

**Minutes of a meeting of the  
Members of the Reserve Bank of New Zealand Staff Superannuation and Provident Fund (Fund)  
Held in accordance with Section 161 of the Financial Markets Conduct Act 2013**

**Venue:** Cliftons Event Centre, 100 Willis Street, Wellington

**Date:** 31 January 2024      **Time:** 9am

**Present:** David Archer, by videoconference  
Peter Brady  
Mike Coghlan  
Tony Fenwick  
Ian Jupp, also a Trustee  
Peter Katz  
Atholl Law, by videoconference  
Peter Ledingham  
Greg Leech, also a Trustee  
Michael Reddell, also a Trustee  
Colin Robertson  
Andrew Rodgers  
Murray Sherwin  
Bruce White

**Apologies:** Peter Brady, Beryl Green, Kerry Morrell

**In attendance:** Tony Baldwin – Independent Meeting Chair  
Alan Langford – Licensed Independent Trustee  
Sarah Owen – Chair of Trustees  
John McDermott, Trustee  
Steve Grant – Principal, Melville Jessup Weaver (**MJW**)  
Elizabeth Jennings – Secretary to the Trustees, MJW

## 1. Procedural

The following transcript is to be relied on, together with this covering page, as the minutes of the meeting. The transcript was created from a recording of the meeting and has been reviewed against the recording by Bruce White, Michael Reddell, David Archer and Tony Baldwin.

The recording is also retained as part of the record.

The meeting was closed at 12.42pm

The meeting chair hereby confirms that these minutes are, on the terms set out in the transcript, a true and accurate record of the meeting.

*Tony Baldwin*

\_\_\_\_\_  
Tony Baldwin, Meeting Chair

15 November 2024

\_\_\_\_\_  
Date

## Reserve Bank of New Zealand Staff Superannuation and Provident Fund

### Meeting Transcription

The speakers were:

1. Tony Baldwin, (independent) Chair of the Meeting
2. David Archer, a member & former Assistant Governor of the Bank, presenting his presentation and participating in discussion.
3. Alan Langford, Licensed Independent Trustee, participating in discussion.
4. Bruce White, a member and former Trustee, adding context to some of David Archer's points
5. Peter Katz, a member and former Trustee, also adding context on some points
6. Murray Sherwin, a member, former Deputy Governor, a former Trustee and, post the meeting, re-appointed by the Bank's Director's as a Trustee
7. Michael Reddell, a member and (long-standing) Trustee (since around 2008)
8. Ian Jupp, a member and also a (long-standing, since 2000) Bank Director-appointed Trustee
9. Sarah Owen, current Assistant Governor of the Bank and current Chair of the Trustees (including at the date of the meeting); appointed by the Bank's Directors.
10. John McDermott, current Assistant Governor of the Bank and current Trustee, appointed by the Bank's Directors.

*Comments have been attributed to the relevant speaker wherever possible, although in a few instances the speaker was not able to be clearly identified from the recording. There were also a few instances where what was said was unclear, meaning this transcript may not be as 100% accurate as, say, a Court transcript. However, it is fairly accurate having been reviewed against the recording by Bruce White, Alan Langford, Michael Reddell, David Archer and Tony Baldwin, before being confirmed by Tony Baldwin as Chair of the meeting.*

Who	
David	Sarah, just a small technical point. I was having difficulty hearing people from the room so I am not sure how the recording will pick up people from the room. Maybe there is a microphone that can be passed around or repositioned or people come to the front when they are speaking.
Sarah	So, is this speaker here? Steve?
Steve	I will go and confirm that – Where the microphone is
Sarah	We are just going to confirm that this is a microphone so if people want to speak, they can stand near the microphone.
David	That would be great, thank you.
???	Have we only just got David online?
Sarah	There is two people online – Atholl and David
Tony	So, this is the microphone

Who	
Sarah	<p>Perfect. Thank you. So, for people speaking if we could come near to the microphone.</p> <p>So incoming Chair is there anything else that we needed to do?</p> <p>Ok with that the next thing we are going to do is the election of the meeting chair. So, Mr. Ledingham.</p>
Peter Ledingham	I move that we invite Tony Baldwin to chair the meeting.
Sarah	So, there is a move that you are invited to chair the meeting, Tony. So, does everybody agree with that – all the members here and online?
Several agrees	
Sarah	So, everybody? Thanks
Tony	Very good. Hello David and sorry who was the other person online David
Unknown	Atholl is the other one
Tony	<p>Hello Atholl and good morning to all the members of the Reserve Bank Staff Superannuation Scheme. I am pleased to take on this role with some trepidation. Thank you to Tony Fenwick.</p> <p>A brief synopsis. I started as a Chapman Tripp lawyer and worked overseas in England and France for a few years and in Washington DC and returned to Chapman Tripp and then went up to the Prime Minister's department where I stayed for about 7 or 8 years and in that capacity I worked with Peter, with Tony Fenwick and then more recently I – mainly in the area of regulatory policy and I do a – I consult now and work primarily in the electricity area but you know strange things happen and you trawl into superannuation matters and in this capacity – just so that everyone knows – I know Michael Reddell through interests and various policy commentaries and so on and I don't know if I know anyone else in particular.</p> <p>But I see my role as a neutral facilitator. I am not here as an arbitrator or a judge or any sort of expert opinion maker, but as I understand it – just to frame the meeting – members of the Fund have requested the meeting to seek information, clarification and rationale for various statements made by the trustees in the 2022 annual report. So, in that capacity I see my role as facilitating the members' objective of seeking to obtain that information. So during the meeting I might reframe something which is said by either side and it does seem to me that there are two sides and so I may look to try to dig into a question that has been raised and help the members frame their question. On the other side I may look to help the trustees to frame their response but without – I am not taking a side. So, the objective is for the members to try and better understand the reasons behind the trustees' statements in the 2022 report. I think it is also worth acknowledging that this has a long history. I have read some of the material and I don't pretend to be fully informed or an expert on all matters. So, along the way if it becomes clear that I am not fully informed – please tell me and I will defer to people with more information.</p> <p>So, it is a facilitation role and as I understand the members' goal is not to seek to necessarily make any decisions today but to gain a clear understanding of the reasons for the various statements by the trustees in the report of 2022. So perhaps I will pause</p>

Who	
	there and see if that corresponds with members' and trustees' understanding of the purpose of the meeting.  Anyone have a different view? Sarah
Sarah	Can I speak? To the matter-
Tony	Sure
Sarah	To the consent for the recording
Tony	Sure, sure, hold on, a new person has arrived. Sorry would you like to enable that?
Sarah	Just before we go to the new chair, we just talk... the purpose of the minutes
Sarah speaking here – can't hear exactly what is being said – consent or undertakings I think	
Tony	So just following on from that – on the question of the minutes and the nature of the minutes that you would like taken – it might be worth getting some guidance from you on what level of information and detail you want to have in the minutes. Obviously, there is a full recording so at one end of the spectrum it can be a full transcript and at the other end it can be key points, but it is your call as to the nature and extent of the minutes.
David	Certainly, from the members' perspective – we are anticipating we have a pretty good – pretty complete record of the questions that are asked and the answers that are given. So more on the detailed side I would have thought.
Tony	But you wouldn't necessarily want every comment, every utterance, to be captured in the minutes or
David	No no – there will be lots of repetition no doubt and going around in a few circles but where there are key points and substance where questions are put, and answers are given in a particular ways or not given in other ways – these are things we would like recorded.
Tony	Sure ok. Alright so fulsome – full as it relates to the essence – the essential questions of the meeting.
David	Yes
Tony	So perhaps I will give an undertaking that I can work with our supporters here and prepare a draft and I can circulate it to members and trustees to see if that reflects their – your needs in relation to the minutes. Yep – ok?  So, before we move to the next item -- are there any other sort of introductory matters that we should pause to cover off?  Alright, so the next matter on the agenda is apologies and I have two here. One from Kerry Morrell and another from Beryl Green.  Bruce?
Bruce	Peter Brady
Steve	And apologies from Atholl who has to leave at 10 o'clock
Tony	From 10 o'clock from Atholl

Who	
	<p>Then the next item on the agenda is approval of non-member attendees – representative of the FMA or the auditor. Now my understanding is that neither are attending. Then confirmation of the agenda. So, the agenda that follows from here. I understand the proposal is that we start with an outline of presentation by David Archer and then we move through a set of questions which David has prepared and there was a pre- meeting session with the trustees where David outlined to the trustees the essential questions that you would like to cover and so I think everything should be in line with those expectations.</p> <p>In terms of the flow of the meeting: I don't propose to stand the whole time so I will sit behind - over here and it's your meeting as members so I will be guided by the areas that you want to dig into further and where you would like to move on – if you think it is time to move on – and perhaps you could also indicate that to me.</p> <p>And then the summation and I think in the pre-meeting David – Item 9 the next steps you were proposing that that would take place separately</p>
David	That is correct we envisage closing the meeting after Item 8.
Tony	So, I think there is a need for a confirmation of the agenda by the members and trustees that everyone is confirming that we can take that as confirmed and with that I will hand over to you David to walk through your presentation and proceed then to the questions
<b>10.20</b>	
David	<p>Thanks Tony.</p> <p>So, this is a rather a complicated issue – well it seems very complicated when one goes through all the documents which have been made available – including the documents which we wrote which I acknowledge are quite complex in the way they deal with the range of the issues.</p> <p>So, what I thought would be appropriate to make the meeting effective is to try and narrow the issues down to the very core issues so that the questions that we put to trustees where we are looking for clarification for better understanding relate to these very core questions that are at the heart of the issues. Now that doesn't mean that we can't open up other questions that are of importance for members, that are related to the decisions reported in the 2022 annual report, but for my framing it will be a focus on the very core questions and the very core questions relate to the issue of whether financial harm has been done to members.</p> <p>To understand financial harm, I think it is important to realise that there are several types of financial harm that we believed were opened up as possibilities by the 1988 amendment to the definition of superable salary. We want to focus in this discussion on just one of those. The very important one. The most important one and the one which is least agreed – I think – or certainly the least well understood, and this is a thing which we described as progressive erosion in our document.</p> <p>Now what is progressive erosion. Recall that the 1988 amendment changed the superable salary definition from 'ordinary salary' to 'a specified proportion of total remuneration'. Now this happened after decades of fringe benefits having become a bigger and bigger part of the remuneration structure not only in the Reserve Bank but elsewhere. Fringe benefits for us were not counted in superable salary before 1988 – we didn't have a total remuneration number to work from – but in fact what had been</p>

Who	
	<p>happening was that superable salary had been moving at a slower pace than total remuneration.</p> <p>Now this was about to change. The flip side was coming because fringe benefits were about to become taxable and for that reason it was to be expected that ordinary salaries would come back as the remuneration method of choice and grow faster than fringe benefits which were relatively and, in some cases, absolutely fall away.</p> <p>So as background total remuneration would grow slower than ordinary salaries. This was what was coming. Now at this point to switch the superable salary definition – the link for defining superable salaries to total remuneration away from ordinary salaries would therefore make the superable salary number grow slower. As total remuneration is growing slower – if it is linked to the slower growing thing – you end up with a slower growing superable salary. So, any safety margin that might come from having a high initial superable salary percentage – that's the proportion that makes the link – any safety margin would erode away, and retirees would then end up with smaller pensions than they would have had had the link not been changed.</p> <p>So, the 1988 amendment created this possibility by shifting the link from what was going to be the faster growing thing to what was going to be the slower growing thing. Now is this hindsight that makes us say this? – no. We have this executive remuneration paper that created a policy – several policies but one of those policies was an offer to review and adjust the superable salary percentage to offset changes in the structure of remuneration. So, it was something recognised at the time.</p> <p>Now this question of financial harm is really important. The question of it coming from the progressive erosion side is a key to the question and here [Slide 3] is like a summary of the different perspectives that the claimants have, and the trustees have as reported in the 2022 annual report.</p> <p>We have a timeline that starts in 1988 – two important events in 1991 and 1994 which we'll cover and that goes to today. Now the claimant's perspective has two phases to it. Firstly, up to 1994 we think that fringe benefits began to fall away– well we know that fringe benefits began to fall away but the superable salary percent was actually adjusted in 1991 and again in 1994 to offset that effect. So, no harm resulted in that phase.</p> <p>The second phase however ... in that second phase the remuneration structure in the market and the Reserve Bank kept on changing but the super salary percentage – this linkage factor – was no longer being adjusted. This means that pensions did in fact start to grow slower than they had been doing under the old superable salary definition – ordinary salary – and that is the essence of financial harm – that there had been a change in the definition which resulted in slower growth in superable salaries so slower growth in pensions.</p> <p>Now the trustees' perspective is different. The trustee's perspective has also two important phases. One the – the first one is a little shorter for various reasons. In the trustee's perspective the question of harm in this first phase is a relevant question – was a relevant question in terms of the rules of the Reserve Bank Superannuation Fund but no harm was identified in that period. This is something which we agree with as no harm resulted in that period because the superable salary percentage was adjusted. In the second phase from the trustee's perspective the question of harm seems no longer to be relevant and thus – I presume thus – we are going to ask questions about this – the existence of harm in that period was not evaluated. So, in</p>

Who	
	<p>the trustees' perspective overall no financial harm has been identified and this is crucial it seems to their decision not to pursue this issue any further.</p> <p>So, two big questions follow from these different perspectives. The first one [Slide 4] is why is it of interest – why should it be of interest to trustees that we ended up with lower pensions because of the change in the superable salary definition. The second question of interest [Slide 5] – the big question – is why was it not relevant any longer to evaluate, why was financial harm no longer a relevant question after around 1993, say? The date of 1993 has been chosen because the financial harm was evaluated only in the first five years after the 1988 amendment took effect.</p> <p>So, let's look at the first question [Slide 6]. Why should trustees be interested and concerned about the possibility that pensions were lower as a result of these things. It is clear the trustees don't need ... it is not one of their duties to ensure that pensions are maximised or that a given dollar value is produced. There are many things which can change that are completely outside the control of trustees, outside the rules of a defined benefit superannuation scheme that can lead to lower outcomes than people might have preferred. So, trustees don't need to ensure that pensions are maximised or kept up but they do need to make sure that the rules are followed.</p> <p>There is this important Rule 7 which says that other rules may not be altered without affected members consent if the amendment could adversely affect their existing interests in the Fund. Now existing interests in a DB scheme here are future pensions that flow from contribution years to date with those future pensions based on two types of things. One - the rules within the DB scheme that defines how things work and then all of the things which happen in life in the employment relationship to things like inflation and to wage growth and to individual remuneration paths which are outside of the Scheme.</p> <p>So, this is what existing interests are about. Existing interests are about what the rules say - the rules component - as applied to things which happen to remuneration over the years until retirement, to define the future pension. Now the 1988 amendment as we have seen created the possibility of harm from progressive erosion and some other sources of potential harm which we are not going to cover here – therefore according to Rule 7 consent was required but it was not sought or obtained. Now this is acknowledged by everybody.</p> <p>This means that the new superable salary definition created by the 1988 amendment was legally invalid and that is also agreed by all the parties. Invalidity perhaps could have been ignored, could be ignored and has been ignored and it has been ignored on the presumption that no harm has resulted and we are probably ourselves could easily ignore it as long as no harm resulted, but as we have seen, we believe that harm has resulted which turns us to the important second question. Why do trustees seem - and it has to be seem too, [it is] not crystal clear in any of the documentation – seem to think that financial harm is irrelevant after around 1993. We see two possibilities as the prominent possibilities that come through in the documents, including in the legal advice and in the minutes and so forth, for explaining why trustees might think this and we are going to examine these two possibilities.</p> <p>[Slide 7]</p> <p>Possibility No 1 is that a further amendment to the definition of superable salary in 1991 replaced the 1988 definition with another one that itself did not require members'</p>

