ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

FIFTH ROUND OF PUBLIC HEARINGS: SUPERANNUATION

SUBMISSION OF NATIONAL AUSTRALIA BANK – SUBMISSION IN RESPONSE TO QUESTIONS ARISING FROM THE FIFTH ROUND OF PUBLIC HEARINGS

A. INTRODUCTION

1 This submission is made on behalf of National Australia Bank Limited (**NAB**) and NULIS Nominees (Australia) Limited (**NULIS**). Where it is appropriate to draw a distinction between the positions of the two entities, that has been done in the body of the document.

2 This submission is made in response to Counsel Assisting's invitation to respond to the general questions arising from the case studies considered in the fifth round of public hearings concerning superannuation. The general questions are set out in Counsel Assisting's closing submissions dated 28 August 2018 (**CS**).

3 The Australian superannuation system and wealth management industry has evolved over many years in response to member needs and preferences and to address ongoing regulatory change that has taken into account both domestic and international guidance.

4 Across the industry, vertically integrated organisations, including industry and retail funds, have evolved in response to members who prefer to have their multiple financial affairs managed by one provider who can meet their full spectrum of needs, offer services, relationships and pricing that takes advantage of economies of scale and, importantly, has the financial capacity to address any issues that arise.[1]

5 Within these models, conflicts of interest and issues with related parties can arise and they need to be appropriately managed. The Australian Securities and Investments Commission (**ASIC**) has recognised that members can benefit from vertically integrated organisations and that conflicts can be adequately managed. NAB and NULIS believe that the existence of fiduciary and best interests duties means that key pillars are in place to address these issues, so long as there is the right balance of ongoing regulation, guidance and enforcement.

6 Further, NAB and NULIS submit that a competitive, open and transparent superannuation system where all industry and retail funds operate on an equal footing will also further address potential issues. Competition is also critical to enable choice, innovation and

[1] The Treasury, *Background Paper No. 24*: *Submission on key policy issues*, 13 July 2018, at [210]-[226] considering these issues in the context of advice, and [227]-[230] in the context of superannuation.

efficiency and will ultimately deliver better and sustainable long-term superannuation outcomes for all Australians.

NAB and NULIS's approach to the general questions raised by Counsel Assisting

7 The general questions posed by Counsel Assisting raise important matters that are the subject of ongoing consideration by NAB and NULIS as part of improving member outcomes. However, a number of those questions are not capable of comprehensive or meaningful response at this point, having regard, amongst other things to the limited evidence presently before the Commission.[2]

8 The approach of NAB and NULIS in responding to the questions is as follows:

(a) where a particular question can be addressed by reference to evidence presently before the Commission, it has been answered by reference to NAB's and NULIS's views on the issue raised by the question; and

(b) some of the questions require more comprehensive investigation and review before a meaningful answer can be given. Although NAB and NULIS are not at this stage in a position to provide a substantive response to these questions, they have, where appropriate, sought to assist the Commission by identifying key matters which would need to be further considered and explored to enable meaningful answers to be given.

Guiding principles in considering any policy reforms to the superannuation system

9 The superannuation system in Australia is dynamic and complex.[3] The system has important social and macroeconomic dimensions, including Australia's ageing population, and involves a diverse mix of participants.[4] Further, there are many wider government policy concerns that affect the superannuation system, including overall fiscal sustainability, broader retirement policy and taxation policy.[5]

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[2] By the phrase "evidence presently before this Commission", NAB is referring to documentary evidence, including witness statements and exhibits tendered before the Commission, and oral testimony of witnesses before the Commission as at the conclusion of the fifth round of public hearings on 17 August 2018, together with documents referred to in the additional tender list of exhibits referred to in Counsel Assisting's closing submissions dated 28 August 2018.

[3] As noted in the Productivity Commission, *Superannuation Competitiveness and Efficiency – Issues Paper*, March 2016, at page 5: https://www.pc.gov.au/inquiries/current/superannuation/competitiveness-efficiency/issues/superannuation-competitiveness-efficiency-issues.pdf.

[4] As noted in Productivity Commission, *Superannuation Competitiveness and Efficiency – Issues Paper*, March 2016, at page 5: https://www.pc.gov.au/inquiries/current/superannuation/competitiveness-efficiency/issues/superannuation-competitiveness-efficiency-issues.pdf and The Treasury, *Super System Review Final Report*, 30 June 2010, at page 4: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2009-001_Final_Report_Part_1_Consolidated.pdf.

[5] As noted in The Treasury, *Super System Review Final Report*, 30 June 2010, at page 4: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2009-001_Final_Report_Part_1_Consolidated.pdf.

10 The superannuation system has been the subject of broader consideration in various inquiries, reviews and submissions in relation to the superannuation system in Australia and internationally. This includes the 2014 *Financial System Inquiry*, the 2010 *Super System Review* and the Productivity Commission's ongoing review of the competitiveness and efficiency of the superannuation system.

11 NAB and NULIS consider that any policy recommendations relating to the superannuation and retirement income needs of Australians would need to consider the extensive body of research and data already available, as well as the outcomes of the numerous inquiries and reviews into the sector. Caution should be exercised when considering complex matters of general policy and in seeking to draw overall conclusions about the superannuation system from the limited evidence before the Commission relating to specific case studies.

12 As to the general considerations which should inform any assessment of future policy recommendations in relation to the superannuation system in Australia, NAB and NULIS:

(a) are supportive of changes to improve the superannuation system and ensure that any issues are addressed as quickly and as efficiently as possible for the benefit of members. Where additional interventions are required, priority should be given to regulatory guidance and codes of conduct, and any prescriptive legislative changes should be carefully assessed and targeted, so as to avoid unintended consequences and increased complexity;

(b) consider that a well-regulated system is critical for generating improved, or self-funded, retirement outcomes for Australians. In that regard, NAB and NULIS fully support well-resourced regulators who provide both policy and regulatory clarity and timely and effective enforcement where issues arise;

(c) believe that a competitive and transparent market where industry and retail funds can operate on an equal footing is critical to enable choice, innovation and efficiency and that this will ultimately deliver better and sustainable long-term superannuation outcomes for all Australians. For this reason, NAB and NULIS submit that policy enhancements should promote a competitive superannuation system that transparently enables informed choice by members;

(d) acknowledge that conflicts may arise, including in vertically integrated organisations such as industry and retail funds. NAB and NULIS believe that these conflicts can be effectively managed with the right balance of regulation, guidance and enforcement. Further, NAB and NULIS submit that members benefit from a properly managed vertically integrated model. These benefits may include economies of scale, and the provision of secure and integrated financial services. In particular, larger vertically-integrated providers are likely to have greater capacity to protect members (including through remediation) in the event of fraud

or operational issues, as was recognised in Background Paper 24 prepared by the Treasury.[6] These considerations should be kept in mind when evaluating whether any mandated structural change is necessary or desirable; and

(e) believe that access to quality advice that is affordable to all Australians is an integral aspect of the superannuation system. In particular, NAB and NULIS believe that access to high quality advice provided by advisers with high professional standards can increase member engagement with their superannuation, improve financial literacy and help to bridge information gaps – which could result in better outcomes for members. It can also assist in helping members to understand the very intricate superannuation and tax regime, to make the complex choices the regime demands, and to plan for their retirement and manage assets in the retirement phase. Any policy reforms should seek to maintain and increase the accessibility, affordability and quality of advice for members.

