Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

SUBMISSIONS BY ANZ IN RESPECT OF GENERAL QUESTIONS - ROUND 5 HEARINGS

1. This submission responds on behalf of Australia and New Zealand Banking Group Limited and its associated entities including OnePath Custodians Pty Limited (**OPC**) and Oasis Fund Management Limited (**Oasis**) (collectively, **ANZ**) to the policy-related issues raised in Counsel Assisting's Round 5 Closing Submissions.

ADVERTISING

Question 1: Is political advertising consistent with the intention behind section 62 of the SIS Act? Is any amendment to the SIS Act warranted, and if so, why? [825.1]

2. ANZ considers that it is inappropriate and inconsistent with s 62 of the SIS Act for member funds to be used by trustees to engage in political advertising. OPC and Oasis do not use member funds to engage in political advertising.

3. It would be appropriate for the SIS Act to be amended to make clear that member funds cannot be used for political advertising.

Question 2: Is there identifiable detriment to consumers from advertising by super funds or particular advertising (such as Fox and Henhouse)? Is there identifiable benefit to consumers from advertising by super funds or particular advertising? [825.2]

4. ANZ considers that appropriate advertising has the potential to benefit consumers. As Counsel Assisting have noted, there is disengagement of consumers in superannuation.[1] Appropriate advertising has the potential to encourage more engagement and provide consumers with accurate information about the fund that is relevant to decisions that consumers commonly need to make about their superannuation.

5. However:

   (a) advertising which is not educational (in the sense referred to above) may cause detriment to members if it is paid for out of (and therefore erodes) member funds; and

   (b) advertising that is inaccurate or misleading, or which may be described as 'scaremongering', can be detrimental to consumers (and, in the case of misleading advertising, unlawful). For example, such advertising may lead consumers to make decisions that are not in their best interests, such as switching to a less suitable fund.

SECTION 68A OF THE SIS ACT

Question 3: Is it appropriate, as a response to conduct of superannuation trustees that seeks to induce employers to select funds, or affect their decisions as to default funds, to make alterations to section 68A of the SIS Act to widen the prohibition? [825.3]

Question 4: How wide should the prohibition be – should it extend to prohibiting providing benefits to employers for the purpose or with the intention of inducing the selection of the fund as the default fund for employees, or affecting the decision, or being likely to induce or affect? [825.4]

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[1] Round 5 Closing Submissions at [782] and [795].

Question 5: Are there matters of principle that would justify such a change? Are there problems that would arise in the application of the law? [825.5]

6. ANZ addresses questions 3, 4 and 5 together.

7. While ANZ acknowledges the matters raised in the case study relating to Hostplus referred to at [312] to [322] of Counsel Assisting's Round 5 Closing Submissions, ANZ does not consider that the evidence currently before the Commission warrants an amendment to section 68A of the SIS Act. Its view may change, however, if additional evidence of superannuation trustees or related parties providing inducements to employers, or trustees using member funds for entertainment or corporate hospitality to induce employers to select funds or to affect their decisions as to default funds, were available.

8. If the Commissioner considers that further regulation is needed, ANZ submits that consideration should be given to requiring trustees to maintain, provide to APRA and ASIC, and publish, registers with details of the nature and monetary value of benefits provided to employers and to whom it was provided. Disclosure of those matters would enable APRA and ASIC to monitor the inducements or benefits provided and take appropriate action in relation to any concerns they may have as to whether expenditure on those benefits is inappropriate or not in the best interests of members. Consideration could also be given to a requirement on employers to record and explain to employees and APRA the basis on which default funds have been chosen.

PAYMENTS FROM EXTERNAL RESPONSIBLE ENTITIES OF MANAGED INVESTMENT SCHEMES

Question 6: Is it appropriate for the trustee of a superannuation fund to retain payments from the responsible entity of a managed investment scheme where that payment is derived from the investment of members' money? [825.6]

9. ANZ understands this question to be directed to payments that do not contravene s 964A of the *Corporations Act* 2001 (Cth).

10. ANZ acknowledges the importance of payments of the kind referred to in question 6 flowing through to benefit members.

11. ANZ considers it appropriate for a trustee to retain payments of the kind referred to in this question where benefits do otherwise flow to members. For example, where, in anticipation of receiving the payment, the trustee takes the payment into account in calculating the costs of managing the fund and therefore in setting the amount of fees charged to members.