Who	
	<p>consent because <b>it itself</b> did not add harm. So that is the thought process. We will examine that thought process in a little bit more detail in a second.</p> <p>Possibility No 2 is that the trustees think / believe that individual employment contracts which were on the table from early 1991 but executed over the next couple of years – made the superable salary percentage used to calculate superable salary itself the base for pensions – an agreement between the Bank and the member. So, by that gave the necessary consent which had been missing from the 1988 process. So that is possibility No 2 – it is about us entering individual employment contracts that mentioned an agreement on the superable salary percentage but as we will see we think that was for a narrow purpose rather than a broad purpose.</p> <p>So, let's look at these two possibilities. The first one concerns [Slide 8] the 1991 amendment and we don't think that can make sense, that the 1991 amendment did what people might think it did in terms of making from there on the question of financial harm an irrelevant matter from the perspective of a pension fund. Now [Slide 9] recall that the 1998 definition – sorry 88 definition - had a specified proportion of total remuneration as determined from time to time by the Bank as the core words in the definition. The 1991 definition in contrast – small contrast - had these words “a specified proportion of total remuneration... and determined from time to time by agreement between the Bank and the member”. The “member” is in square brackets because a different word was used but it meant the same thing.</p> <p>Now let's examine what is going on here. The first set of words are identical. Both specifying or saying that a specified proportion of total remuneration is the superable salary calculation that creates the superable salary base. They are the words, however, that created the risk of harm. These are the words which mean that progressive erosion is a risk to members. It is a risk – the harm would be created should the superable salary percentage (the linkage factor) <b>not</b> be adjusted to offset falls in the share of fringe benefits over time. Over the time between this period and when people retired. So, the words that created the risk of harm in 1988 are still there in 1991. Unchanged. Same risk of harm not moderated at all.</p> <p>Now the question then is whether this other change [Slide 10] – the move from determined from time to time by the <b>Bank</b> to determine by <b>agreement</b> creates some kind of a protection mechanism that helps protect against the harm which was made possible by this shift to a link to a proportion of total remuneration.</p> <p>Well, we can see certainly that members get a veto over superable salary percentage changes that would harm them but note it is over changes that would harm them. You can only veto a change. By agreement did not allow members to oblige the Bank to continue reviews and adjustment of the superable salary percentage. So, the introduction of the by agreement did nothing at all to moderate the risk.</p> <p>So [Slide 11] the question then becomes if the 1991 amendment did not itself add any harm it gave a veto for something which is not related, not relevant to progressive erosion and the source of harm remained without any new protection, so we still have a situation where there is no consent for the unabated potential for harm, what do we then think of the idea that because the 91 definition replaced the 88 definition without itself needing consent somehow rule 7 has been complied with, or somehow rule 7 is now irrelevant to this risk of financial harm arising from progressive erosion.</p> <p>That idea must be wrong because if it was right, it would make rule 7 or similar statutory protections totally useless. Any ill-intentioned employer could use a strategy</p>



Who	
	<p>which involves introducing harmful amendments without consent, make a further trivial change that itself does not need consent, maybe the change is to fix a typo, and then can say, well no consent was required for the second amendment, and the second amendment we have replaced what happened in the first amendment so any consent requirement has now been satisfied.</p> <p>That must be a nonsense, that would restrict statutory and contractual law-based protections out of the system altogether so it cannot be right.</p> <p>What about possibility two [Slide 12], which involves individual employment contracts which we also think makes no sense. Look at the standard wording of individual employment contracts, where it mentions a superable salary percentage. The standard wording is that, for the purposes of this contract unless otherwise agreed in writing, the superable salary percentage, the superable salary shall be deemed to be whatever it was percent of total remuneration package. Note that the words 'for the purposes of this contract' is not supplemented with any other words such as 'and for the purpose of satisfying super fund rules' or 'implementing something in the super funds system' or anything remotely similar to that. There is no way in which you can extend 'for the purposes of this contract' to cover what is needed in order to have a determination of the superable salary percentage for the purpose of determining people's pensions. It's a different purpose and there are many reasons why you need a superable salary percentage and agreement on the superable salary for the purposes of an employment contract -- such as providing the authority to deduct a certain amount of money for a contribution, employee contributions to the superannuation fund or set up the basis for redundancy payments or other things which are limited, which are linked to what would, an entitlement that people would foregoing by being, by exiting the Bank under such circumstances.</p> <p>Nor can this agreement within IECs on the superable salary's percentage be read as implementing the amended 1991 definition and the reference to the superable salary percentage now being agreed between the Bank and the member. It can't be read that way because the contract wording came before the 1991 amendment was made and moreover, the 1991 amendment was hidden from members. So, you can't hide something which supposedly gives somebody an entitlement and then say they're fully informed as they execute a right that they don't know that they have. So, we don't think that an agreement by subterfuge would be legitimate in anybody's minds.</p> <p>[Slide 13]</p> <p>So, we are confused, uncertain, unclear as to why trustees decided that harm was only a relevant matter for the first five years. So, this is what we want to ask in this meeting.</p> <p>So, let's ask. Before we do, just quickly, note that the truncation at five years was something not introduced by the trustees that reached their conclusions in 2022, it was reached, this truncation was something which came earlier in the lead up to the 2016 decisions of the trusteeship were, however endorsed, explicitly endorsed by the 2022 trustees. So, the truncation at five years seems to be something that the 2022 trustees have endorsed.</p> <p><b>34:40</b></p> <p>So, we have posed seven questions, we have foreshadowed these questions and there is some slightly different wording, but they are essentially the same questions that we have foreshadowed. And so, I'll just run through them quickly before we stop then and ask the questions, pose the questions to trustees, and then pose them to the</p>

Who	
	<p>two trustees who dissented from the relevant decisions as reported in the 2022 annual report. So, we can get, as good an understanding as we can of the two sides of the argument around the trustees' table and inform ourselves better.</p> <p>So, the first question is going to be about whether trustees accept that the reviews and the adjustments to the superable salary percentage that were happening over the first period in that timeline, were relevant to protecting retirees from the harm that would come through progressive erosion.</p> <p>[Slide 14]</p> <p>The second question will be about whether the trustees actually ever did evaluate the damage done to pensions by the abandonment, the Bank's abandonment of the policy to review and adjust the superable salary percentage. Just a quick word, I forgot to explain if it wasn't clear to everybody that the last actual adjustment in the superable salary percentage happened in 1994; this was under Dick Lane's watch. Before he retired in 1998, he did a further review, he had done essentially annual reviews ever since the policy was introduced and in 1998 identified a need for a further adjustment to the superable salary percentage because of ongoing changes in the structure of remuneration, fringe benefits had kept on falling away relative to other forms of pay. And he passed the implementation task onto his successor Rod Carr. That implementation never happened.</p> <p>So, the question for the trustees, is did they ever actually evaluate the damage to pensions by that abandonment of that policy?</p> <p>The third question will be about whether the trustees think that the 91 amendment somehow removed the potential for harm in a way that we can't see. Having looked at those words, is there something else going on that meant that after the 1991 amendment there was no longer the possibility of harm that would come if the Bank were to abandon this policy.</p> <p>[Slide 15]</p> <p>The fourth question will be about whether instead of removing the possibility of harm, that somehow members' consent to being harmed – or the possibility of being harmed - - was achieved by that amendment or made unnecessary by that amendment.</p> <p>[Slide 16]</p> <p>The fifth question will be about a process one which you might have seen discussed in the various papers that were prepared for the meeting. If the 1991 amendment actually did what trustees seem to think it did -- that is turn an unconsented potential for damage into a consented potential for damage or potential for damage which no longer needed consent or something of that nature -- then this is a material change in the situation of those with an interest in the Fund. If there was such a material change, is there evidence that the trustees actually intended to make this change to the defined benefit division rules? It seems from reading the records that there was no such intention and indeed the 91 trustees said to the members that there was no intention to make a change and there had been no change to the rules.</p> <p>[Slide 17]</p> <p>The sixth question will be about whether trustees think that individual employment contracts have relevance to the determination of the superable salary percentage for</p>

Who	
	<p>the purpose of implementing pension fund rules. That is beyond the limited purpose stated in those contracts.</p> <p>[Slide 18]</p> <p>And the final question will be about, well if it's not that the protections were removed, if it's not, sorry protection, if it's not that protections became unnecessary, protections were introduced, if it's not that consent was somehow acquired, what was it that justified truncating the evaluation of harm to the five years after the 1988 amendment? Because everybody I think, understands that it is the question of whether harm has been established which drives the practical answer to the question, what to do about an invalid amendment. If there is harm, something has to happen, if there is no harm, then maybe we can just say what a pity it wasn't very tidy but we can live with the invalidity of that amendment.</p> <p>So those are the questions we are going to pose one by one and discuss with trustees and with dissenting trustees. Before starting to pose the questions though, I think it would be worthwhile trying to think about what would constitute reasonable responses and what would constitute unreasonable responses to these questions. [Slide 19] We are asking about the logic, the rationale, the thinking behind decisions taken in 2022 and reported in that annual report. Those trustees, the 2022 trustees also reaffirmed significant decisions taken by the 2016 trustees.</p> <p>Now it's true that not all of today's trustees participated in those decisions that were reported in the 2022 annual report, and just a few of them participated in the 2016 decisions that the 2022 trustees reaffirmed. The question is, can we reasonably expect today's trustees, the ones here, to be able to speak to the thinking about the decisions that they weren't personally involved in.</p> <p>[Slide 20] We think yes, this is a reasonable expectation. Trustees do have a legal responsibility to inquire into actions taken by their predecessors when suspicions are raised, when wrong-doing is alleged. So, there's a quote on the screen, I hope it's readable from the distances that you're sitting away. That comes from a Law Commission Issues Paper, and what it says, I'll read the bit that is relevant in case you can't read it, it says that <i>'New trustees can assume their predecessors acted properly in the absence of circumstances indicating a breach of trust or a possible breach'</i>. So, it's only okay to say that was my predecessors, that was not me, I assume they acted properly, if no questions, no substantial questions have been raised about the actions taken by predecessors. So, they do have, we believe, a legal responsibility to have inquired into the wrong-doings that are alleged. And trustees will have had plenty of notice of this meeting and the issues we're raising, so they have had plenty of time to make these inquiries.</p> <p>[Slide 21] Another point in terms of thinking about what would be reasonable responses and what would be unreasonable responses, is that trustees may be unwilling for whatever reason to expose their thinking in this forum, and they may choose just to direct us to documents and to the Minutes that have been made available. We don't see in those Minutes and in the other documents clear answers to these important questions as I've laid out. There are possibilities which are not answered, and it may be in fact that the two possibilities that we think are perhaps at the core of the thinking, are not the things that are at the core of the thinking. So, we don't have the answers, and it is entirely reasonable to ask trustees to provide those answers because they are making decisions which are affecting our financial interests. Trustees have both a legal and a moral duty to provide information needed for their</p>

Who	
	<p>accountability and as their prime responsibility is to protect the interests of beneficiaries, that is us, it is to us that they are primarily accountable. So not being willing to expose their thinking is not a reasonable response.</p> <p>[Slide 22] Another point is the question of whether it's okay for trustees to say well, we commissioned a huge amount of external advice from people who are really expert in their domain. Is it okay for them to say that they relied on that advice without doing their own due diligence, so that they don't have a personal view on the reasonableness of that advice, and they can't articulate the reasons why they agreed with that advice. Is that reasonable? There is jurisprudence that says it's only okay to take that position if the people seeking the advice are non-expert, amateurs, unable to perform due diligence on external expert advice. They don't have the capability to perform that due diligence... it's okay. But if they do have the capability, it's not okay. And it is the case here that our trustees do have the capacity, they're smart people for a start, they're familiar with the domain which is subject to dispute, and moreover draft legal advice has typically been provided to the trustees ahead of the final advice being submitted and the final external advice you can see in the records, sometimes differs from the draft in material ways, as a result of discussions with trustees. So, trustees can't both say we think you've got the analysis wrong go away and think again, resulting in a change in external expert advice, and then now say we don't have the capacity to do due diligence on legal advice.</p> <p>So with that as background, and with that as framing the question of whether, when we hear from the trustees whether we think those responses are reasonable in terms of what we're seeking which is a better understanding, a more fulsome understanding of the reasons why these key decisions, particularly the one about there being no material harm, form our judgement as to whether there have been decent attempt to provide that understanding to us.</p> <p>So, question number one ...</p>
<b>48.15</b>	
Tony	Just, just hold on, David, just pause for a moment ...
David	Yes.
Tony	<p>... I think we'll just have a moment for any general comments on the presentation. So, it's a meeting of the members David, so before we dive into the specific questions, are there any general comments that people would like to make, trustees or members?</p> <p>No? David, over to you, the first question.</p>
David	<p>So, the first question concerns this claim that we make that reviews and adjustments of the superable salary percentage <b>were needed</b> in order to protect members from progressive erosion. So, this is the question, and the issue is whether trustees accept that, understand that and accept that, that because of the change in the link of superable salary from one thing to another thing, that created a risk of a slower growth of the new superable salary definition, should changes in remuneration structure happen as they were expected to happen. Is that an accepted point?</p>
Murray	David ...
Tony	<p>Sorry, just before you came – you need to come up -yeah sorry Murray you need to come up here for the microphone unfortunately. Also, probably it's quite useful</p>

Who	
	because then David can see you on the camera, so, it will be a little bit clumsy people coming up and down, but ...
Murray	It will be.
Murray	So where am I, where am I, I'm not in there.
Tony	Right there is good.
Murray	Giddy David.
David	Hey.
Murray	You mention that Dick continued to run the superable salary reviews periodically and passed one across to Rodd Carr when Rodd became Deputy Governor, I remember that, it was around '99 I think that ended up coming across my desk at Deputy Governor when Rod had done, but I think Dick always did, was go out to Hays and find comparable institutions and see what their ratios were. There were only, I think by that stage, I think about four deemed as comparable institutions. The Hays data itself seems, we always thought it was pretty ropey anyway. It wasn't obvious to me at that point that any of the numbers which were in a fairly close range I think from memory, were obviously better or more valid than what the Bank was already using. And that had been the way in which I think those reviews had taken place in the past. So, it wasn't as if there weren't superable salary reviews taking place over time, that's my key point.
Tony	Any comment there David?
David	Yeah, other people may want to chip in because this brings us closer to ...
Tony	I was actually thinking detail... I know that...
David	... some of the details ...
Tony	You might finish reconfiguring the room, so that everyone's facing this way, but ...
David	Right.
Tony	That's alright.
David	My ...
Tony	Sorry David, Bruce is going to comment.
Bruce	I can be very quick. I recall what Murray's referring to and I think that's mostly correct, with one very material exception. And that is the exercise that Rod did was based on Hays All Industries Data, which was a switch from what had been used previously. And there was a very big difference between the two. And so that's, indeed in the previous review the non-salary benefits in the financial services sector had fallen away a lot as mortgage interest rates came down, they had not for the All-Industries Data. So, making that switch completely changed the picture. It was an ...
Murray	I don't know that that switch was made or not ...
Murray	It just seemed to me that the number of comparative organisations had shrunk to a very small number, so the whole concept was becoming difficult in the way that it had initially been run and constituted...