B. ADVERTISING

13 **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?* (CS [176.1], [825.1])

14 **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?* (CS [176.2], [825.2])

15 **NAB and NULIS response:** Questions 1 and 2 are answered together.

16 In responding to Questions 1 and 2, NAB and NULIS understand "political advertising" as referring to a media campaign that seeks to influence a subject of political debate and in doing so, influences the policy positions of the Government, opposition parties and other political representatives, and voters.

17 NAB and NULIS support the provision of further regulatory guidance on the circumstances where member monies may be used to fund or facilitate political advertising or other forms of advertising and where they may not.

18 There is some complexity and lack of clarity as to whether political advertising is consistent with the intention behind section 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). Section 62 of the SIS Act (the **Sole Purpose Test**) identifies the core purposes for which a fund must be maintained.[7] It requires the trustee of a superannuation

[6] See The Treasury, *Background Paper No. 24: Submissions on key policy issues,* 13 July 2018, at [210]-[226], considering these issues in the context of advice, and [227]-[230] in the context of superannuation.
[7] SIS Act, section 62.

fund to ensure that the fund is maintained solely for one or more of the core purposes, which includes the provision of benefits for each member once the member retires or reaches 65 years of age (or to the member's dependants where the member dies before the earlier of those events occurs),[8] or for one or more of the core purposes *and* an ancillary purpose.[9]

19 As a starting point, NAB and NULIS consider that to the extent that member funds are used by a superannuation trustee to either fund or facilitate political advertising or other forms of advertising, such use should be subject to the Sole Purpose Test and must be in the best interests of members.

C. SECTION 68A OF THE SIS ACT

20 **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?* (CS [329.1], [802.3], [825.3])

21 **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?* (CS [329.2], [802.3], [825.4])

22 **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?* (CS [329.3], [802.3], [825.5])

23 **NAB and NULIS response:** Questions 3 to 5 are answered together.

24 NAB and NULIS support additional regulatory guidance on the scope and application of section 68A. This will provide clarity on its application, in practical terms, including outlining the type of conduct that *is* and *is not* permissible under section 68A.

25 Section 68A of the SIS Act, as currently framed, prohibits a trustee of a regulated superannuation fund, and its related parties, from supplying or offering to supply goods or services, such as superannuation products, to a person "*on the condition that one or more of the employees of the person will be, or will apply or agree to be, members of the fund*".[10] The prohibition in section 68A does not apply in relation to a supply of the kind prescribed by the regulations.[11]

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[8] SIS Act, subsection 62(1).
[9] SIS Act, subsection 62(2). See further Professor Pamela Hanrahan, *Background Paper No. 25: Legal framework governing aspects of the Australian Superannuation System,* 26 July 2018, at pages 50-51.
[10] SIS Act, subsection 68A(1).
[11] SIS Act, subsection 68A(2).

26 Section 68A was inserted into the SIS Act[12] as part of a suite of reforms introduced in 2004 to enhance consumer protections for employees who did not choose their own fund and were "defaulted" into a fund chosen by their employer.[13] Section 68A is not a civil penalty provision.[14] However, civil liability attaches to a contravention of the provision. In that way, a person who suffers loss or damage as a result of a contravention may seek to recover the loss or damage by commencing legal proceedings against the superannuation trustee or its related party.[15]

27 NAB and NULIS accept that there may be some lack of clarity with the practical application of section 68A including that it may be difficult for an employee to establish a nexus between the conduct of their employer and loss suffered as a result of that conduct for the purposes of section 68A, in order to recover loss or damage.

28 Before any alterations to the current operation of section 68A are contemplated, the following matters should also be considered:

(a) the nature and extent of the proposed changes to section 68A – for example would the provision be amended to include a subjective element, in which case evidentiary considerations of establishing "intent of inducement" would need to be considered;

(b) whether employee outcomes would be improved or diminished by changes to section 68A;

(c) the experience in other jurisdictions (for example, the United Kingdom) of comparable provisions and alternative provisions;

(d) the ability of a trustee of a regulated superannuation fund, or an associate of a trustee of a regulated superannuation fund, to comply with any proposed alternative to section 68A;

(e) the way in which compliance with the provision would be regulated and enforced; and

(f) judicial consideration of similar provisions to section 68A, such as other "third line forcing" provisions including those contained in the *Competition and Consumer Act 2010* (Cth), which prohibit the supply of goods or services on conditions that limit the buyer's freedom of choice.

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[12] *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth).
[13] See the Second Reading Speech to the *Superannuation Legislation Amendment (Choice of Funds) Bill 2002*.
[14] Section 68A is not listed as a civil penalty provision in section 193 of the SIS Act.
[15] SIS Act, subsection 68A(5)-(6).

D. PAYMENTS FROM EXTERNAL RESPONSIBLE ENTITIES OF MANAGED INVESTMENT SCHEMES

29 **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?* (CS [474], [825.6])

30 **NAB and NULIS response:** In certain circumstances, as outlined below, the existing legal framework and practice across the superannuation industry recognise that a trustee of a superannuation fund can appropriately retain payments from the responsible entity of a managed investment scheme where that payment is derived from the investment of members' money.

31 NAB and NULIS consider that the legal framework can best be explained by setting out several broad propositions that apply to the issues raised by Question 6:

(a) any asset derived by the investment of superannuation fund money is an asset of the superannuation fund. Accordingly, any financial benefits derived from the investment of members' money should be treated as an asset of the superannuation fund and used for the benefit of members in a way that is consistent with the trust deed of the superannuation fund;

(b) subject to the terms of the trust deed and the SIS Act, a superannuation trustee may use those funds to reduce or limit:

(1) fees that the trustee would otherwise deduct from members; or

(2) expenses of the trustee that the trustee would otherwise be entitled to recover from members accounts pursuant to its right of indemnity;

(c) there are limited circumstances under trust law where a trustee can retain (as an asset that is not subject to the terms of the superannuation fund's trust deed) a payment made by an underlying managed investment scheme as a result of the investment of the assets of the superannuation fund in that managed investment scheme. In addition, any retention by the trustee (outside of the terms of the trust) of such a payment also has to be consistent with the Future of Financial Advice (**FoFA**) legislation.

32 Having regard to the above propositions:

(a) money that is received from the responsible entity of a managed investment scheme that is paid as result of the investment of superannuation fund money into that scheme is an asset of the superannuation fund and must be used consistently with the terms of the superannuation fund trust.

(b) subject to the terms of the relevant superannuation fund trust deed, the SIS Act and FoFA arrangements, such a payment may be: (a) passed on to members in the form of additional investment returns; and/or (b) used to subsidise costs that would otherwise be deducted from members' accounts under the trustee's right of indemnity. Of course, these matters would also need to be adequately disclosed to members.

