

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

AMP Group Submission  
Case Study 1: Duties of RSE Licensees

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

**AMP Superannuation Limited and NM Superannuation Pty Ltd  
Submissions**

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**Overview**

1. AMP welcomes the opportunity to provide these submissions in respect of the evidence received by the Royal Commission in its superannuation, round 5, hearings.
2. AMP Superannuation Limited (**ASL**) and NM Superannuation Pty Ltd (**NMS**) are Trustees responsible for the management of 8 superannuation funds, with approximately \$120 billion in total funds under management.
3. The Trustees consider that they have robust governance structures in place for the proper management of these funds.
4. Other than in relation to the performance monitoring of cash investments, which NMS has reported to Australian Prudential Regulation Authority (**APRA**) and Australian Securities and Investments Commission (**ASIC**), and has taken steps to rectify, the Trustees reject any suggestion that they have failed to meet their obligations.
5. The evidence received by the Royal Commission demonstrates the prudent and effective management of the funds by the Trustees and highlights a number of the recent enhancements to governance and pricing that the Trustees have made.

**AMP’s outsourced model is effective**

6. The Trustees outsource the day-to-day operation and administration of their funds to AMP Life and other related entities. This does not mean that the Trustees have

relieved themselves of their responsibilities and obligations. On the contrary, the Fund Governance Charter<sup>1</sup> acknowledges that while the Trustees may delegate their powers and utilise outsourcing arrangements, it is the Trustee Boards' ultimate responsibility to ensure the sound and prudent management of the funds.

7. Furthermore, Helen Rowell, Deputy Chair of APRA, in her evidence before the Commission, rejected the assertion of Counsel Assisting that the Trustees had "entirely handed over control of the trust to other AMP Group entities". Ms Rowell noted that the RSE's operations are "oversighted" by Trustee Services and that "there are processes in place to manage those relationships and review and monitor those relationships".<sup>2</sup>
8. The Trustee Boards ensure their responsibilities and obligations to members are met by the terms of their outsourcing arrangements, the work of Trustee Services, the use of the Business Monitoring Model (**BMM**) framework and other complementary monitoring activities. The Fund Governance Charter also reserves to the Board a range of decisions that materially affect member interests such as the issuance of new products, the approval and amendment of all key documents such as the outsourcing agreements, business plan, Investment Policies and the Risk Appetite Statement.
9. The Trustees' membership of the AMP Group is in the interests of members and benefits them in a number of ways. The structure gives the Trustees access to Group-level resources, such as head office and legal and regulatory implementation functions, at no additional cost to members. It gives the Trustees timely access to Group executives, who are accountable through the Group structure and not simply as third-party service providers. It provides access to a wider range of investment opportunities and, finally, it provides protection for members because AMP has the incentive, resources and capacity to fix mistakes if and when they are made.<sup>3</sup> Indeed the outsourcing arrangements contain indemnity provisions that mean the Trustees (and their members) are assured that any failings on the part of the outsource providers will be fully corrected and compensated.<sup>4</sup>

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<sup>1</sup> Witness Statement of Rachel Catherine Sansom in response to Rubric 5-35 dated 9 August 2018 (**Sansom Statement 5-35**) (Exhibit 5.277) and Exhibit RCS-1 to Sansom Statement 5-35 (**Exhibit RCS-1**), Tab 2 (AMP.6000.0212.0001). See also the Business Monitoring Model Framework at Exhibit RCS-1, Tab 9 (AMP.6000.0124.0552), which contains a similar acknowledgement that ultimate responsibility for compliance with the *Supervision Industry (Supervision) Act 1993* (Cth) and other relevant obligations remains with the Trustees, notwithstanding outsourcing arrangements.

<sup>2</sup> Transcript, Helen Rowell (APRA), 17 August 2018, T5172.

<sup>3</sup> Sansom Statement 5-35, [203].

<sup>4</sup> Master Outsourcing Agreement cls 6.2, 12.2 (Exhibit RCS-1, Tab 3 (AMP.6000.0190.6472 at 0.6497-0.6498)); Administration Deed cl 12.1 (Exhibit RCS-1, Tab 6 (AMP.6000.0125.0272 at .0296)).

