already commenced, through an initial meeting with the key personnel from Planlogic. We will continue to work with you and closely monitor the progress, to ensure successful and timely completion.

With respect to the Advice Assurance Review, I am aware that you have participated in a conference call with Peter Ornsby and Adrian Caspar to discuss the findings. Specifically, Peter and Adrian disclosed a number of issues relating to the five additional files that have been reviewed. The review reflected systemic issues in relation to file maintenance, which is concerning and reaffirms many of the findings from your 1st review, conducted earlier this year. By close of business 23rd June, Peter will ring you to schedule a meeting in your office, to outline the remediation that must be completed for these five files. We will now broaden the scope of our review to consider all advice that has been provided by Carrington Financial Services, since

joining RI in 2013. Peter will discuss the logistics, when you meet face to face.

In the meantime, all SOA's will need to continue to be vetted, prior to being issued to new clients. In addition, all ROA's will be required to follow the same process, before being issued to existing clients.

John, in our meeting on the 11th June, I mentioned the importance of working together to make the necessary process changes and that it was non-negotiable from our aspect. After careful consideration, I confirm it is our intention to terminate your Principal Authorised Representative Agreement, with the notice period being 180 days, per the attached notice. Should the process changes be successfully implemented, all remediation completed and you pass an Advice Assurance review, we will revoke our notice to terminate, upon agreement with you.

I will call you in a few days to discuss further. In the meantime, should you wish to discuss further, please do not hesitate to contact me.

(Emphasis in original.)

291 I note the following matters in relation to the above email:

(a) The email indicated that RI would conduct a review of all advice that had been provided by Carrington since joining RI in 2013.

(b) Mr Doyle remained subject to the pre-vetting program. As discussed above, this required all proposed advice documents to be submitted for approval. Although Mr Whereat referred to SOAs for "new clients" requiring vetting and ROAs for "existing clients" requiring vetting, I do not understand those statements to detract from the proposition that all proposed advice documents were required to be submitted for approval.

(c) In the email, Mr Whereat offered to revoke the notice of termination in the event that process changes were successfully implemented.

292 Mr Whereat gives evidence in his affidavit that the reason that RI terminated Carrington's authority on a 'without cause' basis included that:

(a) RI needed Mr Doyle to continue to work collaboratively to clear outstanding statements of advice;

(b) As Mr Doyle operated as a single adviser practice, documentation processes needed to be implemented through Planlogic to protect Carrington's clients' best interests;

(c) RI was actively seeking to assist Mr Doyle to sell the Carrington business and it was thought that implementing documentation processes through Planlogic would make the business more attractive to potential buyers.

293 On 3 July 2015, Mr Volk sent an email to Ms Collins and Ms Nugent (copied to Mr Whereat and Mr Ornsby) (CB tab 2215 and 2216). The email outlined a project to improve Carrington's processes. In the email, Mr Volk stated he continued "to have serious reservations about Carrington's ability to implement", and set out details of those concerns.

294 On 6 July 2015, Ms Marfatia sent an email to Mr Ornsby attaching a list of clients and advice given or services provided by Carrington since July 2013 (CB tab 2230). The attached spreadsheet (CB tab 2228) included the names of the clients and details, such as the appointment date, the adviser (i.e. Mr Doyle), whether superannuation advice was given, whether SMSF advice was given, whether insurance advice was given, and whether an SOA had been presented. It was apparent from this information that Mr Doyle had provided many advice documents to clients during the period between 8 May 2013 and 25 August 2014 (being the period he was on pre-vetting for all practice areas). This indicated, to someone with knowledge of the small number of advice documents submitted by Mr Doyle for pre-vetting, that Mr Doyle had circumvented the pre-vetting program.

295 Mr Ornsby gives evidence in his affidavit that it was not until 6 July 2015 that he became aware that Mr Doyle had been providing advice to clients outside of RI's vetting requirements. I accept this evidence, which was maintained during cross-examination.

296 On 7 July 2015, Ms Nugent sent an email to Mr Whereat (copied to Ms Collins and Mr Volk) (CB tab 2233). The email stated that Ms Marfatia (of Carrington) had called to advise that "680 clients have been seen by JD [i.e. John Doyle] whilst under the RI Licence, receiving some form of review or advice, with documentation". The email stated that this was "at least 2/3 greater than the number originally identified".

297 Mr Whereat gives evidence in his affidavit that this was the first time that he became aware that Mr Doyle may have provided advice to a large number of clients outside of the RI vetting process. I accept this evidence, which was maintained during cross-examination.

298 On 20 July 2015, a meeting of the Consequence Management Committee took place (CB tab 2269). Mr Whereat attended the meeting. In relation to Mr Doyle, the minutes of the meeting recorded that a notice under s 912C of the *Corporations Act* had been received from ASIC on 24 June 2015, requesting information about clients of the practice between 1 January 2013 and 31 May 2015, and that the information had been sent to ASIC on 14 July 2015. The minutes also recorded:

> Darren Whereat also advised that the adviser has been given a termination notice with a six-month timeframe that requires him to agree to numerous process changes in his business or leave RI. They are:
>
> - Outsourcing paraplanning to Plan Logic (Phil Volk);
> - Plan Logic to remap the advice process to deal with differences identified in past audits (three-month process);
> - External advice firm (TBA) to be engaged to compile a view on whether there has been client detriment in the advice received since 1 January 2013, against the list of clients given to ASIC.
>
> The adviser has been accommodating in making these changes to processes.

299 On or around 28 July 2015, ANZ's Advice Assurance team reviewed a further six Carrington client files (CB tab 2286) (the **Third Advice Assurance Review**). The results of this review identified similar issues to those identified in the First and Second Advice Assurance Reviews.

300 On 13 August 2015, an email exchange took place between Mr Whereat and Mr Ornsby in relation to Carrington (CB tab 2333). Mr Whereat asked Mr Ornsby to provide details in response to a number of topics. Mr Ornsby responded to Mr Whereat's email, providing details as requested by inserting them into Mr Whereat's email under the topics he had identified. Under the heading "Summary of issue …", Mr Ornsby stated in part:

> The business was placed on pre-vet and remained there until late 2014. At that time it was identified that Carrington's had not been sending advice documents through to pre-vet as required

During cross-examination, Mr Ornsby said that this was a reference to another Carrington adviser, Mr Intherarasa, rather than Mr Doyle, not sending advice documents to pre-vetting as required. I accept that evidence, which Mr Ornsby maintained under questioning.

301 Later in the email, Mr Ornsby indicated that, since the Second Advice Assurance Review, a further group of Carrington files had been sent to the Advice Capability and Assurance team (the **Third Advice Assurance Review**). Mr Ornsby stated:

> These files were reviewed in an effort to determine whether client detriment was a concern for the business. The results of this review are currently being assessed by Melinda Toomey in Corporate & Advice. This review will lead to an assessment as to whether a breach notice in regards to the conduct of Carringtons will be submitted to ASIC.

302 Mr Ornsby's comments also included:

> In the [submission] of 10 July to ASIC, we were able to establish that Carringtons had provided advice to 777 clients post joining our business. Carringtons are not thorough users of Xplan, so we also had to review Johns [i.e. John Doyle's] diary as another source of information. We are now working through the client files to establish the categories of advice provided to clients by the business. That is considering clients

who may have advice related to Defined benefits, SMSF's, property etc.

303 Mr Ornsby outlined the following mitigation steps that had been taken:

> To mitigate risk, all advice documents must be submitted to the pre-vet team for review. Prior to be submitted to pre-vet, all advice must follow the new process and procedures implemented by Plan Logic. (Subsidiary of RI Advice Surrey Hills). This process considers a new fact Find for each clients and a new SoA for each client. Weekly meetings are held with our local Practice manager, and our Regional manager is also supporting the implementation and ongoing reporting of the project.
>
> (Errors in original.)

304 On 18 August 2015, a meeting of the Consequence Management Committee took place (CB tab 2339). Mr Whereat attended. In relation to Mr Doyle, the minutes recorded:

> Darren Whereat advised that the Licensee [i.e. RI] is expecting to submit this as a reportable breach to ASIC this week. A full remediation plan is being drafted and is to be signed off by 1st and 2nd Line Risk and Legal.

305 On 25 August 2015, Mr Whereat sent a letter to Mr Doyle suspending his authorisation (subject to certain exceptions) (CB tab 2381). The letter was in the following terms:

> We notify you that, in accordance with clause 8 of your Individual Representative Deed with RI Advice Group Pty Ltd (**RI Advice**) dated 8 May 2013 (**Individual Representative Deed**). We suspend your appointment under the Individual Representative Deed in accordance with the terms of this letter, effective immediately. We do so in reliance upon breaches of the following sections of the Corporations Act which were evident in some of the 16 files we have reviewed during the period 6 February 2015 to 28 July 2015:
>
> (a) Section 961B – best interest duty;
> (b) Section 946A – obligation to give a Statement of Advice to retail clients;
> (c) Section 947D – requirement to provide additional information on replacement of one product with another;
> (d) Section 1012A –obligation to give a Product Disclosure Statement when providing personal advice which recommends a particular financial product;
> (e) Section 962G or 962S – obligation to give a Fee Disclosure Statement to retail clients; and
> (f) Section 941B – obligation to provide a Financial Services Guide when providing a financial service to a retail client.
>
> During your period of suspension you cannot perform any act as an authorised representative of ours except under our instruction to:
>
> (a) identify further breaches of the Corporations Act, all other relevant acts, regulations, orders and laws, [RI] Advice's Manual (as that word is defined in the Individual Representative Deed), and any guide RI Advice publishes; and
> (b) remediate clients who have been affected by such breaches to our reasonable satisfaction. We will provide you with our formal remediation plan shortly. We expect your full compliance with that

plan.

You are only able to provide advice to existing clients which is not required as part of the remediation plan on the following basis:

(a) the client approaches you or one of your advisers seeking advice;
[(b)] you follow RI Advice's policies and procedure; and
[(c)] such advice is pre-vetted through RI Advice's Advice Assurance Team.

If you would like to discuss this letter or would like copies of any of RI Advice's policies and procedures, please contact Peter Ornsby on [number omitted].

306 As indicated in the last part of the above letter, Mr Doyle was still permitted to provide advice to existing clients in certain circumstances as set out in the letter. The letter was, therefore, a partial (rather than a complete) suspension of Mr Doyle's authorisation.

307 Mr Whereat gives evidence in his affidavit that he and Mr Ornsby discussed this and determined that this approach was the most effective way in which RI could carry out its remediation program of Carrington, including by directing Mr Doyle to remediate certain files and work with certain clients that RI had identified required remediation. During cross-examination, Mr Whereat gave the following evidence in relation to the decision to partially suspend Mr Doyle:

And you could have just suspended him completely at that stage, couldn't you, under the terms of his agreement?---We suspended him to only react to his – to existing clients because they were in the remediation program.

You could have stopped him working completely, not seeing any clients?---So we could have terminated him. The ramifications of that from a client aspect is the clients were – had a longstanding relationship with Carrington. The reality is that we were going through a remediation program. The needs if and when they - - -

I just asked you the question that you could have terminated him. You could have terminated him at that stage because you knew that he had been circumventing pre-vetting and that was a breach of the obligations he had under his deed of authorisation. So you could have terminated him?---So we could have.

Or suspended him?---We could have – we did suspend him.

Not – partially suspended him?---Well, again, we are quarantining the issue – the size of issue. If you terminate somebody, you've got 700 clients there who have had a longstanding relationship with the adviser, who cannot get advice should those needs arise.

And you think it's better for them to be exposed to an adviser who has high issues in three audits?---So definitely paper-based issues. I agree with what you're saying. The quality of the advice, as we were going through this, again, I refer back to my earlier comments that there was many clients that had longstanding relationships with Carrington. The advice was deemed to be – across those areas deemed to be or couldn't be concluded that it was inappropriate and so our belief at that stage was to quarantine the issue, work with Carrington on the sale and build out as much of the remediation

as we could.

308 On 25 August 2015, Ms Nugent sent an email to Mr Whereat and Mr Ornsby (copied to Ms Collins) in relation to Carrington (CB tab 2382). Ms Nugent referred to a meeting that had taken place that day and stated that she wanted to be clear on the role that Mr Whereat and Mr Ornsby wanted her and Ms Collins to play. Ms Nugent stated:

> I'm concerned about you granting John [Doyle] the ability to continue to see even existing clients for NB, given the risks associated with his **continual behaviour around scant file notes, incomplete PFP's and lack of commitment/ability in the practice to use X Plan**.
>
> FYI, John's diary has been reviewed and he has met with **166 clients** between 1/8 and 24/08.
>
> (Emphasis in original.)

The reference to "NB" would appear to be to new business.

309 On 31 August 2015, Mr Whereat sent a letter to ASIC giving notice of a potentially significant breach under s 912D of the *Corporations Act* (CB tabs 2403, 2404). The letter referred to three file reviews having been conducted. The letter stated that the three file reviews had identified potential breaches of a number of provisions of the *Corporations Act* (which were specified). The letter outlined steps that had been taken by RI in response to the issues identified in the letter.

310 On 31 August 2015 and 7 September 2015, Mr Caspar (of ANZ) sent emails to Mr Ornsby (and, in the latter case, also Mr Whereat) to the effect that he had uncovered recent instances of Mr Doyle providing further advice to clients without having submitted the advice document for vetting (CB tabs 2405, 2422).

311 On 6 September 2015, Mr Doyle sent an email to Mr Whereat and Mr Ornsby complaining about their recent decision not to allow his business to write "New Business" (CB tab 2421).

312 In or about September 2015, RI and ANZ established a working group, known internally as the Carrington Remediation WIP forum, to specifically consider the ongoing investigation and remediation involving Mr Doyle and Carrington (**Carrington Working Group**). The group, which included RI and ANZ representatives, met regularly to keep track of the progress. Mr Ornsby was the primary RI contact for the ongoing remediation of Carrington's clients and the "Business Action Owner" of the working group. Mr Whereat also attended meetings of the working group.

313 From about October 2015, Mr Whereat and Mr Ornsby took an active role in liaising with Mr Doyle in relation to the sale of Carrington. Prior to his departure in February 2015, Mr Hyland had handled much of the earlier negotiations. By about October 2015, the consortium of current and former Carrington staff who had been engaged in negotiations for over a year were no longer interested in purchasing the business (many of them having resigned from the business in the preceding months).

314 On 14 October 2015, Mr Whereat received an email from Ms Nugent noting that she had a meeting with Richard McLean (of Frontier) who expressed interest in purchasing Carrington (CB tab 2503). Ms Nugent requested that Mr Whereat meet with Mr McLean in Melbourne to ascertain "whether there is anything we could do to support the transaction, including moving Frontier into the RI group from FSP". The reference to FSP was a reference to Financial Services Partners Pty Ltd, a member of the Aligned Dealer Group of which Mr McLean's business, Frontier, was an authorised representative. Mr McLean had a similar client base to Carrington. Mr Doyle knew Mr McLean as both had worked for a long time within the financial services industry. Mr Whereat subsequently met with Mr McLean. From that point on, the day-to-day dealings in relation to the brokering and ultimate sale were handled by Ms Nugent and Mr Peters.

315 On 26 October 2015, Mr Whereat received an email from Brent Van Der Wel (Senior Paraplanner, Carrington) requesting an approval for Carrington to use the Strategy Retirement Fund for its existing clients. Mr Van Der Wel noted that Carrington had "a number of clients who have been retained in Strategy as it was not cost effective to transfer them into the Voyage-badged version of this product". Mr Whereat subsequently explained to Mr Van Der Wel, by way of email dated 27 October 2015, the standard waiver process for such requests, including the requirement to make a formal waiver request with ANZ's Chief Investment Officer and retaining all supporting evidence on Xplan (CB tab 2532).

316 Mr Doyle responded to Mr Whereat's email to Mr Van Der Wel later on 27 October 2015, in which he stated:

> This is the opposite to what we discussed only last Friday.
>
> Why the change?,
>
> We have many many clients with Strategy & it is very time consuming to have to apply for a waiver each time we are completing a Review for one of our clients.
>
> We have always & continue to act in the "Best Interests" of our clients & this individual requirement of "Your Own Anz Product" is strange to say the least.

317 Mr Whereat subsequently exchanged emails with Mr Doyle and Mr Van Der Wel in relation to the waiver request, in which Mr Whereat requested that Carrington submit a few waiver requests and supporting documentation initially, prior to the product being considered for a blanket waiver.

318 On 28 October 2015, a meeting took place of the Carrington Working Group (CB tab 2543). The chair of the meeting was Jodie Hanson and the attendees were Mr Whereat, Ms Rockliff, Ms Salerno and Matt Ellsmore. The minutes of the meeting are on ANZ letterhead. Item 1 was an update on adviser activity and recorded that a meeting had taken place that week between Mr Doyle and Mr Whereat. It was recorded that Mr Doyle had been advised that "he must remain in the business until the files are remediated". In section 2 of the minutes, there is reference to 160 clients being "in structured products".

319 Under the heading "Actions" in relation to this matter, the minutes recorded: "Need to understand when these clients entered into these products and if any were advised to do so under the RI license".

320 On 30 October 2015, Mr Doyle sent an email to Mr Ornsby in relation to structured products (CB tab 2556). In summary, Mr Doyle sought to make a case for being permitted to recommend structured products. Mr Ornsby responded that he would have a meeting with Amelia (a reference to Amelia Kennedy of ANZ) "to work through potential solutions".