(c) trustees may also sometimes charge a responsible entity of an underlying managed investment scheme the trustee's estimated costs of assessing and monitoring the managed investment scheme as an investment option of the superannuation fund. This may be done to determine whether the relevant managed investment scheme is an appropriate investment to be offered to members of the superannuation fund.[16] By charging some of these costs directly to the responsible entity, a trustee can use that money consistently with the terms of the trust deed to reduce or limit the costs that it reasonably incurs and that will ultimately be deducted from members' accounts under its right of indemnity.[17]

E. SELLING OF SUPERANNUATION

33 **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?* (CS [475.1], [825.7])

34 **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?* (CS [475.2], [825.8])

35 **NAB and NULIS response:** Questions 7 and 8 are answered together.

36 The NAB Group does not have in place any programs or instructions for branches or branch staff to sell, recommend or encourage customers to open a superannuation account with NULIS.[18]

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[16] Subsection 52(6) of the SIS Act requires that the trustee must formulate and regularly review its investment strategy and investment option offered by the trustee, having regard to, amongst other things, the costs that might be incurred in relation to the investments covered by the strategy (see especially, subsection 52(6)(vii) of the SIS Act). The selection or retention of an investment by a superannuation fund must *not* be influenced by any arrangements between the trustee and a third party where the third party makes a payment to the trustee or another party (and that payment does not then become an asset of the fund): see the covenants in section 52 of the SIS Act (eg subsections 52(2)(c), 52(2)(d) and 52(6)) and section 109 of the SIS Act that require investments to be made on arm's length terms.

[17] SIS Act, section 56.

[18] Exhibit 5.2, Statement of Paul Alexander Carter dated 30 July 2018 in response to Further Revised Rubric 5-40 (WIT.0001.0087.0001) at [161].

37 Informing a consumer in a bank branch of the availability of a superannuation product is not inherently problematic. The provision of factual information or a Product Disclosure Statement, without giving an opinion or recommendation, does not constitute advice.

38 Whether it is appropriate for a bank branch representative to recommend a superannuation product in a particular case is likely to depend on the following:

(a) whether the regulatory requirements for the giving of financial product advice are met;

(b) whether the person providing the advice has the appropriate knowledge and training to do so; and

(c) whether any conflicts of interest can be appropriately managed or avoided.

39 The provision of financial advice in relation to superannuation through suitably qualified branch staff may render such advice services more accessible to the average superannuation member.

40 Access to appropriate high quality advice about superannuation needs for more Australians is a desirable policy outcome. Information and advice must be provided to members in a convenient format that recognises member preferences.

41 The Banking Code of Practice (**Code**)[19] applies to all products sold through bank branches, including superannuation. Signatories to the Code (including NAB) have commitments and obligations under the Code which are relevant to the distribution of superannuation.[20] NAB and NULIS support the Code – NAB has been a signatory to the Code since 1993 and was an active participant in the recent review of the Code. In particular, NAB considers that the Code plays, and that the Proposed Code[21] will play, an important role in setting standards of practice and service that members, and their guarantors, can expect through all channels, including branches.

F. ENGAGEMENT BY SUPERANNUATION FUNDS WITH ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

42 NAB and NULIS recognise that the following questions in relation to Aboriginal and Torres Strait Islander people raise important matters for consideration. Working through these issues is a considerable and complex undertaking and should involve engagement and co-ordination amongst multiple stakeholders including indigenous participants, industry participants, the Association of Superannuation Funds of Australia, relevant government

[19] Exhibit 3.133, Statement of Anna Maria Bligh dated 17 May 2018 in response to Rubric 3-20 (WIT.0001.0048.0001), with exhibits tendered as exhibits 3.133.1-3114.58 (**Bligh Statement**), tab 2, of Exhibit AB-1 (ABA.001.007.1128).
[20] See for example: Bligh Statement, tab 2, ABA.001.007.1128 at clauses 3.1(b), 3.2, 4.1, 4.2, 9, 12.1 and 12.2.
[21] The Proposed Banking Code of Practice was published in August 2018 and commences on 1 July 2019.

departments and agencies, local communities and representatives from bodies routinely advising Aboriginal and Torres Strait Islander people. Subject to these observations, NAB and NULIS turn to the particular questions identified by Counsel Assisting.

43 **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?* (CS [638], [825.9])

44 **NAB and NULIS response:** NAB and NULIS recognise that its Aboriginal and Torres Strait Islander members, including those living in regional and remote communities, may encounter difficulties in providing conventional proof of identification.[22]

45 The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is the applicable regulator in respect of the regulatory obligations imposed on financial institutions (including NULIS) with respect to proof of identification.[23] In 2016, AUSTRAC released guidance about identification requirements for Aboriginal and Torres Strait Islander people.[24] The AUSTRAC guidance allows reporting entities, such as NULIS, to accept alternative identification documents from persons of Aboriginal and Torres Strait Islander heritage while remaining mindful of social and cultural sensitivities.

46 As set out in its submissions on the questions arising from the fourth round of public hearings, NAB and NULIS have sought to address this issue by adopting AUSTRAC's guidance about identification requirements for Aboriginal and Torres Strait Islander members.[25] In doing so, it is also important that the ability to accept alternative forms of identification is sufficiently understood and implemented by bank or fund staff. In this regard, NAB and NULIS aim to continue to improve the awareness of their staff of alternative forms of identification available to its Aboriginal and Torres Strait Islander members, especially those living in regional and remote communities.

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[22] See for example: Exhibit 4.140, Statement of Lynda Edwards dated 22 June 2018 (WIT.0001.0067.0001) (**Edwards Statement**)at [50]–[51]; Exhibit 4.138, Statement of Nathan Boyle dated 25 June 2018 (ASIC.0800.0007.0001) (**Boyle Statement**), at [77]–[79].

[23] The regulatory requirements are contained in Part 2 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and Chapter 4 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No 1) (Cth).

[24] Edwards Statement at [52]; Boyle Statement at [77]–[79]; paragraph 5.2.2 of The Commission, *Background Paper No. 19: Aboriginal and Torres Strait Islander consumers of financial products*, 22 June 2018, at [5.2.2].

[25] NAB submissions in response to questions arising from the fourth round of public hearings dated 16 July 2018 at [89].

47 As to whether the guidance for identification for superannuation funds for their Aboriginal and Torres Strait Islander members is appropriate, to determine this would require at least the following matters to be evaluated:

(a) the obstacles and barriers that may be faced by Aboriginal and Torres Strait Islander peoples in identification, including the nature and extent of the cultural and linguistic barriers and the issues presented where people live in remote and regional communities and the way in which those issues give rise to practical difficulties meeting the alternative identification requirements, and affect day to day interactions with superannuation funds;

(b) the barriers and restrictions to accessing online services for some Aboriginal and Torres Strait Islander members, particularly those living in regional and remote communities;

(c) an analysis of industry wide procedures to determine current best practice and the merits of adopting a consistent industry approach to addressing those matters;

(d) how appropriate procedures are to be designed and implemented in a manner that is mindful of social and cultural sensitivities and consistent with applicable anti-discrimination laws, particularly having regard to the fact that within and across Aboriginal and Torres Strait Islander communities, there will be differences of experience;

(e) whether it is necessary and desirable to have specific procedures for Aboriginal and Torres Strait Islander members or whether it would be preferable to ensure universal policies and procedures adequately address the difficulties presented for all persons in regional and remote communities in obtaining and presenting identification, with particular regard to Aboriginal and Torres Strait Islander members; and

(f) which external bodies and regulators should be consulted in relation to any such procedures.