Who	
Bruce	Right.
David	So, I think ...
David	I think that's probably a fair point, that it was, running the reviews in the same way, making the assessments of the nature of the structural changes in the same way that had been done before might not have easily continued. But that doesn't mean that the concept that as fringe benefits fell away and became a smaller proportion of the total remuneration, that would need to be considered when setting the superable salary percentage. Hunting for another way of making the detailed analysis would have been the appropriate thing to do. But Rod as I understand it, if I recall correctly and people may tell me I'm wrong in this, basically said: Well, as far as I can tell, in history there have not been changes we've just held the superable salary percentage, we've got no obligation to do anything more about this, that's it, period, finished.
Murray	Don't know, don't know.
Tony	Peter?
Peter Ledingham	Can I just come in on this one too, I'm actually holding the memo that Murray is referring to. It did do some numerical analysis and come up with a recommendation and a number for review that work was done by Anne Russell. The major problem with this document is Rod's recommendation which is, which was, we do not change our present policy which is to leave the superable salary at historical proportions of total remuneration, and that was never a policy, that was made up, and actually seriously misled both Murray and Don, I think in agreeing to it.
Peter Katz	I'll just make one very short point, I think is that irrespective of what information was available at the time and it was changing in terms of the database the HR department were using at the time, I think we know just by facts that there was a move to away from unremunerated, what do you call it, perks or whatever, to cash-based salaries. So irrespective of what was being used by the Bank, the actual outcome was a shift from remuneration salary to virtually cash.
David	So, I think the question on the table, however, is what was in the minds of trustees when they made the decision that there has been no harm? And therefore, they would not take this question any further. Is there anything of what has been discussed in terms of progressive erosion and the value of, the sequence of reviews and adjustments to avoiding the damage from progressive erosion, was that an accepted issue? Or were there grounds for saying, no this is not relevant? At least from 1993 on?
Tony	David, you, your question also notes that the legal advisors seemed to say that it was relevant, is that a relevant point to your position?
David	Ah, that's something which certainly features in the legal advice at different points, that there is a lot of emphasis on the Bank's practice, so there's a, the theme is very commonly repeated that oh, maybe there was an invalidity, maybe there was a problem with the '88 amendment, but there's no need to rectify it, because Bank practice prevented harm being done. And indeed, if you were to go to the Court and ask for the Court to sanction rectification, what the probable grounds for going to the Court and proposal for rectification would be to write the Executive Remuneration Paper's policy into the rules, rather than just have them followed, as a matter of practice for a period.

Who	
Tony	So, you're saying that the Piper advice relied on the ERP as a remedy?
David	It pointed to the fact that no harm had been done, and in the same breath, talked about Bank practice and referred to the ERP as part of that practice. To the point where if you were to go back and try and re-write the '88 definition, you would actually include in the definition that the superable salary percentage would be adjusted, reviewed and adjusted regularly as per the ERP.
Tony	David, sorry, Bruce.
Bruce	Just, just, very directly to answer your question. The DLA Piper advice in 2016 in relation to the invalidity of the '88 amendment, was that, if trustees were minded to rectify, it so happens they weren't minded to rectify because of subsequent amendments and events. But the advice was, and I'll read it ' <i>Rectification here would make it clear that the amendment was mutually intended that's between the Bank and the trustees, to allow the Bank to determine a superable salary proportion in accordance with the terms of the Executive Remuneration Paper</i> ', or the policy that David's referred to. So that was DLA Piper's advice that if the 1988 invalidity was to be rectified, that's what they thought would be appropriate, and would be approved by the Court. So ...
David	So, this is all background to the question, the question to the trustees. What was in their minds when deciding as they decided?
Tony	So just, so just to pick up your point about the trustees who were in place in 2022. So, it's, my understanding it was Ian, Michael and David, sorry Alan, sorry David, and Bruce at the time, yeah. So perhaps one of you could start.
Alan	I'll start.
Tony	Alan.
Alan	<p>Can I say at the outset that in terms of the so-called expert, that I probably am not an amateur and the reason for that is that I've worked in the superannuation industry since 1990 as Chief Executive of the Government Superannuation Fund from 2001 to 2012, and Chief Executive of the National Provident Fund since 1995 to 2012. Since then, I've been the licensed independent trustees on the ANZ Bank scheme, on the BP Oil scheme, on the Inland Revenue scheme and the Reserve Bank scheme, this one in turn. It's fair to say that the way that this scheme is purported to be managed is quite different from my experience with all of those other schemes. And it seems that the difference is the relationship, again, purported, between the trustees and the Bank and the members is quite different from what I've seen in any other scheme. And it really does come down to the role of the trustees in managing the scheme, and the role of the Bank in dealing with its employees in determining salary and conditions. Now the claimants' endeavor to suggest that somehow the trustees are part of the ERP, and really in terms of my role as a trustee, the role that I bring from all the other schemes that I've been involved with, it is certainly not a role that I see a trustee providing.</p> <p>The second concern that I've always had is this question of harm. If you take the argument that the claimants make to absurd lengths, then really the sky is the limit. There doesn't seem to be any figure that they seem, that they have put forward that this is a reasonable outcome. They suggest that the outcome is somewhere below that and that somehow the trustees have some sort of responsibility for that. But if we go back and look at the history of 1988; 1988 – it's has been conceded by the trustees in 2016 that that amendment was probably invalidly made. When talking about rectifying</p>

Who	
	<p>the 1988 amendment, but that resolution was not passed by the trustees at that time, and the view that I took was that the 1991 amendment replaced it. What has not been discussed so far at this meeting is all the work that was done by the trustees to determine whether the 1991 amendment was validly made, and the Minutes do record in detail a lot of discussion on that point. But unfortunately, we get to the situation where the majority of trustees thought or considered and resolved that it was validly made, and a minority, the dissenters as they're called in Minutes, decided that it was not. Under the rules of the Trust Deed, the majority resolution is the outcome. I think the dissenting trustees do accept that but don't necessarily accept that it was the right decision, but they do accept that it is the decision.</p> <p>So if we look at the 1991 amendment in isolation, the advice that we got from DLA Piper following very detailed research, in the minds of the majority of the trustees did tilt towards the fact that that amendment was validly made, and for that amendment to be validly made, it had to be done on the basis that there was to be no what they call 'adverse effect'. The term 'harm' is not used in the trust deed. But in the Superannuation Schemes Act, you can't make a trust deed amendment where there is an adverse effect on the members. Now you can possibly add, well not add but use the word 'harm' and 'adverse effect' similarity, in similar ways, but in terms of the majority view, the view was that the amendment was validly made, we had solicitor's certificate signing off on that fact that it complied with the Superannuation Schemes Act and therefore that, the certificate could only be issued on the basis that there was to be no adverse effect.</p> <p>So, in terms of going forward from that point, the majority of the trustees took the view that the 1991 amendment was validly made, there was no need to rectify '88, we had accepted our position on '88 but 1991 became the rule from that time on. So, we then come back to, well, if that, the majority view was that that was validly made, then what else is there for the trustees to do?</p> <p>Now the claimants suggest that it was the onus on the trustees to ensure that the ERP, the terms as it applied to superable salary, was implemented. Well, again, in my experience in working in the superannuation industry, it is certainly not the role of trustees to determine the salaries or superable salaries paid, or negotiated, or set between an employer and an employee. To just give you a very crude example, if we are told that a member is on a salary of \$100,000.00 and we receive contributions that are consistent with \$100,000.00, then the trustees would say, what more can we do? The operation is consistent – we do have situations where members would claim that their salaries are \$200,000.00, and we receive contributions consistent with \$100,000.00, that is an issue that the trustees have to work on, and they usually do and so on.</p> <p>And so, the question I'm going to come back to in a moment, when the other trustees have had an opportunity to consider this, but I think the point that I really want to make in summary is that we believe the 1991 amendment was validly made. Secondly, the issues that have been traversed in detail about reviews of superable salary, about harm, are not issues that the trustees consider, they are matters between the employer, the Bank, and the member. They have been traversed in the past in Court, there was a Court case that tried to link the ERP to the independent employment agreements, and that failed. And now the effort is to try and link the ERP back to the terms of the superannuation scheme. And I think that link fails in my mind, thank you.</p>



Who	
Tony	Alan, just to be clear, you said you would come back to this question after other people have commented?
Alan	Yeah, I'll come back.
Tony	Okay, thank you.
David	Can I come in at this point?
Tony	I think, wait a minute David, we'll just see if Michael or Bruce would like to comment.
Michael	<p>Yeah, I guess I, will, it seems to me that what Alan is saying there, his first comment I actually agree with. I mean I have probably a different emphasis on many of these issues than some of the people who have requested this meeting, so I don't think the trustees had any responsibility for the ERP document. I don't think the ERP document in many respects is relevant to this, the ERP document was a statement of policy, that was released by the Bank months after the 1988 amendment had been done. And so, my focus always has tended to be on the legality or otherwise of the 1988 rule amendment against the obligations of trustees, Rule 7 supported by the Superannuation Schemes Act.</p> <p>But I think relevant to Alan's point, while trustees certainly can't and never could attempt to enforce the conduct of reviews on the Bank and I don't think anyone has ever claimed that they could, it becomes relevant nonetheless because of the question that David has posed around the evidence of harm. That the trustees, the majority trustees in 2016 and cursorily in 2022 which is the annual report here, concluded that there had been no adverse effects from the 1988 change. The only way in which they could reach that conclusion is to look at how those reviews were applied. Not that they can oblige people too, but in making a judgement that they believed that nothing more needed to be done, that there was no practical problem, the only way that you can reach that conclusion is to look at the experience of people.</p> <p>The trustees consciously chose to look only at that group of people in five years or so after the policy was adopted, quite a few of them would have otherwise been adversely affected, but the Bank explicitly grandfathered them. And it was quite appropriate, an appropriate transitional issue. But the issue that faces people who retired decades later simply isn't explored and trustees never engaged with that. And you know, partly to anticipate one of David's questions, it is 100% clear that in 2022 when trustees discussed these matters, there was no substantive discussion at all of the adverse effect. What was presented to the trustees by the then chair Jonathan Ross, who wanted to wrap things up before his term was finished, was a reiteration of the resolution in 2016 with no exploration of the point. So yeah, there was no obligation on trustees to enforce those reviews, but if you're going to reach a conclusion that no adverse effect has existed because of the way that things were applied, then you actually need to look at how things were applied, because that's the pragmatic judgement the trustees made, and I think I'll leave it there.</p>
Tony	Bruce.
Bruce	I think I won't say much just now, because I'd prefer to wait for sorry, Alan or other trustees to come back, Alan, I think you said you would come back to the question. Do you agree with the explanation that David has provided on how the rule changes introduced or enabled the progressive erosion harm? So, it's not what trustees may or may not have appropriately done in terms of monitoring what the Bank did and the like re the ERP. Its focused very much on did the rule change introduce the progressive

Who	
	erosion harm, or protect against that harm, as David has explained. And that's what I would like to better understand from, you know, all trustees. It's the rule change.
1:11:50	
David	So ...
Tony	Just, sorry David. Any other comments from the floor? No? Back to you David.
David	<p>Yeah, I thought Alan's contribution was <b>immensely</b> useful, because it allows us to clear away some clear misconceptions, maybe because we're not very clear in the way we articulate in written form or in oral form or whatever. But absolutely categorically, trustees have no responsibility for ensuring the implementation of the ERP, never had, never will. They had no responsibility for ensuring that people's salaries progress in any particular way, never had, never will. It is not part of the duties of trustees.</p> <p>The reason why trustees need to be interested in this question of whether the ERP avoided harm, prevented harm from being done, is as I tried to explain (clearly not very well) without the practical offset to the risk introduced by the amendment without consent, without the practical offset that was provided initially by the ERP's adjustment mechanism, that rule was both invalid and damaging.</p> <p>Now it's, it is an absolute obligation on trustees to ensure that the rules that are being implemented in the Fund space, in the superannuation rule space, in the space involving duties of trustees, absolutely an obligation to ensure that the rules are followed. The only ... the '88 rule was invalid and should never have been allowed to continue. The only reason it was allowed to continue was because it wasn't doing harm -- until it started to. So, no claim has been made at all, the trustees have a responsibility for having ensured the implementation of the ERP. It's exactly as Michael said: they needed to consider whether the absence of a practice that had been introduced by the ERP, the subsequent absence of that practice resulted in harm and therefore allowed us no longer to turn a blind eye to the invalidity of the 1988 amendment.</p> <p>The second really valuable point from Alan is the, coming back to the idea that the '91 amendment a) was validly made, and b) replaced the invalid 1988 amendment, so all is now good. Now we're going to come onto specific questions about this because each of the questions I've articulated that are coming, will address exactly these questions. So, to have an early statement that indeed you Alan think that this somehow creates a case for clearing the way for harm to be done through progressive erosion and clearing away the invalidity of the '88 amendment, well it's useful to know you're thinking.</p>
Alan	I'm going to come back ...
Tony	Yeah, I was going to say Alan I think ...
Alan	... I said I'll come back to this question.
Tony	Would you like to do that now?
Alan	I think my personal answer is that it's, it's not a matter for the trustees to consider. So, we've been asked for a view, I'm not sure, the view has been, sorry the question has been directed at the trustees and given my earlier comments about the responsibility of the trustees, so let's go back right to the beginning. These are questions for the trustees. So, the question is, were the reviews and the adjustment needed? Well, the

Who	
	trustees do not have a view on this matter, at all. This is an employment issue, and so I'm not prepared to comment any further on that.
Tony	So, just a ...
David	So, a follow-up ...
Tony	David, David, just an administrative thing. The emailed questions I was actually running off the questions that you emailed for the trustees, the meeting that we had with the trustees. And question one was, do the trustees accept an indexation policy was an integral part of avoiding harm to retirees? Is that, have you, am I missing the boat on something?
David	I did flag that the questions have been adjusted a little bit because ...
Tony	Sorry, okay, yeah.
David	... so, in the substance they are the same question.
Tony	Right. But if, yeah, okay.
David	So the, what Alan just said was that there was no need to take a view on this question when asking whether harm was done, even asking whether harm was done in the first five years. So can, given that there was a significant change, two significant changes in the superable salary percentage over that period... are you saying that those changes were not relevant to resulting pensions?
David	So, if no harm was done, it means that the pensions were not hurt ...
Tony	Okay.
David	... and two changes to the superable salary percentage happened in that period, so just prima facie, it would seem that those adjustments to the superable salary percentage must have been relevant to the question of whether pensions were hurt, compared to, if the '88 amendment had been accepted as invalid so thrown out the door?
Tony	I guess Alan you may be ...
Tony	<p>So, can I have a go at, as I understand it what you're saying, is that I think you're saying two things. That the changes, without taking into account the executive remuneration package, the changes were harmful. Or to use your words Alan, more correct words, they had an adverse effect. And I think David is saying in effect, you must have taken into account the ERP because without it, it was harmful and therefore you couldn't have agreed to the change.</p> <p>And I think the second thing that you, we referred to earlier, was that it seemed to be the approach implied by DLA Piper in their advice to the trustees as well. Is that what you're saying David?</p>
David	Yeah, that's correct. I mean, the changes in the superable salary percentage that happened in this period, which was exact apparently, ended up with a significant difference in the superable salary calculation. 12% I think was the difference it made in the superable salary calculations. So when one goes and says, was anybody harmed by the introduction of this new superable salary base? then presumably one would have said, well what were the superable salary numbers that resulted at the end of this period you evaluated, compared to what would have happened if the old rules had