321 On 8 November 2015, Ms Kennedy of ANZ sent an email to Mr Ornsby in relation to Carrington and structured products (CB tab 2577). Ms Kennedy's email stated:

> Structured Products have received much attention from the regulator especially as to how and why they are provided to retail customers.
>
> ASIC released a report early last year around Complex products, Report 384 (http://www.asic.gov.au/regulatory-resources/find-a-document/reports/rep-384-regulatingcomplex-products/) which focuses on the importance of [clients] demonstrating their understanding of these complex products. **We agree that it is difficult, if not impossible for the average retail customer to fully comprehend and grasp/[assess] the risks associated with such products**. This is particularly difficult when clients may be attracted to the past returns.
>
> There are unfortunately no similar [comparisons] for the structured products you have mentioned (Mason Stevens, InStreet and Macquarie Flexi100) as the only other equivalents would be other structured products. **We don't have structured products on the APL [approved product list] as we don't believe the rewards in this space are aligned to the risk having to be taken by the client, the adviser and the AFSL**. This will be difficult for advisers and clients as we understand that at face value the potential returns can appear very attractive.

> Assuming FIIG is used for direct bond purchases the closest equivalent funds would be those with corporate debt exposure. The funds on the APL we would recommend include Macquarie Income Opportunities and CFS Global Credit Income.
>
> (Emphasis added.)

322 On 11 November 2015, Mr Ornsby forwarded the above email to Carrington with instructions as to how to deal with clients already in structured products (CB tab 2592). Then, on 12 November 2015, Mr Whereat forwarded that email chain to Mr Doyle. Mr Whereat's email stated:

> See email below from Peter [Ornsby] to Brent [Van Der Wel] outlining how to deal with structured products for existing clients. No further or new investments are to be made into any Structured Product as they are not on our APL [Approved Product List] as Amelia [Kennedy] outlines below.

323 On 12 November 2015, a meeting of the Carrington Working Group took place (CB tab 2588). The meeting was chaired by Mr Ellsmore. The participants included Mr Whereat and Mr Ornsby. There was discussion about extending the date of termination of Carrington's authority (the notice of termination dated 22 June 2015 had specified 21 December 2015 as the termination date). The minutes recorded:

- Discussion covered that extension of termination is in part due to the fact that investigations are continuing and that retaining Carrington Corporate Authorisation will assist the Licensee to be able to effectively implement its remediation activities. It is expected that by retaining Carrington as a Corporate AR, this will help remove potential delays and potentially lead to better outcomes.
- It was important to ensure that should RI determine that John's AR status is no longer appropriate to hold, that it is able to rescind this in a timely and effective manner. (Noting that a meeting is to occur between John, RI CEO, Line2 Risk and the Advice Assurance to discuss aspects relating to the files.

324 On 19 November 2015, Mr Whereat attended the monthly Consequence Management Committee meeting. As recorded in the minutes, the matter of Mr Doyle was closed given it was being tracked at the Incident Review Forum and Risk Compliance and Board Committee meetings.

325 On or about 19 November 2015, RI and Carrington entered into a deed of extension by which the termination date of Carrington's authority was extended from 21 December 2015 to 30 June 2016 (CB tab 2607). RI was permitted to terminate Carrington's authority before 30 June 2016 by providing 60 days' written notice. Mr Whereat gives evidence that, given the ongoing nature of RI's remediation, he formed the view that the termination of Mr Doyle's and Carrington's authorisations with RI ought to be extended to ensure ANZ and RI retained access

to all client files and personnel within Carrington, to ensure those clients could be investigated and remediated as appropriate. I accept that Mr Whereat formed that view at the time.

326 On 29 January 2016, Mr Ornsby sent a letter to Mr Doyle stating that he (Mr Ornsby) had been advised that Mr Doyle had recently met with a new client, to whom he intended to provide financial product advice under RI's AFSL (CB tab 2734). Mr Ornsby reiterated that under the notice of suspension dated 25 August 2015, Mr Doyle was suspended from providing any financial product advice to new clients, and sought an explanation for Mr Doyle's contravention of the notice of suspension. Mr Doyle responded by email on 3 February 2016, stating that he had had discussions with "these people" for over five years (CB tab 2761).

327 On 2 February 2016, RI produced a draft report headed "Remediation capability – Investigation report" in relation to Carrington (CB tab 2738). The draft report indicated that approximately 170 clients had invested in structured products, including the Instreet and Macquarie Products.

328 On 4 February 2016, Mr Whereat sent a letter to Mr Doyle regarding products not on RI's Approved Product List (CB tab 2745). Mr Whereat's letter stated that he understood that, for some of Mr Doyle's clients who had invested in non-Approved Product List products, "advice was provided under RI Advice's AFSL without obtaining prior approval from the CIO". Mr Whereat stated that "[s]uch conduct is a breach of your Principal Authorised Representative Agreement with us". Mr Whereat stated: "Please note that your advisers cannot provide advice to any clients regarding new investments in the Non-APL Products" (emphasis in original).

329 In his CEO Report of February 2016, Mr Whereat outlined the intended imminent sale of Carrington, and the interplay between the proposed sale and the ongoing remediation of Carrington's clients (CB tab 2853). His report included:

> Practice is now subject to immediate remediation program. RI Management are also engaging businesses expressing interest to acquire the Carrington practice. …
>
> Carrington has employed a business broker for the sale of the [assets] with a FSP [Financial Services Partners Pty Ltd] business expressing [interest] in buying. Intent agreements expected to be complete by 31 march. It is expected that the business will remain with RI Advice group

330 In mid-March 2016, Mr Doyle met with Frontier to discuss a potential sale of the business to Frontier (CB tab 2816).

331 On 5 April 2016, Johan Werle of ANZ prepared a report headed "ART Targeted Review Outcome Report" (CB tab 2840). The report focussed on clients of Carrington who had invested in the Instreet Products. The report stated in part:

> In June 2013, soon after Carrington was licensed by RI, CIO refused to provide a waiver for Instreet (structured) products, on the basis of its complexity and inherent risks. … Despite this, a new series of this investment, commencing in June 2014 was recommended by Carrington FS to a number of clients. These investments were not authorised and not appropriate. The initial targeted review therefore focused on 21 clients that were identified holding this investment.
>
> The Instreet investment is a geared structured investment, in the shape of a 3 year Deferred Purchase Agreement. The current investment series, commenced in June 2014 and maturing in June 2017 have exposure to the ASX/S&P 200 price Index (Series 36) and the Euro Stoxx 50 price index (Series 38).
>
> The investor is required to pay a 'finance cost' of 7.35% per annum upfront, as well as a 1% entry fee. The investor will receive a fixed 4% coupon after year 1 and year 2. The final payment at the end of year 3, if any, is dependent on the performance of the underlying index. The investor has an annual 'walk away' option, but will forfeit the 4% coupon in that case.
>
> Given the performance of the markets over the past two years, (the indices for both investments are down around 7% from inception in 2014, whereas the so-called participation rate has been negatively affected by the higher volatility of recent times) investors are unlikely to make a positive return from their current (and inappropriate) Instreet investments.

332 The report provided details of proposed remediation in respect of 21 clients who had invested in the Instreet Products. It was recommended that clients exercise the option to 'walk away' from the investment. To do so, they needed to give notice before 15 May 2016.

333 On or about 18 April 2016, Mr Whereat ceased his role as Chief Executive Officer of RI and assumed the role of General Manager, Aligned Licensees and Advice Standards at ANZ.

334 On 12 May 2016, Mr Whereat and Mr Ornsby held a meeting with Mr Doyle. The evidence includes Mr Ornsby's file note of the meeting in an email of 19 May 2016 (CB tab 3091). Mr Whereat participated in the meeting by telephone. As recorded in the file note, Mr Whereat asked Mr Doyle about progress regarding the sale of his business. Mr Whereat reiterated that Mr Doyle's termination as an adviser would take effect on 30 June 2016. Mr Ornsby informed Mr Doyle that RI had identified 21 cases where clients had been placed on the Instreet Product, which had not been approved by RI. Mr Ornsby stated that a "client detriment calculation" had been made and that the amount to be paid to this group of clients was above $250,000.

335 On 18 May 2016, a meeting took place between Mr Ornsby and Mr Doyle regarding remediation in relation to the Instreet Product, as confirmed in an email from Mr Ornsby to Mr Doyle dated 19 May 2016 (CB tab 3176).

336 On 20 May 2016, Mr Werle (of ANZ) prepared a report headed "ART: Carrington Progress and Next Steps Report" (CB tab 2902). The first part of the report related to the Instreet Product. After setting out the background, the report stated:

> On 16 May 2016 Carrington's principal adviser John [Doyle] recommended to all of his 21 clients holding a current Instreet product to remain invested. This conflicted with instructions to Mr Doyle received from RI. Therefore it is likely most clients will remain invested until the product matures in June 2017.
>
> In the Carrington working group of 17 May 2016 it was decided that as a consequence of Mr Doyle's actions, no further correspondence to the clients relating to the Instreet investment was needed.
>
> Clients' detriment for this population will be determined after the investment matures.

337 On 23 May 2016, Darren Williams, Head of Risk, Wealth Advice & Distribution at ANZ, sent an email to Tessa Micock of ANZ and Matthew Ellsmore (CB tab 2908). The email followed on from an email regarding the remediation in respect of the Instreet Product. Mr Williams's email noted that "all parties are now of the view that Doyle needs to be terminated as soon as possible". He asked the recipients of the email to let him know immediately if there was any change in that view and if anything arose that delayed this occurring.

338 On 25 May 2016, Mr Ornsby circulated by email a memorandum he had prepared on whether RI should terminate the authority of Mr Doyle with immediate effect (CB tab 2910, 2911). Parts of this document have been redacted on the basis of legal professional privilege. The memorandum set out the background in some detail and noted that Mr Doyle's authority was already due to terminate on 30 June 2016. Mr Ornsby recommended that that date be maintained. The memorandum included:

> RI Advice understands its obligations to monitor and supervise its advisers and it is quite evident through his own actions, that John Doyle may not act under clear instruction from the AFSL, thus in a normal course of business, RI Advice would uphold its [rights] and terminate John immediately.
>
> It is the extenuating circumstances of this matter that require urgent consideration. This includes:
>
> 1) As per the legal advice [Privileged].
>
> 2) We already have agreement with John to the termination of our agreement in 36 days time.

3) We have a buyer for the business and both parties are close to finalising a non binding terms document. (Due 31 May). Based upon execution of this document, it is envisaged that sale will be completed by 30 June

4) The potential buyer is currently authorised with FSP [Financial Services Partners Pty Ltd] and could easily transition into RI Advice.

5) [The] buyer is personally known to John Doyle and they share the same target segment (school teachers)

6) The buyer has been made aware of the issues with the Carrington business and has considered this in the proposed business valuation

7) Carringtons has approximately 800 clients

With the above in mind, RI Advice seek support for the recommendation to maintain Johns authority with RI Advice through to 30 June 2016. More robust monitoring and supervision must be applied to ensure client interests are managed appropriately.

339 The memorandum then sets out the following reasons for the recommendation:

The first concern of our business is the client, and John [Doyle] has a high number of active clients. Each of these clients have servicing needs, with many of the needs documented in ongoing service agreements. Our key concern with immediate termination is how will the financial planning needs of so many people be managed appropriately.

With an immediate termination, the risk of John giving poor quality advice is mitigated but we still hold a risk that John can then act outside his powers and provide advice to clients with no AFSL in place. John is passionate about his clients and we have little proof that John has implemented advice with consideration of his clients needs.

Upon immediate termination, we would have to contact all his clients to [advise] that John is no longer authorised. This may alarm the many clients who have held a long standing relationship with John, and we are concerned that if these clients cannot speak to John they may become stressed with the situation. (John does have a number of older clients in his book)

Our next key concern will be how we manage the needs of a high number of clients who may have a need for immediate advice. We can contract an aligned adviser for three days a week but this may not cater for the significant jump in queries we may receive post advising the client of the change.

RI Advice also hold grave concerns that such actions will impede the impending sale of the business. Under the current proposed transition process, John will be employed in a non adviser capacity by the buyer to facilitate the smooth transition of clients to the proposed buyer. This supports a smooth transition for the many clients of John Doyle.

It is envisaged that a smooth client transition will also maximise client retention post sale. Our goal is to ensure the buyer, operating under our AFSL, is given every best opportunity to retain the client base and ongoing intrinsic value in the business. (A fire sale type transaction will lead to lower client retention, potentially leading to financial stress on the buyer)

The final key consideration is that should we terminate John with immediate effect, and clients start to look for another adviser immediately, the sale of the business may

> not eventuate. This could lead to a situation where RI Advice is required to manage the many client needs without any infrastructure to support this over an extended period of time.
>
> With the implementation of the strategies below, we believe we can mitigate the risk of John not following policy and procedure. We also believe that the inherent risk over the next 36 days is not different to the risk exposed to the business over the past three years.

340 The memorandum also set out some risk mitigation strategies.

341 On 30 June 2016, Carrington's and Mr Doyle's authority as representatives of RI came to an end.

The period after 30 June 2016

342 On 1 July 2016, completion of the sale of Carrington to Frontier took place.

343 The evidence includes a memorandum dated 5 June 2017 prepared by members of ANZ's Advice Review Team (CB tab 3141). This referred to the Advice Review Team's review of Carrington's files in 2016, and the areas of concern that had been identified. The second concern, which related to the Instreet and Macquarie Products, was as follows:

> 2. Unauthorised use of structured investments. Instreet and Macquarie Flexi 100
> …
>
> - 21 Clients own a current Instreet product. The clients received correspondence that RI will remediate the advice to purchase the investment when the product matures in June 2017. Detriment is estimated to be a maximum of $16k for each client. This requires remediation.
> - The June 2015 series of Macquarie Flexi 100 was not covered by the 2013 [waiver] and therefore not authorised. Depending on the performance this may require remediation. There are 9 clients.

344 In October 2018, RI and two other financial advice businesses were sold by ANZ to IOOF.

EXPERT EVIDENCE

345 I will now summarise the expert evidence of Ms Birkensleigh (called by ASIC) and Mr Unicomb (called by RI). The evidence of Mr Green relates to whether Mr Doyle contravened his obligations and need not be summarised in light of Mr Doyle's admissions (see [5] above) and the way ASIC now puts its case against RI (see [30] above).

Ms Birkensleigh's first report

346 Ms Birkensleigh was instructed to express opinions on the following two questions:

Question 1

In my opinion, what steps should a financial services licensee with the knowledge of the matters referred to in the documents in the Briefed Materials have taken between 1 November 2013 and 30 June 2016 (the **Relevant Period**) to ensure that Mr John Doyle complied with sections 961B, 961G, 961H and 961J of the Corporations Act?

Question 2

In my opinion, did RI Advice Group Pty Ltd in the Relevant Period take reasonable steps to ensure that Mr John Doyle complied with sections 961B, 961G, 961H and 961J of the Corporations Act?

347 Ms Birkensleigh's first report contains the following summary of her opinions in relation to Question 1 is as follows:

> 24. In summary, at all times during the Relevant Period, Doyle was an Authorised Representative of RI Advice. In the Relevant Period RI Advice failed to take reasonable steps to ensure Doyle did not engage in conduct in contravention of the Best Interests Obligations. RI Advice knew that there was a significant risk that on and from 1 November 2013, if not earlier, Doyle was providing significant levels of un-vetted advice to retail clients and there was a significant risk that that advice had not met the Best Interests Obligations. RI Advice knew there was a significant risk that Doyle advised his retail clients to invest in Structured Products that were not approved by it and/or were not suitable for those retail clients. Despite that knowledge of those significant risks and being aware of the results of the First, Second and Third File Reviews [i.e. the reviews referred to in these reasons as the First, Second and Third Advice Assurance Reviews], RI Advice failed [to] take reasonable steps to prevent Doyle providing personal advice that was not in the retail clients' best interests until the termination of his Authorised Representative status on 30 June 2016.
>
> 25. In my opinion Doyle's conduct, described in paragraphs 338 and 340, was not arrested by the compliance or management efforts applied by RI Advice. In my opinion RI Advice did not adapt its compliance activity or management responses until June 2015 when Doyle was first issued with a termination notice which was to become effective six-months after the date it was issued. Subsequently Doyle's Authorised Representative status was suspended in August 2015. However, neither of these actions prevented Doyle from continuing to act in a manner that was inconsistent with RI Advice's standards. RI Advice took no other action to arrest Doyle's conduct until his Authorised Representative status was finally terminated as at 30 June 2016, upon the successful sale of his practice to another party authorised by RI Advice.
>
> 26. Prior to 1 November 2013 there were multiple "red flags" that should have alerted RI Advice to the likelihood that the significant risks identified in paragraph 24 had, and/or would, manifest. In brief, those "red flags" were:
>
> a. as part of the acquisition strategy RI Advice was aware that advisers from AFS who were being considered for recruitment, including Doyle, were considered high risk;
>
> b. the assessment of his advice files as part of the due diligence process contained a list of errors/concerns which were then repeated many times subsequent;

c. the due diligence process identified that Doyle utilised investment products that were not on RI Advice's APL. This included Structured Products which based on RI Advice's assessment were higher risk and unlikely to be suitable for most clients;

d. during the month of June 2013, a number of Doyle's retail clients invested in the Macquarie Flexi 100 Trust June 2013 issuance;

e. it was highly likely that Doyle gave personal advice to those retail clients sometime after he joined RI Advice and before the investment in the Macquarie Flexi 100 Trust June 2013 issuance occurred noting that;

   i. any personal advice should have been documented in an SOA before being presented to the retail clients; and

   ii. Doyle had not had a single SOA approved by vetting prior to 1 November 2013; and

f. on 17 July 2013, RI Advice was advised that Doyle had been rated "*not yet competent*" after having failed 4 out of 7 modules of the Kaplan Knowledge Test;

g. on 26 August 2013, all ten of Doyle's files submitted for vetting were returned because they could not be assessed by vetting due to their incomplete nature;

h. on 2 September 2013 Ms Rundle raised a concern with Ms Collins as to whether Doyle had been presenting advice to retail clients before it was pre-vetted;

i. Ms Collins conveyed to Ms Rundle that she had asked Doyle if he was issuing SOAs without getting clearance from vetting – Ms Collins reported "*he was not forthcoming with this information after I reiterated his obligations under the Pre Vet policy*";

j. Doyle's funds inflow for the period up to 30 September 2013 was reported as $8,434,407.00 noting that;

   i. Doyle received upfront service fees in relation to funds inflow;

   ii. it was highly likely upfront adviser service fees were charged for the provision of personal advice;

   iii. Doyle received ongoing adviser service fees which in some instances may also have been charged for personal advice related to funds inflow;

   iv. in the majority of circumstances personal advice should have been documented in an SOA prior to being provided to any retail client;

   v. Doyle was subject to the vetting requirements; and

   vi. Doyle had not had any SOAs approved by vetting; and

k. by 1 November 2013, approximately six months after he became an Authorised Representative of RI Advice, Doyle had not satisfied any

of the requirements of pre-vetting.