48 **Question 10:** *Should superannuation funds be required to record whether their members identify as Aboriginal or Torres Strait Islander people?* (CS [639], [825.10])

49 **NAB and NULIS response:** NAB and NULIS recognise that this is an important and complex issue which warrants further consideration, including through consultation with the appropriate stakeholders. NAB and NULIS also acknowledge that there was some difference of opinion in the evidence before the Commission.[26] In their view, in determining whether it is appropriate to require superannuation funds to record whether their members

[26] For example, see: Edwards Statement at [73(a)]; Edwards XXN at T3736.40 – T3737.17 and Boyle XXN at T3737.24-39; Melcer XXN at T4728.15-46.

identify as Aboriginal or Torres Strait Islander people, the following matters would at least need to be considered and evaluated:

(a) an analysis of whether providing this information is appropriate or whether there are other (preferable) ways to capture and utilise meaningful data in respect of Aboriginal and Torres Strait Islander peoples (and the composition of a fund's membership);

(b) how appropriate procedures for the collection of this information are to be designed and implemented in a manner that is mindful of social and cultural sensitivities and consistent with applicable anti-discrimination laws, particularly having regard to the fact that within and across Aboriginal and Torres Strait Islander communities, there will be differences of experience;

(c) the purpose for collecting the information and the way in which the superannuation fund would then use the information provided, including its use for the purposes of implementing the matters raised by Counsel Assisting's Questions 9 and 11 to 13, and any appropriate restrictions on the use of that information; and

(d) consideration of any risks or adverse outcomes that may occur for Aboriginal and Torres Strait Islander members should this information be collected and known by all parties involved within the superannuation system, including insurance providers.

50 **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?* (CS [640], [825.11])

51 **NAB and NULIS response:** NAB and NULIS support further consideration of this issue and consider that this question raises important issues that interact with complex questions of social policy.

52 While the aim of superannuation benefits is to preserve income until a member's retirement, there are circumstances, such as severe financial hardship, where it is appropriate for early release of funds where the benefits of early access to superannuation for an individual will exceed the benefits of preserving the balance until retirement.

53 NULIS has policies, procedures and guidelines in place for all members (including Aboriginal and Torres Strait Islander members) to allow the release of superannuation entitlements on financial hardship grounds (amongst others).

54 NAB and NULIS acknowledge that issues associated with employment outcomes and the lower life expectancy of Aboriginal and Torres Strait Islander people may result in Aboriginal and Torres Strait Islander people facing severe financial hardship at greater rates or a higher incidence than non-Aboriginal and Torres Strait Islander people. This and other

related issues were recognised in the Commission's Background Paper 19.[27] NAB and NULIS are supportive of this issue being considered further including through consultation with the appropriate stakeholders.

55 **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?* (CS [641], [825.12])

56 **NAB and NULIS response:** NAB and NULIS support further consideration of this issue and consider that this issue goes to the very crux of the potential disadvantages faced by Aboriginal and Torres Strait Islander people in respect of their superannuation.

57 The Commission's Background Paper 19 recognises that Aboriginal and Torres Strait Islander people may have a lower life expectancy than non-Aboriginal and Torres Strait Islander people, and as a result have less opportunity to benefit from their superannuation savings.[28] In answering this question, NULIS also acknowledges the evidence of Ms Lynette Melcer as to the ways in which superannuation funds can take into consideration the lower life expectancy of Aboriginal and Torres Strait Islander people.[29]

58 NAB and NULIS believe further consideration of this issue is required, including through consultation with the appropriate stakeholders. To address this issue would also require at least the following matters to be considered and evaluated:

(a) an analysis of the considerations relevant to determining the appropriate age or criteria when the release of funds would be appropriate or necessary;

(b) ways in which the relevant criteria or requirements would need to be established and evidenced in order to be satisfied (and having regard to that issue, any issues experienced disproportionately by Aboriginal and Torres Strait Islander people that may lead to those criteria or requirements not being able to be satisfied);

(c) the matters which ought to be considered in any decision-making process by a fund, and the extent to which there would be discretion in decision-making (or not, as the case may be);

(d) any related issues, for example whether life expectancy and remoteness should be relevant criteria in the policies and procedures for the release of funds for severe financial hardship and total and permanent disability;

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[27] The Commission, *Background Paper No. 19: Aboriginal and Torres Strait Islander consumers of financial products*, 22 June 2018, at [4.3] and [4.6].
[28] See for example, The Commission, *Background Paper No. 19: Aboriginal and Torres Strait Islander consumers of financial products*, 22 June 2018, at pages 18 – 19.
[29] Melcer XXN at T4727-4728.

(e) how appropriate procedures are to be designed and implemented in a manner that is mindful of social and cultural sensitivities and consistent with applicable anti-discrimination laws, particularly having regard to the fact that within and across Aboriginal and Torres Strait Islander communities, there will be differences of experience;

(f) the lack of flexibility provided by the current system and the way in which any changes will be dealt with (through legislation, prudential standard, guidance); and

(g) which external bodies and regulators should be consulted in relation to these matters, and in the case of regulators, which will monitor, supervise and enforce these requirements.

59 **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?* (CS [642], [825.13])

60 **NAB and NULIS response:** NAB and NULIS support further consideration of this issue.

61 Under the current legislation, a person is only able to nominate their legal personal representative or "dependent" to receive death benefits.[30] The definition of "dependent"[31] in the current regime does not appropriately accommodate the unique and complex kinship structures operating in Aboriginal and Torres Strait Islander communities. The Commission's Background Paper 19 recognised that these factors are capable of contributing to difficulties for Aboriginal and Torres Strait Islander members in accessing superannuation benefits and financial exclusion.[32]

62 NAB and NULIS believe further consideration of this issue is required, including through consultation with the appropriate stakeholders. To address this issue would also require at least the following matters to be considered and evaluated:

(a) the way in which the kinship structures operate;

(b) the need for flexibility in the criteria or requirements that are prescribed in order to ensure that the appropriate requirements or criteria can apply to the multiple kinship structures that may exist and continue to evolve in the future;

(c) how appropriate procedures are to be designed and implemented in a manner that is mindful of social and cultural sensitivities and consistent with applicable anti-discrimination laws, particularly having regard to the fact that within and across

[30] SIS Act, subsection 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 6.17A.
[31] SIS Act, section 10.
[32] The Commission, *Background Paper No. 19: Aboriginal and Torres Strait Islander consumers of financial products*, 22 June 2018, at [4.5].

Aboriginal and Torres Strait Islander communities, there will be differences of experience; and

(d) which external bodies and regulators should be consulted in relation to these matters, and in the case of regulators, which will monitor, supervise and enforce these requirements.

G. DISCRETION TO APPOINT AND REMOVE DIRECTORS

63 **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?* (CS [695], [825.14])

64 **NAB and NULIS response:** NAB and NULIS consider that it is important to ensure that directors of a registrable superannuation entity (**RSE**) licensee are fit and proper persons to hold such office, and that the Board composition reflects an appropriate mix of skills and experience.[33] However, rather than imposing a "best interests" obligation upon shareholders in exercising any discretion to appoint directors, NAB and NULIS consider that it is preferable for this issue to be more directly addressed by improving existing prudential standards and guidance, which may include specific criteria which promote strong governance arrangements by RSE licensees, including as to the appointment and removal of directors.