Who	
	remained in place. The numbers that resulted at the end of the period included significant adjustments of the superable salary percentage. How can you possibly say that you cannot take a view as to whether the superable salary percentage adjustment was relevant to harm? I don't understand.
Michael	Can I jump in there? I mean partly in defense of the majority trustees in 2016, I don't think you're right David. I mean trustees at that time did not discuss at all the implications specifically of the ERP reviews whenever they were in 1991 and 1994, so the review that was done by the Bank of that specific group of people who retired in the five years or so afterwards, simply looked at their personal experiences and whether their superable salary had been lowered relative to what their ordinary salary I guess had been, prior to that period. So, there wasn't an engagement there. I mean where you are right is where DLA Piper's advice in 2016 although they backed away from it said that it was implicit in the rule change the terms of something like the ERP – but the big issue is not did we look at those two changes we didn't but the question of how did trustees reasonably conclude that there was no harm after 1994 and that's the question I think that you probably should be directing to the majority trustees because I am mystified by it. We simply didn't look at that. There was a conscious choice not to. That seemed to stem from the DLA Piper advice at the time that you are on contracts so you might want to pose those questions specifically about the power of contracts and where the majority of trustees believe that the contracts dealt with the historic problem.
David	Yeah, that's coming.
Tony	So sorry Alan...
Alan	I seem to be...
Tony	...You're the man
Alan	A bit unfortunate anyway but I think let us go back. In 1991, the trust deed was amended, and David has explained the new rules. The advice at the time was that that trust deed amendment would cause no adverse effect. That received a solicitor's certificate and it was signed off and from that time on – was the onus on the trustees to consider on an ongoing basis was there an adverse effect? We only have to consider it at the time the trust deed amendment is made and we received a solicitor's certificate. The trust deed amendment was accepted by the Government Actuary at the time, and we moved on.
Tony	So, what is the basis of your view that the 1991 amendment caused no adverse effect.
Alan	Because we received – we received a solicitor's certificate to say that it had no adverse effect and when you look at the wording of it compared with 1988. Now I know there are some trustees who say well is it valid for us to compare 1991 with 1988 amendment.
Tony	What do you say about that?
Alan	And I say that the advice from DLA Piper was the trustees in 1991 had no cause at that time -- because events have changed subsequently -- they had no cause at that time to think that 1988 was invalid. So there was no suggestion in 1988 [or] 1991 and the defense we offer for that was that the 1988 amendment was also accepted by the Government Actuary as well

Who	
Tony	So, the sort of the assessment of whether there was harm in 1991, or adverse effect, was a determination in effect by DLA Piper which
Alan	Oh no we had made our own assessment because when you look at it, it was accepted that a unilateral ability on behalf of the Bank to set the percentage in 1988 was probably not valid but moving to a situation where the percentage was going to be set by agreement between the Bank and their member was seen to be a positive outcome.
Tony	Right so the key thing was that the 1991 change required the change to be by agreement.
Alan	By agreement
Tony	And that was the key thing for you in deciding that it was ok.
Alan	It was ok
David	So, Alan do you accept
Tony	Hang on David David just hold on
Alan	So, and again – so there was a lot of debate in the DLA Piper opinion which has been available to all members about whether that 1991 amendment was validly made and the majority believe that it was.
Tony	I was just interested in the annual report that relating to it – it says based on DLA Piper's advice and their own deliberations – the trustees...  So, I think that is the point of interest
Alan	The fact that the deliberation
Tony	And so, the key point there was that the thing that made it ok, that obviated any harm issue, was that both parties had to agree to a change
Alan	Absolutely, and that was better than what we had in 1988
Michael	I mean just briefly I think if you look at the annual report you will actually find that even Bruce and I accepted that there was no adverse effect, new adverse effects from the 1991 change so that was actually common ground. That didn't mean that either Bruce or I thought it was validly made. There were other reasons to suppose it was not validly made which David hasn't really touched on and we won't get into for the moment but the issue then was still – Did the 1991 change if it had no official adverse effect do anything to remedy any potential harm that had been raised by the 1988 ones and that is where I think both Bruce and I
Tony	Is it fair to say obviously at the time in 1988 there wasn't – there wasn't a view that it caused harm
Alan	No no
Tony	In 1988. So...
Michael	That's right because I think that in 1988 there is no evidence that...
Tony	No no sure so by 1991 had it become apparent that the 1988 was a problem.

Who	
Michael	Well one of the problems was that what we honestly don't know. The one trustee at the time has suggested without authority that the Government Actuary had suggested that this might be something to fix up but that is not something that you can take as an authoritative view. An alternative hypothesis which I documented quite a lot was that it was probably an accident, but...
Tony	The 1991 change?
Michael	The specific change as it affected the DB division...
Tony	Was an accident... Yes, no, I have read that.  So, at what point did it become apparent that the 1988 change was invalid?
Michael	Well, these issues were not brought to trustees until 2014. So, the deliberation from 2014-2016 and that is where all trustees actually in 2016 agreed that probably it should have been sought but they never quite used that word. A resolution-
Tony	But not robust
Michael	But then the division was simply on – did anything need to be done about it now?
Alan	But then I think you do need to look at this in the context of the court case and essentially and a view that I have is that what we are doing is running the same line. Running basically the same argument but on a slightly different line.
Tony	But do you see now – given that this is something that is apparent some years later, but do you see looking back now that there is this progressive erosion problem? Do you see that? Not whether it was the right decision at the time but with the benefit of this perspective...
Alan	Well I think the other concern that I have with the argument of the claimants is that this expectation that their pensions or their superannuation should be at a particular level and it is not – I think there has only been one example presented to the trustees where the pension might have been reduced but there has been and that – I think that was a lady – I think you may have mentioned some woman that I may have got that wrong – but I don't think there has been any evidence represented to the trustees that pensions have been reduced so the harm that we are talking about here is a theoretical harm.
Tony	So, I think this is probably getting to the crux of the points of difference that – Bruce, sorry Alan you go
Alan	Can I just finish? I mean there is as I said in my opening comments, we could carry this argument absurdum really that these people could argue that they are entitled to pensions that are – dare I say it – very high and their argument is that – just to put some numbers on it -they believe their pension should be \$60,000 a year and it is \$40,000 a year.  Now that pension and even in the graphs and shown in the claimants' papers – the pensions have increased over time. They just haven't increased at the rate that the claimants think they should and that is why this argument is really about to me about an employment issue. It is not about a pension issue. Because from the point of view of the superannuation scheme it has seen a steady increase in the pensions paid – or payable – over time. And we don't have the ability to have a view as to whether the

Who	
	slope of that increase should be higher than what it actually is or lower than what it actually is.
Tony	I will come back to you David but my understanding that the members are saying that the 1988 change had the effect of creating a new counter-factual – it created a new trajectory for the benefits which was lower than it would have been if the 1988 change hadn't been made and the 91 change didn't correct that. .
Alan	No, no, no
Tony	So, I think the question about what the pension should be is not an abstract -you know- notion but it is the counter-factual of the pre-88 Rule if you like and the change happened because of change in the rules of the Trust Deed not the employment contract
David	That is correct
Alan	Well, I haven't seen evidence of that so
Tony	Well perhaps that is more the crux of where the dispute is
Alan	There has been no evidence. There are graphs in the papers but there is actually no evidence presented that people in 1988 and through to say 1993-94 which is at a time where I thought David was saying in his graph that there was no harm done.
Tony	Well I think in effect that is what they are saying; they are saying that because of other arrangements in the context that it meant that in effect people didn't suffer change but when those policies were abandoned or not applied from the mid-90s or abandoned from 2000 there wasn't this offset so they were dropped back to something which the 88 change meant was lower than it would have been without the 88 change.
David	That's totally correct-
Tony	So I think it is sort of -- and we are looking back so I think it is important not to see this as any sort of criticism of anyone but it is just more to distill what the question is and I think that DLA Piper in the 91 situation, so when they look back at 2016 back at 1991 they are saying the 1991 change was valid it didn't – it wasn't - it didn't make things worse and the trustees in 2016 relied on that advice so that whether there was harm I think you are saying the trustees relied on the Piper advice about their assessment of harm and I think the members were saying Pipers didn't understand the harm.
Alan	Well, we also received advice from the Reserve Bank which was also important, and I think a file note that Ian had as well
Tony	Sure. I think we are getting to the crux of it
Michael	<p>Just briefly, Alan says the evidence was never presented. The majority of trustees have <b>refused</b> to ever consider it. That is the decision that was made back in 2016 was to look at that 5 or so years after the thing came into effect because that was the period when people's salaries were being affected for the last five years before their retirement.</p> <p>Alan who was an observer at the time and the majority of trustees at the time would waive their hands and say oh no we can't possibly look at anything after that because who knows, who knows what would have happened.</p>

Who	
	<p>Well, if you don't dig into it, you don't find out. In 2022 as I said earlier Johnathan Ross put through that motion – the one that we are looking at in the annual report. There was no substantive discussion of harm at all, and I think even people on the majority side of that vote would acknowledge that. It was a pro forma resolution that did not engage with any of the questions of harm so if you don't ask you don't know.</p>
Tony	<p>Sure. David, sorry to come back to you.</p>
David	<p>So, this thing – running through some of this is the claim that things just happened and we are now aggrieved that we have lower pensions than we would <b>like</b> to have and the result is that they are lower because of things which happened in the employment space not in terms of the pension rules space.</p> <p>I want to examine that question a little bit more closely. I am going to use an example that DLA Piper used as something where they said it would clearly open pension entitlements to potential harm if the rules for calculating the final pension were to be changed from say a five-year average of final salary to say a 20-year average of final salary. Now this is something that is totally within the pension rules: the calculation method for working out what the pension is going to be.</p> <p>At the point in time that the rule change is made nobody knows what is going to happen to salaries over the next 20/30/40 years. Nobody knows whether that rule change from a five-year average to a 20-year average would be harmful or beneficial. We only find that out over the future and the thing which drives that outcome is something outside the ambit of the superannuation Fund. It is what happens to salaries over that time which is an employment matter but as DLA Piper recognised the risk of harm from that rule change is evident at the time. There is a risk of harm being done and this is the case in our situation where the change in the superable salary linkage went from one construct of remuneration to another construct of remuneration.</p> <p>Now to come back and then say actually harm was done -- and I think we can pretty clearly provide evidence of that; we can provide evidence of that within the first five years that potential harm existed because superable salary percentage needed to be changed substantially. We also know from documents that Dick Lang was responsible for that another adjustment in the superable salary percentage was indicated but was not done. The part that was not done at a minimum is the part which says salary – the pensions are now lower because superable salary is now lower by that amount, and we have pretty good evidence that the changes in the remuneration structure continued into the future.</p> <p>So, the risk of harm existed in the 1988 amendment. It was not consented. To now say ok we didn't realise at the time that there was a risk of harm but now subsequently that has been identified and to be able to point that harm has been done, is sufficient to say that the 88 amendment should never have happened.</p> <p>We, as I said earlier, we wouldn't be discussing this if circumstances had evolved differently. If the superable salary percentage had continued to be reviewed. But it wasn't continued to be reviewed just as in the DLA Piper example if it had moved to a 20-year average and there had been a massive inflation people would have been worse off by having a 20-year average as opposed to a five-year average. You look back later and say yes harm was done but at the time you can also say that there is potential harm.</p>



Who	
	<p>So, it does come then to the question of whether in 91 this was all dealt with. We haven't really got onto that discussion yet. Alan has put a stake in the ground saying that the amendment itself was valid. I have already said that the change in the words of the definition in 91 changed things in one way and that was to move from a unilateral determination of the superable salary percentage to something where members had a veto over <b>changes</b> but got no ability to protect themselves against progressive erosion. Zero ability to protect themselves against progressive erosion. So the risk of progressive erosion remained in the Rule in 91. It might have been procedurally correct – there is some real disagreement about whether that was true. It probably was not procedurally correct but if it had been procedurally correct it would still have left a potential for damage -- potential for adverse effect in the Rule -- and if no consent was needed for the change which was not relevant to this problem is somehow to say that consent was not needed for the problem any longer is totally bizarre. There is zero protection then coming from Rule 7. Rule 7 is totally empty if you are to maintain that.</p>
Tony	<p>So just to come in here David you are saying in effect that 1988 amendment was probably invalid, and it created harm but the 1991 amendment didn't fix that because in order to remove the harm, it required both parties to agree and if the Bank didn't agree the default position was the 1988 harm. Yep?</p>
David	<p>Correct. So, if the Bank turned out not to agree to continue the reviews -- Rod Carr decided they weren't going to continue the reviews -- there was no ability for members to require that introduced by the 91 amendment which by the way members did not know anything about.</p>
<b>1:42:30</b>	
Tony	<p>So, I am just thinking we need to move to the next specific question I think</p>
Peter Katz	<p>Can I just make one point. It is just a clarification that in terms of the harm it has been referred to sky's the limit.</p> <p>Just to put some sort of bounds on harm – it is really the harm is somewhere between 73% superable salary and probably around about 90-95% so there are bounds on harm. It is not a pie in the sky thing.</p>
Peter Katz	<p>It can be measured</p>
Tony	<p>Right and that would bring it back to the pre-88 change. So to get back to the pre-88 change it is in the order of 20%</p>
Peter Katz	<p>Yep and I think the key thing is what we are saying that 73-90% would have changed periodically over time as elements in the work place changed. So just on that point there are bounds.</p>
Tony	<p>Sure. Murray sorry you are going to have to wander up. You look like you – you have got your satchel. You look like you are heading somewhere.</p>
Murray	<p>I am I am. have to leave.</p> <p>I just wanted to make one point in terms of disadvantage or whatever I have always thought that yes the reviews did continue to take place even if they didn't get the answer they wanted and if some people think they were invalid in some aspect but the other point I wanted to make is David's next point about the link between superable salary and independent employment contracts and the argument is that the reference to superable salary in the contract which is agreed between the staff member and the</p>