27. Doyle was a very experienced adviser. He had been providing financial advice since 1988 and had been an Authorised Representative under an AFSL since 2004. He was 72 years of age. He was the owner of Carrington and its sole director, and as such he had operated his business for a long time in a manner that best suited him. On and from the commencement of the Authorisation Period he had minimal staff, only one of whom appeared to be a para-planner or financial planner (this was Mr Daniel Muscat who was not an Authorised Representative of AFS or RI Advice). Doyle generated significant levels of revenue. He had circa 2000 active retail clients. I assume he interacted with those retail clients in relation to giving personal advice. Combined with this insight and the "red flags" set out in paragraph 26, RI Advice should have determined that the significant risks identified in paragraph 24, presented by Doyle, as an Authorised Representative of RI Advice, could not be effectively eliminated or managed and therefore RI Advice should have taken immediate action to avoid any future occurrence of the significant risks.

28. In my opinion, in light of the information set out in paragraphs 24 to 27, the only reasonable step RI Advice could have taken was to have terminated Doyle's Authorised Representative status on and from 1 November 2013.

29. On the basis that RI Advice was prepared to acknowledge and deal comprehensively and decisively with Doyle's conduct an alternative approach might have been possible. In the alternative, in my opinion, RI Advice could have taken the following reasonable steps on and from 1 November 2013:

    a. immediately suspended Doyle's authorisation pending the outcome of an investigation referred to in sub-paragraph g. below;

    b. advised Doyle's staff, in writing, that Doyle's authorisation was suspended pending an investigation, and that no advice documents were to be processed or applications, switches or transfers lodged with any fund manager during the period of suspension;

    c. immediately upon suspending Doyle have contacted the relevant fund managers within ANZ and requested that no applications, switches or transfers lodged by or on behalf of Carrington/Doyle be processed until further advised by RI Advice;

    d. immediately upon suspending Doyle have contacted Macquarie and Instreet and made the same request as set out in sub-paragraph c.;

    e. received, and considered, timely and regular reporting from ANZ regarding Doyle's weekly funds inflow to ensure that there was none during his suspension period and to have received and considered timely and regular reporting and confirmation from Macquarie and Instreet that no applications had been processed during the suspension period;

    f. ensured that ongoing concerns regarding Doyle were at all times escalated with urgency, to RI Advice's CEO, who should have been accountable at all times for ensuring that Doyle complied with the Best Interests Obligations;

    g. immediately upon Doyle's suspension, undertaken an investigation regarding Doyle's advice practices and having regard to the results of the investigation determined whether, and on what terms, Doyle's

authorisation would be continued;

h. if, as a result of the findings from the investigation in sub-paragraph g., it was determined by the CEO of RI Advice that Doyle could not be remediated, then his authorisation should have been terminated with immediate effect;

i. if, as a result of the findings from the investigations in sub-paragraph g., it was determined by the CEO of RI Advice, to continue Doyle's authorisation, then the terms of that should have been set out in writing. Those terms should have included the time-frame within which remediation was required and that any subsequent breaches of policy, standards and/or procedure would result in immediate termination. Doyle should have accepted those terms, in writing, acknowledging that he understood the consequences of him failing to meet his obligations;

j. in the event that Doyle continued to be an Authorised Representative of RI Advice, then there should have been processes put in place to support Doyle's remediation and to minimise the likelihood of any future non-compliance. RI Advice should have ensured that Doyle had appropriately qualified staff, and that there was regular and relevant management reporting to both Doyle and RI Advice so that any concerns could be swiftly identified and addressed. RI Advice should also have implemented a more frequent and risk based monitoring and supervision approach aimed at ensuring that Doyle complied with the relevant requirements at all times; and

k. in the event that remediation did not occur within the time-frame agreed in subparagraph i. then RI Advice should have immediately terminated Doyle's authorisation.

30. As a result of not taking any of the reasonable steps set out in paragraphs 28 or 29 RI Advice allowed the following to occur:

a. from November 2013 until November 2014, RI Advice employed an escalating level of resources to assist Doyle to satisfy the advice vetting requirements. These resources were largely ineffective; it took 12 months for Doyle to satisfy the vetting requirements, an extraordinary amount of time for a highly experienced adviser. The findings of the First File Review indicated that personal advice files prepared, and provided to retail clients, during the five-months Doyle was not subject to vetting had not met the Best Interests Obligations;

b. in June 2014, during the period that Doyle was subject to vetting, 21 of his retail clients invested in the Instreet Masti 36 & 38 series (20 in both series and one in the 38 series only);

i. Instreet Masti was not approved by RI Advice as it was assessed as highly risky (June 2013);

ii. RI Advice appears to have taken no action to ensure retail clients were not invested in non-approved products;

iii. Doyle received an upfront brokerage fee related to the investments by his retail clients into the Instreet Masti 36 & 38 series;

iv. none of the personal advice files related to Instreet Masti 36 & 38 series were submitted to vetting, as was required, and therefore none were approved; and

v. it was highly likely that the personal advice Doyle gave to those retail clients had not met the Best Interests Obligations; and

c. Doyle generated a significant amount of funds inflow into the Voyage platform (circa $72million over three years);

i. circa $50million of this occurred in the period 1 October 2013 – 30 September 2014 – a period during which Doyle had not satisfied the advice vetting requirements;

ii. Doyle received substantial upfront adviser service fees for personal advice related to investments into the Voyage platform;

iii. there was a significant risk that Doyle was issuing SOAs that were not vetted and had not met the Best Interests Obligations related to the transfers from the Strategy platform to the Voyage platform;

iv. not all investments into the Voyage platform were as a result of transfers from the Strategy platform and regardless of whether it was an external or internal transfer, where personal advice was given, an SOA was required and this should have been submitted to vetting (other than for a five-month period); and

v. for those SOAs that should have been subject to vetting and weren't, there was a significant risk the personal advice given by Doyle had not met the Best Interests Obligations; and

d. the results of the First File Review (February 2015) and the Second File Review (May 2015) were the worst possible for an adviser - a rating of 5;

i. the First File Review confirmed that advice given by Doyle when he was not subject to vetting didn't meet the Best Interests Obligations; and

ii. subsequently Doyle was required to submit all personal advice files for vetting; and

e. despite being issued with a termination notice (June 2015) and a notice of suspension (August 2015) Doyle continued to give personal advice up until May 2016 and that advice was not submitted to, nor approved by, vetting.

31. I assume that RI Advice had regular business reporting available to it including weekly funds flow reports, commission reports that supported the regular payments of commissions to advisers, regular vetting status reports, advice vetting reports and assurance review reports. It should have been able to conclude from all the information available to it that the significant risks posed by Doyle as set out in paragraph 24 were more likely than not to occur. Accordingly, RI Advice should have taken steps much sooner than mid 2015

to arrest Doyle's conduct.

32. Notwithstanding the matters set out in paragraph 30, and RI Advice's knowledge of these matters as set out in paragraph 31, RI Advice did not terminate Doyle's Authorised Representative status until 30 June 2016, the date on which Doyle's business was sold to Frontier Financial Group Pty Ltd, an Authorised Representative of RI Advice.

(Footnotes omitted.)

348 In relation to Question 2, the first report contains the following summary of Ms Birkensleigh's opinions:

34. In my opinion, RI Advice did not take reasonable steps in the Relevant Period to ensure that Doyle complied with sections 961B, 961G, 961H and 961J of the Corporations Act.

35. RI Advice failed to take the steps set out in response to Question 1. In my opinion, it was necessary to take these steps to ensure that Doyle did not continue to provide advice to clients which did not comply with sections 961B, 961G, 961H and 961J of the Corporations Act. In particular, on and from 1 November 2013, RI Advice failed to terminate Doyle's Authorised Representative status, with immediate effect.

36. In the alternative RI Advice could have undertaken the following steps on and from 1 November 2013:

    a. RI Advice should have immediately suspended Doyle's authorisation pending the outcome of an investigation referred to in paragraph 29.g. RI Advice failed to suspend Doyle's authorisation on and from 1 November 2013;

    b. as a result of RI Advice's failure to suspend Doyle's authorisation on and from 1 November 2013, RI Advice did not take the steps set out in paragraph 29. b, c, d, e and f. as those steps would only have been taken if the suspension set out in 29.a above had occurred. This is because the steps in paragraph 29.b, c, d, e and f., are consequential to and dependent on the step in 29.a being taken;

    c. immediately upon Doyle's suspension, RI Advice should have undertaken an investigation as contemplated in paragraph 29.g regarding Doyle's advice practices and having regard to results of the investigation determined whether, and on what terms, Doyle's authorisation could be continued. RI Advice failed to undertake an investigation of Doyle's practices on and from 1 November 2013; and

    d. as a result of the failure to undertake c. above RI Advice did not take the steps set out in paragraph 29.h, i, j, and k. This is because the steps in paragraph 29.h, i, j and k., are consequential to and dependent on the conclusions formed from the undertaking of step c. above.

37. In my opinion, during the Relevant Period RI Advice took steps which were designed by it to ensure that Doyle remained an Authorised Representative of RI Advice, thereby securing the FUM that Doyle advised on, until such time as the Carrington/Doyle business could be sold or placed in the hands of another financial advice group, authorised by RI Advice. The steps that RI Advice took that in my view were not reasonable and did not prevent Doyle

providing advice in contravention of the Best Interests Obligations were as follows:

a. RI Advice allowed an extraordinarily extended period for Doyle to satisfy its vetting requirements, some 18 months from his authorisation date. Finally satisfying the vetting requirements was only achieved by RI Advice obtaining extensive third-party para-planning support for Doyle and by Ms Collins dedicating extraordinary amounts of effort to achieving that outcome;

b. RI Advice did not take account of Doyle's unwillingness to change his behaviour or habits which meant that once off vetting, for five months, SOA errors occurred during those five months that were similar to those that occurred in the prior 18 months; and

c. RI Advice exhibited a lack of urgency in taking reasonable steps to prevent Doyle's conduct. The results of the First, Second and Third File Reviews were very serious and yet Doyle was only finally terminated on 30 June 2016 when Doyle's practice was successfully sold to another financial advice group licenced by RI Advice.

38. RI Advice's failure to take the reasonable steps set out above, in a timely manner, meant that there was a significant risk that Doyle's conduct, as described in paragraphs 338 and 340, continued unabated for the whole of the Relevant Period.

(Footnotes omitted.)

Mr Unicomb's first report

349 Mr Unicomb was instructed to address the following question (set out at paragraph 2.2.1. of his first report):

2.2.1. I am instructed to address the following question:

(a) During the period 1 November 2013 to 30 June 2016 (the Relevant Period), did RI Advice take reasonable steps to ensure Doyle complied with his obligations under sections 961B(l), 961G, 961H and 961J of the Act?

350 Mr Unicomb's report contains the following summary of his opinions:

2.3.1. My response to the question in paragraph 2.2.1 above is dealt with by answering two sub-questions, namely:

(a) What steps are reasonable to expect RI Advice to have taken to ensure Doyle complied with his BIO [i.e. Best Interests Obligations]?

(b) What reasonable steps, if any, did RI Advice fail to take to ensure Doyle complied with his BIO?

2.3.2. My response to the questions above have been considered over two periods, being the Initial Pre-vet Period [8 May 2013 to 14 November 2014] and the Post Initial Pre-Vet Period [15 November 2014 to 30 June 2016], and are set out below.

Initial Pre-Vet Period

What steps are reasonable to expect RI Advice to have taken to ensure Doyle complied with his BIO?

2.3.3. During the Initial Pre-Vet Period, RI Advice took the following key steps:

(a) Appointing a Practice Development Manager to support and monitor Doyle in preparing client files for pre-vetting;

(b) Requiring all advice prepared by Doyle in the first and second rounds of pre-vetting to be reviewed prior to presentation to clients;

(c) Placing Doyle on supervisor coaching after failing the first and second rounds of pre-vetting;

(d) Engaging a specialist para planner to assist in the writing of SOAs for submission to pre-vetting and fine-tuning SOAs for resubmission;

(e) Requiring Doyle to continue to be subject to pre-vetting after failing the second round until Doyle had demonstrated the necessary improvement in advice quality to be cleared from pre-vetting on 25 August 2014; and

(f) Requesting an audit to be undertaken immediately following Doyle being cleared from pre-vetting in accordance with the Advice Assurance Standard, with the audit initially scheduled for mid-December 2014. The request was made of Marie-Aimee Collins, Practice Development Manager - RI Advice ("**Collins**") by Darren Whereat, Chief Executive Officer - RI Advice ("**Whereat**") on 2 September 2014. After being rescheduled on a number of occasions, the audit occurred on 3 February 2015.

2.3.4. In my opinion, the steps taken by RI Advice were reasonable in ensuring Doyle complied with his obligations under BIO.

2.3.5. I have formed this opinion after considering the steps referred to at paragraph 2.3.3 within the following context:

(a) Doyle was the sole principal of Carrington having run an advisory business for over 30 years with a client base of more than 2,000 clients. He had long-standing relationships with clients who were generally well educated and had previously invested in, or were currently invested in, Macquarie Flexi and Instreet products. The decision to terminate or suspend Doyle was a significant matter. Terminating or suspending Doyle without his cooperation and assistance had the potential to materially adversely impact on clients.

(b) The FOFA legislation required Doyle to make material changes to his advice practices and processes. Doyle had developed advice practices over the previous 30 years and it was reasonable to allow more time for transitioning to the new regime in comparison to an adviser who had less financial advisory experience;

(c) Doyle's conduct being broadly characterised as advice quality issues involving failure to document the basis for advice recommendations and repeated noncompliance with internal business rules;

(d) There being no indication of breaches of the Act up to the end of the

Initial Pre-Vet Period; and

(e) There being no identified client detriment during the Initial Pre-Vet Period.

2.3.6. In forming my opinion above, I have considered that Whereat and Peter Ornsby, Senior National Manager - Advice and Operations - RI Advice ("**Ornsby**") were not aware in August 2014 that Doyle was recommending the Instreet product and that he had been bypassing pre-vet.

2.3.7. After considering all of the factors referred to in paragraph 2.3.3 and 2.3.5 above, in my opinion, the seriousness of Doyle's conduct is at the lower end of the scale.

What reasonable steps, if any, did RI Advice fail to take to ensure Doyle complied with his BIO?

2.3.8. I do not consider that RI Advice failed to take any other reasonable steps to ensure Doyle complied with BIO.

Post Initial Pre-Vet Period

What steps are reasonable to expect RI Advice to have taken to ensure Doyle complied with his BIO?

2.3.9. During the Post Initial Pre-Vet Period, RI Advice took the following key steps:

(a) Undertaking the First File Review [i.e. the review referred to in these reasons as the First Advice Assurance Review] on 3 February 2015.

(b) Subjecting Doyle immediately to mandatory remedial action following the First File Review including placing Doyle on pre-vetting, one-on-one compliance coaching and obtaining a written affirmation from Doyle regarding his understanding of policy requirements. Doyle continued to remain on pre-vetting thereafter.

(c) Requiring all advice delivered by the Carrington business to be passed through the pre-vet team prior to being presented to clients.

(d) Enhancing monitoring and supervision of Doyle including, assigning five staff to support the ongoing monitoring and supervision of the Carrington practice. This included placing Collins "on the ground" to support Doyle.

(e) Engaging Plan Logic, a specialist in advice processes, to support the remediation of client files at Carrington. This required a complete re-engineering of the advice processes.

(f) Reporting to the CM Committee on 30 April 2015 that a decision was to be made within four weeks regarding whether Doyle should be terminated, in accordance with the Consequence Management Standard. The steps proposed and taken regarding Doyle were monitored by the CM Committee on a monthly basis as recorded in the minutes of 19 May, 16 June, 20 July, 18 August, 19 November 2015.

(g) Obtaining legal advice on 7 May 2015 regarding RI Advice's options to suspend or terminate Doyle.

(h) Subjecting Doyle to a Second File Review immediately after satisfying the remediation requirements of the First File Review.

(i) Issuing a notice of termination to Doyle on 22 June 2015, immediately following the issues identified in the Second File Review.

(j) Undertaking a Third File Review on 28 July 2015.

(k) Suspending Doyle's AR status on 25 August 2015 which was shortly after the Third File Review. The terms of Doyle's suspension effectively precluded him from providing advice to new clients. Doyle was also limited in his capacity to provide advice to existing clients to circumstances where the client approached Doyle and the advice being subject to pre-vet.

(l) Undertaking a further file review on 26 August 2015.

(m) Undertaking a further targeted review of files with multiple strategies on 18 November 2015.

(n) Undertaking a comprehensive investigation of Doyle's practice and preparing the Remediation capability - Investigation report dated 2 February 2016.

(o) Warning Doyle by letter from Whereat dated 4 February 2016, that RI Advice would look to seek full indemnity from Carrington for any loss suffered by a client where Doyle had recommended products not on the APL.

(p) Informing ASIC of the remedial steps being taken by RI Advice to address Doyle's non-compliance in a breach notice dated 31 August 2015. This included confirmation that Doyle had been terminated on 22 June 2015 with effect from 21 December 2015 and suspended from providing advice to new clients on 25 August 2015. ASIC was also advised that Doyle was able to provide advice to existing clients in limited circumstances.