### *Trustee obligations and considerations permeate the business*

10. The Trustee Boards are supported by a dedicated Trustee Services team, headed by the Director Regulatory Governance, Ms Sansom. The Trustee Boards have delegated certain specified authority to the Directory Regulatory Governance and Trustee Services to assist them in the discharge of their duties. The role of Trustee Services is set out in the Fund Governance Charter and includes assisting the Trustee Boards to ensure there is an effective governance framework including the management of conflicts, monitoring the performance of outsource providers, monitoring the implementation of the Investment Policies, and management of risk (including risks arising from delegations of authority).<sup>5</sup>
11. However, it is not just the Board members and the Trustee Services team who have trustee obligations. The terms of the outsourcing arrangements expressly require the AMP entities exercising delegated or outsourced functions to do so in accordance with the Trustees' duties and obligations, and to give priority to the interests of members in the event of a conflict of interest.<sup>6</sup>
12. Accordingly, the general question posed by Counsel Assisting, whether the obligation to act in members' best interests should be extended to related bodies corporate of the trustee in respect of conduct that will affect the interests of the members of the fund,<sup>7</sup> is effectively already in place at AMP via the terms of the outsourcing arrangements.

### *Monitoring*

13. The outsourcing arrangements contain performance standards and reporting requirements to enable the Trustees to properly monitor the performance of outsource providers.<sup>8</sup>
14. The formal mechanism by which the Trustees monitor the outsourced arrangements is the BMM. The BMM framework has the following key elements:<sup>9</sup>
  - a. Quarterly reports are provided to Trustee Services in relation to Finance, Product Management, Risk Management & Compliance, Operations, Investment Management and Insurance.
  - b. The BMM reporting is critically reviewed by the Trustee Services team to identify potential exceptions or other areas of concern to discuss at

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<sup>5</sup> Exhibit RCS-1, Tab 2 (AMP.6000.0212.0001).

<sup>6</sup> Master Outsourcing Agreement cls 2.2, 2.6 (Exhibit RCS-1, Tab 3 (AMP.6000.0190.6472 at .6488-.6489, .6490-.6491)); Administration Deed cls 7.1, 7.4 (Exhibit RCS-1, Tab 6 (AMP.6000.0125.0272 at .0292-.0293)).

<sup>7</sup> Counsel Assisting, Closing Submissions for Module 5: Superannuation, [779].

<sup>8</sup> See e.g. Master Outsourcing Agreement cls 5, 6, sch 2 (Exhibit RCS-1, Tab 3 (AMP.6000.0190.6472 at .6491-.6492, .6528-.6529)); Administration Deed cls 3.3, 3.4, schs 3, 4 (Exhibit RCS-1, Tab 6 (AMP.6000.0125.0272 at .0285, .0384-.0386)).

<sup>9</sup> Business Monitoring Model Framework (Exhibit RCS-1, Tab 9 (AMP.6000.0124.0552)).

stakeholder meetings. Trustee Services assess and analyse reports and engage with outsource providers as required to clarify data and understand trends ahead of stakeholder meetings.

- c. Trustee Services holds an internal meeting ahead of stakeholder meetings to draw insights from other AMP forums that Trustee Services participates in (as to which see [16] below), as well as external market trends and regulatory developments.
- d. Stakeholder meetings are held quarterly and attended by the Director Regulatory Governance, members of Trustee Services and senior members of the relevant outsource provider. Exceptions that require escalation to the Trustee Boards are identified and discussed during these meetings.
- e. Trustee Services then prepares a report to the Trustee Boards, certifying the reports were submitted, stakeholder meetings held and giving the Trustee Boards details of exceptions and any other material information the monitoring frameworks identify should be brought to the Trustee Boards' attention arising from the reports and meetings. The business units who have reported exceptions also prepare exceptions reports for the Trustee Boards and the responsible executive attends the board meeting to explain them.
- f. The Trustees have also adopted AMP's Enterprise Risk Management Framework (**ERM**). As such, the Trustees utilise ERM reporting specifically on the effectiveness of the risk and control framework relevant to the operations of their funds, including emerging risks, incidents and breaches is provided to the Trustee Boards. Representatives from AMP ERM report directly to the Trustee Boards at each quarterly board meeting to provide assurance regarding compliance with the Trustees' Risk Management Strategy.
- g. Internal Audit regularly assess the BMM reporting of outsource providers, and the effectiveness of risk management and oversight by Trustee Services and provide assurance to the Trustee Boards.
- h. The BMM is reviewed annually, and more frequently if required, including the roadmaps,<sup>10</sup> which map all legal, investment, insurance and prudential obligations of the directors/Trustees, and the contractual obligations and performance metrics for outsource providers, to specific policies, documents, or reports to ensure all obligations are being discharged and compliance appropriately monitored and certified. Any required changes to reporting are submitted to the Trustee Boards for approval.