Who	
	Bank – is not relevant to the superannuation fund. I simply don't understand or accept that. It seems to me you wouldn't have it in the contract if it wasn't for that purpose.  So that is my view
Tony	That's great. Bruce?
Tony	Go closer the mic please
Bruce	Just I mean a question for Alan at some point – not necessarily now but I think Alan you made the comment that there had been no reduction in superable salaries and it's kind of picking up on I think what Tony is perhaps trying to get at. It is no reduction compared with what, and I think you said there had been no reduction in superable salaries compared with what had been people's superable salaries – I think you said that only one person might have actually had an absolute reduction but generally speaking there had been no reduction but the question is that – is that the right test? Or is that the right comparison or is it no reduction in your superable salary pre-retirement which might be many years hence compared with under the pre-amendment rule and so I think that – what is your understanding of what you mean by no reduction. Is it backward looking or is it forward looking?
Tony	So, Bruce is that you have a change 88 so pre-88 post 88 here and it looks fairly close but over time the distance – if you go forward 20 years it is quite a large difference
Bruce	I think you use the trajectory word – so if it changes the trajectory does it reduce the future superable salary compared with what it would have been under the old rule and is that the right test or is it actually you know superable salary this year compared with last year. They are very different things so I would be interested to know what you think is the correct basis on which to make that comparison
Tony	The absolute number versus the net present value of the future.  I am conscious that we have been going for nearly sort of 1 hour and three quarters and people may need a pause to take some water and go to the bathroom and things so should we take a 10-minute break is that a good idea. Let's do that and we can resume in 10 or 15 minutes.
<b>Tea Break here (From 1:47:00)</b>	
<b>Recommended 1:58:09)</b>	
Tony	Right shall we resume now. We were in question 2 David and
David	Can we just wrap that one up and move on.
Tony	But we haven't – perhaps if you could distill what you think the answer to question 2 is from both sides.
David	Yeah, so what I understand from what both Alan and Michael have said is that in fact there was never any evaluation done of this, the implications of the abandonment of the review and adjust policy. It simply was not evaluated at all. Now here is a key point. Alan says he has never seen any evidence that harm was done including the form of harm that we have asserted. Michael has said that trustees have refused to even consider that question. To Alan and to other trustees – Would you consider evidence of

Who	
	harm done to pensions arising from progressive erosion? If evidence was provided to you of harm from this channel – would you consider it?
John	Hi David, it is John here. Yes absolutely.
David	Ok that's great
Tony	Sorry David Sarah is coming in.
Sarah	Thanks David. So, any decisions by the trustees are made by the trustees as a whole so individual trustees on the hoof I would suggest we don't just individually decide what we are going to do. It would be something that we would need to take away after this meeting and one of the reasons for the meeting is to hear and listen and we will then take any information including the minutes and reflect on what we heard.
Tony	Bruce
David	Including this question...
Tony	David, David - Just a second
Bruce	My – I am just wondering whether the same question might be put to each of the trustees given my understanding– I think Sarah is right the trustees act collectively but also individually like joint and several so I am just wondering the same question could be put to each of the trustees.
Tony	Sure – Sarah.
Sarah	I think any issues arising out of this meeting for the trustees to consider should be at a trustees' meeting to have a chance to discuss and debate as all governance do rather than on the hoof in a members' meeting.
Tony	So just to be clear as I understand it the question is not whether you agree with the evidence or how you would assess the evidence – it is simply whether you would consider the evidence. Is that the question David?
David	That is the question
Tony	So, there is no clearly I think there is no invitation to form a view about the evidence
Michael	I would certainly consider the evidence David
Tony	So that was Michael – I don't know if you could hear – Alan? Reflecting?
Alan	As long as I have the right to also consider the cause
Tony	Sure, So, if you could hear that, David. Alan's answer was yes as long as he had the right or discretion to consider the cause of the harm.
David	Sure absolutely. That is a necessary part of it.
Tony	Sorry Ian
Ian	Yes, I would consider
Tony	Ian says that he would consider it.
Ian	I would also have to be comfortable with the context of the evidence.

Who	
Tony	Sure, and he would also have to be comfortable with the context of the evidence
David	<p>Absolutely I think we would need to agree what is the relevant test which is the question that Bruce posed. We don't need to go into this now but if we can least have some kind of a way of suggesting to trustees that here is the test that we think is relevant for this question. Here is the data that we think is relevant for this question so trustees can then say ok we think that is a relevant test or we don't think that is a relevant test for the following reasons. If we think it is a relevant test, we are going to look at your data and form some kind of a view.</p>
Tony  <b>2:03:30</b>	Ok so let's move on to the next question.
David	<p>So, coming now to the role of the 91 amendment. What role does the 91 amendment play in this?</p> <p>Now Alan has said that – at the point a couple of times that there was no awareness in 91 of any invalidity in 88. There is no awareness in 91 that the amendment that was made in 91 contained the risk of adverse effect for members. Now this is true, but I want to consider this question as to what is the relevance of those points.</p> <p>There have been repeated examples with the Reserve Bank of New Zealand Staff Superannuation Scheme that of problems coming to light some years later. Things which should never have been done were done without awareness that they were wrongly done but then that – the fact that they were invalid, wrong actions came to light later and they have had to be corrected. Sometimes it took some time to correct them but they have had to be corrected. Michael, I think, has got quite a long list of such situations. Why is it, for example, the disposition of any surplus in the Fund on a wind-up of the Fund is something that when a problem is discovered years later warrants action to rectify and for some reason the sorts of things that we are talking about, the need for consent in 88 and the continuation of the potential for harm in 91 these problems which we were not aware of <b>at the time</b> only came to light later. Those somehow are ruled out of time. I think that is a point that needs to be considered because otherwise we should not take the fact that it was not known at the time as relevant to our discussion.</p> <p>So, the question of whether the 1991 amendments to the superable salary definition removed the potential for harm that could come if the superable salary percentage was not continued to be adjusted.</p> <p>I think we have already had quite a bit of discussion around this point. I think it is fairly clear that the words that created the risk of harm remained in the 91 amendment. So, the fact that the 91 definition replaced the 88 definition with identical potential for harm from progressive erosion I think is clear and it must be accepted. If there is any disagreement on that – it would be good to know.</p>
Tony	Can I just frame this more clearly that what you are referring to is the context of the 2016 consideration of the effect of 1991, not – we are not examining what the views were in 1991, we are examining what the trustees made of it when they looked at it in 2016 and then 2022. Yep?

Who	
David	Well, no I think we are asking the current trustees or anybody if they go back and look at what happened in 91 to the words of the definition – did the potential for harm due to progressive erosion stay in place or did they not stay in place?
Tony	Looking at it at what point in time?
David	Looking at it now. Looking back at 91 and comparing it with 88. We know that 88 introduced potential for harm for progressive erosion. The same words existed in 91.  Do we also accept therefore that the potential for harm continued in 91.
Tony	Looking at it as at today?
David	As at any point from the 91 amendment on. Yes
Tony	Well, that's a perspective from now? Ok.
David	The question is relevant because we are asking what was in the heads of the trustees [unclear]
Tony	So just to be clear here I think we are – just that's the point I am trying to distil – if you are asking what was in the heads of the people in 1991 then
David	No no – what was in the heads of the people who said that the 91 amendment had cleared away any problems – rectified any problems.
Tony	And that was said when?
David	Alan said that a few moments ago.
Tony	Right so we are talking about now. OK. Bruce?
Bruce	Hopefully this might help but in 2016 DLA Piper's advice was and I will read it:  <i>The Members agree (referring there to the initial employment contracts) the members agreement to a superable salary proportion for superannuation benefits was logically prior to and undoubtedly effective for the purposes of any consent that may be required from members for superannuation benefits to be determinable on a superable salary portion.</i>  So, the substance of that advice was that – and this is under the heading of the 1991 amendment – that the 1991 amendment was consented to by members by way of their employment contracts
David	So, you are skipping on to the next question Bruce
Bruce	Ok. Well, I will leave it at that then if that is breaking the flow
David	So, the only point here is that did the words defining the superable salary calculation remain the same in 91?
Bruce	With respect to –
Tony	So, David, you are saying this is your slide where you showed the wording of 88 and 91 where it had each – there were two limbs: one was superable percentage of total remuneration and that is common to 88 and 91 and the point of difference is that the 88 gave a unilateral power and the 91 required agreement and you are saying – 'Did the

Who	
	<p>91 wording which required agreement between member and Reserve Bank to – did that fix the 88 problem?’</p> <p>Is that-?</p>
David	That is correct with respect to progressive erosion. Is there anything that happened in 91 which fixed the problem with progressive erosion?
Tony	Right and you are saying it didn’t
David	Clearly not
Tony	<p>And you are asking whether the trustees agree now with the perspective as at now – whether the trustees agree that it didn’t fix the harm caused by the 88 amendment which was to set the superannuation on a lower trajectory?</p> <p>So would any trustees like to comment on whether the 91 fixed it or not</p>
Michael	It definitely didn’t fix it. It did slightly improve the position of members because absent the formula it removed the discretion that was previously there with the Bank. It could have cut the [inaudible that’s removed, that’s a gain..]
Tony	So, it dropped the downside – it cut the downside
Michael	Absolutely and that’s a gain its an undoubted a gain
David	No, to be clear – we are talking about progressive erosion
Tony	David, David...
Michael	And you have also got the wording of it is written up on the screen which is worded differently. In terms of David’s progressive erosion, I agree with him and it certainly did not fix the harm.
Tony	So basically 88 dropped the trajectory and in order... and then 91 said: Well to change that both parties have to agree so one party could veto a drop but the other party could veto an increase. So, you are basically stuck at that point?
Bruce	The Bank was in the driver’s seat and
Tony	You were defaulting to the post 88 change. Is that something that you would agree with Alan?
Alan	I think the trustees in the 2016 conceded that the 1988 was suspect
Tony	Sorry I am going to have to ask you to come up again for David
David	Yes, I can’t hear
Tony	Do you want to bring a chair up
Alan	I think the trustees in 2016 conceded that the 1988 amendment was suspect and as I have said before 1991 replaced it. So, from 1991 on the view of the majority was that it was a valid amendment and that governed the rules of the scheme from that time onwards
Tony	Do you think that it had any effect on 88?

Who	
Alan	No.
Tony	Did it make things better or worse for members compared to 88.
Alan	The rules from 88 to 91 were the 88 rules.
Tony	So, what you are saying is – 88 was probably a bit dogy and 91 (Alan – yeah) was technically robust but it didn't change (as you are saying) it didn't change the members benefits or there was no adverse harm for members was what you were saying?
Alan	Well, the claimants seems to suggest that contrary to what was put on the chart that between 88 and 91 when the 88 rules were in effect that somehow there was a basis for harm established. I think that is what they were saying, and that lower base then carried on and through until they retired. So that is what they seem to be suggesting.
Tony	Do you think that is wrong?
Alan	That's the bit
Tony	That's the bit it's like give me the evidence
Alan	I don't see the evidence because the chart that David put up right at the outset was that he said between 1998 and 94 there was no harm.
Tony	I think part of the argument there is that the executive remuneration policy kind of kept things pretty much the same so that the 88 change went through but it didn't actually make anyone worse off because the ERP kind of kept everyone whole.
Alan	That's right
David	That's right. It's because the Bank implemented the ERP.
Tony	David just hold on and then that might have – that would have been taken into account by the trustees at the time
Alan	I really don't know
Tony	We are speculating
Alan	We don't know, we don't know. There is no mention in the minutes of what I have seen – of the ERP being a factor.
Tony	And I think the argument is that somewhere in the 90s that employment remuneration plan policy dropped away
Alan	Absolutely
Tony	And then there was obvious harm at that point?
Alan	Yes
Tony	Which I think you agree with.
Alan	I think I agree with it, but the argument seems to be drifting a little bit because I would have thought I was hearing a suggestion from the claimants that there was harm done in the period 88-91.
Tony	I don't think – I think – my understanding I can clarify – that the members are saying there was no harm done because the ERP kicked in and kept everybody in that

Who	
	position so as I understand the members saying during 88 to mid 90s no issue but the potential if the ERP fell away then there is harm and that's what happened.
Alan	But let's be. I can't think in those sort of terms. I tend to think in numbers.
Tony	Numbers right.
Alan	And the problem I have got is that I was hearing in the earlier discussion that the base from 88 to 91 was lower than what it should have been.  That was what I was hearing. Then because the base was lower than you were starting from a lower base
Tony	If the ERP fell away
Alan	But then the ERP fell away because the base was lower, whatever change that happened was of the low base. That was what I was hearing. But on the other hand, I am also hearing that there were regular reviews of the ERP during that time so I am sort of struggling to
Tony	That's a good
David	The answer is Alan that you miss heard the first part. Nobody claimed that the base was lower at the end of the first period because the base was adjusted upwards by those superable salary reviews. The base was adjusted upwards twice.
Alan	Ok so that is good, isn't it? Isn't that good?
David	That is correct which is why no harm occurred during that period which is why when trustees asked the Bank if there had been evidence of harm during the period – the Bank said no. And that was quite reasonable.
Tony	Alan, I think I might be responsible for saying that the base dropped post 88 – I think it got adjusted up. My understanding is that it did but there were these reviews that brought it back up and then it was sort of post 91/92
Alan	94
Tony	94 thank you – didn't occur and the trajectory was lower. Is that better am I
Alan	So, I need to come back to the question. It seems to be suggested that 1988 is accepted as invalid but it had an ongoing effect. How did it have an ongoing effect?
Tony	I think we are at the nub of it. So, Bruce go ahead
Bruce	Somewhere in the minutes and I can't – I mark lots of things but not this one so I am not going to try and find it but Alan you made a comment that is attributed to you in the minutes to the effect that the ERP policy is not in the Rules and the construction I put on that is therefore it is not an issue for the trustees. I think members would say that that is precisely the problem that the ERP policy was not in the rules and that's what – it was the omission of that from the Rules that introduced or enabled the adverse effect and indeed DLA Piper's advice was that to rectify the 88 amendment what you would do is write the ERP policy into the rules and if that had happened then my construction would be that the regular reviews and adjustments <b>within the rules</b> could not have been abandoned.
Alan	No, I fully accept that



Who	
Bruce	So, the problem and I think in a sense you have put your finger on it – that the ERP policy was not written into the Rules and that is what introduced the adverse effect.
Alan	But who is responsible?
Bruce	The trustees make the rules – so the trustees are responsible for that omission
Alan	Do you really think so? I mean I have said right from my opening comments that in my mind there is a fair separation between the role of the trustees, the role of the members and the role of the Bank as an employer and I can't see why the trustees would say that they have to adopt the Bank's employment policy
	[People talking over each other]
Tony	It seems to me Alan's point is quite valid that the terms of your employment arrangements are entirely between the employees and the Bank. Nothing to do with trustees whatsoever and I think that should be agreed [David: correct] but then I think what the claimants are saying is that the – without some sort of economic adjustment so the change in 88 people would be worse off. Members would be worse off.
Alan	That's agreed
Tony	That was agreed too and that economic and so by definition as you said the trustees can't agree to something where it adversely affects members interests and so the economic substance of the ERP not the ERP itself but the effect of it needed to go into the Rules somehow to make sure there wasn't a harm and if there wasn't an offset for that harm then it wasn't valid.
Alan	But you are talking about a theoretical situation. I mean what should have happened and what actually did happen. The trustees are bound to administer the Scheme in terms of the Rules and if the rules do not include the ERP, then how are the trustees...
Tony	I think the reference to the ERP in some ways is not helpful because I think Alan you are absolutely right: that is an employment thing -- but the what the Rules say is that you can't change if there is an adverse effect and what the claimants are saying is that there was an adverse effect. You have to adjust so that there isn't one.  So, whether it is called the ERP or not it doesn't really matter, it is just that you have to have the change in the Rules to make sure there is no adverse effect.
Bruce	For the Rule to be valid there needed to be something in it that mirrored the substance of the policy
Tony	Or the effect of...
Bruce	Mirrored it or incorporated
Tony	So basically, what and the reason you are saying that is the case because otherwise there would be harm or an adverse effect. A risk
Bruce	The Bank would then be at liberty to abandon what was needed
Alan	We are going around in circles here a little bit
Tony	We are