(q) Updating ASIC further at a presentation on 15 February 2016 and also by emails sent on 29 March 2016 and 1 August 2016, including confirmation that Doyle's business had been sold on 1 July 2016. The Briefed Materials do not indicate that ASIC raised any concerns regarding the steps taken by RI Advice in implementing the remediation program.

2.3.10. In my opinion, the steps taken by RI Advice were reasonable in ensuring Doyle complied with his obligations under BIO.

2.3.11. I have formed this opinion after considering the steps referred to paragraph 2.3.9 within the following context:

(a) Doyle was proposing to sell the business and he was given notice that full indemnity would be sought for losses suffered by Carrington's clients, it is reasonable for RI Advice to have proceeded on the basis that Doyle would not engage in non-compliant conduct in ensuring the business was sold for the maximum price with minimum exposure to indemnity for any client losses.

(b) Doyle was the sole principal of Carrington having run an advisory

business for over 30 years with a client base of more than 2,000 clients. He had long-standing relationships with clients who were generally well educated and had previously invested in, or were currently invested in, Macquarie Flexi and Instreet products. The decision to terminate or suspend Doyle was a significant matter. Terminating or suspending Doyle without his cooperation and assistance had the potential to materially adversely impact on clients and any potential remediation.

(c) At paragraph 113 of its Statement of Claim, ASIC asserts that on or about 25 May 2015 Doyle recommended to one Sample Client that they invest in the Macquarie Flexi product. This is the only instance that has been identified between August 2014 and 30 June 2016 where Doyle has recommended an investment in Macquarie Flexi or Instreet, which are the products in issue in The Proceeding.

(d) RI Advice did not make any findings that Doyle may have been breaching the BIO until the Second File Review was undertaken on 28 May 2015.

What reasonable steps, if any, did RI Advice fail to take to ensure Doyle complied with his BIO?

2.3.12. I do not consider that RI Advice failed to take any other reasonable steps to ensure Doyle complied with BIO.

(Footnotes omitted.)

Ms Birkensleigh's reply report

351 Ms Birkensleigh was instructed to review Mr Unicomb's first report and prepare a report which addressed the following questions (set out in paragraph 1 of her reply report):

a. any matters raised in the Unicomb Report which I consider appropriate to address; and

b. whether my review of the Unicomb Report has caused me to change any of the opinions expressed in My Report and, if so, how.

352 Ms Birkensleigh's reply report addresses ten specific areas, as outlined in paragraph 6 of that report:

In addressing the requirements of paragraph 1.a above I do not intend to provide a paragraph by paragraph critique of the Unicomb Report. Rather I have selected a number of specific areas to address. It should be noted that where I have not made comment on any particular part of the Unicomb Report, in my Reply Expert Report, this should not be taken to infer that I agree with that part of the Unicomb Report. The specific areas my Reply Expert Report addresses are as follows:

a. the general principles underpinning a compliance program as set out in AS 3806-2006;

b. the effectiveness of RI Advice's Compliance Program;

c. the complexity of the FOFA requirements and the additional time advisers required to change their previous advice approaches and habits;

d. the relevance of the facilitative compliance approach adopted by ASIC;

e. reasonableness of steps taken by RI Advice to ensure Doyle complied with the Best Interests Obligations, particularly as set out in paragraph 2.3.9 of the Unicomb Report;

f. the nature and degree of Doyle's non-compliance;

g. the Approved Product List (APL);

h. the accuracy of the commission reports;

i. the nature of Doyle's client base; and

j. the effectiveness of the resources allocated by RI Advice, including Ms Collins and [Ms B], in ensuring that Doyle complied with his Best Interests Obligations.

353 Ms Birkensleigh's reply report contains the following summary of her opinions in relation to those questions:

8. In response to paragraph 1(a) I have considered ten specific areas. These areas are listed in paragraph 6 above. I have summarised my comments and conclusions on each of those areas below:

a. Mr Unicomb did not apply the 12 principles of AS 3806–2006 in assessing the adequacy or otherwise of RI Advice's Compliance Program. In my opinion had he done so he would have concluded that RI Advice's Compliance Program did not meet the requirements of AS 3806-2006 and as a result he would not have concluded that the Compliance Program was reasonable – refer paragraphs 11 to 20;

b. the RI Advice Compliance Program, which was key to RI Advice's approach to ensuring its Authorised Representatives complied with their Best Interests Obligations, failed to ensure RI Advice took reasonable steps to ensure that Doyle complied with his Best Interests Obligations during the Relevant Period – refer paragraphs 21 to 31;

c. Doyle was an experienced adviser. He had operated under the "Reasonable Basis of Advice" regime for many years. The changes introduced by FOFA were not as significant for him as they were others, such as stock brokers, who were not subject to the previous advice regime. There was no reason that Doyle needed more time to adjust than others, other than his own unwillingness to adapt – refer paragraphs 34 to 43;

d. ASIC's preferred supervisory approach has no relevance to these Proceedings. The financial services industry had over 12 months to prepare for mandatory compliance with FOFA. ASIC's facilitative compliance approach did not mean the effective date for mandatory compliance was extended by 12 months nor did it mean that serious breaches, such as those reported by RI Advice to ASIC on 31 August 2015 would not be dealt with according to their severity – refer paragraphs 44 to 47;

e. in forming his view as to what reasonable steps RI Advice should have taken Mr Unicomb does not state what steps could have been taken.

He concludes that the steps RI Advice took were reasonable and that there was nothing else RI Advice could or should have done. Further, Mr Unicomb has confused steps taken to ensure compliance with the Best Interests Obligations with steps taken to investigate and remediate breaches or alleged breaches of the Best Interests Obligations. A number of the steps he lists at paragraph 2.3.9 fall into this category – refer paragraphs 48 to 50;

f. neither expert was asked to express an opinion on the quality of Doyle's advice or whether or not he had met the Best Interests Obligations. As Mr Unicomb has expressed such an opinion and formed his opinions as to reasonable steps taken by RI Advice by reference to his opinions on Doyle's non-compliance I have made a number of comments and observations. Mr Unicomb has characterised Doyle's non-compliance in the Initial Pre-Vet Period as procedural in nature and stated that Doyle's conduct was at the "lower end of the scale". I do not agree with Mr Unicomb's assessment. RI Advice had designed its criteria for whether an advice file submitted to vetting would be approved or not. The Advice Vetting Standard was clear that a file that contained any high-rated issues would not be approved. RI Advice utilised the Advice Quality Checklist as a tool to guide the rating of advice files submitted to vetting. Mr Unicomb's analysis of the files submitted by Doyle for vetting showed that the majority contained high-rated issues some of which were still not resolved when the files were approved. I agree with Mr Unicomb that the Advice Quality Checklist formed part of the RI Advice Compliance Program. Mr Unicomb does not state that the Advice Quality Checklist was not appropriate for its purpose. Therefore, it is difficult to understand how he has been able to characterise high-rated issues as being "at the lower end of the scale". Mr Unicomb similarly attempts to minimize the significance of the issues found in the advice files reviewed as part of the First, Second and Third File Reviews. Mr Unicomb again characterises high-rated issues as something less serious. The findings of the First, Second and Third File Reviews were not dissimilar to those identified in the Initial Pre-Vet Period. Similarly, the high-rated issues identified were not insignificant. In its significant breach notification RI Advice notified breaches or alleged breaches of the Best Interests Obligations in all 16 of files that were the subject of the First, Second and Third File Reviews – refer paragraphs 51 to 83.

g. RI Advice failed to monitor compliance with its APL in accordance with its policies. It failed, prior to August 2014, to identify that Doyle was recommending non-approved Structured Products to retail clients. It failed to take any action, once it became aware, prior to late 2015. Prior to October 2015, it failed to monitor the conditions that it had placed on the waiver granted for Macquarie Flexi 100 Trust. The waiver was granted in October 2013. – refer paragraphs 84 to 93;

h. Mr Unicomb states in his report that Doyle received commission payments, in respect of the Macquarie Flexi 100 Trust November 2013 series, directly from the issuer and that RI Advice was not aware of these payments. That is not correct. Mr Unicomb makes the same assertion in relation to commission paid in respect of Instreet Masti series 36 & 38. That is not correct. The only commissions that RI Advice were unaware of prior to August 2014 were in respect of 91

SMSFs – refer paragraphs 95 to 104;

i. during the Relevant Period Doyle had a very active book of clients. During the Relevant Period, Doyle provided un-vetted advice to over 700 clients. There was a significant risk that much of this advice did not satisfy the Best Interests Obligations. In my view, Doyle's clients did not have the training or professional experience to understand complex financial risk even if they had previously invested in complex products, such as Structured Products. There was no evidence in the Briefed Materials that there would be a material adverse impact on Doyle's clients if he was terminated or suspended. Both ultimately occurred. There is no evidence in the Briefed Materials that RI Advice considered any material adverse impact prior to taking both actions. There is limited commentary that suggests that extending Doyle's termination date to 30 June 2016 could assist with RI Advice's investigation and remediation activities. This may have been of some benefit to his clients. Doyle was ultimately terminated long before RI Advice's investigation and remediation processes had been finalised. There is no evidence in the Briefed Materials of any negative impact for his clients of his termination – refer paragraphs 105 to 127; and

j. the resources applied by RI Advice to ensuring Doyle complied with the Best Interests Obligations including Ms Collins and [Ms B], were ineffective. Whilst Doyle did ultimately satisfy the vetting requirements it was a point in time achievement. This was apparent from the negative findings of the First, Second and Third File Reviews. The findings were similar in all reviews and similar to those high-rated issues identified in relation to the files submitted by Doyle for vetting. Ultimately Doyle was terminated by RI Advice, as an Authorised Representative, on 30 June 2016. This meant that RI Advice finally accepted that, regardless of the resources it applied, it could not put any reasonable steps in place to ensure Doyle complied with his Best Interests Obligations – refer paragraphs 128 to 140.

9. In response to paragraph 1(b) nothing in my review of the Unicomb Report causes me to change any of the opinions expressed in My Report.

(Footnotes omitted.)

Mr Unicomb's reply report

354 In his reply report, Mr Unicomb stated that he had had the opportunity to consider Ms Birkensleigh's reply report, which had caused him to change some of the opinions he expressed in his first report. Of the ten specific areas identified in paragraph 6 of Ms Birkensleigh's reply report, Mr Unicomb responded to areas A, B, E, F and H. Mr Unicomb stated that he did not agree with Ms Birkensleigh's opinions as set out in areas C, D, G, I and J and stood by the opinions expressed in his first report.

355 In relation to areas A, B and E, Mr Unicomb's response was as follows:

2.1.5. In assessing the adequacy of RI Advice's Compliance Program, I did apply the 12 principles of AS3806-2006 Compliance Programs ("**the Australian**

Compliance Standard"), which as Birkensleigh observes are organised into four core areas, namely Commitment (Principles 1 to 5), Implementation (Principles 6 to 9), Monitoring and Measuring (Principles 10 to 11), and Continual Improvement (Principle 12).

2.1.6. As indicated in my Expert Report at paragraph 4.5.8, in assessing the RI Advice Compliance Framework, I have adapted the Australian Compliance Standard to undertake the assessment based on four key components of the Australian Compliance Standard, namely:

(a) Preventing (including controls such as an APL policy and Pre-vet policy, and training) (Principles 6, 7, 9, 10 and 11);

(b) Monitoring (including compliance audits) (Principle 10, 11 and 12);

(c) Responding (including investigation and root cause analysis) (Principles 10 and 12); and

(d) Reporting (both internal and external) (Principles 10 and 12).

2.1.7. Principle 5 was considered in my assessment of RI Advice's Compliance Program. I noted that compliance with BIO was appropriately identified as a priority legislative requirement.

2.1.8. In the course of forming my opinion that the RI Advice Compliance Program did ensure RI Advice took reasonable steps to ensure that Doyle complied with BIO, I did take into account Principles 1 to 4 and 8, namely RI Advice's commitment to compliance and its compliance culture.

2.1.9. The effectiveness of the four key components referred to above in paragraph 2.1.6 were intrinsic in measuring the overall effectiveness of RI Advice's Compliance Program, including Principles 1 to 4 and 8.

2.1.10. In my opinion, the RI Advice Compliance Program was reasonable in ensuring RI Advice took reasonable steps to ensure that Doyle complied with his BIO.

2.1.11. Birkensleigh has stated in her summary of conclusions section at paragraph 8.e that I have confused the steps taken to ensure compliance with BIO with steps taken to investigate and remediate. I have not confused these steps. I do not agree with Birkensleigh's view that in forming my opinion regarding the reasonableness of RI Advice's Compliance Framework that I should have only considered the effectiveness of the preventative steps rather than both preventative and reactive steps.

2.1.12. In my opinion, the results of undertaking an investigation and root cause analysis are important factors in Monitoring, Measuring, and Reporting the effectiveness of a Compliance Program (Principle 10) and Improving its effectiveness (Principle 12). By undertaking this process, the risk of future breaches of a similar nature will be mitigated.

2.1.13. RI Advice was a substantial practice with over 170 advisers, and over 1,000 advisers within the ANZ Authorised Dealer Group, subject to monitoring at any time. In my experience, breaches of internal business rules will occur and queries may not be satisfactorily followed up. In my view, none of the issues raised by Birkensleigh at paragraphs 29 to 31 of the Birkensleigh Reply Report were either individually or collectively significant red flags which required Doyle's practice to be immediately subject to an investigation.

(Footnotes omitted.)

356 In relation to area F, Mr Unicomb's response was:

> 2.1.15. At paragraph 55, Birkensleigh states that it is unclear which scale I applied in forming my opinion as to the seriousness of Doyle's conduct. Unfortunately, Birkensleigh appears to have confused the scale I have relied upon in characterising Doyle's misconduct "*at the lower end of the scale*". Birkensleigh also incorrectly states I have expressed an opinion on the quality of Doyle's advice. I have not expressed an opinion on the quality of Doyle's advice. I have relied on the reasons for the high ratings identified by RI Advice in its assessment of Doyle's SOAs, as one input in the characterisation of Doyle's misconduct.
>
> 2.1.16. I may have contributed to Birkensleigh's confusion as in section 2 of my Expert Report, headed "Summary of Opinions", I have at paragraph 2.3.7 inadvertently referred to the factors in paragraph 2.3.3 (reasonable steps taken) as being considered in determining the seriousness of Doyle's conduct at the lower end of the scale. Consistent with the detailed content section of my Expert Report, I have only relied on the factors identified in paragraph 4.8.7 (context) in forming my opinion of seriousness of Doyle's conduct.
>
> 2.1.17. As noted at paragraphs 57 and 70 of the Birkensleigh Reply Report, I have broadly summarised the nature of Doyle's non-compliance at paragraphs 4.6.1, 4.6.12 and 4.6.13 of my Expert Report, as known to RI Advice over the Relevant Period, as follows:
>
> (a) High rated issues identified in SOAs, which includes a failure to maintain sufficient records on file and a failure to document by maintaining adequate documents to support the basis of the recommended investment being appropriate and in the client's best interests;
>
> (b) Failure to submit all client files for Pre-Vet; and
>
> (c) Recommending products not on the APL.
>
> 2.1.18. The nature of the conduct identified above in paragraph 2.1.17, is the basis for determining the seriousness of Doyle's misconduct to be at the "*lower end of the scale*".
>
> 2.1.19. My assessment of Doyle's misconduct accords with ASIC's categorisation of seriousness of non-compliant conduct by advisers as set out in ASIC's Report 515 *Financial advice: Review of how large institutions oversee their advisers* ("**REP 515**") published March 2017. At paragraph 108, ASIC has separated non-compliant conduct into two categories as follows:
>
> (a) "*Serious compliance concerns: This is where an advice licensee believes, and has some credible information in support of the concerns identified, that an adviser ... may have engaged in the following:*
>
> *(i) Dishonest, illegal, deceptive and/or* [*fraudulent*] *misconduct;*
>
> *(ii) Any misconduct that, if proven, would be likely to result in the instant dismissal or termination of the adviser;*
>
> *(iii) Deliberate non-compliance with financial services laws; or*

(iv) Gross incompetence or gross negligence.

(b) *Other compliance concerns: This is where an advice licensee has reason to believe, and has some credible information in support of the concerns identified, that an adviser ... may have been involved in misconduct (other than a serious compliance concern), including but not limited to:*

(i) A breach by act or omission of the licensee's internal business rules or standards, such as where an adviser has recommended non-approved products, entered into personal agreements or arrangements with customers, demonstrated poor record keeping, or acted outside the scope of their authorisation or competence;

(ii) An adverse finding from audits conducted by, or for, the licensee; or

(iii) Conduct resulting in actual or potential financial loss to customers as a result of the advice received.

(c) At paragraph 160 of Report 515, ASIC states in relation to adviser conduct considered to be "Other compliance concerns" as follows:

(i) *"We consider that the conduct of the adviser's classified by the institutions as giving rise to 'other compliance concerns' was not serious enough to warrant enforcement or other regulatory action by ASIC"*."

2.1.20. As previously indicated in paragraph 2.1.13, throughout the Relevant Period, RI Advice was responsible for the day to day monitoring and supervision of over 170 advisers. The monitoring and supervision of advisers was risk-based. RI Advice cannot investigate every adviser, in circumstances where there is a breach of internal business rules and/or unsatisfactory audit ratings. Both Ornsby and Whereat consistently categorised Doyle's non-compliance as a failure to document and build a defensible file. They both considered Doyle's compliance concerns to be behavioural-based rather than involving serious compliance concerns regarding breaches of the BIO. There was no reasonable basis to conclude that Doyle was not acting in his clients' best interests.

2.1.21. Applying ASIC's categorisation of the seriousness of non-compliance criteria, I conclude that Doyle's failure falls within the category of "Other compliance concerns" as his conduct involves a breach of the licensee's internal business rules, poor record keeping, and adverse audit quality ratings.