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<sup>10</sup> See Directors Roadmap (Exhibit RCS-1, Tab 56 (AMP.6000.0190.6646)).

15. The BMM framework was developed with legal input. It was reviewed by APRA last year and found to provide robust support for the monitoring of related party relationships.<sup>11</sup> That review identified areas for enhancement to further strengthen the monitoring framework, which have been addressed by the Trustees. One of those areas was the monitoring of distribution via financial advisers. This monitoring has been enhanced by making ERM Distribution and Advice risk reporting available to Trustee Services and requiring the inclusion of commentary regarding distribution in ERM's regular BMM reporting.<sup>12</sup> The Trustee Boards have also requested direct reporting from a senior executive in AMP Advice, and the reporting model for this is being developed.<sup>13</sup> While this is being developed, the Trustee Boards have received reports from AMP Advice outside the BMM framework at their May and June board meetings.
16. Further, the BMM is not the only mechanism by which the Trustees have visibility into the conduct of the outsourced arrangements. Trustee Services receives information in other formal and informal ways, including receipt of internal and external audit reports, regular meetings with representatives of each business unit, representation at the AMP Senior Leaders Forum, attendance at the Group Investment Committee, membership of the Breach Review Committee when trustee-related matters are raised, participation in cross-organisational steering committees and working groups, and other informal information channels.
17. The Trustee Board members participate in the Group Non-Executive Director briefings, have lines of communication to other boards within the Group and regularly have executives from other parts of the Group attend board meetings to brief the Trustee Boards and answer their questions. The Chairman has regular meetings with the CEO and Chairman of AMP Limited.

### *Management of conflicts*

18. The Trustees act separately from the AMP Group. They bring an independent, member-focused lens to all decisions they make.<sup>14</sup>
19. The Trustee Boards are comprised of non-executive directors, who do not hold directorships of other AMP entities. Their remuneration is not directly linked to, nor contingent upon, AMP Group profitability or turnover. The recent Board Review conducted by Blackhall & Pearl found that the Board maintains a consistent focus on members' best interests and has very high levels of high performing director attributes and skills relative to other financial services organisations.<sup>15</sup>

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<sup>11</sup> Exhibit 5.291 (APRA.0004.0001.4047).

<sup>12</sup> Sansom Statement 5-35, [209]; T5154.24-33.

<sup>13</sup> Sansom Statement 5-35, [210].

<sup>14</sup> See, e.g. Sansom Statement 5-35, [183]-[190], [198].

<sup>15</sup> Sansom Statement 5-35, [198]; Blackhall & Pearl, 'AMP Super 2018 Board Review', 26 June 2018 (Exhibit RHA-3 to Allert Statement 5-34 (**RHA-3**), Tab 26A, AMP.6000.0190.6820 at .6832, .6834).