SELLING OF SUPERANNUATION

Question 7: Is it appropriate that superannuation be sold through bank branches? Is it reasonable to think that there is any prospect that this is likely to produce an outcome that is in the best interests of consumers? [825.7]

Question 8: Are there statutory reforms that are required to address this problem (if it is a problem) or are the existing laws with respect to personal financial advice and general financial advice sufficient? What is the nature of the "advice" that a customer of a bank receives when told by a bank branch staff member about the availability of a superannuation product offered by a bank? [825.8]

12. ANZ addresses questions 7 and 8 together.

13. ANZ considers that it is appropriate that superannuation is distributed (such that customers are able to obtain information about superannuation, and open an account), through a range of "channels", including through bank branches.

14. Other means through which superannuation is distributed include:

    (a) obtaining personal advice from a financial adviser;

    (b) when a person starts a new job (eg when they are given an application form for their employer's default superannuation provider); and

    (c) over the internet or through a call centre.

15. Each of these options may or may not be appropriate for a particular person. While ANZ considers there are benefits to be achieved through obtaining personal advice from a financial adviser, not all people wish to do so (for a number of reasons, including potentially cost or that some people prefer to carry out their own research). For those who do not engage a financial adviser, it is important that they have access to a means of obtaining information about superannuation that they feel comfortable with.

16. Many people feel comfortable carrying out research or opening an account over the internet or telephone, but not all customers are inclined or adept at doing so. For them, face to face interaction such as that which occurs in branch may be the only way, or the best way, for them to engage with superannuation, obtain information or open an account.

17. In those circumstances, ANZ does consider that it is reasonable to think that distribution of superannuation through bank branches can produce an outcome that is in the best interests of customers. Moreover, in circumstances where (as touched on by Counsel Assisting) there is already an issue with a lack of engagement with superannuation,[2] ANZ does not consider the interests of customers would be served by restricting the means through which they can engage.

18. As ANZ understands it, the principal concern that has been raised about superannuation being accessible through bank branches is that customers may mistakenly believe that the branch staff member that they are talking to has taken their relevant circumstances into account and on that basis is recommending the particular product being discussed. ASIC raised that concern with ANZ in circumstances where the discussion about superannuation in the branch occurred in close proximity to an "A-Z Review" fact finding process.[3] This has been addressed in case study submissions concerning ANZ. ANZ has undertaken not to distribute superannuation following an "A-Z Review" or any other needs-based discussion, and so that particular concern will not arise in connection with the distribution of superannuation through ANZ branches in future. ANZ does not consider it appropriate that further steps be taken to entirely prevent customers being able to obtain information about superannuation or open an account in branch.

19. With respect to law reform, Treasury has consulted on a draft *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*. Schedule 1 of this Bill would introduce a new Part 7.8A into the Corporations Act concerning design and distribution requirements relating to financial products for retail clients that may address, to some degree, the appropriateness of distribution channels for superannuation products (other than MySuper products). The Commission may wish to consider whether this new Part 7.8A, if enacted, would address any identified concerns with the distribution of superannuation products.

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2 Round 5 Closing Submissions at [782] and [795].

3 Statement of Mark James Pankhurst dated 1 August 2018 (Ex. 5.256) (**First Pankhurst Statement**) at [291(b)] (ANZ.999.019.001 at 0105) and Exhibit MP-215 (ANZ.800.873.0025).

20. ANZ considers that there would be potential benefits in two other areas of reform:

(a) First, using a label other than "general advice" (such as "general information") in section 766B of the Corporations Act, and in disclosures such as those required under section 949A of the Corporations Act not requiring the use of the word "advice" (and instead requiring the use of another label). The recent Productivity Commission reports contain recommendations to similar effect.[4]

(b) Secondly, in providing greater clarity and certainty as to how entities can ensure that they can provide general information about products and that doing so will not constitute personal advice. ANZ suggests consideration be given to a "safe harbour" provision operating where certain disclosures are made. The starting point could be amendments to section 949A which both ensure clarity of disclosure and its operation as a safe harbour.

ENGAGEMENT BY SUPERANNUATION FUNDS WITH ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Question 9: Are the identification procedures used by superannuation funds appropriate for their Aboriginal and Torres Strait Islander members? (i) If those procedures are appropriate, are those identification procedures sufficiently understood and implemented by staff on the ground? (ii) If those procedures are not appropriate, what should be changed? [825.9]

Question 10: Should superannuation funds be required to record whether their members identify as Aboriginal or Torres Strait Islander people? [825.10]

21. ANZ addresses questions 9 and 10 together.

22. OPC and Oasis do not currently record whether their members identify as Aboriginal or Torres Strait Islander people. ANZ acknowledges that it will be necessary to do so in future if changes of the kind referred to in the answers to Questions 12 and 13 below are made.

23. ANZ considers that its identification procedures recognise barriers to financial inclusion faced by Aboriginal and Torres Strait Islander people whilst complying with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**).