2.1.22. The tipping point to warrant RI Advice needing to immediately suspend and investigate Doyle's advice practice would be in circumstances where there were reasonable grounds to believe Doyle's conduct was dishonest or involved a deliberate non-compliance with the Act. These circumstances did not apply to Doyle.

2.1.23. In summary, in my view, Doyle's non-compliance does not fall into the "serious compliance concerns" category.

(Footnotes omitted.)

357 Mr Unicomb's reply report contains the following response in relation to area H:

2.1.25. In August 2014, for the purpose of determining a valuation of Carrington, Hyland undertook a reconciliation of the fee revenue recorded in Carrington's profit and loss statement for the period from 1 July 2013 to 30 June 2014, with the fee income recorded in RI Advice's records.

2.1.26. By attachment to an email from Huet to Hyland dated 1 August 2014, a list of all of Carrington's clients invested in Macquarie Flexi products being the June 2012 series, June 2013 series and November 2013 series was provided to Hyland.

2.1.27. Hyland was also provided with a list of all of Carrington's clients invested in the Instreet Masti products by an attachment to an email from Gao to Hyland dated 8 August 2014.

2.1.28. By email from Hyland to Prachi and Doyle and copied to a number of parties dated 12 September 2014, Hyland advised that he had identified 91 SMSFs, in the spreadsheet attached ("**Hyland Report**"), where the fees were paid directly to Carrington rather than via RI Advice for the period 1 July 2013 to 30 June 2014. The list included clients invested in Macquarie Flexi and Instreet products. Hyland also stated that the fees needed to be re-directed to RI Advice.

2.1.29. I concluded at paragraphs 4.6.37, 4.6.43 and 4.6.44 in my Expert Report that the commissions for the:

(a) 43 clients listed in the attachment to Huet's email as invested in the Macquarie Flexi 100 Trust November 2013 series product; and

(b) 41 investments listed in the attachment to Gao's email as invested in the Instreet Masti products,

were not received by RI Advice, as they were not recorded in the Commission Report from 8 May 2013 to 30 June 2016 ("**2016 Commission Report**").

2.1.30. I also concluded the commissions were not received by RI Advice for the following additional reasons:

(a) The Hyland Report recorded all of those clients where the fees were paid directly to Carrington rather than via RI Advice. The list of clients in the Hyland Report included nearly all the same names as those clients invested in Macquarie Flexi 100 Trust November 2013 series and Instreet Masti, which were recorded in the attachment to Huet's email dated 1 August 2014 and Gao's email dated 8 August 2014.

(b) The email from Peters to John Collins dated 3 September 2014 indicated that the primary difference between Carrington's records and RI Advice's records was "SMSF advice fee revenue of $276k and Macquarie/Instreet".

2.1.31. In addition, for Macquarie Flexi, there were no commissions recorded in the 2016 Commission Report under the heading "Macquarie Flexi 100 Trust" investments for the November 2013 series.

2.1.32. At paragraph 102, Birkensleigh has indicated that the clients and the commissions for the Macquarie Flexi 100 Trust November 2013 series were listed on the Commission Report for the period 19 December 2013 to 30 January 2014 ("**January 2014 Commission Report**") under the heading "Macquarie Adviser Payment Arrangement" rather than "Macquarie Flexi 100

Trust:". The difficulty in determining the nature of these commissions is also underscored by the fact that both Experts in these Proceedings did not initially identify these investments as Macquarie Flexi 100 Trust November 2013 series.

2.1.33. Despite the matters referred to in paragraphs 2.1.29 to 2.1.31 above, on balance I agree with Birkensleigh's opinion regarding RI Advice's receipt of commissions for the Macquarie Flexi 100 Trust November 2013 series investments, for the following reasons:

(a) The names of the clients listed in the January 2014 Commission Report are also mainly the same as those listed in the attachment to the Huet email dated 1 August 2014; and

(b) The amount of upfront fees for each client is $1,000 and is consistent with the upfront fees for the Macquarie Flexi investment.

2.1.34. I agree with Birkensleigh that the 2016 Commission Report does record the 41 investments in Instreet Masti. I note that it is unclear when those commissions were entered into the 2016 Commission Report.

2.1.35. The fees not accounted to RI Advice were most likely ongoing commissions rather than upfront commissions and concerned those clients who were already invested in the Macquarie Flexi and Instreet products before Doyle commenced as an AR with RI Advice.

2.1.36. On the basis Birkensleigh is correct regarding RI Advice receiving the commissions for the Macquarie Flexi 100 Trust November 2013 series and Instreet Masti products, I conclude Doyle did not conceal upfront commissions relating to Macquarie Flexi 100 Trust November 2013 series and Instreet Masti.

2.1.37. Doyle's failure to ensure existing clients in Macquarie Flexi and Instreet products were transferred to RI Advice when he became an AR, is most likely an administrative oversight. This position is supported by the fact Doyle allowed RI Advice access to Carrington's financial accounts and business records.

2.1.38. Based on the Briefed Materials reviewed, the earliest RI Advice was likely to have been aware of the investments in Macquarie Flexi 100 Trust November 2013 and Instreet Masti was August 2014, being when Hyland received the client lists from Huet and Gao for the purposes of undertaking a valuation of Carrington.

(Footnotes omitted.)

Observations on the expert evidence

358 Each of Ms Birkensleigh and Mr Unicomb was cross-examined at length. While some concessions were made, these were relatively minor and each substantially maintained the opinions expressed in the written reports.

359 While both Ms Birkensleigh and Mr Unicomb were qualified to express the opinions that they did, and both provided logical and clear reasons for the opinions that they formed, I have derived only limited assistance from their evidence.

360 First, to some extent, the experts drew their own factual inferences from the documents that they reviewed and took these into account in forming their opinions. In particular, in a number of cases, the experts drew inferences as to what RI knew and when it knew it. The difficulty is that some of the inferences drawn by the experts are different from, or go beyond, the inferences that I have drawn in these reasons. Thus, to some extent, the experts' opinions are founded on factual premises that have not been established.

361 Secondly, the body of material that was before the experts was more limited than the body of evidence that is before the Court. While the experts were briefed with most of the relevant documents, they did not have before them (as the Court does) the oral evidence of Mr Whereat and Mr Ornsby. Their oral evidence is useful and important in contextualising and explaining the documents. The fact that the experts did not have the benefit of this body of material affects the utility of many of the opinions they express. I note also that Mr Unicomb did not have the affidavits of Mr Whereat and Mr Ornsby.

362 Thirdly, to some extent at least, the evidence of each expert involved the expert applying their own judgment as to the same question as that before the Court, namely whether RI took reasonable steps to ensure that Mr Doyle complied with his Best Interests Obligations. While the opinions of the experts on this question are admissible and relevant, ultimately the Court has to form its own judgment as to this question.

363 In light of the above, I do not consider it necessary to go through each opinion expressed by each expert and express a view on whether or not I accept that opinion. To the extent that, as set out later in these reasons, I have reached different conclusions from those of the experts, it is largely explained by the matters referred to above.

364 The above comments apply to the evidence of both experts. In addition, I make the following observations about the evidence of each expert.

365 One of the criticisms of Ms Birkensleigh's evidence, developed during cross-examination, was that she had taken a "hindsight approach". I do not consider that Ms Birkensleigh adopted such an approach. I consider that she expressed her opinions on the basis of her understanding of what was known by RI at the relevant times.

366 In the course of cross-examination it was put to Ms Birkensleigh that the way she had approached the task was to say that "the program wasn't reasonable because it wasn't effective to stop what Mr Doyle was doing". While Ms Birkensleigh accepted that proposition, I do not

take her to be saying that Mr Doyle's breach of his Best Interests Obligations automatically establishes that RI breached its obligation to take reasonable steps to ensure that Mr Doyle did not breach his Best Interests Obligations. Rather, I take her to be saying that RI's compliance standards and other processes were not effective in relevant respects (for example, in ensuring that Mr Doyle provided all advice documents to pre-vetting while he was subject to the pre-vetting program) and therefore were deficient.

367 Turning to Mr Unicomb's evidence, one of the matters Mr Unicomb emphasised in his oral evidence was that RI was a large business with approximately 170 planners. For example, in the context of being asked questions about the Weekly Inflow reports, and whether RI should have been concerned about the amounts in the inflow reports at a time when Mr Doyle was on pre-vetting, Mr Unicomb said:

> If you were a manager receiving it you would want to investigate it?---Well again, I don't want to sound difficult, but when you're in a situation and you're running a major business with 170 planners you're going to be receiving all sorts of information. And what it's all about is prioritisation of risk in terms of red flags – it is a flag but I'm not convinced that it's a red flag; that's the best way I can put it.

If and to the extent that Mr Unicomb was saying that the size of RI's business affects the assessment of the adequacy of its compliance framework, I would not accept that proposition. The fact that RI had a large number of advisers as authorised representatives did not affect the standard of supervision that it was required to apply.

368 In the course of cross-examination, it was put to Mr Unicomb that he was not providing independent expert evidence. To the extent that ASIC challenges Mr Unicomb's independence, I reject that submission. I am satisfied that Mr Unicomb was an independent and impartial expert witness.

369 I note for completeness that in the course of the cross-examination of Mr Unicomb, senior counsel for ASIC handed him a document that was said to be a copy of Ms Birkensleigh's reply report (at T371-372). (Although most of the cross-examination was conducted by reference to electronic copies of documents that were displayed on a computer monitor, in a few instances a paper copy of a document was handed to a witness for ease of reference.) Towards the end of the cross-examination of Mr Unicomb, it emerged that the document that had been handed to him was in fact a draft, rather than the final version, of Ms Birkensleigh's reply report (at T504-505, 509-511). The parties were given the opportunity to make submissions on whether any of Mr Unicomb's evidence during cross-examination was affected by the fact that he had

been given a draft, rather than the final version, of Ms Birkensleigh's reply report. Neither party made any such submissions. Having reviewed the transcript, I am satisfied that Mr Unicomb's evidence was not affected.

APPLICABLE PROVISIONS AND PRINCIPLES

Ch 7 generally

370 The relevant provisions are located in Ch 7 of the *Corporations Act*. In *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 387 ALR 1, Gordon J stated:

> 28 Chapter 7 of the Corporations Act, headed "Financial services and markets", was introduced in 2001. It was designed, in part, to introduce a single licensing regime applicable to all persons providing financial services to ease the administrative burden on financial service providers, who previously were required to obtain multiple licences. But it was also intended to benefit consumers, who previously could not "be certain that the conduct of the financial service provider [met] minimum standards".
>
> 29 Thus, the object of Ch 7 includes to promote:
>
> (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
>
> (b) fairness, honesty and professionalism by those who provide financial services ... .
>
> (Footnotes omitted.)

371 I will refer to the provisions as in force at the commencement of the Relevant Period (1 November 2013). There was no material relevant change to the provisions during the Relevant Period. For ease of expression, I will refer to the provisions in the present tense.

372 Section 761A provides the following definitions for the purposes of Ch 7:

> ***authorised representative*** of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services on behalf of the licensee.
>
> ***financial services law*** means:
>
> (a) a provision of this Chapter [i.e. Ch 7] or of Chapter 5C, 5D, 6, 6A, 6B, 6C or 6D; or
>
> (b) a provision of Chapter 9 as it applies in relation to a provision referred to in paragraph (a); or
>
> (c) a provision of Division 2 of Part 2 of the ASIC Act; or

(d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services; or

(e) in relation to a financial services licensee that is a licensed trustee company (in addition to paragraphs (a) to (d))—any rule of common law or equity that covers conduct relating to the provision of financial services that are traditional trustee company services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of such services.

financial services licensee means a person who holds an Australian financial services licence.

general advice has the meaning given by subsection 766B(4).

personal advice has the meaning given by subsection 766B(3).

retail client has the meaning given by sections 761G and 761GA.

wholesale client has the meaning given by section 761G.

It is not necessary for present purposes to set out the provisions referred to in those definitions.

Part 7.6 of Ch 7

373 Part 7.6 of Ch 7 deals with the licensing of providers of financial services. The expression "representative" of a person is defined in s 910A. If the person is a financial services licensee, a representative of the person means (among other things): an authorised representative of the licensee; or an employee or director of the licensee.

374 Section 911A(1), located in Pt 7.6, relevantly provides that "a person who carries on a financial services business ... must hold an [AFSL] covering the provision of the financial services". Licence holders can authorise representatives to provide financial services on behalf of the licensee: see s 916A.

375 Section 912A, also located within Pt 7.6, deals with the general obligations of financial services licensees. It relevantly 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; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

…

376 Section 912A was not a civil penalty provision during the Relevant Period, and the provision was given less attention in the parties' submissions than s 961L. ASIC's case based on s 912A largely, if not entirely, follows from its case based on s 961L.

377 Section 912A(1)(a) was considered by the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 (***ASIC v Westpac***) at [169]-[175] per Allsop CJ, at [286], [289] per Jagot J, at [421]-[427] per O'Bryan J; and by Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 3)* (2020) 275 FCR 57 (***AGM Markets***) at [505]-[528]. I adopt the statements of principle concerning s 912A(1)(a) in those passages and note that they emphasise the breadth of the expression "efficiently, honestly and fairly". To the extent that different views have been expressed as to whether "efficiently, honestly and fairly" is a compendious expression, it is unnecessary to resolve that issue for present purposes. Insofar as RI submits that s 912A(1)(a) comprehends conduct of the licensee that is morally wrong in the commercial sense, I do not consider the provision to be limited to such conduct.

378 It is convenient to note at this point that Pt 7.7 of Ch 7 deals with, among other things, a requirement that a statement of advice be given in relation to the provision of personal advice to a retail client (other than in certain circumstances).

Part 7.7A of Ch 7

379 Division 2 of Pt 7.7A of Ch 7 is headed "Best Interests Obligations". The Division (comprising ss 961-961Q) applies in relation to the provision of personal advice (referred to as the "advice") to a person (referred to as the "client") as a retail client: s 961(1). The individual who is to provide the advice is referred to as the "provider": s 961(2).

380 Division 2 of Pt 7.7A was introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) following the Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia* (November 2009). The provisions became law on 1 July 2012. Compliance was voluntary for the first year of operation, and compulsory from 1 July 2013.

381 It is important to understand the structure of the provisions in Div 2 of Pt 7.7A as they are said to apply in the present case. Sections 961B, 961G, 961H and 961J (referred to in these reasons

as the "Best Interests Obligations") impose obligations on the *provider* of the advice (here, Mr Doyle). Section 961L imposes an obligation on the *financial services licensee* (here, RI).

382 Section 961B relevantly provides:

> **961B Provider must act in the best interests of the client**
>
> (1) The provider must act in the best interests of the client in relation to the advice.
>
> (2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
>
> (b) identified:
>
> (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
>
> (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);
>
> (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
>
> (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
>
> (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
>
> (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
>
> (ii) assessed the information gathered in the investigation;
>
> (f) based all judgements in advising the client on the client's relevant circumstances;
>
> (g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.
>
> Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

383 The expressions "reasonably apparent" and "reasonable investigation" are defined in ss 961C and 961D. Section 961E deals with what would reasonably be regarded as in the best interests of the client.

384 Section 961G, 961H and 961J provide:

> **961G Resulting advice must be appropriate to the client**
>
> The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.
>
> Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).
>
> …
>
> **961H Resulting advice still based on incomplete or inaccurate information**
>
> (1) If it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the provider must, in accordance with subsections (2) and (3), warn the client that:
>
> (a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and
>
> (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs.
>
> (2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.
>
> (3) If a Statement of Advice is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.
>
> Note: The Statement of Advice must at least contain a record of the warning (see paragraphs 947B(2)(f) and 947C(2)(g)).
>
> (4) If 2 or more individuals provide the advice and one of those individuals provides a warning in accordance with this section, the other individuals are taken to have complied with this section.
>
> (5) Nothing in this section affects the duty of the provider under section 961B to make reasonable inquiries to obtain complete and accurate information.
>
> Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

…

961J Conflict between client's interests and those of provider, licensee, authorised representative or associates

(1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

(a) the provider; or

(b) an associate of the provider; or

(c) a financial services licensee of whom the provider is a representative; or

(d) an associate of a financial services licensee of whom the provider is a representative; or

(e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or

(f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client's interests when giving the advice.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

385 There has not been extensive judicial consideration of the Best Interests Obligations (or of s 961L). In *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47 (***NSG Services***), in the context of an application for declarations and orders by consent, I provided an overview of the provisions at [14]-[31]. In the course of that overview, I discussed the scope of ss 961B and 961G at [21]:

> It was common ground that, while s 961B is concerned with the process or procedure involved in providing advice that is in the best interests of the client, s 961G is concerned with the content or substance of that advice. At first blush, the text of s 961B does not appear to support the proposition that s 961B is concerned with the *process* or *procedure* involved in providing advice that is in the best interests of the client. However, support for this way of viewing the focus of s 961B is provided by the context in which it appears, including the language of s 961G, the legislative history, and the legislative materials (see, in particular, the revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) at [1.23], [1.24], [1.57]). It is unnecessary for present purposes to reach a concluded view on this issue.

386 In *ASIC v Westpac*, the Full Court of this Court made some observations on the scope and nature of s 961B: see at [151] per Allsop CJ, [301] per Jagot J, at [404]-[409] per O'Bryan J. The Chief Justice said at [151]:

> It is unnecessary to deal with the question of the distinction between procedure and substance discussed by Moshinsky J in *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47. That distinction may be seen, perhaps, to be less than of complete utility. Certainly, the detailed text of s 961B(2) and some of the extrinsic material referred to by his Honour makes the distinction relevant. But s 961B(1) expresses a concept flowing out of a relationship of advice. The obligation of a financial advisor to act in the best interests of a client draws on the concepts of fiduciary loyalty commonly resting on persons in such a position: *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 and 385. The circumstances that will lead to a conclusion that a provider of personal advice did not act in the best interests of his or her client may be drawn in part from the list of factors in s 961B(2), but the source of equitable faithfulness of the duty in s 961B(1) should also be recognised in the content of the phrase and the possible circumstances of its contravention.