20. Similarly, Trustee Services is an operationally separate team, which does not have revenue or cashflow targets. It routinely engages with other AMP Group entities to advance member interests.<sup>16</sup>
21. The Trustees are cognisant of the potential for conflicts that may arise within the outsourced model and are mindful of their duties and obligations with regard to conflicts, including Prudential Standard SPS 521. To that end, the Trustees have robust policies and frameworks in place for the identification and management of conflicts. These include the Trustees' Conflict Management Policy<sup>17</sup> and Procedures,<sup>18</sup> the Group Conflicts of Interest Policy<sup>19</sup> and the ERM Risk Management Policy.<sup>20</sup> The terms of the outsourcing arrangements expressly deal with conflicts and require the interests of members to be preferred.<sup>21</sup>
22. Moreover, the Trustees have documented triggers for the termination of services provided by related parties, which provide a structure, proposed action and timeframe for consideration of events. These triggers include a wide variety of circumstances,<sup>22</sup> such as significant reputational impact to AMP, a significant change in AMP's strategy and/or its implementation that results in a diminished commitment to superannuation, failure to adequately remediate breaches that have an impact on members, sustained underperformance by AMP against agreed service standards with no commitment to rectify, significant increase in member fees, a material fraud or non-compliance event, and the breakdown of a relationship with an outsource provider that cannot be rectified.<sup>23</sup>
23. Of course, whether the outsource provider is a related entity or not, terminating a significant outsourcing relationship is a very serious step, with significant associated costs and high operational risk. The Trustees would only be justified in taking that step if they considered it to be in members' best interests, bearing those consequences in mind.
24. Since October 2017 there has also been a formal Customer Advocate within AMP, who works closely across teams to ensure customer, including member, interests are protected by overseeing the customer complaints process.
25. Counsel Assisting suggests the consideration given by other AMP entities to the initial pricing of MySuper products and the timing of ADA transfers somehow demonstrates the Trustees' outsourcing arrangements prevented the Trustees from

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<sup>16</sup> Sansom Statement 5-35, [201].

<sup>17</sup> Exhibit RCS-1, Tab 57 (AMP.6000.0124.0568).

<sup>18</sup> Exhibit RCS-1, Tab 58 (AMP.6000.0124.0635).

<sup>19</sup> Exhibit RCS-1, Tab 59 (AMP.6000.0124.0615).

<sup>20</sup> Exhibit RCS-1, Tab 60 (AMP.6000.0046.0120).

<sup>21</sup> Master Outsourcing Agreement cl 2.6 (Exhibit RCS-1, Tab 3 (AMP.6000.0190.6472 at .6490-.6491)); Administration Deed cl 7.4 (Exhibit RCS-1, Tab 6 (AMP.6000.0125.0272 at .0292-.0293)).

<sup>22</sup> Contra. Counsel Assisting, Closing Submissions for Module 5: Superannuation, [518].

<sup>23</sup> ASL and NMS Board Papers, 6 December 2017 (Exhibit 5.289, AMP.6000.0128.8032 at .8195-.8198).

properly exercising their functions and powers.<sup>24</sup> That other members of the Group had regard to the particular interests of their stakeholders in relation to particular matters does not mean that the Trustees failed to properly exercise their functions.

26. The initial pricing of MySuper products was approved by the Trustees.<sup>25</sup> Their approval was required in order for the products to be offered.<sup>26</sup> That the pricing also required the approval of others within the Group does not mean the Trustees failed to properly exercise their functions, as without the Trustees' approval the products would not have been offered to members. There is no evidence to suggest the Trustees exercised their powers to approve the products improperly. Moreover, as discussed at [60]-[61] below, prudence requires the Trustees to ensure the products could be operated sustainably, which required the input and approval of other members of the Group.
27. With regard to the timing of ADA transfers, the Trustees completed all transfers within the mandated timeframe.<sup>27</sup> The exercise was an operationally complex one which required substantial planning, testing and review. Although the planning was carried out by a special working group, an appropriate measure given the scale of the program, final approval of the transition plan, including timing, rested with the Trustees.<sup>28</sup> There is no evidence that the Trustees failed to have regard to members' interests when approving those plans, which were also discussed extensively with APRA. Ms Sansom was emphatic in her evidence that the key consideration for the Trustees was management of risk, and the plan they approved did that effectively by taking a staged approach and working through the transfers in order of complexity.<sup>29</sup> This is supported by the documentary evidence, which also makes clear that the management of CGT rollover risk and outcomes for members was a critical consideration.<sup>30</sup>
28. It is entirely unexceptional that other entities within the Group analysed and modelled the impact the proposed timing of transfers would have on their stakeholders and developed plans to mitigate any adverse effects. There is no evidence that these considerations affected the timing approved by the Trustees on the basis of members' best interests.

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<sup>24</sup> Counsel Assisting, Closing Submissions for Module 5: Superannuation, [552]-[583], [614].

<sup>25</sup> Exhibit 5.278 (AMP.6000.0226.0015 and AMP.6000.0225.0812).