Who	
Alan	With all due respect – the trustees in 2016 accepted that 1988 was invalid so we are not going to resile from any of that and we can have a theoretical hypothetical discussion about how you would fix it but at this point it is basically we are saying why do we need to fix it. Because in 1991 it was replaced. It wasn't rectified, it was replaced.
Tony	Right and I think the claimants are saying it is replaced with the harm still in place or the risk of the
Alan	And that is
David	Identically in place.
Alan	The majority of trustees do totally and completely disagree with that.
Tony	That the harm was left in place?
Alan	Basically, the harm stopped in 91 because then the rules of the game as agreed with the member
Tony	<p>Oh, I see – so that at that point you could the members and the Bank could agree to an arrangement for a different percentage.</p> <p>I think what the (I will use your words) what the claimants are saying is if the Reserve Bank had a veto it then you were stuck, and I think you agree 88 was invalid and harmful and the Bank could keep it at that level if they wanted to. If they said no, we are not going to agree to a change you are stuck. It didn't fix things because you are stuck at the lower level.</p>
Alan	But on a sort of a very casual review looking at it not with the benefit of 30 years hindsight but at the time when you looked at it and compared it with 88 and then it was <b>better</b> , and the advice was at the time and as I said this issue of whether it was valid or not has been a more recent development. All of the discussion in the review of DLA Piper was that whether that had actually been made
Tony	Technically passed and then there was all that looking about for minutes and who said this and implied that and must have done it as they wouldn't have done it – all that – circumstantial
Alan	<p>But there was no doubt at the time that the – we had a solicitor sign off and the trustees in their resolution probably had said that this complies with the relevant section of the Superannuation Schemes Act.</p> <p>So, at the time they did not see an adverse effect.</p>
Tony	No, I think that is where I raised that question earlier. Are we looking at it from the point of the view of the trustees at that time or are we looking at it from now and I think what they are saying like if you look at it now, you can see the harm.
Alan	Well in 2022 the trustees looked at it again and they did not see the harm and said it was validly right
Tony	It seemed to me that Pipers were saying technically if this thing went to court the claimants would lose because they can't prove these different points of evidence. It is like – it actually quite struck me the Piper's piece and they say the prospects of success was a relevant consideration for the trustees deciding whether it was valid or not but I think what the claimants are saying is that if you look through all the technical

Who	
	evidence about whether it was resolutions were passed or not and you look at the question of adverse effect – you can see the adverse effect.
Alan	That has always been the position and nothing I have heard so far would cause me to change the view I have in terms of the resolution ...
Tony	Which I think then goes back to this thing if you
Alan	That resolution ...
Tony	...Which I think goes back to this thing, if you, you know, provide some evidence than maybe it could be considered.
Alan	Well, as I said, I will look at it ...
Tony	Yep
Alan	... and as to the cause of the harm. But I still am struggling to see how the Trust Deed amendment, the agreement between the Bank and the member, basically causes harm going forward.
Tony	Right.
Alan	And as I said, I have a slightly different view of harm than what the members do.
Tony	Which is?
Alan	Well basically that, harm is reducing, and I noticed that David in one of his papers actually uses the term 'reducing' but he does, he actually doesn't mean that, he means 'less than' ...
Tony	It's less than the counterfactual, being...
Alan	... less than what it might have been.
Tony	Yeah.
Alan	But unfortunately, the heading in one of these papers talks about pensions being reduced ...
Tony	Right.
Alan	... which I think it quite emotional.
Tony	Oh, you mean pensions have always gone up?
Alan	Always, pensions ...
Tony	I think what they're saying is that it hasn't gone up as much as it should have.
Alan	It hasn't gone up as much as it should have.
Tony	Yeah.
Alan	And, you know, there is another argument about harm, that says that pensions can't be reduced.
Tony	Yeah.

Who	
Alan	And that's certainly, there's no argument ...
Tony	So, I think, I think what you're saying is that on review by Pipers the '91 change was technically valid ...
Alan	Yeah.
Tony	... and that corrected the invalidity of the '88 ...
Alan	No, it didn't correct it.
Tony	... sorry, well, it replaced it.
Alan	It replaced it.
Tony	It ...
Alan	It didn't rectify it.
Tony	... it didn't rectify it, it just replaced it.
Alan	That's right
Tony	And it was technically valid. There's no evidence, looking at things now, that there's, that pensions were lower than they otherwise would have been. And third, they didn't reduce, they have actually increased.
Alan	Yeah, yeah.
Tony	Is that ...
Alan	Yeah. And I think the critical thing is, my opening comment was that the setting of superable salaries is an employment issue, and the, it is not driven by what the Trust Deed says. Basically, the Trust Deed says, well, to the members, you and the Bank agree on what it is and [2:29:37] ...
Tony	... and that money will come into us, and we will do our thing.
Alan	... we will do our thing with it.
Tony	But it's not our job to say how much comes in.
Alan	Definitely not.
Tony	Okay. Well, it's ...
David	And nobody, but nobody, but nobody is claiming that Alan, so let's leave that one aside. No-one is claiming ...
Alan	Can I sit down now?
Tony	Please.
David	... The Bank is responsible for ...
Tony	Thank you for your forbearance.
<b>2:30:00</b>	

Who	
David	... so, the '91 amendment which 'replaced', let's use that word, replaced the '88 amendment. The '91 amendment had the same risk of progressive erosion, identical, unaffected, not moderated in any way whatsoever. So, if the '88 amendment was invalid because there was no consent for that risk, and the '91 amendment had an identical risk of progressive erosion, then the '91 amendment is equally invalid if there was no consent.
Unknown	[inaudible]
David	But the question ...
Unknown	[inaudible]
David	... the question I then come to is whether the individual employment contracts provided that consent. This is what Alan is maintaining
Tony	No, no, I don't think he is. I think Alan is saying the introduction of the limb of the any change from '91 requiring agreement between the Bank and the member fixed the problem of the absence ...
David	But you articulated yourself in your summary of what we were saying, it could not have fixed the problem because the problem could only be fixed by increases in the superable salary percentage alongside changes in the structure of remuneration.
Tony	... yeah, so I guess....
David	There was no ...
Tony	The point of difference is whether the 1988 change had the effect of an adverse, whether it harmed members, and Alan is saying that the harm was the absence of any change requiring agreement between member and Bank, and that was fixed in '91. And I think, the point that is missing, or the point that is not, you know, not being seen is the idea that '88 set up a problem which '91 didn't fix, and it's, I think there's no meeting of minds around that point at the moment.
David	... that's correct and so we need to ...
Tony	Yeah.
David	... we need to somehow find a way of articulating what seems to be a straightforward logic which we clearly have not been able to ...
Tony	Yeah.
David	... do to Alan's satisfaction.
Tony	That would be right.
Tony	My suggestion is we go onto the next question.
<b>2.32.44</b>	
David	Which is exactly the question about consent being achieved. Now the argument here is that there was in some way or another the '91 amendment, because it did not require consent because at the margin it improved things, but it left the bulk of the problem in place. Because if the margin has improved things, somehow it created

Who	
	consent for the bigger problem. How is it? Let's go back to the example I used in my introduction. If there was a typo in the '88 amendment and the '91 amendment simply fixed that typo but had no other effect, fixing a typo does not require consent. The new amendment, the new rule would replace the old rule, it's a new rule with the typo fixed. How is it that consent is no longer required? Substantively, nothing has changed.
Tony	This is quite closely related to the point we were just discussing I think.
David	It is.
Tony	Yeah, so in other words, by adding the requirement that the member has to agree with the Bank, how did that, how did that – fix things, yeah? And I think it goes back to the point where I think, there isn't, there isn't a shared view about you know, I think your argument is that if you make something worse off and then the only way you can get of that worse off position is if both parties agree. The default is the worse off position.
David	That's correct.
Tony	And so, I think that's, that's not crystalising I think in the current context, in the current discussion. So, I think maybe that's a to do thing for you guys.
<b>2:35:25</b>	
Tony	Yeah, I think we've kind of covered the discussion as far as it will go, and it will be reflected as just a point of difference of view at present ...
Bruce	If any of the other trustees want to comment.
Tony	... sure. Sarah – no? Okay. Why don't we go to the next question.
David	Right, so, this is the question to do with process, which is the question which Michael raised, and said we didn't really address this which is quite correct, we haven't emphasised this question at all. This is a, the point that there's an evidentiary dispute as to whether it's likely that the 91 trustees intended to change the defined benefit division rules. Whether the Board signed off on a change of the defined benefit division rules and what were the 91 trustees doing when they told members of the defined benefit scheme that there had been no change to their rules. Is there evidence that the trustees can point to which backs the conclusion that there was an intention to change these rules other than citing DLA Piper?
Alan	I am going to have a go and caste through that as well.
Tony	Very noble
Alan	But I do think that the question of whether the trustees intended to change the Defined Benefit rules is fully canvased in the DLA Piper opinion and I really do question whether the claimants could have reasonably expect the trustees of that time when they made those resolutions to do anymore. What else could they reasonably do? Now we did have the opportunity to consider quite detailed submissions from Michael as to why he thought that the 1991 amendment was not to the salary was not intended to cover the defined benefit division but the trustees at the time basically decided that it did and it was their intention to do it and I rely pretty heavily on the comments of Mr. O'Brien where he said that we wouldn't have ended up with the outcome that we did, in other words with the salary definition applying to both divisions, if the process had not been signed off directly. Those are not his exact words but his words to that effect. So, the trustees at the time pretty much based on the detailed review and research that

Who	
	<p>DLA Piper had done, basically decided that the change to the salary definition which became a definition applying to both divisions was properly intended.</p> <p>Now there was a lot of discussion about a FINSEC submission and no-one has actually seen the FINSEC submission to actually say what they wanted, but there was suggestion in Barry's file notes and things that the salary change that was made was intended to address the FINSEC. So subsequent to the Trust Deed changes being made, there's no evidence that FINSEC kept coming back to this issue. So whatever change was made to the salary definition as applied to the defined benefit division and also to the defined contribution division, seems to have resolved their issues, because they didn't keep coming back to it. And that seems to have been the trigger for the record in the Minutes to say that an amendment was made to the salary, to the definition of salary in the various Trust Deed drafts that were coming into the system.</p> <p>Now this question here, do they believe that the '91 trustees intended to make such a material change without exclusively disclosing that intention? Well clearly when you read the DLA Piper opinion, and I think this is also accepted by Michael, that the timeframe was particularly tight, and this issue became really onto the table in a very short period of time. And there were trustee meetings one day, board of director's meetings the next day. And the paper, basically the whatever documentation ...</p>
Tony	The paper chain
Alan	<p>... that was produced to change the salary definition was really coming through in day one or day two. So, it wasn't a case of disclosing the intention, you know, up until the FINSEC submission, and this issue was being considered, then as of that time the definition of salary was the old definition of the DB scheme and a new definition for the defined contribution scheme. It was only in that very short period of time that somehow they became amalgamated and we have one definition applying to both schemes. But this bit here, this last sentence, is totally and completely wrong, and I'm really surprised David that you've even put this in there. That you said 'They're denying they've made any changes to the DB rules' but the papers that went out to members are quite clear that there were a number of changes made to the DB scheme and various clauses and sections in the Trust Deed are referred to, a number of them are referred to. And DLA Piper make a big thing about the fact that there were a number of changes made to the DB rules and the section where salary is defined, or the clause where the section where salary is defined, is one of those clauses that is referred to as being having been changed. So, I think that last statement is totally and completely unfair.</p>
Tony	So, you're saying it was intended and disclosed?
Tony	So, sorry, the correction to this is that it was intended, you would say, the change was intended?
Alan	No, no, I'm not saying it was intended. I'm saying, he was saying without explicitly disclosure being mentioned ...
Tony	Yeah, yeah, yeah.
Alan	<p>... I'm saying there really was no opportunity, in a very short period of time to do it because you know, I think, everybody accepts the early drafts of the Trust Deed had two definitions of salary. It was only the final version that basically came up with a definition that applied to both the DB section and the DC section.</p>

Who	
Tony	So, so, it was intended to make a change to the defined benefit part?
Alan	No, no, the defined contribution is a new section...
Tony	Yeah, yeah but the idea that you would have the same definition for both contribution and benefits ...
Alan	Yeah.
Tony	... that was intended, and it just wasn't disclosed
Alan	No, it wasn't, no ...
Tony	... because there wasn't, it wasn't intended.
Alan	It wasn't intended, no. In the early days, there was a separate definition, but it was only at the last minute ...
Tony	So how did, how did, why did it come together as the same at the end?
Alan	Well, that's the bit that people are really ...
Tony	It's unknown.
Alan	... they don't know, they really don't know.
Tony	So, it wasn't intended and it wasn't disclosed and it's not clear why that happened?
Alan	Right up until the last minute there were two definitions.
Tony	But so, the idea that there was a – one definition which changed the DB definition just happened but it's not clear why or ...
Michael	I think Alan's arguing that it was late in the piece, a conscious intention to make that change, the day before ...
Tony	Oh, the day before? But it wasn't disclosed because there wasn't time?
Alan	No, no.
Michael	The trustees met on one day and Board met on the next day, so obviously there was no communication with members at that time ...
Tony	But, but ...
	... [inaudible] ...
Tony	... but was it intended to, intended to change, it was obviously intended to change the definition in the DB scheme?
Alan	No, no.
Michael	That's what's – That's the question in dispute ...
Tony	So, so that's what I'm trying to speak to.
Alan	No what I'm saying it was, originally there was a scheme that was purely defined ...
Tony	And you created a contribution scheme ...



Who	
Alan	... created a new scheme.
Tony	... a new scheme, that was the focus of the thing.
Alan	... and that had a definition of salary which has never been disputed ...
Tony	Right.
Alan	... by anybody ...
Tony	Right.
Alan	... which was agreed between the Bank and the member.
Tony	For the contribution scheme.
Alan	Yeah, for the defined contribution.
Tony	Yeah.
Alan	So that was seen to be totally appropriate ...
Tony	Yeah.
Alan	... for whatever reason for that scheme.
Tony	So, so why did that suddenly at the last minute ...
Alan	Well, that's ...
Tony	... get imported to the ...
Alan	... well, that's the bit that no-one really knows.
Tony	... so, it's no clear?
Alan	Not clear.
Tony	It's unknown?
Alan	Unknown. So, there are ...
Tony	Is it an accident or a ...
Alan	Sorry?
Tony	... do you think it's accidental?
Alan	Michael would argue it's a mistake.
Tony	But nobody knows?
Michael	Accident or mistake.
Alan	Yeah, accident or mistake. But Jim O'Brien who was the secretary of the board of trustees – was he the secretary of the board of trustees or the ...
Michael	Yes.
Alan	... and of the Board?