24. ANZ recognises the importance of assisting all customers, including indigenous customers, who may face obstacles associated with geographical remoteness, or cultural, linguistic or financial literacy barriers.

25. ANZ's "know your customer" (**KYC**) guidelines allow Aboriginal and Torres Strait Islander customers without primary or secondary identification documents to provide alternative forms of identification.

26. For example, there is an option in the identification procedures to accept alternative identification such as “Indigenous Community Identification Card” or a verification document signed by two community leaders (who are defined in the identification procedures). If these cannot be met, the matter is to be escalated to the Wealth Money Laundering Officer Team who can provide other viable options and approve the exception (where applicable).

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[4] See eg Productivity Commission Draft Report "Superannuation: Assessing Efficiency and Competitiveness" dated April 2018 at [39], [370] and [474]-[475] and Productivity Commission Inquiry Report "Competition in the Australian Financial Systems" at 27, 47, 279 and 290-295.

27. After customers have been verified through the KYC guidelines, ANZ customers are able to verify their identity over the phone in a variety of ways, including by providing a verbal password chosen by the customer, or a one-time passcode sent to the customer's mobile phone number. Additional security questions are only required if ANZ is unable to authenticate the customer through these means.[5] In December 2017, ANZ began a review of its over the phone verification processes to consider whether its security questions are appropriate and understood by all customers (including indigenous customers), while still remaining compliant with the AML/CTF Act. The review is primarily focussed on customers in remote communities who are more likely to experience difficulties in over the phone verification and who face geographical challenges in attending a branch if re-verification in person is necessary. The review is due to be completed later this year and, following completion, ANZ will consider what, if any, modifications are necessary to its current verification processes.

28. ANZ, OPC and Oasis offer training to their staff to enable them to apply the verification procedures described above and to be sensitive to the needs of indigenous customers more generally. In particular, frontline staff undertake mandatory training each year to build and maintain knowledge of ANZ's KYC guidelines and requirements. ANZ's Contact Centre staff receive training on how to appropriately identify customers over the phone, and the implementation of verification checks. ANZ also offers staff cultural awareness training which is designed to increase staff (in particular frontline staff and management) awareness and understanding of the barriers to financial inclusion that vulnerable customers including indigenous customers may face. ANZ intends to make the training mandatory for all Australian Retail Distribution staff by 31 December 2018. ANZ staff will be required to complete this training every three years.

Question 11: Should those superannuation funds who do not currently permit the early release of superannuation on the basis of severe financial hardship do so? [825.11]

29. OPC and Oasis permit, in appropriate circumstances and in accordance with the SIS Act and SIS Regulations, the early release of superannuation on the basis of severe financial hardship.

30. ANZ considers that all superannuation funds should permit, in appropriate circumstances and in accordance with the SIS Act and SIS Regulations, the early release of superannuation on the basis of severe financial hardship.

Question 12: Should the lower life expectancy of Aboriginal and Torres Strait Islander people be taken into account in the decision-making processes of superannuation funds when considering how to administer or release the funds of Aboriginal and Torres Strait Islander people? If so, how? [825.12]

31. ANZ is supportive of life expectancy being taken into account when considering how to administer or release funds of Aboriginal and Torres Strait Islander people. To allow this to occur:

    (a) amendments would need to be made to the SIS Act, and in particular, provisions relating to conditions of release and acting fairly in dealing with classes of beneficiaries;

    (b) it would be necessary for the trustee to hold records as to whether members identify as Aboriginal or Torres Strait Islander people;

    (c) it may need to be recognised that not all Aboriginal or Torres Strait Islander people have a lower life expectancy (ie as opposed to those living in particular communities);

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[5] T4068.21-29.

(d) in order for trustees to practicably consider lower life expectancy, it may be necessary to create specific superannuation funds or products for Aboriginal and Torres Strait Islander communities;

(e) any proposed amendments should be developed through engagement with stakeholders within the superannuation industry and Aboriginal Torres Strait Islander peoples to ensure that those proposed amendments are capable of being practically implemented and administered in a way that does not add undue cost and complexity for trustees and members (particularly insofar as administering funds are concerned); and

(f) consideration may also need to be given to whether amendments were required to existing anti-discrimination laws to allow particular changes.

Question 13: Should the categories of person permitted by legislation to be the subject of a binding nomination be changed to reflect Aboriginal and Torres Strait Islander kinship structures? If so, how should the categories be broadened? [825.13]

32. ANZ is supportive of consideration being given to amendments being made to the SIS Act and SIS Regulations so that the subject of a binding nomination appropriately reflects Aboriginal and Torres Strait Islander kinship structures. In order for this to occur, it would be necessary for the trustee to hold records as to whether members identify as Aboriginal or Torres Strait Islander people.