H. RELATIONSHIP BETWEEN TRUSTEES AND FINANCIAL ADVISERS

65 **Question 15:** *Are legislative interventions to remove grandfathered commissions and ongoing service fees from superannuation accounts appropriate? If so, why? If not, why not?* (CS [773.1], [825.15])

66 **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.* (CS [773.2], [825.16])

[33] NULIS Nominees (Australia) Limited, Fit and Proper Policy (Exhibit 5.84, Statement of Peggy O'Neal in response to Rubric 5-22 dated 19 July 2019 (WIT.0001.0078.0001), Exhibit PYO-1, Tab 11 (NAB.005.498.0057)).

Grandfathered commissions

67 **NAB and NULIS response:** As stated in NAB's submissions in response to questions arising from the second round of public hearings,[34] NAB and NULIS agree in principle with the cessation of grandfathered commissions[35] and support measures which encourage the transition of financial advice businesses to non-conflicted remuneration models.

68 NULIS's preference for removing commissions is reflected in its program of transitioning members from legacy products with commission to modern products without commission.[36]

69 NAB has recently announced that NAB Financial Planning and NAB Direct Advice will no longer accept grandfathered commissions from NAB Wealth superannuation and investment product providers. As a result of this change, around 32,000 superannuation and investment members and customers will benefit through fee rebates and reductions, totalling approximately $11 million, with effect from 1 January 2019.[37]

70 NAB and NULIS consider that the removal of grandfathered commissions should occur at an industry level with appropriate engagement and transition arrangements.

Ongoing service fees

71 Access to affordable and quality financial advice for all Australians is an important element of the superannuation system. Quality advice can improve financial understanding both generally and in relation to the complexities of the superannuation regime, can help members understand their choices, and assist them in ensuring that their superannuation remains on track to deliver expected retirement outcomes.

72 NAB and NULIS consider that financial advice will remain accessible to a significantly larger proportion of superannuation members if members continue to be able to pay for advice services (including ongoing advice services) from their superannuation savings, rather than having to find the funds to pay for such advice from another source.

73 The ability to enter into an arrangement to make ongoing payments from the member's bank account to a financial adviser, in order to obtain ongoing superannuation advice (as proposed in CS [764]), is unlikely to replace ongoing service arrangements funded from superannuation savings. In the view of NAB and NULIS, many members are likely to be

[34] NAB submissions in response to questions arising from the second round of public hearings dated 7 May 2018 at [15]-[16].
[35] The reference to "grandfathered commissions" in answer to this Question 15 is a reference to those commissions that are covered by grandfathering regulations or exemptions contained in Part 7.7A, Division 4, Subdivision 5 of the *Corporations Regulations 2001* (Cth).
[36] Exhibit 5.85, Statement of Peggy O'Neal dated 23 July 2018 in response to the Further Revised Rubric 5-40 (WIT.0001.0077.0001) at [13]-[16].
[37] Media Release, 'NAB moves on Grandfathered Commissions', 3 September 2018: https://news.nab.com.au/nab-moves-on-grandfathered-commissions/.

unable to incur the cost of advice from immediately available funds in order to obtain a benefit in relation to superannuation savings which may remain inaccessible for many years.

74 Furthermore, if payment for ongoing superannuation advice from superannuation savings were prohibited, the cost to members of obtaining advice may increase. That is due both to the loss of economies of scale which presently exist for advice services, and to the loss of the tax advantage to members for superannuation advice funded from superannuation savings.

75 NAB and NULIS consider that it is important that ongoing service arrangements remain accessible to all members. As noted in NAB's submissions in response to questions arising from the second round of public hearings,[38] there are significant benefits to ongoing service arrangements. Ongoing service arrangements provide clients with:

(a) an opportunity to have a regular review of their financial plan;

(b) regular access to newsletters, articles and seminars which keep clients informed of the changing regulatory landscape which can have a significant impact on their investments; and

(c) immediate access to financial advice should the client need it at any time throughout the course of the ongoing relationship.

76 Regular reviews may be of particular benefit in relation to superannuation, as it is NAB's and NULIS's experience – and the Commission has heard[39] – that many consumers are passive or disengaged in respect of their superannuation. However, consumers' circumstances typically change over time in ways which may require the realignment of their superannuation strategy. Ongoing service arrangements provide an opportunity for those consumers to re-engage or act as a prompt to review their arrangements, where appropriate.

77 NAB and NULIS continue to support improved transparency regarding what fees are paid for the services to be delivered. Further, NAB and NULIS continue to support putting the member in control of whether they receive services and the fees they pay. Enhancements to better achieve this outcome should not preclude members from paying for agreed services from their superannuation accounts for the reasons outlined above.

78 NAB and NULIS support greater clarity on how services can be provided to members to better meet their specific needs and to make them more affordable. Recognising that all member needs are not the same, a model that distinguishes between the provision of

[38] NAB submissions in response to questions arising from the second round of public hearings dated 7 May 2018 at [6]-[7].
[39] For example, see: Senior Counsel Assisting's opening address at T4519.22-T4160.21; Senior Counsel Assisting's oral closing address at T5267.4-6.

information, guidance and in-depth personal advice could assist to ensure that the right service offer is accessible and affordable for Australians. The importance of this distinction was referred to in the 2014 *Financial Services Inquiry*.[40]

I. MANAGING CONFLICTS

79 **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?* (CS [776], [825.17])

80 **Question 18:** *If certain structures do raise inherent problems, is structural change of entities, mandated by legislation or otherwise, something that is desirable?* (CS [777], [825.18])

81 **NAB and NULIS response:** Questions 17 and 18 are answered together.

Structures giving rise to conflicts of interest

82 NAB and NULIS accept that some structures may contain inherent conflicts of interest. In particular, NAB and NULIS acknowledge that conflicts may arise in some vertically integrated structures across both industry and retail funds, including in circumstances where superannuation trustees are integrated into advice businesses.[41] NAB and NULIS consider that, in practice, the elimination of all potential forms of conflict in the operation of a modern superannuation fund would be very difficult.

83 NAB and NULIS understand the reference to "dual-regulated entities" to refer to an entity which is both the responsible entity of a registered management investment scheme and a RSE licensee. NULIS is not the responsible entity of a registered management investment scheme and therefore the potential conflict identified by Counsel Assisting at CS [776] does not arise with respect to NULIS. As such, NAB and NULIS do not make any comment on this issue.

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[40] The Treasury, *Financial System Inquiry – Interim Report,* July 2014, at pages 3-73: http://fsi.gov.au/files/2014/07/FSI_Report_Final_Reduced20140715.pdf and The Treasury, *Financial System Inquiry – Final Report,* November 2014, at pages 201, 271: http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf.

[41] NAB Submission, *Financial System Inquiry Interim Report*, August 2014 at page 21: http://fsi.gov.au/files/2014/08/NAB.pdf.