Who	
Michael	No not of the Board, just the trustees.
Alan	... board of the trustees. He would argue that whatever happened, was correct process was followed.
Tony	Right, but it was a very late change ...
Alan	A very late change.
Tony	... to the defined benefit scheme ...
Alan	Yeah.
Tony	... of salary and that, would that, that was a material change then?
Alan	Well, that is another argument as well because the, there was a comment in the Minutes that trustee changes were approved by both the trustees and the board ...
Tony	Yeah.
Alan	... with only non-material, is that the word? ...
Tony	Yeah.
Alan	... I can't think of the word...
Tony	Yeah.
Michael	[inaudible] not affect substance.
Tony	Yeah.
Michael	Minor drafting.
Alan	... minor drafting changes.
Tony	Right.
[2:45:49] Alan	Now again, putting your mind to how the trustees in 1991 might have thought about this, they could have looked at that and said, this looks fine, you know. The sort of issues that we're now considering about harm ...
Tony	Right.
Alan	... and that sort of stuff, they would look at that and say ...
Tony	It sounds about right.
Alan	... it's a possibility.
Tony	Yeah.
Alan	This looks fine.
Tony	Right.
Alan	It makes sense to have one definition ...
Tony	Yeah.

Who	
Alan	... of both schemes.
Tony	Yeah.
Alan	Now ...
Tony	But they didn't actually kind of think about what it would mean for the DB scheme?
Alan	... no, no.
Tony	But they didn't consider its impact or ...
Alan	No.
Tony	... right.
Alan	They just looked at it and said, well you know ...
Alan	makes life a lot easier ...
Tony	Right.
Alan	... if we have one definition ...
Tony	Right.
Alan	... applying across both schemes.
Tony	Right. So, it's fairly sort of, a glib kind of look at it.
Alan	Well ...
Tony	Obviously with the pressure of time ...
Alan	... I think people like Don Brash would baulk at that and ...
Tony	Well, it sounds like given the timeframe, but you know, you'd have to be very...
Alan	... it was a very short timeframe.
Tony	Yeah, yeah. So that, by definition the timeframe makes it ...
Alan	Makes it look [inaudible].
Tony	... yeah.
Alan	And so, you know, I see Michael has written a very detailed paper as to what he thought happened ...
Tony	Yeah.
Alan	... and best, you know, the best he could come up with was a mistake.
Tony	Right.
Alan	Which you can't argue with ...
Tony	Does that seem reasonable to you as a possibility?
Alan	... well, it's a possibility.

Who	
Tony	Yeah.
Alan	But you have to focus on the outcome and the outcome was the Trust Deed was signed off by the Board and by the trustees.
Tony	Yeah.
Alan	It was signed off by the legal advisor to the Trust, to the superannuation schemes ...
Tony	Yeah.
Alan	... he issued a Section whatever it was certificate ...
Tony	Yeah.
Alan	... saying it complied with the Superannuation Scheme Act.
Tony	So technically it all wrapped up.
Alan	It all wrapped up, yeah.
Tony	Yeah.
Alan	All wrapped up. But the question then becomes ...
Tony	But nobody knew what it did?
Alan	... well, we know what it does.
Tony	Right.
Alan	The issue is, you know, how did it get there? And you can ...
Tony	Well just on that, what it does ...[inaudible – Michael made a comment]
Tony	... also, on what it does, I mean, it did change the what, it did change salary, or what counted as salary which ...
Alan	... yeah.
Tony	... I think the members are saying, well that changed things quite a bit over time ...
Alan	Well, it did. I think, looking back ...
David	No, it didn't change the basis for salary calculations for superable salary calculations, it left it at the 1988 ...
Tony	Yeah, yeah, that's what I'm saying, which held it at a lower level than it otherwise would have been.
Bruce	It didn't fix the problem
Tony	It didn't fix the problem so that was because at the time there didn't seem to be a problem in '88. So, if you were a 91 trustee you would think there is nothing to fix.
Michael or Bruce	Mistake on a mistake
Tony	A mistake on a mistake

Who	
Alan	And this looks better. The new definition looks better.
Tony	Right right the symmetry. It looks tidier and yes, right..
Alan	So, coming back I mean, you know, then denying – I mean as you say that point is picked up again by DLA Piper opinion as to the fact that there were a number of changes to the rules and the section where the salary
Tony	So, you think the last phrase is provocative and unnecessary.
Alan	Absolutely right. Absolutely incorrect. I just don't think the members should be
Tony	There was no denial.
Alan	No
Tony	Sounds like there is common ground that it submitted an Agatha Christie sort of mystery.
Alan	When we are dealing with so called facts that you know the words any change is totally and completely wrong.
[2:49:24] Tony	So, hold on, I am sure there will be some discussion. You go first Michael
Michael	<p>Because Alan has actually treated my argument somewhat fairly. What I just want to add is Don Brash. Don Brash raised these issues with us. The trustees consistently refused to engage with Don over the whole period this issue was reviewed. Don has been quite clear there cannot have been any intention to have changed this as it affected the DB scheme. Don is the chair of the trustees. He was in this meeting. He was chair of the Board. He was the Governor. The Bank executed this change. Ian Harrison has sworn an affidavit in an earlier court case as trustee at the time not being aware of any change to salary as it affected the DB scheme. He introduced the trustees commission from past trustees 1991. Not one of them indicated any consciousness of an intention to make this change.</p> <p>And in terms of disclosure, I mean Alan is right there were some other minor changes to the DB scheme. The trustees in 2016 accepted legal advice that we have been in breach of – the 1991 trustees have been in breach of the law in not disclosing this change to members and apologised to members. We were advised at the time by the lawyers that it was out of time in terms of being prosecuted for it but there was still some risk of civil action being taken against trustees.</p>
Alan	Let's be clear – on the last point that DLA Piper – what Michael has said is correct, but they also said the failure to disclose that amendment did not make it invalid
Tony	I will just repeat that for David
David	Yes, I heard that one
Bruce	Just to pick up on the disclosure – I mean I will just go through what was disclosed to members and bear with me. In a memo that shortly followed the execution of the 91 amendment the trustees wrote – <i>Those members of the DB scheme who choose not to transfer to the DC scheme will simply remain in the existing plan and enjoy the benefits prescribed in the rules of that plan, which are unchanged by these arrangements.</i>

Who	
	<p>And then a few days later in the annual report the trustees reported to the members that <i>Members remaining in the existing scheme including pensioners are <b>unaffected</b> by these arrangements.</i></p> <p>So that is the 91-amendment deed creating the DC scheme. I mean Alan is correct that on page 8 of the first memo I referred to there was a short piece that said there have been <i>a number of other consequential changes (consequential because the DC scheme was incorporated into the existing DB scheme deed), and I think it was other minor changes to tidy up minor problems or something like that.</i> One of the rule changes referred to was Rule 2. Rule 2 is the definition section at the beginning of the deed which at that time I think included 23 definitions and one of those changes Alan would say was the 91 amendment to the salary definition which has been the focus of the dispute so the question is whether that change that Alan says was fully disclosed – one might ask the question whether it was disclosed or buried – if it was intended.</p>
Alan	I did not use the words fully disclosed
Tony	<p>No no I think this is a bit of an unhelpful phrase here “denying any changes made” – I mean that can be seen to be provocative from the trustees’ point of view and from Alan’s point of view which I acknowledge but I think it is not material and it doesn’t need to be there.</p> <p>As I understand it – Alan you are saying that the fact that there was changes was disclosed and it was also but they were for the most part considered to be not material or not having an effect of relevance to the members so there was a sort of yes we are making some changes but on the other hand they are I think – you read out the phrase that they are ‘unaffected’</p>
Bruce	They were consequential
Michael	[inaudible] two documents that Bruce is mentioning...the statutory document is the annual report [inaudible] disclose any rule changes. The second [inaudible] no changes affected the DB scheme at all. Then there is this other document about the establishment of the DC scheme, it’s about a 15 page document it does have a reference to [Inaudible]
Tony	Right
Ian	Just if I could just say something
Tony	Please come up. You need to take the stage
Ian	In the statement that Bruce read out there was quite a bit of discussion about that statement and there was a lot of emphasis on the word ‘benefits’, that no members benefits will be affected by the change. And I guess that has been an issue of discussion and contention between various groups.
Tony	The substance seems to me to be actually quite agreed and that is that it is not clear how and why the changes were made at the last minute to the DB scheme and both parties seem to agree with that.
Michael	Or therefore whether they were legally ...

Who	
Tony	And the consequence of that is probably not agreed but the fact that there was its not known why they were made and what the intention was is agreed.
Michael	There are gaps, clear gaps in the...
Tony	Yeah, yeah
Alan	Can we just also be clear that the majority of trustees agree that the 1991 amendment was validly made
Tony	Technically valid yeah.  I think the point of disagreement is whether it was correcting the harm caused by the 88 amendment and that is the point of disagreement, I think.
Michael	No, I think there are two disagreements
Tony	Two disagreements?
Michael	I argued always that it simply was not validly made
Tony	Oh ok, you would dispute the first point that it was technically valid – you say not valid. Ok
Peter Katz	Just a question a point – it does seem to me that the last-minute adjustment was made in 1991 it may not have been fully understood what the impact was
Tony	Right
Peter Katz	So, my question is that if that was the case and its proved – go back and say yes, all things equal the impact of 1991 was adverse to members does that have any – does that give any sort of – to support the trustees to say well there is a case to go back
Tony	I think
Michael	I mean can I just clarify that -- in 2022, all trustees including Bruce and I accept that there is no additional adverse effect from the 1991 change [inaudible]
Tony	To be fair you are saying that because it didn't fix the 88
Peter Katz	It was understood – I personally believe that a lot of what we are talking about now wasn't understood at the time – what was being made because the impact hadn't even started to happen and
Tony	You are going back to the question of if evidence can be shown now that there was a harm which wasn't fixed then that should be brought forward.
Peter Katz	I guess for me new information is that this whole change in 1991 was a pretty quick thing and no one is blaming anyone but other than to say
Tony	No one understood it
Peter Katz	Is that in itself this should be looked at without blame or anything
Tony	The last-minute kind of importation of the salary definition from the contribution scheme into the benefit scheme – that looks tidy but we didn't really think about what it would do.

Who	
Bruce	Putting it differently if someone does something with intent that they didn't know about – is that a mistake?
Tony	Sure sure. Alright
Alan	It begs the question there were great minds
Tony	Great minds that were
Alan	Of the trustee board and directors basically saying that all of these people just let it slide through and it really does make you question, did they know what the hell they were doing which is basically [inaudible]
Tony	Certainly, he didn't say well if they were great people they wouldn't have made a mistake
Alan	I don't know
Tony	It is an unknown
Alan	That was the outcome, and they had another opportunity to look at it when they signed off
Tony	Sure, I think the point now is like seeing it in from today's perspective, if it has had this adverse effect which you don't agree with then it was either thought of and dismissed or not thought of or not understood. Yeah
Alan	Let's move on
Tony <b>2:58:57</b>	Next question
David	So, this is the question of whether the individual employment contracts have a role to play in this discussion. Murray said on his way out that he couldn't see any reason why there would be a reference to the superable salary percentage in individual employment contracts if not to implement an agreement between the Bank and the member of the number to use for calculating superable salaries. So here I think it would be good to turn to Bruce to articulate the range of reasons why you would want to include a superable salary percentage in the employment contract not for calculating superable salaries but for other reasons.

Who	
Bruce	I will just give my understanding on that, and it is based very much on a Privy Council case, but my understanding that I take from it is essentially that let me back up a moment. The clause in the employment contract says for the purposes of this contract and I emphasize those words, superable salary shall be deemed to be x percent of total remuneration package. The contracts is varied a little bit from individual to individual but in general for most cases there were two purposes in the contract or two places in the contract where there was a reference to superable salary. One was as the base for redundancy compensation and retirement gratuities. Neither of which have



Who	
	<p>anything to do with the superannuation fund. So, the construction I put on that is the contract was importing the proportion that had been – the superable salary that had been determined by the Bank, for other contractual purposes and that seemed like a logical rational thing to do.</p> <p>The other is the reference to – it said superable salary shall be the basis for superannuation contribution and my understanding of that is a matter of the legal construction of a superannuation fund set up as a trust, the trust deed is an agreement between the employer and the trustees. The members are actually not party to that deed. They are beneficiaries of the deed, but they are not party to the agreement that sets up the Trust.</p> <p>The way in which the members relate to the Trust is contractual through their contribution and the reference in the employment contracts to superable salary being the basis for contributions to put it in kind of simple terms was the contractual authorisation for the Bank to deduct the contributions from pay. So that clause was needed – it was in the contract for other purposes namely the basis for redundancy and retirement perpetuities and it needed to be in the contract to provide the contractual authorisation or the contractual link of the member to the Fund. So, I mean my point is that it was entirely logical and necessary that that clause be in the contract for the purposes of the contract. It did not constitute agreement for the purposes of an amendment that had been made to the rules which though respecting what Alan says he thinks it was disclosed. I think I would say that it was not – that introduction of agreement for when your superable salary for fund purposes was not and could not have been known to the members which then raises the question well how can you agree to something that you don't know about.</p>
Tony	Comment from the trustees?
Alan	My answer to the second question is no
David	Sorry I missed that
Tony	Alan just commented “the answer to the second question on the slide is ‘no’”.
Michael	My answer to both questions is no.
Tony	So that is agreed. Ok
Bruce	And there is no connection
Tony	No to both
David	That's a pretty fundamental agreement if it is an agreement. If trustees don't think that the individual employment contracts had a role in providing consent; that strips away one of the two legs that we thought they might be relying on.
Tony  <b>3:04:40</b>	Next question David.
David	<p>So, what justifies truncating the evaluation of harm to that first five years only.</p> <p>I think we have heard from Alan that it's because in 91 there was a replacement to the harmful, potentially harmful, provision and that meant there was no need to ask any</p>

Who	
	questions relating to harm beyond that point. It is a bit of a curiosity that 91 is not where the first five years ends – that's a little earlier -- but is, that Alan's answer, I think. Am I correct in that?
Alan	Yes.
Tony	The answer is yes.
David	Other trustees – Michael, Bruce, Ian?
Michael	Well, I mean there was never a good case made for truncating at that point. The closest I ever came to hearing one probably related to the fact that salaries, pensions, were determined on the last five years of salaries so it was sort of to encompass anyone who had retired in those first few years after the change was made. It was clearly not my view. My view all along has been that we needed to look at harm more generally so my bottom-line answer is nothing would justify truncating it but that is the closest to a rationale that I heard in the context where DLA Piper was offering those stories in 2016. That somehow signing contracts had fixed things that which we just discussed in answer to the previous question is now generally accepted did not do so.
Ian	Yeah...[inaudible]
Tony	Sorry, Ian, do you want to just pop up
Ian	Other than giving my rationale which is what Michael articulated– that is was the rationale was based on the last five years where – with pensions related to the average of five years from retirement, the previous five years that was considered like a time to be the period of? [this paragraph is not very clear].
Tony	Right so it's really for the people who are about to retire in that period?
Ian	Yes
David <b>3:07:30</b>	So this comes back to a question I think we haven't really addressed directly and that is the issue of whether the members' interests in the fund at the time of the amendment are limited to people who are retiring immediately. Or interest in a superannuation fund actually refers to the future benefits that somebody might get 20 years later from the position that they have currently in the fund their contributing years in the fund and the rules of the fund that govern the link between their final pension and their final remuneration.  I mean to say it is only the five years average from the date of the 1988 amendments is to say that future interests that are coming from an existing set of contributions are somehow irrelevant. Is that what you are saying Ian?
Ian	I don't – I am not sure if anybody has access to this but if someone could look at the text of Rule 7 what it actually said in 1988 [hard to hear]
Tony	Before it was changed or – it would be helpful
Alan	Before
Tony	No no I was going to say I would be quite interested before the 88 amendment as well.
Michael	Several rules have changed since then so...
Alan	Rule 7 is the one that allows the change in the first