33. How the categories could appropriately and practically be broadened is a matter which ANZ considers ought to be undertaken by way of engagement with stakeholders within the superannuation industry and Aboriginal and Torres Strait Islander communities to ensure that proposed amendments are capable of being practically implemented and administered in a way that does not add undue cost and complexity for trustees and members.

DISCRETION TO APPOINT AND REMOVE DIRECTORS

Question 14: Is it appropriate for shareholders of RSE Licensees to retain a broad discretion to appoint and remove directors? Or should there be an obligation imposed on shareholders to exercise such powers in the best interests of the members? [825.14]

34. ANZ does not consider that there should be any change to the way in which shareholders of RSE Licensees can appoint or remove directors (including imposing an obligation for shareholders to act in the best interest of members).

35. All directors, regardless of the circumstances of her or his appointment, are subject to a number of significant obligations, including obligations under the SIS Act that are directed towards protecting the interests of members, duties under the Corporations Act and at general law. Those obligations include acting honestly in all matters concerning the RSE,[6] exercising the same degree of care, skill and diligence as a prudent superannuation entity director,[7] performing the director's duties and exercising the director's powers in the best interests of the beneficiaries,[8] giving priority to the duties to and interests of beneficiaries,[9] and not entering any contract or doing anything else that would prevent or hinder the director's or trustee's proper performance.[10]

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6 Section 52A(2)(a) of the SIS Act.

7 Section 52A(2)(b) of the SIS Act.

8 Section 52A(2)(c) of the SIS Act.

9 Section 52A(2)(d)(i) of the SIS Act.

10 Section 52A(2)(e) of the SIS Act.

36. The consequences for directors of failing to comply with those obligations are serious, and include exposure to personal financial liability (which, subject to the requirement of the court granting leave, can be pursued by any person who suffers loss).[11] The possibility of such action being taken is very real, particularly given the active class actions environment in Australia.

37. Directors of RSE Licensees are also "responsible persons", and must be "fit and proper", according to APRA Prudential Standard SPS 520.[12] As part of this, directors must have their fitness and propriety assessed prior to appointment, and annually.[13] APRA can apply to the Federal Court for an order to disqualify a person from being a responsible officer of a trustee.[14]

38. Against that background, ANZ does not consider that there is likely to be any benefit for members in imposing any additional obligations on shareholders.

RELATIONSHIP BETWEEN TRUSTEES AND FINANCIAL ADVISERS

Question 15: Are legislative interventions to remove grandfathered commissions and ongoing service fees from superannuation accounts appropriate? If so, why? If not, why not? [825.15]

Question 16: Are there possible detrimental effects on the provision of high quality financial advice by such changes? If it is said that there are such detrimental effects, then the detriments and the reasons for the detriments should be precisely identified. For example, if it is said that it is unlikely that consumers will be willing to pay for the true value of financial advice then, amongst other things, it ought to be explained how the "true value" of financial advice is to be determined, why consumers will pay for the true value of other services but not for financial advice and why it is not sufficient to allow consumers to make an informed choice as to the specific price that is to be paid for a specific service. [825.16]

39. ANZ addresses questions 15 and 16 together.

Grandfathered commissions

40. ANZ considers that legislative intervention to remove grandfathered commissions from superannuation accounts would be appropriate, given the difficulties that trustees currently face in stopping payment of commissions under binding agreements between financial advisers and the product issuers.[15] Given those difficulties, ANZ considers that any legislative intervention to remove grandfathered commissions from superannuation accounts should make it clear that the payment of commissions is prohibited and that trustees or other relevant entities cannot have any liability (in contract or otherwise) for not paying them.[16]

41. However, ANZ considers that any legislative intervention to remove grandfathered commissions from superannuation accounts should have an appropriate lead time to ensure that, from an operational perspective, trustees are able to implement the necessary system, process and related changes to stop paying commissions and to adjust

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11 Section 55(3) and (4A) of the SIS Act.

12 APRA Prudential Standard SPS 520 at [11(a)], [17]-[18], [26]-[36] and [43]. This is also discussed in the Commission Background Paper 25 at section 2.3.

13 APRA Prudential Standard SPS 520 at [29] and [32].

14 Section 126H of the SIS Act.

15 As discussed eg in First Pankhurst Statement (Ex. 5.256) at [142]

16 ANZ recognises that this raises the need to consider, when drafting the legislation, whether extinguishing contractual rights would encounter constitutional difficulties.

member fees accordingly. That should take the form of a definitive sunset date so as to provide trustees with certainty as to when the payment of grandfathered commissions can and must cease.