Mandated structural change is not necessary

84 NAB and NULIS do not believe that there needs to be a mandated prohibition on certain structures,[42] given the existing requirements on trustees and financial service licensees to manage conflicts, which are extensive, and provided conflicts of interest are managed appropriately.

85 These requirements include the following:

(a) pursuant to subsection 912A(1)(aa) of the *Corporations Act 2001* (Cth) (**Corporations Act**), a financial services licensee must have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative;

(b) pursuant to subsection 52(2) of the SIS Act, the governing rules of a RSE licensee are taken to include covenants which cannot be excluded or modified by statute or the trust deed, including the covenant in subsection 52(2)(d) which requires the trustee to prioritise the interests of members where conflicts arise and the covenant in subsection 52(2)(h) not to enter into any contract or do anything else that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;

(c) pursuant to subsection 34C(1) of the SIS Act, APRA may determine (in writing) prudential standards relating to prudential matters that must be complied with by all RSE licensees of registrable superannuation entities, or the connected entities of all RSE licensees of registrable superannuation entities;

(d) prudential Standard *SPS 521 Conflicts of Interest* (**SPS 521**) imposes a range of obligations upon RSE licensees with respect to conflicts management. In particular, SPS 521 provides that a trustee of a superannuation fund must have a board-approved conflicts management framework, so as to ensure that the trustee identifies all potential and actual conflicts in the RSE licensee's business operations and takes all reasonably practicable actions to ensure that they are avoided or prudently managed.[43] The conflicts management framework is defined as "the totality of systems, structures, policies, processes and controls within an

[42] See also The Treasury, *Background Paper No. 24: Submissions on key policy issues*, 13 July 2018 at [204] – [226] with respect to vertical integration in the context of advice generally, and [227] – [230] in relation to superannuation.
[43] APRA, Prudential Standard SPS521: Conflicts of Interest at [8].

RSE licensee's business operations that identify, assess, mitigate, manage and monitor all conflicts";[44]

(e) pursuant to section 58A of the SIS Act trustees can no longer entrench service providers by the governing rules prescribing that they use related body corporate service providers; and

(f) section 109 of the SIS Act requires investments of a superannuation entity to be made and maintained on an arm's length basis.

86 Further, any consideration of whether mandated structural change is necessary should be informed by a consideration of the benefits which may arise for members through certain structures.

87 In particular, NAB and NULIS submit that members benefit from a properly managed vertically integrated model. These benefits may include economies of scale, the provision of secure and integrated financial services, and the financial capacity to protect members (including through remediation) in the event of fraud or operational issues, as was recognised in Background Paper 24 prepared by the Treasury.[45] In this regard, ASIC has acknowledged that vertical integration has potential benefits for clients:[46]

> *Vertical integration can provide economies of scale and other benefits for both the financial institution and its customers. The economies of scale may allow customers to access advice at lower cost. Customers may choose to obtain both advice and financial products from a vertically integrated institution because of 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.*

88 Additionally, great care should be taken with respect to the relationship between advice businesses and superannuation when considering any reforms to vertical integration. This is because of the unique needs of superannuation members, as seen through the provision of 'in-product' and 'intra-fund advice', and the need for financial advice when a member is moving from an accumulation phase into a pension phase. The unique requirements of superannuation were recognised by the Treasury in Background Paper 24.[47]

89 NAB and NULIS also consider that the significant legislative amendments enacted by the FoFA reforms (including the introduction of the duty on financial advisers to act in the best

[44] APRA, Prudential Standard SPS521: Conflicts of Interest at [9].
[45] See the Treasury, *Background Paper No. 24: Submission on key policy issues*, 13 July 2018, at [210]-[226] considering these issues in the context of advice and [227]-[230] in the context of superannuation.
[46] See Exhibit 2.1, Statement and exhibits of Peter Kell dated 12 April 2018 (ASIC.0902.0001.3284) at [51(a)] and [218]; Exhibit 2.1.9, ASIC Report 562 (ASIC.0015.0001.5455) at [8].
[47] The Treasury, *Background Paper No. 24: Submission on key policy issues*, 13 July 2018, at [227]-[230].

interests of the member) further mitigate the risk of conflicts with respect to the vertical integration of superannuation trustees within advice businesses (whilst acknowledging the need for continuous improvement). Relevantly, the Productivity Commission noted in its Draft Report at page 20:

> *The Future of Financial Advice laws have helped to reduce biased advice stemming from advisers' conflicts of interests (especially within vertically integrated institutions), but the quality of advice remains variable. In super, all financial advice is arguably personal, and needs to take into account members' individual circumstances. The need for tailored and impartial advice will only grow as the system matures.*

90 Generally, NAB and NULIS support measures, including additional scrutiny, to ensure that members' interests are being prioritised by their superannuation fund, whatever the structure of the business, and to ensure any conflicts of interest are appropriately monitored and managed in a way which puts members first. NAB and NULIS would also welcome further regulatory guidance in relation to appropriate conflicts management. Further, NAB and NULIS consider that it is important for institutions to take responsibility to ensure better alignment of interests and incentive structures to ensure the best interests of members are served.

91 **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? (CS [779], [825.19])

92 **Question 20:** *Are there unforeseen consequences of such a legislative intervention that would make it undesirable to strengthen the SIS Act in this way?* (CS [781], [825.20])

93 **NAB and NULIS response:** Questions 19 and 20 are answered together.

94 NAB and NULIS acknowledge that it is important to ensure that the best interests provisions of the SIS Act work effectively and efficiently. However, they observe that any proposal to extend the "best interests" obligation in the manner suggested by these questions should be subject to careful consideration. Subject to that general observation, NAB and NULIS have a number of more specific submissions that may assist the Commission in its deliberations.

Civil penalty

95 NAB and NULIS support the extension of the civil penalty regime to directors of trustees through the imposition of civil penalties with respect to contraventions of the "best interests" obligation. Such an approach is proposed in Schedule 3 to the *Treasury Laws* Amendment *(Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017* (Cth), which is currently before the Senate.

96 However, NAB and NULIS submit that any legislative intervention to impose civil penalties on directors with respect to a contravention of the obligation in subsection 52(2)(b) should be subject to the availability of appropriate defences in order to ensure that directors are adequately protected in circumstances where, for instance, the director acted in good faith, or reasonably relied upon information provided by others.[48]

97 In this regard, it is important to recognise that the practical application of the "best interests" duty is not straightforward. The determination by a superannuation trustee of whether a particular exercise of power or duty is in the best interests of members often involves the exercise of complex discretionary judgement, requiring the trustee to evaluate and forecast risks, benefits and potential adverse effects by reference to a wide range of relevant facts and circumstances before them.

98 Case law and commentary considering the scope and content of the "best interests" obligation at general law and under subsection 52(2)(c) of the SIS Act reinforces the point that the application of the test is beset with a significant degree of uncertainty.[49] By way of example, areas of uncertainty include the interaction between the "best interests" covenants and the other covenants in subsection 52(2); which general law duties are reflected in the covenant and the scope of such duties; and whether the word "best" adds anything.[50] As such, it is desirable for the meaning of the "best interests" duty to be the subject of further regulatory guidance and clarification.