Who	
Tony	Whether or not there is an adverse effect
Alan	And DLA Piper made quite strong reference to - reference up to the date of the amendment.
Michael	Yes that's right.
Alan	I am never sure what your interests in the scheme are up to the date of the amendment means.
Bruce	I think the courts have been very clear on that question at least as I understand it that it is your interest in the pension based on the future five years of salary immediately before retirement in respect of your contributory membership up to the date of the amendment so it's the membership up to the date of the amendment in respect of the salary in the five years preceding retirement.
Michael	Just to illustrate it there would have been to nothing to stop the Bank unilaterally cutting superable salary percentages in respect of future service each beyond that date in 1988 but not for the previous
Alan	So that is the point I am trying to make. It really does come back to this argument about the harm and the future you know because I am sure clause 7 talks about up to the date of the agreement; it doesn't talk about into the future.
	People talking over each other
Tony	So just hold on there – Alan go ahead
Alan	But I think this is going to be a contentious point. I just want to remind members what clause 7 says.
Tony	So, as I understand it just hearing that there are two perspectives are, what's the thing that you are limiting up to the date of the amendment and I think Michael and Bruce are saying that it is the range of beneficiaries up to the date of the amendment. It is not what their benefit will be up to the date of the amendment.  So, if you say
David	Let's clarify it in the following way. If somebody has joined the superannuation scheme five years before the amendment and they are young. They are only 25 years old at the time of the amendment and they are not going to retire for another 30 years. The five years that they have been contributing is going to produce an entitlement to a pension in say 25 years when they retire and the calculation about what that is going to be is a combination of what their remuneration is going to be way out in the future and the rules of the Scheme today.
Peter Ledingham	Years of service
David	Sorry say again Peter?
Peter Ledingham	Effectively just your years of service that it gets multiplied by
Michael	Years of service and a set of rules– so I mean take– take David's case right. I have been a member of the scheme for five years from the time this rule was changed and retired 25-30 years later. In principle my pension is five years of service under the rules

Who	
	from pre-88 and 25-30 years of whatever rules subsequently prevailed. So, the interest in the scheme as at the date of your membership is the rules and the service that apply in that first five years.
Tony	Right
Michael	Which is my overall pension entitlement
Tony	So, the assessment of whether there is harm is where there is change to the rules would impact on that group of people for their financial interest in that five years.
Michael	That service prior to 1988 so that is why I mean...
Tony	Probably actually this is quite a key point isn't it because all of this is going back to whether or not there was an adverse effect or 'harm', and this goes to the question of in your view why the changes made then created that harm
Michael	In respect of past membership
Tony	Yeah, and maybe and I think that is also not understood by
Bruce	DLA Piper share the view you have just expressed except when it came to looking at the actual harm they then sort of seemed to think it was more about the future. So, there was a bit of inconsistency in their analysis.
Tony	But I think it is sort of quite a root point.
David	Yeah, absolutely yeah
David	Absolutely yes and so it speaks to Ian Jupp's understanding that it is only the five years average after the amendment of average retirement remuneration after the amendment which matters which is clearly not the case for somebody who has just been in for five years is not going to retire for another 25 years – it affects their final retirement pay as well.
Tony	What I suggest is that you give an example of that, of how the change would affect somebody under the changes that were actually made in 88 or 91
David	So if this person we are talking about has been in the scheme for five years
Tony	The Michael Reddell archetype
David	Yeah, something like that, they've been in the scheme for 5 years and they are not going to retire for another 30 years say, they have been in the scheme for five years where the rule says their final five years of superable salary on which their pension is going to be calculated is based one way which happens to be normal pay but there is a change in the rules which says now it is going to be a percentage of total remuneration and as it happens that percentage of total remuneration is going to produce a number which is less in 25 years' time than it was under the ordinary salary calculation because the Bank stopped doing adjustments. So, for Michael he has got five years' worth of entitlement to a future pension on the basis of a rule which has now been changed producing a lower pension for him in 25- or 30-years' time.
Tony	That's because the five years prior to retirement could be – under the pre 88 arrangement it was very simple salary based thing. Under the post 88 post 91

Who	
	arrangement it is a percentage of total remuneration but that has turned out to be lower than the counterfactual
David	Yes
David	That's correct and it was a structurally expected to be lower because of the likely path of fringe benefits
Tony	Right so there is two changes but there is two reasons for the changes. One is because of the structure of the remuneration package changes and you get a reduction in fringe benefit and the other possible changes that the superable salary percentage is not adjusted
David	To compensate for that
Tony	For the reduction in the total remuneration package.
David	Yep
Tony	And you are saying that the 88 problem was that the Bank could decide the percentage unilaterally but through that
David	That was one of the issues the other issue that we are focusing on is the potential for progressive erosion because of...
Tony	<p>No no I am just going to try and recap how I think all these things are joined together. So, it goes to a unilateral percentage thing for 88 but in practice there are adjustments made which keep the members whole for that period for 88 to roughly the mid-90s.</p> <p>And the practice says no loss because the Bank is making those adjustments to keep the person in the same position as they would have been without the 88 agreement but then that falls away and the adjustments are not made and because the 91 agreement ah change requires both parties to agree – the increases in percentage are not made. And the member can't force that to be made so they finish up worse off than they would have been without the 88 amendment.</p>
David	Correct
Tony	<p>Yep, ok. And then you are saying in addition to that when you look at the harm, the reason why – going to the point in question which is what is the meaning of up to the date of the amendment and you are saying it has got two components: it is like what is the basket of members that are affected – that are under consideration and then secondly what is the five year period of remuneration that counts which is your out-years which is five years prior to when you retire which may be which is not five years up to 1991 but it is five years up to the point of retirement for members as at 1991.</p>
David	Correct.
Tony	So, all the members at that 1991 have an interest in their five-year remuneration prior to their retirement and what is in that five-year remuneration bucket is affected by the rules that were set in 88 and 91.
David	Yep, and it is affected by what the Bank does to their salaries which is nothing to do with the trustees. No responsibility of the trustees at all.

Who	
Tony	Sure, that is purely an employment thing which is like you have a got a bigger job bigger pay or whatever or less or whatever that totally separate as contract law.
David	Precisely
Tony	Ok.
David	It is only the consequence of the rule change which means structurally superable salary can now move differently from what it would do before.
[3:20:17] Tony	So, your argument here is that in relation to the five years that,..why was it truncated to just five years forward – you are saying in effect that that is a mistake. That was wrong.
David	Yes clearly. There is no logic to it.
Tony	What counts as a five years in the future prior to the retirement of members as at 1991. And so, you are saying that there was an error in limiting the evaluation of harm to five years after that 88 amendment
Bruce	Unless you thought '91 fixed things
Tony	Unless you thought 91 fixed it, which you say it didn't
Bruce?	Even then it should have been 6 and a half years instead of five.
Tony	Right right ok.  Alan what did you
David	That was the last question, so I think we have narrowed in on this major issue of whether the 91-amendment ended up with a replacement definition of superable salary which somehow no longer needed consent even though it contained exactly the same potential for progressive erosion under the 88 amendment
Tony	To cut to the chase on this David – you are saying that in effect the 91 amendment was not valid because it wasn't consented to by members which was required because it contained a harm or a risk of harm.
David	So, let's be very careful with the language here I normally am not trying to be careful with the language but here we need to be very careful with the language. The marginal change to the – in 1991 to the definition was not harmful. The <b>marginal change</b> was beneficial because it provided a veto over cuts in the superable salary percentage. What it did not provide however was a veto over the absence of reviews. So, to say that the 91 amendment by itself did not require consent is correct because the 91 amendment on its own terms did not introduce a risk of adverse effect.
Tony	It didn't ensure that the members position was held neutral relative to pre-88?
David	That is correct too. So, it is possible if we use slightly different language for both Alan and me to be correct. Alan can say along with DLA Piper and others that the change in 91 did not require consent and they can even argue it was validly made in process terms. I can agree that the change in 91 did not itself -- the change did not require consent -- but what still was unconsented was the harm that would come from progressive erosion. And because it was still unconsented
Tony	The 88-problem remained

Who	
David	Correct
Bruce <b>3:23:45</b>	<p>Could I just throw in here that DLA Piper also – probably quite late in the piece -- offered the proposition that the 91 change actually rectified the 88 invalidity and the proposition was that it did that by the 91 amendment determination by agreement – the proportion by agreement took things back to as they were pre the commencement of total packages – in other words back to before anyone and when salary was ordinary salary and matching the amount you were actually paid rather than some notional amount and I mean my view is that it is just totally factually incorrect. There was no factual basis for that proposition. And I am not sure whether the trustees accepted that DLA Piper's advice on that point or not. The annual report I think is kind of a bit ambiguous. I just don't know whether the trustees accepted that advice from DLA Piper or rejected it.</p>
Alan	<p>I think we need to clarify one of the draft resolutions that was put to the board members at the meeting of the trustees at the time was basically to say that the 91-amendment rectified 1988.</p> <p>I basically expressed concern about that, and that resolution was withdrawn so the issue is not addressed.</p> <p>And it is not a case of endorsing the [inaudible]</p>
Tony	<p>But the trustees in relation to the 91 amendment did say they agree they are satisfied and agreed that no adverse effect has been established in relation to the 91 amendment.</p> <p>That's the – just by itself in isolation yep</p> <p>Very good</p>
Alan	Can I go home now?
Tony	I thought you had something more to say
[general chat over each other and laughter – we can declare the meeting closed].	
Tony <b>3.26:12</b>	<p>David I think it is at a point where we can bring things to a close and we will do that by making any final comments and then I will see if I can draw things to a close.</p> <p>David, you go first</p>
David	<p>Yeah, I think it is time to call a halt to the discussion. I think we know where to focus. We need to compel some of the trustees and Alan and others that the logic of 91 replacing 88 -- and therefore no harm needs to be considered thereafter -- is totally wrong and we also need to then show with the numbers the consequences of the damage done by cutting, by dropping, the superable salary percentage reviews.</p> <p>So, there are two things that we need to particularly focus on because there are really right at the core of the difference in perspective</p>
Tony	Very good. Bruce? In no particular order, would you like any concluding comments
Bruce	No, I think that's fine
Michael	Yeah, I do have a couple. One is that I was bit surprised that David and Bruce haven't mentioned anywhere in terms of the context of progressive erosion the comparison

Who	
	<p>between people who were on the remuneration packages and those staff who were not. This is a really important point I think in my mind so these changes that were made back in 88 and 1991 affected professional level staff and managers – a lot of clerical staff in the Bank stayed on the collective contract right through. Those people were never put on the superable salary percentage and right through to today if they have retired in the last few years are on superable salaries – percentages that are effectively 100% of the full comparison and to me that is the best evidence of erosion. These people had access to much the same set of fringe benefits as more professional and managerial staff – that's relevant.</p> <p>The other thing I was going to say – I think this discussion is mostly treated the way in which trustees handled things in the last decade as having been done in good faith.</p> <p>I don't think they have been done in good faith. I think it has been pretty consistently from day one – not. The very first meeting after Bruce raised his issues back in 2014 Geoff Bascand's advice to trustees clearly having read the document was just to declare the issue closed and anyway it doesn't matter if Bruce sues you because are indemnified by the Bank. That's sort of been the cast of mind that has gone on. I have written up some of that stuff. Put it on my blog in the last 24 hours. I have got some hard copies here if any members want a hard copy otherwise <a href="http://www.croakingcassandra.com">www.croakingcassandra.com</a></p>
Tony	So yeah, anyone? Ian
Ian	No
Tony	Sarah anything?
Tony	No
Tony	<p>Anyone else like to?</p> <p>Well I mean from my point of view I found it, I thought it was helpful and I know that this is all ancient history to many of you and it has been recycled so many times that you probably think this is kind of sort of a movie that you have watched too often, you know, but I discerned the potential for more points of agreement and if nothing else then some clarity on the root issue that needs to be addressed at least from the claimants point of view, and you know I think it is helpful to focus on the things which provide a platform for understanding rather than part I think historical points of difference which probably cloud relationships.</p> <p>The other thing which I think I am hearing from the (and I will use your words Alan) the claimants is that you are raising issues – you are raising this fundamental question of harm or adverse effect which hasn't been taken into account as a kind of a point of economic substance not necessarily technical legal kind of view or a litigation view, so when I was interested reading the Piper's paper it reads as if it anticipating litigation and looking to ensure that defenses are available if litigation were to come forward. So, I am not suggesting that you take litigation or don't take litigation but what I am hearing from this discussion is that you are looking for the trustees to appraise the issue, to consider the issue, from a point of economic logic applying the rules without necessarily saying who was right or wrong historically. So and that is for you to make the case to the current trustees for them to say well looking at this objectively and putting ourselves free of all the historical kind of exchanges – whether the logic of your argument at its fundamental level, which is that there was an adverse effect caused by the 1988 change which has not been corrected and has given rise to an outcome</p>



Who	
	<p>which is adverse to the members relative to the situation that would have applied if the 88 change hadn't been made.</p> <p>And that's an appeal on sort of logic rather than technical sort of who signed this resolution and what this minute said or the like. So anyway, so in that sense hopefully there has been some benefit that is for trustees and members to work out from here as they wish to take it forward.</p>
Peter Katz	<p>I will just make one observation and that's I was probably a trustee at the time when this started in 2005 and you know it sort of picks up a bit on what Mike said because I think when the point was raised there was immediate defensive response by trustees which was quite in my view, like Mike – many of the trustees were tied to the Bank and they took a defensive role and it has been pretty much a more legal type of approach to the problem which just means and I think it is unfortunate really that it has taken this long to get to a situation where we can be in the same room and actually have the type of two way discussion between the members and the trustees and where as much as there has been words used against us saying we are greedy and various things like that</p>
Tony	Usual heated
Peter	<p>Usual heated thing I think there is has always been an acknowledgment by the group that 1 it is more likely to be a mistake, that something has happened we are not looking to blame anyone but we just want to be able to sit round and discuss it as we have today so I am hopeful that maybe the trustees that are going forward are open to actually having a discussion rather than putting it back to legal opinions and trying to fight it on that basis and I do think that some of the ground work has been laid</p>
Tony	I think what you are sort of saying is that an inquisitorial approach rather than adversarial
Peter	Yeah, and it was very adversarial from day one.
Tony	<p>Very good.</p> <p>With that I will call the meeting to a conclusion and thank you very much.</p>
Several	Thank you
David	<p>So, for those who want to stay on and use the zoom facility and the room to have a bit of a discussion about what we as members take from this and what we think we should be doing next please do stay on. I presume the recording is going to be stopped now and no doubt</p>
<b>3:35:11</b>	Recording ended!