42. In the context of lead time, ANZ acknowledges that the policy intention behind grandfathering of pre-FOFA commissions, which was explained in the Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) at [3.79]–[3.83], included that research had indicated it would take time for advisers to develop viable businesses following the reforms. ANZ does not, however, consider that concern to apply to it. As it has informed the Commission, ANZ Financial Planning (**ANZFP**) has recently decided that it will no longer retain grandfathered commissions paid to it from the OnePath investment and superannuation platforms.[17]

Ongoing Service Fees

43. ANZ considers that it would not be appropriate to prohibit the payment of ongoing service fees from superannuation. While ANZ acknowledges that at times its financial advice business has failed to meet expectations by not providing ongoing services as promised, and ANZ recognises the importance of controls directed to ensuring that clients receive the services, it considers that there are a number of benefits of ongoing service arrangements, and that if people were unable to pay for them through the use of superannuation accounts then they may not be able to obtain those benefits.

44. In particular:[18]

(a) Financial advisers seek to play an important role in helping people define their financial needs and goals and setting a plan to fulfil them. Background Paper 6 (Part A) touches on the role of financial advisers.[19] This includes helping clients decide what insurance they need to protect themselves and their families and helping them set a savings plan for their retirement.

(b) An ongoing relationship with a financial adviser is a good way to help many people stay on track to achieve their financial goals. In ANZ's experience, people often have a tendency towards short term (and often discretionary) spending; ANZ considers that ongoing advice services can help a client maintain focus on the importance of their longer term financial goals and the steps required to achieve them, such as paying down debt.

(c) Clients' needs and circumstances change over time, as do the financial products and strategies that are available to clients. By providing clients with a regular opportunity to review their financial position, ANZ considers ongoing service arrangements can help to ensure that a client's financial strategy remains appropriate to their circumstances and in their best interests over time, and not just at a particular point in time. This can avoid clients being exposed to inappropriate investment risk or being either over or under insured.

(d) Given the complexity of and frequent changes to financial products and strategies (especially transition to retirement strategies) and the legal and regulatory

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17 ANZFP will give effect to that decision by rebating the amount of the commission to the ANZFP client, the result being that the client is not ultimately out of pocket.

18 ANZ does however acknowledge that at times its financial advice businesses have failed to meet expectations by not providing ongoing services as promised, and it recognises the importance of controls within its financial advice businesses directed to ensuring that clients receive the services.

19 The Commission's Background Paper 6 (Part A), at section 2, notes that "Financial planners or advisers seek to play an important role in helping individuals and households in Australia make the most of their finances and achieve their financial goals. They seek to do this by advising and helping retail investors understand and evaluate, among other matters, the right financial products and services for their needs."

landscape, ANZ's experience is that many clients find it difficult to navigate these matters without financial advice. The consequences of clients making mistakes in attempting to manage their finances – or in failing to take steps to deal with them at all - can be costly.

45. Ongoing service clients have selected and signed up to an ongoing service arrangement.[20] For all post-FOFA ongoing service arrangements offered by ANZ, clients are required to 'opt-in' at least every two years.[21] It is ANZ's experience that the vast majority of customers who receive financial advice (including ongoing advice) pay for that advice through deductions from their superannuation accounts.

46. Legislative intervention to prohibit payment of ongoing service fees from superannuation accounts would risk putting many people who do or would benefit from that advice in a position where they may not have access to available funds to pay for it. Having regard to the matters in [44], depriving those people of access to ongoing financial advice would put them at risk of failing to provide adequately for their retirement.

47. ANZ considers that the potential risks associated with ongoing service arrangements are better managed by disclosure of amounts deducted to pay for those arrangements, and regular opt-in requirements of the kind referred to above.

MANAGING CONFLICTS

Question 17: Are there structures that raise inherent problems for a superannuation trustee being able to comply with its fiduciary duties. For example, where a trustee is a dual-regulated entity, that would seem to raise an inherent conflict of interest, or the potential of a conflict of interest. Are there other structures such as investment of funds in insurance policies issued by related party insurers or the integration of a superannuation trustee into an advice business that also raise inherent problems? Is it possible to say that these conflicts are ever manageable? [825.17]

Question 18: If certain structures do raise inherent problems, is structural change of entities, mandated by legislation or otherwise, something that is desirable? [825.18]

48. ANZ addresses questions 17 and 18 together.

49. ANZ notes that, as part of its strategy to create a simpler, better balanced bank, it has agreed to sell its aligned dealer group financial advice businesses, its OnePath Pensions & Investments business and its life insurance business.[22]

50. ANZ acknowledges that potential conflicts of interest can arise for superannuation trustees in vertically integrated structures, such as those involving integration of superannuation trustees with advice businesses, or those involving the investment of funds in insurance policies issued by related party insurers.