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[48] As presently framed, the SIS Act incorporates defences where, for example, the contravention was due to a reasonable mistake (subsection 323(2)(a)); reasonable reliance on information supplied by another person (subsection 323(2)(b)); a due diligence defence (subsection 323(2)(c)(ii)). Further, subsection 221(2) which applies with respect to civil penalty provisions permits relief from liability where it appears to the court that the person has acted honestly and, having regard to all the circumstances, ought fairly to be excused for the contravention. NAB and NULIS understand that the amendments proposed in the Bill referred to in *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017* (Cth) would be subject to these existing defences.

[49] As discussed in, for example, Professor Geraint W Thomas, "The Duty of Trustees to Act in the 'Best Interests' of their Beneficiaries' (2008) 2 *Journal of Equity* 177. The Hon Mark Kranz Moshinsky, "The Continuing Evolution of the 'Best Interests' Duty for Superannuation Trustees from Cowan v Scargill to the Current Regulatory Framework", paper presented to the 2018 Superannuation Conference: Order in the House, available at http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-moshinsky/moshinsky-j-20180309.

[50] See, eg, Moshinsky, "The Continuing Evolution of the 'Best Interests' Duty for Superannuation Trustees from Cowan v Scargill to the Current Regulatory Framework", paper presented to the 2018 Superannuation Conference: Order in the House, available at http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-moshinsky/moshinsky-j-20180309.

99 Similarly, NAB and NULIS support in principle the extension of the civil penalty regime to trustees, subject to the same caveats.

Extension of duty to shareholders and related companies

100 NAB and NULIS do not agree that the "best interests" duty should be extended to shareholders and related bodies corporate of the trustee.

101 To the extent that this is being considered the following matters, whilst not intended to be exhaustive, are illustrative of the issues which may arise:

(a) *firstly*, in circumstances where, unlike a trustee, a shareholder or related body corporate does not exercise any direct control or power in respect of a beneficiary or the superannuation trust, the extension of a duty to such persons is difficult to justify. The extension of such a duty to shareholders or related bodies corporate, outside the accepted categories in which fiduciary obligations are owed, would involve a radical departure from the existing law, without equivalent elsewhere.

(b) *secondly*, the extension of the "best interests" duty to shareholders and related bodies corporate may lead to significant unforeseen consequences, some of which may be adverse for members. For example, transactions between a trustee and a related company can be beneficial to members: e.g. where the related party dealing with the trustee is offering better terms than unrelated parties, or where the related party dealing leads to cost or administrative efficiencies. However, a related company may be discouraged from transacting with the trustee if this might impose some vague "quasi-fiduciary" duty on it which would not be imposed on an unrelated party. Further, the extension of the duty to shareholders and related bodies corporate creates the potential for ambiguity in determining who is responsible for the management of the trustee, and may compromise the independence of trustee directors who may be under increased pressure from shareholders and related bodies corporate to take the interests of those parties into account in relation to decisions the trustee directors make. This may delay decision-making by trustees, which is not in members' interests.

(c) *thirdly*, as noted by NAB and NULIS in their submissions in response to the fifth round of public hearings case study dated 31 August 2018, the covenant in subsection 52(2)(c) of the SIS Act imposes an obligation upon the trustee to *perform the trustee's duties* and *exercise the trustee's powers* in the best interests of members.[51] This requires a focus on the particular duty or power being performed or exercised, which may, in turn, involve a consideration of the trust's

[51] Submissions of NAB and NULIS in response to the round 5 superannuation case study dated 31 August 2018 at [20].

governing rules. It is difficult to see how, in practice, an equivalent obligation could be imposed in the case of shareholders or related parties "in respect of any conduct that will affect the interests of the members of the superannuation fund". In other words: the extension of the duty to other parties may be problematic in circumstances where the content of the "best interests" obligation is grounded in the mandate of the trustee as reflected in the trust deed. To what performance of duty or exercise of power would the duty attach?

(d) *fourthly*, the imposition of a broadly framed duty on shareholders and related bodies corporate would create significant uncertainty for these entities in identifying the circumstances in which the duty might arise, and what its content would require in the circumstances of any given case.

(e) *fifthly*, a related difficulty arises due to the width of the definition of "related body corporate" under the Corporations Act.[52] In the context of retail superannuation funds, superannuation trustees will often be members of a large corporate group. The imposition of a "best interests" duty on related parties of the trustee may mean that the number of entities on whom the duty is imposed could be very large. Those related parties may have their own business independent of the trustee's operations, have a range of pre-existing legal obligations to act in the interests of their own members, and may be subject to a range of pre-existing contractual agreements that are predicated on the trustee alone within the corporate group being subject to a section 52 best interests duty. It is not in the interests of members or other unrelated commercial parties dealing with a related company of a trustee (for example, suppliers or lenders), that the related company may have some indeterminate contingent financial exposure merely because it had dealings with the trustee.

102 Finally, NAB and NULIS note that a protection available to members under the SIS Act in its current form is that, in addition to a right of recourse against the trustee, a person who suffers loss or damage as a result of a contravention of the "best interests" covenant in subsection 52(1)(c) of the SIS Act may also recover the amount against any person *involved in* the contravention.[53] The existence of this protection needs to be taken into account before any recommendation is made to expand the number of entities over whom a section 52 best interests duty is to operate.

[52] Corporations Act, section 50.
[53] SIS Act, subsections 55(1) and (3).

J. SYSTEM CHANGES

103 **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?* (CS [802.1], [825.21])

104 **NAB and NULIS response:** NAB and NULIS consider that seeking to improve outcomes for MySuper members should be a key priority for superannuation trustees, and support additional measures designed to achieve that result.

105 In NAB and NULIS's view, strengthening the MySuper system is also likely to contribute to addressing and discouraging misconduct on the part of superannuation trustees. The MySuper sector is already large and continues to grow. Measures which apply to MySuper will inevitably influence the superannuation system as a whole and introduce further competitive pressures which incentivise trustees to prevent misconduct and quickly resolve and remediate any misconduct which does occur.

106 **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?* (CS [802.2], [825.22])

107 **NAB and NULIS response:** NAB and NULIS support the introduction of outcome assessments for MySuper products. Such assessments would provide additional protection to the disengaged consumers for whom MySuper products are designed.

108 NAB and NULIS note that legislation to introduce outcomes assessment requirements for MySuper products is currently before the Senate.[54] That legislation expands the scope of section 29VN of the SIS Act consistently with NAB's and NULIS's views set out below. NAB and NULIS also note that APRA is working to develop an outcomes assessment framework for RSE licensees.

109 NAB and NULIS consider that outcome assessments should be prepared by trustees, and reviewed by APRA, on a regular basis, in the course of monitoring by APRA of the ongoing adequacy of MySuper products. Outcome assessments should be focused on scale, fees and long-term investment returns. In addition to the matters presently addressed by section 29VN of the SIS Act, outcome assessments should include the following key elements:

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[54] *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017* (Cth).

(a) consideration of the fees charged by trustees in evaluating whether scale objectives are being met; and

(b) assessment of the net performance of a trustee's MySuper product against an investment benchmark tailored to the fund's investment return target and risk target. Such assessment should also take into account potential future returns, where appropriate. Consideration of potential future returns may, for example, be appropriate where adjustment of an investment strategy by an investment manager provides a trustee with a sound basis for believing that a MySuper product will produce improved investment returns in the future.