<sup>26</sup> Exhibit RCS-1, Tab 2 (AMP.6000.0212.0001 at .0022).

<sup>27</sup> Sansom Statement 5-35, [81].

<sup>28</sup> Exhibit 5.278 (AMP.6000.0226.0015 at .0015); T-5116.9-38.

<sup>29</sup> T-5118.5-11.

<sup>30</sup> Exhibit 5.296 (AMP.6000.0128.2284 at .2356).

## Investment performance

### Monitoring

29. The Trustees outsource the management of investments offered through their superannuation products to AMP Life and NMMT, who in turn engage specialist investment managers, being AMP Capital and other external fund managers.<sup>31</sup>
30. In accordance with Prudential Standard SPS 530, the Trustees have approved Investment Policies for each of the funds, which are reviewed as necessary and at least annually, and the Trustees monitor and assess regularly whether the investment objectives contained in the policies are being met. The Trustees monitor the investment performance of their superannuation products through two key mechanisms.
31. The first of these is the Group Investment Committee (**GIC**). The GIC is a management committee of the AMP Group, chaired by a non-executive director, that provides overarching stewardship and governance oversight of AMP's investment offers. One of its functions is to monitor the performance of the investment options offered in AMP's superannuation products.<sup>32</sup> In performing that function, the GIC is obliged under its Terms of Reference to act in accordance with the Trustees' duties and responsibilities under all applicable laws and contractual arrangements. In particular, it is expressly required to "act in the best interests of superannuation members".<sup>33</sup>
32. The Director Regulatory Governance attends all meetings of the GIC as an observer.<sup>34</sup> She is therefore in a position to report back to the Trustee Boards on anything that would be of particular interest or concern to them. The Chairman also meets with the Chairman of the GIC.
33. Further, since the beginning of the year, the Trustee Boards receive direct reporting on the GIC's activities at their meetings.<sup>35</sup> Those reports update the Trustee Boards on the key issues facing the GIC during the relevant period.
34. Secondly, Trustee Services receives Quarterly Investment Management Reports from the Chair of the GIC about investment performance as part of the BMM.<sup>36</sup>

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<sup>31</sup> Witness Statement of Richard Hugh Allert in response to Rubric 5-06 dated 25 July 2018 (**Allert Statement 5-06**) (Exhibit 5.265), [257]-[259]; Witness Statement of Richard Hugh Allert in response to Rubric 5-15 dated 25 July 2018 (**Allert Statement 5-15**) (Exhibit 5.267), [192]-[193], [216]-[219]; Witness Statement of Richard Hugh Allert in response to Rubric 5-34 dated 1 August 2018 (**Allert Statement 5-34**) (Exhibit 5.268), [200]-[201], [226]-[229].

<sup>32</sup> Allert Statement 5-06, [96]-[97].

<sup>33</sup> Exhibit RHA-1 to Allert Statement 5-06 (**Exhibit RHA-1**), Tab 17 (AMP.6000.0156.1078 at .1082).  
<sup>34</sup> T5112.

<sup>35</sup> See, e.g. Group Investment Committee Update from the Head of Investment and Insurance Regulatory Governance, 23 November 2017 (Exhibit 5.289, AMP.6000.0128.8032 at .8074-.8075).

<sup>36</sup> Allert Statement 5-06, [246]. See, e.g. Trustee Quarterly Investment Management Report, 12 August 2016 (Exhibit 5.270, AMP.6000.0151.7160).

Those reports are in addition to the direct GIC reporting provided to the Trustee Boards. They provide a general overview of the market and the performance of the various investment options offered through the Trustees' products, certify compliance with the requirements and standards set pursuant to the outsourcing agreements, and outline any exceptions.