51. ANZ considers that those conflicts, or potential conflicts, of interest can be appropriately managed, and that so long as they are, structures of the kind referred to above can serve the interests of members. Accordingly, ANZ does not consider that structural change of those entities should be mandated.

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20 Williams Statement (Ex. 2.92) at [59] and [62] (ANZ.999.007.0001 at 0012).

21 Williams Statement (Ex. 2.92) at [60] and [63] (ANZ.999.007.0001 at 0012-0013).

22 See also the evidence of Kylie Rixon at T1569:1-23; after acknowledging that she was not a party to executive committee discussions on why the businesses were sold, Ms Rixon referred to her understanding that the sales were part of ANZ's strategy to return to its core business of banking, and to improve its capital efficiency.

52. For example, ASIC has recognised the benefits that clients enjoy when they choose to obtain financial advice from a large, vertically integrated institution.[23] In particular, ASIC has acknowledged that:

> *'They [clients] may be attracted to the convenience of a relationship with a single financial institution. They may also value the perceived safety of dealing with a large institution, and have trust and confidence in the ability of the institution to both deliver the services and compensate them appropriately if required.'*

53. In relation to large institutions compensating clients appropriately if required, ASIC Report 562 (in the context of unpaid FOS determinations) states that:

> *Unpaid determinations are concentrated in the small-to-medium advisory services sector. AFS licensees of larger institutions are more likely to be able to ensure compensation (through self-insurance) for their customers.'*

54. Potential conflicts of interests such as those that may arise as a result of structures that involve the investment of funds in investment-linked insurance policies issued by related parties can be managed by:

(a) Having independent non-executive directors on the RSE Licensee board. For example, five of the seven directors of each of OPC and Oasis are independent.[24] ANZ notes that all directors are bound by the obligations referred to in the answer to Question 14 above.

(b) The RSE Licensee having systems in place to regularly monitor the investments through the related party insurer. For example, OPC has teams and forums that regularly monitor, among other things, the performance of invested assets (including external research house ratings), compliance with mandates, investment policies and risk controls.[25]

(c) The board of the RSE Licensee receiving regular reporting and, when necessary, ad hoc reporting, arising out of the monitoring activities described above. For example, OPC receives quarterly reports from the Chief Investment Office (which in turn receives reporting from other teams engaging in monitoring activity[26]) with an overview of the quality of investment funds on the investment menus.[27] That includes reporting on fund performance on an absolute, relative to benchmark, investment objective and peer group basis,[28] highlighting any investment issues[29] and providing a summary of management actions taken or proposed.[30]

(d) The board of the RSE Licensee maintaining an ability to specify and direct the way that funds invested in investment-linked life insurance policies are in turn invested by the related insurer in underlying investments. For example, through the Master

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23 ASIC Report 562 at [56]-[57].

24 First Pankhurst Statement (Ex. 5.256) at [230].

25 First Pankhurst Statement (Ex. 5.256) at [175(d)], [176], [178], [179] and [182].

26 First Pankhurst Statement (Ex. 5.256) at [173(c)], [178], [180], [181] and [182].

27 First Pankhurst Statement (Ex. 5.256) at [183].

28 First Pankhurst Statement (Ex. 5.256) at [183(a) and (b)].

29 First Pankhurst Statement(Ex. 5.256) at [183(c)].

30 First Pankhurst Statement (Ex. 5.256) at [183(d)].

Investment Terms for the investment-linked life insurance policies, OPC maintains a significant discretion as to the investments made by the related party insurer.[31]

(e) Disclosing the arrangements. For example, in the Additional Information Guide for ANZ Smart Choice Super and Pension, under the heading of "Important Information" on the first substantive page, members are informed that:

> *"The Trustee invests all contributions under master life policy terms issued by OnePath Life which then invests in selected investment options. The master life policy terms are governed by the Life Insurance Act 1995 (Cth). OnePath Life is required to conduct its business in accordance with the law and give priority to the interests of policy holders, invest all of the assets it receives from the Trustee in statutory funds approved by the Australian Prudential Regulation Authority (APRA) and comply with the prescribed capital and solvency standards."*

55. One barrier to removing arrangements that involve investment in insurance-linked life policies is the potentially significant capital gains tax implications to superannuation fund members of redeeming the policies.[32] ANZ would support legislative intervention that provides general capital gains tax relief to RSE Licensees that seek to redeem investment-linked life policies, which would remove that barrier and facilitate trustees removing investments from insurance-linked life policies (with related or third party insurers) where that is otherwise in the best interests of members.