110 Outcome assessments should also be submitted to APRA for objective consideration. NAB and NULIS consider that APRA is best placed to conduct reviews of outcome assessments, rather than a separate body or panel. The creation of a separate body or panel would cause duplication of costs and potentially give rise to conflicts which may be difficult to manage, given the size of the superannuation market and the availability of expertise.

111 APRA should be able to withdraw a MySuper authorisation if it concludes that a MySuper product is failing to achieve adequate scale or is underperforming over the medium term. However, such withdrawal of MySuper authorisations should occur only after APRA has engaged with the trustee to seek to improve scale and performance outcomes, and appropriate protections are in place for:

(a) existing MySuper members; and

(b) employers who have nominated that superannuation fund as the default fund of their employees to avoid them incurring a charge under the Superannuation Guarantee legislation as a result of the nomination of a default fund that no longer has a MySuper product.

112 NAB and NULIS consider that such outcome assessments would address the issue of underperforming and sub-scale MySuper products, where trustees prove to be unwilling or unable to take appropriate action in the best interests of members. The outcome assessment process would likely drive industry consolidation through promoting the merger of sub-scale or poor performing funds. The outcome assessment should not be made public until the existing MySuper members are transferred to another superannuation fund, in order to avoid there being a "run on the fund" by MySuper members who become aware of the adverse outcome assessment to the detriment of the remaining MySuper members.

113 **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 a*

practical method of addressing this type of conduct noting that it is not suggested to be misconduct? (CS [802.4], [825.23])

114 **NAB and NULIS response:** In principle, NAB and NULIS support the introduction of a form of "stapling" such that a person's account for the receipt of default contributions is linked to the person and travels with the person when she or he changes job.

115 NAB and NULIS consider that some form of "stapling" also offers the potential to assist in preventing poor member outcomes resulting from the replication of fees and insurance on unintended multiple accounts.

116 However, a negative impact of such a model may be that superannuation benefits negotiated by employers may be lost. Such benefits may include discounted fees to members as a result of the employer being able to gain wholesale rates, and reduced fees to members in cases where the employer pays for insurance, superannuation fees or both.

117 NAB and NULIS consider that, where a superannuation member changes employer, the member should be invited to specify whether he or she wishes to transfer his or her superannuation benefits to another superannuation fund upon commencement of the new job. Where a member does not make such an election, the previous superannuation fund should remain the member's account for the receipt of default contributions.

118 NAB and NULIS also support other measures aimed at reducing the number of duplicate, inactive and low-balance accounts, including the Protecting Your Super measures contained in the 2018 Federal budget.

119 In relation to default accounts more broadly, NAB and NULIS note Counsel Assisting's submission that it is not appropriate to consider the adequacy of existing laws that establish the existing system for selection of a default fund for Superannuation Guarantee contributions: CS [793]. NAB and NULIS agree that the evidence before the Commission is not adequate for any conclusions to be drawn as to the merits of a change to the method of selecting default funds. There are also significant implications for competition in proposed alternative methods, which would require extensive consideration. For example, NAB and NULIS consider that the "best in show" model proposed by the Productivity Commission for the selection of default superannuation funds[55] would be likely to impede new entrants' participation in the market, constrain real competitive friction for incumbents, and lead to increased homogeneity of superannuation products.

[55] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness – Draft Report*, April 2018 at page 58: https://www.pc.gov.au/__data/assets/pdf_file/0003/228171/superannuation-assessment-draft.pdf.

120 Nevertheless, NAB and NULIS have concerns as to the conflicts inherent in the current system for the selection of default superannuation funds. NAB and NULIS support measures aimed at reducing the number of duplicate, inactive and low-balance accounts already in the system.

121 **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?* (CS [802.5], [825.24])

122 **NAB and NULIS response:** NAB and NULIS submit that the focus of policy enhancements should be to promote a competitive and transparent superannuation system that enables informed choice by members.

123 Where a competitive, open and transparent system exists, providers will be motivated to do the right thing to retain and attract members and ensure the ongoing sustainability of the fund.

124 NAB and NULIS support simple summary disclosure which could represent a "first port of call" for consumers when considering their superannuation options. Single page "key features" summaries may assist consumers in making comparisons between superannuation products. Further work should be undertaken to determine the information that should be included to most effectively communicate the key features about a product to consumers, drawing on international experience if appropriate.

125 Improved descriptions of objectives and outcomes with respect to MySuper products, in order to enhance member understanding, may also assist in addressing misconduct and conduct falling below community standards and expectations of superannuation trustees. Existing product dashboards are of limited benefit to members: fewer than 1% of NAB's members access their product dashboards.[56] NAB and NULIS consider that this indicates that product dashboards are a costly but ineffective tool for the majority of members. Consultation with APRA and with the wider industry is required to design appropriate and useful information tools.

126 NAB and NULIS note that the Productivity Commission has recommended the delivery of product dashboards on a centralised online service.[57] NAB and NULIS agree that the

[56] MLC NAB Wealth Submission, *Productivity Commission Issues Paper: Assessing the Competitiveness and Efficiency of the Superannuation System*, August 2017, at page 5: https://www.pc.gov.au/__data/assets/pdf_file/0020/221447/sub063-superannuation-assessment-attachment.pdf.
[57] Productivity Commission, *Draft Report: Superannuation – Assessing Efficiency and Competitiveness*, April 2018, at page 38: https://www.pc.gov.au/__data/assets/pdf_file/0003/228171/superannuation-assessment-draft.pdf.

centralisation of product dashboards may make it easier for members to compare the key features of MySuper products.

K. DETERRENCE AND INSIGHT

127 **Question 25:** *What can be done to encourage the regulators to act promptly on misconduct or potential misconduct?* (CS [821.1], [825.25])

128 **NAB and NULIS response:** NAB and NULIS acknowledge the importance of prompt action by regulators in response to instances of misconduct or potential misconduct. NAB and NULIS support having well-resourced regulators that, when issues arise, have the capacity to act promptly and with effective enforcement.

129 **Question 26:** *Is the present allocation of regulatory roles appropriate to achieve specific and general deterrence from misconduct?* (CS [821.2], [825.26])

130 **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?* (CS [821.3], [825.27])

131 **NAB and NULIS response:** NAB and NULIS consider that the issues raised by Questions 26 and 27 are worthy of close consideration.

132 Overall, and consistently with the findings of the 2010 *Super System Review*, NAB and NULIS consider that it is desirable to seek better efficiency through the enhanced alignment and coordination of the main superannuation regulatory agencies and their regulatory requirements.[58] In particular, greater clarity is desirable in relation to, on the one hand, APRA's role as the prudential regulator and, on the other hand, ASIC's role in regulating the conduct of superannuation trustees. Further, NAB and NULIS believe that it is important to ensure that each regulator is appropriately resourced to execute their respective responsibilities and deliver their respective mandates effectively and to ensure that those mandates are not at odds with their overall roles.

21 SEPTEMBER 2018

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[58] The Treasury, *Super System Review Final Report*, 30 June 2010, at page 308: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2009-001_Final_Report_Part_2_Chapter_10.pdf.