

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

**HEARING ROUND 5: SUPERANNUATION**

**ANZ'S SUPPLEMENTARY SUBMISSIONS**

**INTRODUCTION**

1. Australia and New Zealand Banking Group Limited (**ANZ**), OnePath Custodians Pty Limited (**OPC**) and Oasis Fund Management Limited (**Oasis**) make these submissions in response to the letter dated 23 November 2018 from Simon Daley, Solicitor Assisting the Royal Commission.
2. Paragraph 474 of Counsel Assisting's Revised Round 5 Closing Submissions raised as a question whether it was 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. Counsel Assisting's Round 5 Closing Submissions did not submit that any finding was open to the Commissioner in respect of the retention of these payments.
3. By letter dated 23 November 2018, the Solicitor Assisting the Royal Commission has raised for consideration whether it would be open to find that OPC's and Oasis's conduct in receiving and retaining money directly generated from members' funds for nothing in return might have amounted to a contravention of the covenant to act in the best interests of members found in s 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*.
4. Solicitor Assisting's letter is based on a factual premise which has not been established – that OPC and Oasis receive and retain these payments and that these payments are made for nothing in return. Members do receive a return on these payments, as the payments are taken into account in setting (and as such reducing) the fees charged to members for the administration and other services that are provided to members.

**Summary of evidence**

5. Subject to the following exceptions, OPC and Oasis generally accept the summary of evidence contained in paragraphs 455-458 of the Revised Round 5 Closing Submissions made by Counsel Assisting and the additional matters noted from the evidence before the Commission, as submitted by the Solicitor Assisting the Royal Commission in the letter dated 23 November 2018.
6. The factual summaries in paragraphs 455-458 of the Revised Round 5 Closing Submissions and the additional matters noted in the letter dated 23 November 2018 from the Solicitor Assisting the Royal Commission do not take any account of the evidence that the purpose of these payments is to facilitate a wholesale pricing arrangement negotiated with third party responsible entities.<sup>1</sup> These payments are the mechanism by which OPC and Oasis are able to pass on negotiated pricing discounts obtained from the third party responsible entities to their members.
7. The third party responsible entities cannot apply the negotiated discounts directly to unit prices, as to do so would require the capacity to discriminate between the units held by investors who invest through ANZ platforms and investors who invest through other platforms, or would require the third party responsible entity to establish a new class of units or a new scheme for ANZ investors (at additional costs to investors).

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<sup>1</sup> T5041.10, T5041.30-5042.2

8. Certain third party responsible entities also require that the payments reflecting these discounts are not paid directly back to members. This condition is imposed for the same reason; to allow the discount to be directly passed back to members who invest through OPC or Oasis would discriminate between members who apply through an OPC or Oasis platform and those who apply through another platform. Those responsible entities may also be concerned that the disclosure of a discount may result in other (non-ANZ) trustees or unitholders seeking a similar discount (and therefore not otherwise be willing to provide a discount at the levels negotiated by ANZ, or at all). To avoid these situations the third party responsible entities make a payment reflecting the negotiated discounts back to ANZ separately, for ANZ to take into account in setting its fees.
9. These payments are not made if OPC and Oasis have sufficient members' funds invested with a third party responsible entity to set up a separate managed investment scheme or a mandate arrangement,<sup>2</sup> whereby ANZ appoints the third party responsible entity to establish and operate a separate managed investment scheme solely for members investing through an OPC or Oasis platform. A wholesale discount can be achieved through these mandate arrangements without the third party responsible entity making a payment back to ANZ, as the price of the mandated managed investment scheme investment option is struck by taking the negotiated discount into account.<sup>3</sup> It is in this context that these payments from third party responsible entities were described as an "antiquated flow"<sup>4</sup> – as mandated arrangements do not require this payment to be made.

#### **The best interests duty**

10. The "best interests" duty is a covenant to perform the trustee's duties and exercise the trustee's powers in the best interest of the beneficiaries: s 52(2)(c) SIS Act. This duty operates to qualify the performance of a particular duty or exercise of a particular power – it is not an overarching obligation to act in a general sense in the members' best interests.<sup>5</sup>
11. Solicitor Assisting's letter does not identify any particular duty or exercise of power which is said not to have been performed or exercised in the best interests of members (whether by reference to the respective trust deeds or otherwise).
12. Solicitor Assisting's letter also does not identify how the content of the best interests duty is said to have been contravened. The best interests duty has been described as concerned with process, rather than outcome, so that it will not be contravened if the original decision was taken with the best interests of all members in mind, despite ultimately turning out not to be beneficial to members.<sup>6</sup>
13. In light of the content of this duty and the further factual matters identified above, it is not open to the Commission to find that OPC's and Oasis's conduct in respect of these payments might have amounted to a contravention of the covenant to act in the best interests of members found in s 52(2)(c) of the SIS Act.
14. These payments are in the best interests of members as they facilitate a discount in fees to members, as the payments are taken into account in setting the fees charged for administration services to members who invest through the OPC and Oasis funds in the

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<sup>2</sup> T5044.40-41

<sup>3</sup> T5044.42

<sup>4</sup> T5044.43

<sup>5</sup> See, for example, *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204 at [121].

<sup>6</sup> *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2010] NSWSC 363 at [51] per Rein J.

third party managed investment schemes. All other things being equal, members would face an increase in their fees if these payments were not made by third party responsible entities of managed investment schemes.

15. That these payments are in members' best interests may also be demonstrated by considering the alternatives available to OPC and Oasis.
16. One alternative would be not to seek any discount from the third party responsible entities of managed investment schemes offered through the Oasis and OPC platforms. This would result in members paying more fees overall, as the fees would be set at a higher level, as there would be no discount to the management fees on account of these payments.
17. A second alternative would be to only allow third party responsible entities onto the OPC or Oasis platform if the third party responsible entities are able to pass any negotiated discount directly to members through unit pricing. This would require the third party responsible entities to set up a separate managed investment scheme for members that invest through ANZ's platforms or to issue a different class of unit to those members. This would impose significant barriers to entry to those third party responsible entities, as the third party responsible entity would need to build the systems architecture for different units within the same investment option. This would reduce the number of investment options available to members.

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