Question 19: Would it be preferable to extend the obligation to act in the best interests of members of a superannuation fund so that: (i) contravention of the obligation attracts a civil penalty; and, (ii) the obligation (and the civil penalty for breach) extends to shareholders of trustees and any related bodies corporate (within the meaning of the Corporations Act) of the trustee in respect of any conduct that will affect the interests of the members of the superannuation fund? [825.19]

Question 20: Are there unforeseen consequences of such a legislative intervention that would make it undesirable to strengthen the SIS Act in this way? [8.20]

56. ANZ addresses questions 19 and 20 together.

(i) Civil penalties

57. If the Commission considers that the SIS Act contains insufficient deterrence against trustees failing to act in the best interests of members, then civil penalties may be an appropriate pathway for regulatory enforcement action. If this obligation were to become a civil penalty provision, it may be relevant to consider that section 202 of the SIS Act would, without amendment, mean that the contravention of the obligation would be an offence in certain circumstances (ie in situations involving dishonesty).

58. In conjunction with such deterrence mechanisms, the Commission may also like to consider whether educational initiatives and standards could similarly contribute towards the fidelity of trustees with their obligations under the SIS Act and towards members. In this regard, ANZ notes the recent joint initiative of APRA and ASIC to publish a document outlining the current regulatory framework for RSE licensees and APRA and ASIC's respective roles within that framework.

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[31] Exhibit MP-111 to the First Pankhurst Statement at clauses 3.2(a), (d), (e) and (g), 3.7, 3.8, and 9.2(a), (d), (e) and (g) (ANZ.800.860.1230).

[32] See eg Weekes Statement (Ex. 5.251) at [42].

(ii) Extending the duty to shareholders and related bodies corporate

59. ANZ submits that the evidence before the Commission does not establish that it would be desirable for the obligation on trustees to act in members' best interests to extend to shareholders and other related bodies corporate of the trustee (**related parties**). Having regard to the duties of trustees and directors of trustees under s 52 and 52A of the SIS Act, it is not apparent to ANZ why conflicts of interest between this duty and the interests of members on the one hand, and the interests of related parties on the other hand, cannot be appropriately managed without resorting to such measures.

60. Further, ANZ envisages that practical difficulties would arise if the duty to act in members' best interests were extended to related parties. For example, this might inhibit related parties from providing services to the fund even where they may be best placed to do so. If a related party enters into an agreement with the trustee to provide services to a fund on arms' length terms, could that be considered to be a breach of the duty *by the related party* because it may profit from the transaction (as it would from any similar third party transaction)? If the trustee satisfies itself that it is acting in the best interests of members because the related party is the most appropriate service provider, how does the *related party* independently ensure that it is acting in the best interests of members? The related party could not ensure that it is the most appropriate provider of services to the fund without access to information about the services that were offered to the trustee by its competitors and the terms of those offers. Would the trustee be permitted or required to provide such information about competing offers to the related party (noting that this information may have been provided by the competitors on a confidential basis)? If the related party is not able (or prepared) to take the necessary steps to satisfy itself that it would be acting in the best interest of members, does that mean that the trustee would need to engage an independent third party even if that was on terms less advantageous to members than the terms that were, or would have been, offered by the related party?

61. Rather than extending the best interests obligations to shareholders and related bodies corporate of a trustee, enhancements could be made to APRA's powers to intervene if APRA is concerned that a person with a controlling stake in an RSE licensee may hinder or adversely affect the trustee complying with the trustee's obligations. While the detail of any proposal would need to be carefully considered, ANZ submits that this may be a more appropriate approach than extending the best interests obligations (with or without civil penalties).

SYSTEM CHANGES

Question 21: Is one way of addressing and discouraging misconduct on the part of superannuation trustees to seek to encourage improvements to outcomes for members whose contributions are made to MySuper products or is the link too tenuous to justify recommending any system changes to the default system? [825.21]

62. While ANZ considers that an annual outcomes test may increase transparency and accountability of trustees for fund performance, ANZ does not consider that the test would be likely to address or discourage misconduct on the part of superannuation trustees. The link between outcomes of MySuper products and misconduct is tenuous. Discouraging misconduct is better addressed by other means, such as improved guidance and training for trustees, and regulators having a deep understanding of the RSE licensee's operations and the appropriate powers to address misconduct.

Question 22: Is it appropriate, as a response to misconduct of superannuation trustees, to apply an additional filter to MySuper authorisations so as to require outcome assessments? If so, what are the general parameters for such a system change and who is appropriate to apply the test? [825.22]

63. ANZ considers that it would be appropriate for MySuper authorisations to consider the trustee's conduct, and for authorisations to be cancelled or not renewed if that was appropriate having regard to misconduct that has occurred.