387 Justice Jagot said at [301]:

> To discharge the duty in s 961B(1) the provider must have as its purpose or object acting in the best interests of the client. The provider can effectively prove that their purpose or object was to act in the best interests of the client by doing each of the matters in s 961B(2), each of which is essentially procedural. As the Explanatory Memorandum explains the fact of harm is not the criterion against which performance of this duty is measured. Given the unchallenged facts as found by the primary judge, it is apparent that Westpac was not acting in the best interests of the customers. It was acting in its own interests in circumstances where it would be merely fortuitous if the rollover would also be in the customer's best interests. This is sufficient to establish a contravention of s 961(B)(1) of the *Corporations Act*.

388 Further, O'Bryan J said at [405]:

> In my view, textual and contextual considerations compel a conclusion that s 961B is not concerned with the question whether the substance of the advice is in the best interests of the client and, if it was necessary to refer to it, the relevant extrinsic materials confirm that conclusion. Rather, the section is concerned with the actions taken by the provider in the formulation of the advice and the objective purpose of the provider in taking those actions and giving the advice.

389 For present purposes, it is unnecessary to reach a concluded view on whether s 961B is concerned only with the process or procedure involved in providing advice that is in the best interests of the client, or extends to the content or substance of any advice provided to the client. That is because the focus of the present case (insofar as it concerns RI) is s 961L and it is alleged that RI failed to take reasonable steps to ensure that Mr Doyle complied with both s 961B and s 961G.

390 Sections 961K and 961L deal with the responsibilities of a financial services licensee. Although the relevant provision for present purposes is s 961L, I set out s 961K as well as s 961L in order to provide context. The sections provide:

961K Civil penalty provision—sections 961B, 961G, 961H and 961J

(1) A financial services licensee contravenes this section if the licensee contravenes section 961B, 961G, 961H or 961J.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and

(b) the licensee is the, or a, responsible licensee in relation to that contravention.

Note: This subsection is a civil penalty provision (see section 1317E).

961L Licensees must ensure compliance

A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J.

Note: This section is a civil penalty provision (see section 1317E).

391 It can be seen that s 961K imposes a direct form of liability on a licensee if a representative *other than an authorised representative* (for example, a director or employee of the licensee) contravenes s 961B, 961G, 961H or 961J. Contrastingly, s 961L, which applies in relation to representatives generally (and thus in relation to both authorised representatives *and* directors and employees of the licensee), imposes an obligation on the licensee to take reasonable steps to ensure that representatives comply with ss 961B, 961G, 961H and 961J.

392 The obligation imposed by s 961L is to take *reasonable* steps. The test does not require the financial services licensee to find and to take the optimal steps.

393 Section 961L was considered by Lee J in *AMP Financial Planning*. His Honour stated:

> 104 Three things can be said about s 961L by way of preliminary observation.
>
> 105 *First*, the word "ensure" is forward-looking. It is directed to the taking of steps to achieve compliance with certain statutory norms (including the relevant best interests obligations) before any particular instance of non-compliance has arisen. Although the seriousness of the obligation is amplified by the use of the word "ensure" (see *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87; [2006] VSC 112 at [105] (Byrne J)), the onerousness of the standard is moderated by the requirement to take "reasonable steps". Such language of "reasonable steps" is redolent of defences to liability employed in the Act (such as the safe harbour provisions in Ch 5) and other legislation, although in this case the absence of reasonable steps is itself an element of any contravention.
>
> 106 *Secondly*, the text of s 961L makes its focus the conduct of the licensee, not the representative, and whether the licensee has taken "reasonable steps" (albeit these steps are directed at the conduct of their representatives). Critically, there is nothing in the text of s 961L that makes a contravention of

> the relevant best interests obligations a pre-requisite to a contravention of s 961L. Indeed, it was common ground between the parties that a contravention of s 961L may arise even if there has been no contravention of the relevant best interests obligations. This is easily imagined: a licensee could run a "bucket shop" without taking any reasonable steps to put in place adequate safeguards but may, by luck, have conscientious representatives who do their job. This would not inoculate the licensee from liability. Of course, the converse may also be the case, and the provision does not visit liability on a conscientious licensee, who has done all that could reasonably be expected, by reason of a representative unexpectedly going rogue.
>
> 107 *Thirdly*, the relevant best interests obligations to which s 961L refers fall under separate subdivision headings and each prescribe distinct statutory norms of conduct for the providers of financial advice, broadly summarised as: (a) acting in the best interests of the client (s 961B); (b) providing advice only where it is appropriate to the client (s 961G); (c) warning clients that advice is based on incomplete or inaccurate information (s 961H, not being in issue in this case); and (d) giving priority to the client's interests when giving the advice (s 961J). Although the obligations relate to one another and breach of one may, depending upon the circumstances, amount to a breach of another, their particular content and focus differs.

I accept the above observations, which were not disputed by the parties in the present case.

394 In *AMP Financial Planning*, Lee J considered, and rejected, ASIC's contention that there was a separate contravention of s 961L on each occasion that an adviser, in respect of each client, contravened the relevant best interests obligations (where the licensee failed to take reasonable steps to ensure that the advisers complied with those provisions): at [115]-[124]. In the course of that discussion, his Honour emphasised that the focus of s 961L is the taking of reasonable steps by the licensee rather than the advice given by the representative: see [123].

395 Having rejected ASIC's primary case of 120 contraventions of s 961L, it was necessary for Lee J to consider the alternatives put forward by the parties: six or 18 contraventions (as contended for by ASIC) or two (as contended for by AMPFP): see [126]-[140]. In the course of considering those issues, his Honour made the following observations regarding s 961L:

> 130 As observed above, each of the best interests provisions prescribes a distinct statutory norm of conduct designed to protect the clients of financial advisors. Indeed, the distinct and protective nature of each norm has recently been emphasised and discussed recently in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 373 ALR 455; 141 ACSR 1; [2019] FCAFC 187, *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* (2019) 140 ACSR 561; [2019] FCA 1932 and *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 (*ASIC v Westpac*). These separate norms of conduct are the reference points by which a licensee is obliged by s 961L to take steps to ensure compliance by its representatives. **Importantly, as ASIC correctly submitted, quite different reasonable steps might be required to ensure representatives comply with each of the**

relevant best interests obligations.

131 To adopt an example from ASIC's submissions, different reasonable steps might be required to ensure representatives comply with their obligation under s 961J to give priority to a client's interests where there is a conflict (such as by adjusting the Commission Model to remove any financial incentive for a representative to prefer his own interests) than those that might be required to ensure representatives comply with their obligation in s 961B to act in their clients' best interests (such as by implementing and enforcing a policy prohibiting Rewriting Conduct and ensuring training is provided to representatives regarding such a policy).

(Emphasis added.)

396 Although the duty in s 961L is broad, the case law has begun to fill in the contours of what is expected of a licensee by way of compliance with the provision. The authorities indicate that s 961L may require a licensee to take steps to ensure representatives are competent, to monitor and supervise them (including in relation to advice processes, advice quality and conflicts of interest), to ensure compliance concerns are escalated, and to take action that is commensurate with the risks presented by such concerns: see, eg, *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 131 ACSR 484 at [62], [67]; *AMP Financial Planning* at [57]-[62]; *AGM Markets* at [488]-[499].

CONSIDERATION

Overview of ASIC's case

397 ASIC alleges that, between 1 November 2013 and 30 June 2016, being the Relevant Period, RI contravened s 961L of the *Corporations Act* by failing to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations (that is, the obligations in ss 961B, 961G, 961H and 961J). ASIC submits that: s 961L imposed on RI a "forward-looking" duty to take reasonable steps to ensure Mr Doyle complied with the Best Interests Obligations (*AMP Financial Planning* at [105]); this required RI to take proactive steps to ensure Mr Doyle was competent, to monitor him adequately, to escalate compliance concerns about him to a sufficient level of seniority within the organisation, to address such concerns appropriately, and to have in place policies and processes that achieved those things; and the evidence shows RI failed to take such steps.

398 Further, ASIC submits, during the Relevant Period, RI failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a) of the Act. ASIC submits that contraventions of s 912A(1)(c) and (ca) follow from RI's contraventions of s 961L.

399 ASIC's case is that, by reason of the matters alleged in sections C to G of the statement of claim: (a) there was a substantial risk in the Relevant Period that Mr Doyle was not complying with the Best Interests Obligations; (b) RI knew or ought to have known of that risk; (c) RI did not take reasonable steps to address the risk; and (d) RI therefore failed to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations: see paragraphs 78-82 of the statement of claim.

400 ASIC submits that, to prove that RI knew or ought to have known of the risk, it is not necessary for ASIC to prove that Mr Whereat and/or Mr Ornsby subjectively knew of the risk, or of particular facts that should have put them on notice of the risk; to begin with, Mr Whereat and Mr Ornsby are not the only individuals whose knowledge is attributable to RI; where other RI employees and ANZ employees were acting on behalf of RI in relation to Mr Doyle, their conduct and knowledge is also attributable to RI: see s 769B(1) and (3) of the *Corporations Act*.

401 Further, ASIC submits, its case is not confined to actual knowledge and includes allegations that RI (including its senior officers) ought to have known of the risk and acted upon it. ASIC submits that RI ought to have known of the risk because of: (a) the information that was available to it about Mr Doyle's practice; (b) concerns that RI and ANZ employees had, and raised about, Mr Doyle; and (c) RI's obligation to assess that information and ensure those concerns were appropriately escalated and addressed. ASIC submits that, to the extent it is suggested that knowledge held by ANZ employees acting on behalf of RI was not attributable to RI (which ASIC disputes), it highlights a further problem that RI was not keeping itself informed of compliance concerns regarding Mr Doyle. ASIC submits that if RI's senior management did not know of serious issues about Mr Doyle because they were not reported by ANZ or RI employees, there was a deficiency in RI's compliance framework. In any event, ASIC submits, officers and employees of RI had more than enough information from which they ought to have identified a substantial risk that Mr Doyle was not complying with the Best Interests Obligations.

402 ASIC bears the onus of proof on each of the elements of its causes of action to the requisite civil standard having regard to the gravity of the matters alleged: *Evidence Act 1995* (Cth), s 140(2) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

General matters raised by RI

403 RI raises a number of general matters by way of defence to ASIC's case. It is convenient to outline those matters and make some observations about them, before examining each of the specific periods of time dealt with in the statement of claim.

404 First, RI submits that ASIC's case was run on the basis that, because RI did not *ensure* that Mr Doyle complied with the Best Interests Obligations, it follows that RI contravened s 961L of the Act. RI submits that: ASIC asked Ms Birkensleigh about the steps RI should have taken *to ensure* Mr Doyle complied with the Best Interests Obligations, Ms Birkensleigh opined that RI's compliance was not reasonable because it was ineffective, and Mr Unicomb was cross-examined on the basis that RI's compliance was not reasonable because it was ineffective. However, RI submits, that is not the test; rather, RI must take *reasonable steps* to ensure its authorised representatives comply with the Best Interests Obligations.

405 In my view, RI's submission does not reflect the substance of the case put by ASIC. As observed at [366] above, I do not take Ms Birkensleigh to be saying that Mr Doyle's breach of his Best Interests Obligations automatically establishes that RI breached its obligation to take reasonable steps to ensure that Mr Doyle did not breach his Best Interests Obligations. Rather, I take her to be saying that RI's compliance standards and other processes were not effective in relevant respects (for example, in ensuring that Mr Doyle provided all advice documents to pre-vetting while he was subject to the pre-vetting program) and therefore were deficient. Thus, I do not take ASIC to be advancing the proposition that RI's compliance standards and other processes were not reasonable simply because (let it be assumed) Mr Doyle breached the Best Interests Obligations. Rather, I take ASIC's case to be that RI's compliance standards and other processes were ineffective in relevant respects, for example, in not picking up that Mr Doyle was not submitting all his advice documents to pre-vetting as he was required to do under the Advice Vetting Standard, or in not picking up that Mr Doyle was recommending the Instreet Product to his clients when it was not on RI's Approved Product List, or in not monitoring whether he was complying with the conditions attached to the waiver in respect of the November 2013 offer of the Macquarie Product (which was not on the Approved Product List).

406 Secondly, RI submits that assessing reasonableness is a factually intense enquiry, to be undertaken having regard to the relevant context. RI submits that ASIC's approach was to de-contextualise and isolate specific documents or pieces of information, seek to thread them

together, and then contend that in consequence RI ought to have terminated Mr Doyle as early as November 2013. RI submits that, critically, it outsourced its onboarding and compliance functions to ANZ Wealth, which monitored and improved its compliance program as appropriate; RI had reason to be confident in its compliance framework; where problems were identified, RI addressed those problems. RI submits that it was not reasonable for it to have pieced together the disparate threads pleaded by ASIC. RI submits that, relevantly, Mr Doyle was vetted and joined RI as an experienced and successful adviser; he was confronted with learning a new regulatory regime, FoFA, and new business rules, both of which involved real change; and he struggled with them. RI submits that Mr Doyle took longer than usual to move off pre-vetting, and RI dedicated resources to educate Mr Doyle and his staff about these changes and RI's business rules. RI submits that, during pre-vetting, RI was expecting to see, and saw, inflows to its Voyage platform, because general advice had been approved to facilitate that transfer.

407 Insofar as RI submits that ASIC's approach was to de-contextualise and isolate specific documents or pieces of information and seek to thread them together, I do not consider that to be a fair or accurate observation about ASIC's case. In my view, ASIC's case involved an examination of specific facts and matters in the context of RI's financial services business as a whole and having regard to the overall relationship between RI and Carrington/Mr Doyle.

408 Insofar as RI seeks to rely on the fact that it outsourced its compliance functions to ANZ Wealth, in my view the conduct (including any omissions) of ANZ Wealth in relation to these matters is to be attributed to RI. During the Relevant Period, RI was a wholly-owned subsidiary of ANZ. In these circumstances, during the Relevant Period, RI had shared services arrangements with ANZ Wealth, as detailed in [70]-[71] above. These arrangements included the 'outsourcing', by RI to ANZ Wealth, of many aspects of RI's compliance policies and processes. For example, members of ANZ's Advice Assurance Team carried out the vetting of proposed advice documents pursuant to the Advice Vetting Standard. By way of further example, members of ANZ's Advice Assurance Team carried out the advice assurance reviews required by the Advice Assurance Standard. Thus, the First, Second and Third Advice Assurance Reviews were carried out by ANZ Wealth. Further, many of the compliance standards were prepared by ANZ Wealth rather than RI, and decision-making as regards compliance matters was in many cases conducted jointly by RI and ANZ Wealth, with relevant committees comprising Mr Whereat on behalf of RI as well as representatives of ANZ Wealth. In these circumstances, insofar as ANZ Wealth carried out compliance functions on behalf of

RI, I find that ANZ Wealth was acting as the agent of RI within the scope of its actual authority, and ANZ Wealth's conduct (including any omissions) is to be attributed to RI pursuant to s 769B(1) of the *Corporations Act*. I therefore do not consider that any relevant distinction is to be drawn between compliance functions carried out by RI itself and compliance functions carried out by ANZ Wealth on RI's behalf. If, for example, the compliance standards prepared by ANZ Wealth were deficient, it is no answer that they were prepared by ANZ Wealth rather than by RI itself. Likewise, if the practical implementation of the standards by ANZ Wealth on RI's behalf was deficient, it is again no answer that the act or omission was that of ANZ Wealth rather than of RI.

409 Thirdly, RI submits that ASIC's case is a stark example of hindsight bias. RI submits that the case law is replete with warnings about the influence of hindsight on later perceptions of what could or should have been done to prevent a wide range of events, and that those warnings are apt here.

410 I am not persuaded that this is a valid criticism of ASIC's case. As a matter of substance, ASIC's case is that RI's policies and processes were deficient assessing the matter at the relevant time (rather than with the benefit of hindsight). ASIC relies, for example, on matters that it says were, or should have been, apparent to RI at the relevant time.

411 Fourthly, RI submits that ASIC's case conflated the knowledge, motivations and actions of RI (the licensee) with those, variously, of ANZ (the parent entity), ANZ Wealth (the financial advice division within ANZ and provider of the outsourced services under the Service Level Agreements) and OnePath (the financial product manufacturer).

412 In my view, RI is correct to highlight the need for precision as to the knowledge of RI, both as regards what it knew and when it knew it. I consider that the knowledge of senior management – specifically, Mr Whereat as the CEO of RI during most of the Relevant Period and Mr Ornsby as the National Operations Manager and then CEO of RI during the Relevant Period – can be attributed to RI. I do not consider it necessary to determine whether the knowledge of other individuals within RI and ANZ Wealth can be attributed to RI as a corporation. This is because I find, below, that ASIC's case is made out by reference to what Mr Whereat and/or Mr Ornsby knew or ought to have known.

413 Fifthly, RI submits that ASIC's case was presented without proper regard to timeframes for knowledge. RI submits that this is evident in ASIC's statement of claim at paragraphs 78-82,

but was most evident in senior counsel for ASIC's cross-examination of Mr Whereat and Mr Ornsby.

414 I do not consider this to be a valid criticism of ASIC's case. Indeed, the fact that ASIC's case is broken down into five periods of time indicates an awareness of the need to address each period separately, having regard to the facts and circumstances of that time.

415 Finally, RI submits that, although ASIC seeks relief for RI's alleged failure to take reasonable steps to ensure that Mr Doyle complied with *s 961J* of the *Corporations Act*, that case as pleaded is defective and for that reason fails (as well as for the other reasons addressed in RI's submissions).