64. However, in answer to question 22, ANZ submits that the evidence before the Commission does not establish that, as a response to misconduct of superannuation trustees, it is appropriate to apply an additional filter to require MySuper products to meet an outcomes test (as described in [797]-[799] of Counsel Assisting's Round 5 Closing Submissions) in order to be authorised as, and to retain authorisation as, a MySuper product. While an additional filter might increase external pressure on trustees in relation to MySuper products (as suggested in paragraph [795] of Counsel Assisting's Round 5 Closing Submissions), it is not apparent that it would address or discourage misconduct on the part of trustees.

65. If a product loses its MySuper authorisation, that may substantially and adversely affect the interests of existing members of the product. That prospect raises a number of potential options. For example, is it proposed that members would remain in the product (without it being a MySuper product and the protections that affords) or would the product be wound up and all members moved to another MySuper product? If so, which one, and would the original MySuper fund bear the costs of members being moved to another MySuper product?

66. The detail of any such proposal to introduce an additional filter, including what would be required to 'pass' the outcomes test and what happens to members if a product does not pass the test, would need to be carefully reviewed and worked through before forming a view that it is desirable to introduce such a test.

Question 23: Is it appropriate, as a response to the conduct of superannuation trustees that might inhibit the consolidation of multiple superannuation accounts of a person, to introduce some form of "stapling" so that a person's account for receipt of default contributions is linked to the person and travels with the person when she or he changes job? Is this is a practical method of addressing this type of conduct noting that it is not suggested to be misconduct? [825.23]

67. ANZ supports "full account portability", or 'stapling', whereby employees are allocated with a single life-time superannuation account number, similar to a tax file number. In the event that the employee wishes to change their linked superannuation fund or product, this single account number would be retained and linked to the new fund or product (with the amount in the first fund to be rolled over into the second).

68. ANZ would see this operating so that employees provide that account number to employers, and contributions are allocated into the fund that is linked (or "stapled") to that account number. Alternatively, where an employee does not provide an account number to their employer, a central clearing house could help identify the stapled fund, and allocate superannuation contributions. Where no existing superannuation account details can be found for an individual, a last resort option may be required (as suggested by the Productivity Commission's Model 1: Assisted Employee Choice).[33]

69. Transitioning towards individuals having a single superannuation account number would require consolidation of their existing (active and inactive) superannuation accounts. Consideration needs to be given to how this would occur, including transitioning over a

[33] PC Draft Report on Alternative Default Models at 130-131.

reasonable period of time. Consolidation could, for example, occur on the basis of rolling up previous accounts into the account currently receiving contributions, or rolling up smaller accounts into the largest account. Detailed consideration would however need to be given to the effect of this on the amount and terms of a person's insurance cover, as cover would ordinarily be lost when an account is closed and the best cover may not be in the largest or most currently active account.

70. Inevitably, there may be employees who want to hold multiple superannuation accounts due to, for example, insurance or investment diversification benefits across products. Having multiple accounts under this proposal would be enabled on an 'opt-in' basis, with employees able to apply to open and/or maintain multiple superannuation accounts through the relevant authority administering the superannuation account number system (e.g. the ATO).

Question 24: Are there other system changes that might be appropriately tailored responses to misconduct or conduct falling below community standards and expectations of superannuation trustees? If so, what are the general parameters for such a system change? [825.24]

71. ANZ does not propose any other system changes, and considers that there are benefits to be obtained by minimising further regulatory changes to the superannuation industry. The superannuation industry has been the subject of a number of significant regulatory changes that have increased the complexity of the framework in which trustees operate. The implementation of change requires substantial time and resources, and to ensure that the best interests of members are served, there is a need to balance the time and costs associated with change management with the benefits of trustees focussing on their core activities and innovation.

DETERRENCE AND INSIGHT

Question 25: What can be done to encourage the regulators to act promptly on misconduct or potential misconduct? [825.25]

Question 26: Is the present allocation of regulatory roles appropriate to achieve specific and general deterrence from misconduct? [825.26]

Question 27: Given that what we are fundamentally concerned with is conduct that in subtle but ongoing ways negatively affects the retirement outcomes of consumers, are either of the regulators best placed to carry the responsibility to protect consumers should the balance between them be restructured or significantly altered? [825.27]

72. While the allocation of regulatory responsibilities and the adequacy of the acquittal of those responsibilities are matters that are appropriately and ultimately at the discretion and oversight of Government, the objectives to which those responsibilities could be directed include:

(a) encouraging cooperation and disclosure with regulators;

(b) ensuring that financial services businesses are held to account for their conduct;

(c) ensuring just, quick and effective enforcement;

(d) creating strong incentives for compliance.