416 It is true that, in the presentation of ASIC's case, little attention was given to the alleged failure of RI to take reasonable steps to ensure that Mr Doyle complied with *s 961J*. However, I do not accept that that case was not pleaded or that the pleading in respect of that provision was defective. In paragraph 78 of the statement of claim (set out at [27] above), s 961J is referred to as one of the "best interests obligations". That expression is then used in paragraphs 79, 80, 81 and 82 of the statement of claim. The particulars under paragraphs 78-82 refer to Mr Doyle's "advice to clients", indicating that ASIC contends that there was a substantial risk that Mr Doyle was not complying with (among other provisions) s 961J in his advice to clients, and that RI knew (or ought to have known) of that risk, and failed to take reasonable steps to address that risk.

417 I will now examine ASIC's case by reference to each of the five periods identified in paragraphs 78 to 82 of the statement of claim.

The first period (1 November 2013 to 31 January 2014)

418 The facts relating to the first period have been set out at [165]-[174] above. I note that, during this period, Mr Doyle remained subject to the pre-vetting program (having been subject to that program since 8 May 2013), and Ms B had not yet been engaged to provide paraplanning assistance to Carrington.

419 I have considered ASIC's and RI's written and oral submissions with respect to the first period.

420 It is convenient first to refer to certain aspects of ASIC's case regarding this period that I do not accept. Insofar as ASIC contends that the recruitment process in relation to Mr Doyle was rushed and incomplete, I do not consider this to be established on the evidence. True it is that

certain steps occurred within a matter of days, but this does not necessarily establish that the recruitment process was rushed. I am also not satisfied that the recruitment process was incomplete.

421 Insofar as ASIC contends that RI's due diligence in relation to Carrington uncovered significant issues with Mr Doyle's advice files, I do not consider that factual proposition to be established. The relevant facts are set out at [118]-[132] above. While some deficiencies regarding Mr Doyle's files were noted in the documents, the overall assessment in Ms Rundle's review of five files was positive (see [120] above).

422 Insofar as ASIC contends that the due diligence missed a significant quantum of structured products in Mr Doyle's book, this seems to be a criticism of the due diligence process (carried out in April-May 2013). I do not consider any such deficiency to be relevant to whether or not RI contravened its obligations during the Relevant Period.

423 Insofar as ASIC contends that RI did not require Mr Doyle to take the Kaplan test before authorising him, and that they should have done so, this seems to be a criticism of a decision made by RI well before the Relevant Period. I therefore do not consider it relevant.

424 Putting those aspects of ASIC's case regarding the first period to one side, I consider ASIC's case based on s 961L regarding this period to be substantially made out. That is, I consider that, during the period 1 November 2013 to 31 January 2014, RI failed to take reasonable steps as required by s 961L to ensure that Mr Doyle complied with the Best Interests Obligations.

425 First, RI did not have in place any adequate process to check whether or not advisers (relevantly, Mr Doyle) who were subject to the pre-vetting program were circumventing the program by providing advice documents to clients without first submitting them for pre-vetting. This was a serious flaw in RI's processes, which was or should have been apparent to RI at the relevant time.

426 The purpose of the Advice Vetting Standard was evidently to seek to ensure that, in giving advice, advisers who were subject to the pre-vetting program complied with the Best Interests Obligations (including s 961J). (The purpose of submitting proposed advice documents for review was not limited to ensuring compliance with the obligations set out in ss 961B and 961G; it extended to seeking to ensure that the advice was not based on incomplete or inaccurate information (s 961H) and that there was no conflict between the client's interests and those of the provider (s 961J).) For the standard to achieve this purpose, it was important

that all advice documents be submitted for pre-vetting. Conversely, the purpose of the pre-vetting program could be frustrated if an adviser, while on pre-vetting, failed to provide all proposed advice documents for review.

427 The possibility that an adviser may circumvent the pre-vetting program by not submitting all proposed advice documents for pre-vetting was, or should have been, apparent to RI at the relevant time. As set out at [155]-[156] above, as early as 4 and 5 September 2013 (before the Relevant Period had even commenced) there were email communications between Ms Rundle (of ANZ) and Ms Collins (of RI) raising a concern as to whether Mr Doyle had provided advice documents to clients that had not been approved as part of the vetting process. It is not clear whether Ms Collins raised this concern with Mr Whereat or Mr Ornsby before or during the first period, but in my view it was a matter of such significance that it should have been raised. If it was not raised, this itself was a failure of RI's processes. Accordingly, in my view, the possibility that an adviser may circumvent the pre-vetting program by not submitting proposed advice documents was, or at least should have been, apparent to Mr Whereat and Mr Ornsby during the first period.

428 I do not consider this criticism of RI's policies and processes to be affected by hindsight bias. In particular, I do not consider this flaw in RI's policies and processes to be only apparent in hindsight because we now know that Mr Doyle was providing advice documents to clients that had not been submitted to pre-vetting. Rather, as discussed in the preceding paragraph, it was or should have been apparent to RI at the relevant time that advisers could circumvent the pre-vetting program by not submitting advice documents for pre-vetting before providing them to the client, and that this was a serious flaw in those policies and processes.

429 If and to the extent that RI submits that this aspect of ASIC's case was not pleaded, I reject that submission. I note that the particulars under paragraph 78 of the statement of claim include the statement that the "[r]easonable steps that RI should have taken included … taking measures to more strictly enforce the requirement to submit all advices to pre-vetting".

430 Secondly, RI did not have in place any adequate process to check whether advisers (relevantly, Mr Doyle) were recommending products that were not on RI's Approved Product List or whether advisers were failing to adhere to any conditions attached to a specific approval of a product not on the Approved Product List. This was a serious flaw in RI's processes, which was or should have been apparent to RI at the relevant time.

431 As discussed at [95]-[98] above, advisers were not permitted to recommend products that were not on RI's Approved Product List unless they had obtained specific approval. Further, as indicated above, where specific approval was granted for a non-Approved Product List product, conditions could be attached. An evident purpose of these policies and processes was to seek to ensure that the adviser complied with the Best Interests Obligations. The purposes of these policies were not limited to ss 961B, 961G and 961H, but extended to s 961J. I infer that one of the purposes of the policies was to seek to ensure that there was no conflict between the client's interests and those of the provider (s 961J); the structure of the product, including the commission, could raise such a concern and be relevant to whether a product was included in the Approved Product List. For these policies and processes to achieve these purposes, it was important that there be a mechanism to check whether advisers were recommending products not on the Approved Product List and whether they were failing to adhere to the conditions attached to a specific approval.

432 The possibility that an adviser may recommend products not on the Approved Product List, or may fail to adhere to the conditions attached to a specific approval in relation to a non-Approved Product List product, was or should have been apparent to RI at the relevant time. This is indicated by the statement in the document headed "RI Advice Procedures and Policies" (quoted in [96] above) that RI "has incorporated into its administrative processes regular checks to ensure that Authorised Representatives adhere to the use of products on the Approved Product List".

433 Despite that statement, RI did not have adequate processes in place to monitor these matters, at least while an adviser was on pre-vetting. During the period that an adviser was on pre-vetting, RI relied on the adviser submitting all proposed advice documents to pre-vetting as the main mechanism to check whether the adviser was recommending products not on the Approved List and whether the adviser was failing to adhere to the conditions attached to a specific approval in relation to a non-Approved Product List product. However, as discussed above, RI did not have a process in place to check whether the adviser was in fact submitting all advice documents for pre-vetting.

434 In the passage of cross-examination set out at [174] above, Mr Whereat conceded that a deficiency with the vetting process was that, if the adviser did not comply with the requirement to submit advice documents for vetting, the process would not pick up if an adviser was recommending products not on RI's Approved Product List.

435 Further, it is apparent from the passage of cross-examination of Mr Whereat set out at [164], that RI had no system in place to check whether an adviser was failing to adhere to the conditions attached to a specific approval in relation to a non-Approved Product List product. In that passage, Mr Whereat referred to the audit (or advice assurance review) process. However, that process was not undertaken while an adviser was on pre-vetting. Further, even when the adviser had achieved clearance from pre-vetting, the advice assurance review (which involved a review of only five files) was not apt to check whether the adviser was failing to adhere to the conditions attached to a specific approval. The review would only check this if one or more of the five files happened to relate to the product that was the subject of specific approval.

436 I do not consider these deficiencies with RI's processes and policies to be apparent only with the benefit of hindsight. In particular, I do not consider these deficiencies to be apparent because we now know that Mr Doyle recommended the Instreet Product (which was not on the Approved Product List) to at least 21 clients. (It may also be inferred from the circumstances generally that Mr Doyle failed to comply with the conditions of the approval of the November 2013 offer of the Macquarie Product.) Rather, for the reasons already indicated, I consider that it was or should have been apparent to RI at the relevant time that advisers might recommend products that were not on the Approved Product List or might fail to comply with the conditions attached to a specific approval of a non-Approved Product List product.

437 Further, to the extent that RI submitted that the Macquarie and Instreet Products were not complex and risky, I reject that submission. These products were not included in RI's Approved Product List for a reason. As the evidence set out above discloses, ANZ Wealth considered the products, which were structured products, to be complex and risky. Further, as noted in [143] above, Mr Whereat accepted during cross-examination that the Macquarie and Instreet Products were not on RI's Approved Product List because of complexity and risk. I accept that characterisation of the products.

438 If and to the extent that RI submits that this aspect of ASIC's case was not pleaded, I reject that submission. A significant focus of the case, as pleaded and run, concerned RI's Approved Product List, RI's policy that advisers were only permitted to recommend products on the Approved Product List unless a waiver had been given, and RI's failure to pick up that Mr Doyle was recommending the Instreet Product (which was not on the Approved Product

List) and the Macquarie Product in breach of the conditions attached to the specific approval in relation to that product: see paragraphs 44-47 and 78-82 of the statement of claim.

439 Thirdly, I consider that, as at 1 November 2013, there was a substantial risk that Mr Doyle was not complying with RI's policies, in particular the Advice Vetting Standard, and RI knew, or ought to have known, of that substantial risk. In particular, in the email exchange of 4 and 5 September 2013 (see [155]-[156] above), Ms Collins (of RI) and Ms Rundle (of ANZ) raised a concern as to whether Mr Doyle had provided advice documents to clients that had not been approved as part of the pre-vetting process. In short, they were concerned that Mr Doyle may be circumventing the pre-vetting process. Ms Collins records in her email to Ms Rundle that she had raised the matter with Mr Doyle but he "was not forthcoming" in his response. On 12 September 2013, Ms Collins sent a detailed email to Mr Blood, the Head of Compliance at ANZ Wealth regarding her concerns about Mr Doyle (see [159] above). Ms Collins referred to a telephone conversation with Mr Blood the previous week in which she had raised "concerns … about John Doyle". Given the proximity in time between Ms Collins's email of 5 September 2013 and the telephone call with Mr Blood, it may be inferred that Ms Collins raised with Mr Blood her concern that Mr Doyle was providing advice documents to clients that had not been approved as part of the pre-vetting process. That Ms Collins was concerned that Mr Doyle may be circumventing pre-vetting was understandable in circumstances where, notwithstanding the size of Mr Doyle's business (he had approximately $80 million funds under advice), he had submitted only a handful of advice documents to pre-vetting in the period between 8 May 2013 and early September 2013.

440 Was RI (through its senior management) aware of the concern that Mr Doyle may have been circumventing pre-vetting? Given Mr Whereat's evidence that throughout the period May 2013 to late August 2014 he was not aware, and no one ever raised with him that Mr Doyle was not submitting all statements of advice to the Advice Assurance Team for pre-vetting (see [215] above), and that it was not until July 2015 that he became aware that Mr Doyle may have provided advice to a large number of clients outside of the RI vetting process (see [297] above) and Mr Ornsby's evidence that it was not until 6 July 2015 that he became aware that Mr Doyle had been providing advice to clients outside of RI's vetting requirements (see [295] above), it seems that neither Ms Collins nor Mr Blood raised the concern with RI's senior management. Be that as it may, in my view the matter was of such significance that it should have been raised with RI's senior management, and the failure to do so itself represents a deficiency in RI's

policies and processes. Thus, I consider that RI at least ought to have known that there was a substantial risk that Mr Doyle may have been circumventing pre-vetting.

441 What steps, if any, did RI (or ANZ Wealth) take to address the concern that Mr Doyle may have been circumventing pre-vetting? Beyond reiterating to Mr Doyle that he was obliged to submit all advice documents, and the general role of Ms Collins as Practice Development Manager, it does not appear that RI or ANZ Wealth took any concrete steps to investigate whether Mr Doyle was circumventing pre-vetting.

442 In circumstances where the Advice Vetting Standard was designed to ensure that advisers complied with their Best Interests Obligations, and there was a substantial risk that Mr Doyle was not complying with that policy, it was incumbent on RI (either itself or through ANZ Wealth) to take steps during the first period to investigate whether Mr Doyle was circumventing pre-vetting.

443 For these reasons, I consider that ASIC's case based on s 961L is substantially made out in relation to the first period.

444 Further, the matters set out above also lead me to conclude that, in respect of the first period, RI failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a).

The second period (1 February 2014 to 14 November 2014)

445 The facts relating to this period have been set out at [175]-[240] above. I note that, in February 2014, Ms B was engaged by RI to provide paraplanning assistance to Carrington. During the first part of this period, Mr Doyle remained on pre-vetting for all practice areas. On 25 August 2014, he obtained clearance from pre-vetting for two practice areas, namely Superannuation and Investments advice and Risk Protection advice. At the end of this period, on or about 14 November 2014, he obtained clearance from pre-vetting for the remaining practice areas.

446 I have considered ASIC's and RI's written and oral submissions with respect to the second period.

447 Again, it is convenient first to refer to certain aspects of ASIC's case regarding this period that I do not accept. Insofar as ASIC relies on the fact that Mr Doyle was accorded a third phase of pre-vetting and this was contrary to the Advice Vetting Standard, there is perhaps a lack of clarity regarding the relevant sentence of the standard (being the sentence underlined in the

extract in [76] above). In any event, I am not inclined to place much weight (at least in isolation) on the fact that Mr Doyle was accorded a third phase of pre-vetting. If Mr Doyle had been complying with the Advice Vetting Standard, and submitting all advices to pre-vetting, there would not have been any significant problem in according him a third phase.

448 Insofar as ASIC submits that RI should have checked Mr Doyle's commission statements to see whether he was writing new business, the commission statements were not prepared for this purpose, and I am not satisfied that it was reasonable to expect RI to use the commission statements as a compliance tool in this way. The evidence indicated that these were lengthy documents and the details did not necessarily make clear whether the commissions related to advice given after Mr Doyle joined RI.

449 Putting those aspects of ASIC's case regarding the second period to one side, I consider ASIC's case based on s 961L regarding this period to be substantially made out. That is, I consider that, during the period 1 February 2014 to 14 November 2014, RI failed to take reasonable steps as required by s 961L to ensure that Mr Doyle complied with the Best Interests Obligations.

450 First, as with the first period, RI did not have in place any adequate process to check whether or not advisers (relevantly, Mr Doyle) who were subject to the pre-vetting program were circumventing the program by providing advice documents to clients without first submitting them for pre-vetting. I refer to my reasons in relation to the first period set out at [425]-[429] above. Those reasons apply equally in relation to the second period.

451 Secondly, as with the first period, RI did not have in place any adequate process to check whether advisers (relevantly, Mr Doyle) were recommending products that were not on RI's Approved Product List or whether advisers were failing to adhere to any conditions attached to a specific approval of a product not on the Approved Product List. I refer to my reasons in relation to the first period set out at [430]-[438] above. Those reasons apply equally in relation to the second period.

452 Thirdly, as with the first period, I consider that, as at 1 February 2014, there was a substantial risk that Mr Doyle was not complying with RI's policies, in particular the Advice Vetting Standard; RI knew, or at least ought to have known, of that substantial risk; and it was incumbent on RI to take steps to investigate whether Mr Doyle was circumventing pre-vetting.

I refer to my reasons in relation to the first period set out at [439]-[442] above. Those reasons apply equally in relation to the second period.

453 Fourthly, during the second period, RI allowed Ms B to have such substantive input into the preparation of Carrington advice documents that RI undermined the purposes of its own compliance policies. Self-evidently, one of the purposes of the Advice Vetting Standard was to gauge whether an adviser was competent to provide advice to clients that complied with the Best Interests Obligations. Only when an adviser had demonstrated a satisfactory level of competence was he or she cleared from pre-vetting in a particular practice area. However, the evidence establishes that Ms B provided extensive assistance to Carrington in the preparation of advice documents that were to be submitted for pre-vetting, to the extent that she was in some cases drafting the documents herself: see [185]-[187], [190]-[192], [196], [198], [199], [205], [224]-[226] and [230] above. That Ms B was providing this level of assistance was apparent to, indeed sanctioned by, Ms Collins, who was copied in to most of the relevant emails. This is a matter that was, or at least should have been, raised by Ms Collins with senior management of RI, namely Mr Whereat or Mr Ornsby. Thus, I find that RI knew, or at least should have known, that Ms B was providing extensive assistance to Carrington in the preparation of advice documents that were to be submitted to pre-vetting. By engaging Ms B to act in this way, RI undermined its own compliance policies, which were designed to ensure that advisers complied with the Best Interests Obligations. It therefore failed to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations.

454 Fifthly, in the course of the second period, it became (or should have become) apparent to RI that Mr Doyle was generating substantial inflows of funds into OnePath while he was still on pre-vetting and had submitted only a handful of advice documents for pre-vetting. This raised, or should have raised, a concern that Mr Doyle was providing advice documents to clients that had not first been approved under the pre-vetting program. The Weekly Inflow reports were provided to Mr Whereat and Mr Ornsby on a weekly basis (at least from 17 June 2014). These showed substantial inflows of funds into OnePath attributable to Mr Doyle. In some weeks, Mr Doyle was the "top writer" for the week and the inflows attributable to him exceeded $1 million. It is true that some of these inflows related to transfers from the Strategy platform to the Voyage platform and that such transfers may not have required an SoA. However, it was (or should have been) apparent to RI's senior management (Mr Whereat or Mr Ornsby) that this did not account for all of the inflows into Voyage. I note Mr Whereat's evidence that transfers from Strategy to Voyage made up the vast majority of the inflows (see [237] above).

However, he did not suggest that *all* the inflows into Voyage were transfers from Strategy. Further, the material provided to Mr Whereat and Mr Ornsby (that is, the Weekly Inflow reports) did not make apparent that all or even the vast majority of the inflows were transfers from Strategy to Voyage. While I accept that the Weekly Inflow reports were prepared for other purposes, I nevertheless consider that the level of weekly inflows taken together with the fact that Mr Doyle was still on pre-vetting and had submitted only a handful of advice documents, raised, or should have raised, a concern that Mr Doyle was providing advice documents to clients that had not first been approved by ANZ's Advice Assurance Team; in other words, that he was circumventing pre-vetting. The evidence does not indicate that RI took any concrete steps (in the latter part of the second period) to investigate whether Mr Doyle was circumventing pre-vetting. In circumstances where the Advice Vetting Standard was designed to ensure that advisers complied with their Best Interests Obligations, and there was or should have been (for this additional reason) a concern that Mr Doyle was not complying with that policy, it was incumbent on RI to investigate whether Mr Doyle was circumventing pre-vetting.

455 I note that the Weekly Inflow reports are useful documents in understanding the commercial context in which RI was operating. RI was not simply conducting a business of authorising representatives to provide financial advice in return for a (fairly modest) fee. As noted at [61] above, Mr Whereat said during cross-examination that RI derived its revenue from fees it charged its authorised representatives and, in the case of Carrington, this was less than $20,000 per annum in 2013. I note that RI agreed to pay Ms B a consultancy fee of up to $100,000 (even though its fee from authorising Carrington was less than $20,000 per annum). These matters serve to demonstrate that RI was operating as part of the ANZ group, which included OnePath, and OnePath derived substantial revenue from the products it issued. In this context, RI was aware of, and closely monitored, the inflows of funds into OnePath referable to RI's authorised representatives.

456 Sixthly, in or about August 2014, it became (or should have become) apparent to RI that Mr Doyle may have been recommending the Instreet Product, which was not on RI's Approved Product List, to his clients, in breach of RI's policies. In the course of assisting with the sale of Carrington's business, in or about August 2014, Mr Hyland obtained information about Carrington's commission revenue referable to the Macquarie and Instreet Products: see [207], [208], [223], [228]. Having regard to Mr Hyland's position (as Southern Regional Practice Development Manager for the region that included Carrington), the requests that had been

made for a waiver to enable Carrington to recommend the Macquarie and Instreet Products, and the fact that these were structured products, I infer that Mr Hyland was aware that these products were not on RI's Approved Product List. The commission revenue information showed that Carrington was deriving substantial commissions in respect of the Macquarie and Instreet Products. While it was possible that this revenue related to past recommendations (that is, made before Mr Doyle joined RI on 8 May 2013), it was also possible that it related to more recent recommendations. While a conditional waiver had been given for the November 2013 offer of the Macquarie Product, no waiver had been given in relation to the Instreet Product. Thus, the commission revenue information raised, or should have raised, a concern that Mr Doyle may have been recommending the Instreet Product to his clients, in breach of RI's policies. Given the significance of this matter, I consider that this should have been raised with RI's senior management (that is, Mr Whereat or Mr Ornsby). The failure to do so itself represents a failure of RI's policies and procedures. In circumstances where RI's policies regarding the Approved Product List were designed to ensure that advisers complied with their Best Interests Obligations, and there was or should have been a concern that Mr Doyle may have been recommending a product not on the Approved Product List, it was incumbent on RI (either itself or through ANZ Wealth) to take steps to investigate whether Mr Doyle was recommending a product not on the Approved Product List.

457 For these reasons, ASIC's case based on s 961L in relation to the second period is substantially made out.

458 Further, the matters set out above also lead to the conclusion that, during the second period, RI failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a).

The third period (15 November 2014 to 3 March 2015)

459 The facts relating to this period have been set out at [241]-[249] above. I note that, during this period, Mr Doyle was not subject to the pre-vetting program. During February 2015, the First Advice Assurance Review was conducted. On 3 March 2015 – the last day of this period – the report of that review was sent to Mr Doyle.

460 I have considered ASIC's and RI's written and oral submissions with respect to the third period.

461 I consider ASIC's case based on s 961L regarding this period to be substantially made out. That is, I consider that, during the period 15 November 2014 to 3 March 2015, RI failed to take

reasonable steps as required by s 961L to ensure that Mr Doyle complied with the Best Interests Obligations.

462 First, as discussed above in relation to the first and second periods, RI did not have in place any adequate process to check whether advisers (relevantly, Mr Doyle) were recommending products that were not on RI's Approved Product List or whether advisers were failing to adhere to any conditions attached to a specific approval of a product not on the Approved Product List. I refer to my reasons in relation to that point in relation to the first period set out at [430]-[438] above. Those reasons apply equally in relation to the third period. The fact that, during this period, the First Advice Assurance Review was conducted, does not detract from that proposition. The review involved only five files; it was not designed to check whether the adviser was recommending products that were not on the Approved Product List; it would only pick this up if one of the five files happened to involve a non-Approved Product List product.

463 Secondly, having regard to the extent of assistance provided by Ms B, as discussed at [453] above, Mr Doyle should not have been cleared from pre-vetting (on 25 August 2014 for two areas and on or about 14 November 2014 for the remaining areas) and should have remained on pre-vetting throughout the third period. Put simply, given the extent of Ms B's assistance, Mr Doyle had not demonstrated that he was competent to provide advice to clients that complied with the Best Interests Obligations. In the circumstances, RI should have kept Mr Doyle on pre-vetting throughout the third period.

464 Thirdly, as discussed above in relation to the second period, by about August 2014, it had become (or should have become) apparent to RI that Mr Doyle may have been recommending the Instreet Product, which was not on RI's Approved Product List, to his clients, in breach of RI's policies. I refer to my reasons in relation to that point at [456] above. Those reasons apply equally in relation to the third period.

465 Fourthly, on or about 9 February 2015, in the course of the First Advice Assurance Review, it became apparent to employees of ANZ Wealth that, while Mr Doyle had been on pre-vetting, he had provided advice documents to clients that had not been approved under the pre-vetting program; in other words, that he had circumvented RI's pre-vetting policy and procedures. This information was set out in an email from Mr Scukovic (of ANZ) to Ms Rockliff and Ms Carless (of ANZ) dated 9 February 2015, prepared in connection with the First Advice Assurance Review (see [244] above). The email relevantly stated:

> Out of the 8 … pre-selected files, none have gone through prevet with advice provided to clients while John was on prevet.

466 As indicated in the above email, it was apparent that Mr Doyle had circumvented the pre-vetting policy on several occasions. In my view, this information should have been conveyed to RI's senior management, as it indicated a serious breach of RI's pre-vetting policy. It would seem, however, that the information was not conveyed to Mr Whereat or Mr Ornsby: see their evidence as summarised at [295] and [297] above. The failure to communicate this information to RI's senior management itself represents a failing of RI's policies and processes. Thus, from about 9 February 2015, RI ought to have known that, while Mr Doyle had been on pre-vetting, he had provided advice documents to clients that had not been approved under the pre-vetting program, in breach of RI's pre-vetting policy. In light of this information, it was incumbent on RI (either itself or through ANZ Wealth) to take steps to investigate the extent to which Mr Doyle had circumvented pre-vetting and then to determine what, if any, further action was appropriate.

467 For these reasons, ASIC's case based on s 961L in relation to the third period is substantially made out.

468 Further, the matters set out above also lead me to conclude that, in respect of the third period, RI failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a).

The fourth period (4 March 2015 to 18 June 2015)

469 The facts relating to this period have been set out at [250]-[286] above. I note that this period starts on the day after the First Advice Assurance Review report was given to Mr Doyle (on 3 March 2015). From 31 March 2015, Mr Doyle was again subject to pre-vetting. In May and June 2015, the Second Advice Assurance Review was conducted. On 18 June 2015 – the last day of this period – the report of that review was provided to Mr Doyle.

470 I have considered ASIC's and RI's written and oral submissions with respect to the fourth period.

471 I consider ASIC's case based on s 961L regarding this period to be substantially made out. That is, I consider that, during the period 4 March 2015 to 18 June 2015, RI failed to take reasonable steps as required by s 961L to ensure that Mr Doyle complied with the Best Interests Obligations.

472 First, as with earlier periods, RI did not have in place any adequate process to check whether or not advisers (relevantly, Mr Doyle) who were subject to the pre-vetting program were circumventing the program by providing advice documents to clients without first submitting them for pre-vetting. I refer to my reasons in relation to the first period at [425]-[429] above. Those reasons apply equally in relation to the fourth period.

473 Secondly, as with earlier periods, RI did not have in place any adequate process to check whether advisers (relevantly, Mr Doyle) were recommending products that were not on RI's Approved Product List or whether advisers were failing to adhere to any conditions attached to a specific approval of a product not on the Approved Product List. I refer to my reasons in relation to the first period at [430]-[438] above. Those reasons apply equally in relation to the fourth period.

474 Thirdly, as discussed above, by about August 2014, it had become (or should have become) apparent to RI that Mr Doyle may have been recommending the Instreet Product, which was not on RI's Approved Product List, to his clients, in breach of RI's policies. I refer to my reasons in relation to that point at [456] above. Those reasons apply equally in relation to the fourth period.

475 Fourthly, as discussed above, on or about 9 February 2015, in the course of the First Advice Assurance Review, it had become apparent to employees of ANZ Wealth that, while Mr Doyle had been on pre-vetting, he had provided advice documents to clients that had not been approved under the pre-vetting program. I refer to my reasons in relation to that point at [465]-[466] above. Those reasons apply equally in relation to the fourth period.

476 Fifthly, the outcome of the First Advice Assurance Review was an advice quality rating of 5, that is, the worst possible rating under the Advice Assurance Standard (see [248]-[249] above). Taken in conjunction with the many other concerns about Mr Doyle discussed above, this outcome (and the report from the review) raised a concern that Mr Doyle may not be competent to provide advice to clients that complied with the Best Interests Obligations. In the circumstances, it was incumbent on RI to take prompt and practical action to address that issue (for example, suspending Mr Doyle from providing advice). It does not appear, however, that RI took any sufficient action during the fourth period. While RI placed Mr Doyle on its "On Watch List", which involved providing an enhanced level of support to Carrington, and undertook a further file review, in my opinion these steps did not sufficiently address the issue in the circumstances, given the concerns that had emerged by 4 March 2015. In my view, the

statutory requirement that RI take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations required RI to do more than it did (for example, suspending Mr Doyle from providing advice to clients).

477 Sixthly, during the course of the fourth period, Ms Collins raised further serious concerns about Mr Doyle with Mr Whereat and Mr Ornsby: see the email dated 31 March 2015 set out at [256] above, and the email dated 2 April 2015 set out at [261] above. Taken together with the many other substantial concerns about Mr Doyle discussed above, these letters provided a further basis for concern that Mr Doyle may not be competent to provide advice to clients that complied with the Best Interests Obligations. In the circumstances, for this additional reason, it was incumbent on RI to take prompt and practical action to address that issue (again, for example, suspending Mr Doyle from providing advice).

478 For these reasons, ASIC's case based on s 961L in relation to the fourth period is substantially made out.

479 Further, the matters set out above lead to the conclusion that, during the fourth period, RI failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a).

The fifth period (19 June 2015 to 30 June 2016)

480 The facts relating to this period have been set out at [287]-[341] above. I note that this period starts on the day after the Second Advice Assurance Review report was given to Mr Doyle. On 22 June 2015, RI gave Carrington six months' notice of termination. On 25 August 2015, RI partially suspended Mr Doyle's authority. On 19 November 2015, RI and Carrington entered into a deed of extension, by which the termination date was extended to 30 June 2016. On 30 June 2016, Carrington and Mr Doyle's authority as representatives of RI came to an end.

481 I have considered ASIC's and RI's written and oral submissions with respect to the fifth period.

482 I consider ASIC's case based on s 961L regarding this period to be substantially made out. That is, I consider that, during the period 19 June 2015 to 30 June 2016, RI failed to take reasonable steps as required by s 961L to ensure that Mr Doyle complied with the Best Interests Obligations.

483 The reasons that I have set out at [471]-[477] above, in relation to the fourth period, apply equally in relation to the fifth period.

484 Indeed, those reasons apply with even more force in relation to the fifth period because, by the beginning of that period, RI had the report of the Second Advice Assurance Review. This again gave Mr Doyle a score of 5, the worst possible score, and identified serious deficiencies in the files that had been reviewed.

485 While RI did, on 22 June 2015, issue Carrington with a notice of termination, this provided a period of *six months' notice*, and did not immediately suspend Mr Doyle from providing advice to clients. In the circumstances, and for the reasons expressed above, I do not consider this action to be sufficient to address the issues that had emerged concerning Mr Doyle, in particular the concern that he may not be competent to provide advice to client that complied with the Best Interests Obligations. The covering email from Mr Whereat to Mr Doyle emphasised that, in the meantime, all SoAs would need to continue to be vetted, prior to being issued to new clients. However, as discussed above, RI did not have a satisfactory mechanism to check whether all proposed advice documents were being submitted to pre-vetting, and there was material that indicated that Mr Doyle had previously breached this requirement. Thus, the requirement that all advice documents be submitted for pre-vetting did not provide a reliable safeguard that Mr Doyle would provide advice that complied with the Best Interests Obligations.

486 Further, while RI did conduct the Third Advice Assurance Review (in July 2015) and partially suspended Mr Doyle's authorisation (on 25 August 2015), this was only a partial suspension. Mr Doyle was still permitted to provide advice to existing clients in certain circumstances. In the circumstances, and for the reasons discussed above, I do not consider this response to be adequate. In other words, in light of the matters discussed above, I consider that a full suspension or termination of Mr Doyle's authority was required. I express this view having regard to the matters that were known, or ought to have been known, by RI by this date.

487 I note that, during the fifth period, RI put in place various resources (including Ms Collins, Planlogic and Ms B) to assist and monitor Carrington. However, I do not consider this to have been a sufficient response in the circumstances. Given the nature of the issues that had emerged, there could be no confidence that this would be sufficient to address the concerns.

488 Further, on or about 19 November 2015, RI agreed to extend the termination date of Carrington's authority from 21 December 2015 to 30 June 2016. In the circumstances, and for the reasons discussed above, I do not consider this extension to have been appropriate. I accept that one of the reasons for extending the termination date was to ensure access to client files,

to assist with investigation and remediation. However, I doubt this provided a sufficient basis in the circumstances to extend the termination date. In any event, the real issue was whether Mr Doyle was permitted to continue to provide advice to clients. For the reasons given above, I do not consider that it was sufficient for RI to have only *partially* suspended Mr Doyle's authorisation. It is unnecessary to express a view on whether RI's motivation in extending the date of termination was to facilitate a sale of Carrington's business to a financial advice business within the RI umbrella.

489 For these reasons, ASIC's case based on s 961L in relation to the fifth period is substantially made out.

490 Further, the matters set out above also lead me to conclude that, during the fifth period, RI did not do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly as required by s 912A(1)(a).

Witnesses not called

491 ASIC and RI contend that there is an unexplained failure by the other party to call certain witnesses, and invite the Court to infer that the uncalled evidence would not have assisted the other party's case: see *Jones v Dunkel* (1959) 101 CLR 298; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [63]-[64]. It is also submitted that the failure to call the witness may permit the Court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if the uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

492 ASIC contends that an adverse inference should be drawn from RI's failure to call Ms Collins, Mr Hyland and Ms Nugent.

493 Ms Collins is no longer employed by RI, having ceased employment at RI in May 2017. The material before the Court indicates that she is currently employed by ANZ. As noted above, RI is no longer a subsidiary of ANZ, having been sold to IOOF in October 2018. In circumstances where Ms Collins is no longer employed by RI and there is no suggestion that she has any ongoing connection with RI, and RI *has* led evidence from its two most senior executives during the Relevant Period, I am not satisfied that Ms Collins "would be expected to be called" by RI: see *Payne v Parker* [1976] 1 NSWLR 191 at 201 (cited with apparent approval in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at [169]).

494 Mr Hyland is currently retired and resides in Western Australia. Although RI initially proposed calling him to give evidence and filed a statement of anticipated evidence, ultimately it did not file an affidavit of Mr Hyland. RI has provided an explanation for the failure to call Mr Hyland, namely health issues and the difficulty of conferring with him in person due to COVID-19 restrictions on interstate travel.

495 In relation to Ms Nugent, I am not satisfied that her role was of sufficient significance in relation to the facts and issues in the proceeding that she "would be expected to be called" by RI.

496 RI contends that an adverse inference should be drawn against ASIC from its failure to call Ms Collins. RI submits that in circumstances where ASIC exercised its powers to examine Ms Collins and had the opportunity to ask her questions, and yet has failed to call her as a witness, it should be inferred that her evidence would not have assisted ASIC's case. I am not satisfied that Ms Collins "would be expected to be called" by ASIC. The fact that ASIC exercised its power of compulsory examination does not provide a basis to expect that ASIC would call Ms Collins as part of its case.

497 Accordingly, I reject both parties' submissions regarding witnesses who were not called.

CONCLUSION

498 I therefore conclude that, during each of the five periods comprising the Relevant Period, RI contravened s 961L of the *Corporations Act*, by failing to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations. I also conclude that, during each of those five periods, RI contravened s 912A(1)(a) by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. It follows from my conclusion that RI contravened s 961L that RI also contravened s 912A(1)(c) and (ca).

499 I will hear from the parties as to the further conduct of the proceeding.

I certify that the preceding four hundred and ninety-nine (499) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 2 August 2021