35. When an exception is triggered by information contained in a Quarterly Investment Management Report, a report on that issue must be provided to the Trustee Boards and the Chair of the GIC must attend the next meeting of the Trustee Boards to explain it. An exception is triggered when:<sup>37</sup>
  - a. an investment option remains under investigation or on the "Exceptions List" for more than eight quarters; or
  - b. an investment option was identified for investigation, but an investigation has not commenced within 90 days; or
  - c. the number of AMP related entity investment options added over the course of 12 months exceed 50% of the total new investment options added to the investments of the Trustees in that period; or
  - d. if there is any material qualification to the Quarterly Investment Management Compliance Certificate provided to the Trustee Boards by the Chair of the GIC; or
  - e. there is any matter concerning investment reporting which, in the opinion of Trustee Services, should be brought to the attention of the Trustee Boards.
36. The last exception is particularly important because it means that Trustee Services can bring issues concerning investment performance to the Trustee Boards even if one of the other exceptions is not triggered.
37. In addition, the Trustee Boards can, and do, ask for investment reporting outside the exceptions reporting if they consider it necessary.<sup>38</sup> For example, as discussed further below, the issues concerning negative returns in certain cash products in SDF and NMRF were brought to the attention of the Trustee Boards outside the exceptions framework.
38. In addition to the general investment monitoring mechanisms above, the Trustee Boards also receive more targeted reporting on the performance of their MySuper products through the annual Strategic Asset Allocation and Strategic Risk Measure (**SAA** and **SRM**) and MySuper Scale tests. Through the SAA and SRM, the

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<sup>37</sup> Trustee Quarterly Investment Management Report, 12 August 2016 (Exhibit 5.270, AMP.6000.0151.7160 at .7162). See also, T5106-7.

<sup>38</sup> T5107; T5087.

Trustees review the continued appropriateness of the return targets, glidepaths (for lifecycle options) and risk measures for the various MySuper options.<sup>39</sup>

39. As part of the annual MySuper Scale Test, the Trustees review the investment performance of each MySuper option, as well as scale in terms of size, fees, insurance and other qualitative measures.<sup>40</sup>
40. In assessing investment performance, one of the key things to keep in mind is that superannuation is a long-term investment, and therefore the Trustees (and others) should not be too quick to make significant changes to approved investment strategies due to perceived underperformance in a short time-frame. The Productivity Commission in its draft report on superannuation has said that long-term returns “should be the core focus for superannuation funds”, that those funds which have that focus are likely to have lower short-term returns, and that “short-termism is likely to be at the expense of long-term returns to members”.<sup>41</sup>
41. Further, returns cannot be the sole focus of monitoring, because there is a direct relationship between risk profile and returns. It would not be prudent for the Trustees to seek returns that would take an investment option outside the appropriate or applicable risk parameters.

### *Cash investments*

42. The low interest rate environment of the last few years has depressed the returns on cash investments across the industry.
43. In May 2018, it was brought to the attention of the NMS Board that some members invested in three cash options in SDF had been receiving negative net returns in some quarters for the last three years.<sup>42</sup>
44. This issue was escalated to the Trustee Boards outside the normal BMM reporting framework.<sup>43</sup> This demonstrates, as noted above, that information is brought to the Trustee Boards as and when necessary, even if the issue falls outside the normal BMM exceptions framework and quarterly reporting timelines.
45. Following identification of the issue, all of the Trustees’ cash options were reviewed. Ultimately, it was determined that the issue affected a minority of the

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<sup>39</sup> Sansom Statement 5-35, [63]-[68].

<sup>40</sup> See, e.g. ASL and NMS Board Papers, 6 December 2017, (Exhibit 5.289, AMP.6000.0128.8032 at .8096); Sansom Statement 5-35, [56]-[62].

<sup>41</sup> Productivity Commission Draft Report, “Superannuation: Assessing Efficiency and Competitiveness”, April 2018, 372-3 and Draft Finding 9.4.

<sup>42</sup> ASL and NMS Board Papers, 12 May 2018 (Exhibit 5.271, AMP.6000.0128.8719 at .8758); T5089-90.

<sup>43</sup> T5091.

cash options offered by the Trustees and was restricted to some cash options within SDF and NMRF.<sup>44</sup>

46. The reason the investment monitoring in place had not detected the issue earlier was that the monitoring was focused on the performance of the investment manager and therefore considered performance after the impact of investment fees and taxes (which had been positive), but not product administration fees. Once product administration fees were taken into account, the net performance for some members in the identified cash options was negative.<sup>45</sup> Not all members in those cash options had negative returns in all quarters due to fee rebates and recredits received in those periods.<sup>46</sup>
47. The Trustees acknowledge that this gap in their monitoring of cash investment performance constituted a breach of NMS' obligations under s 912A(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and s 52(2)(b) of the *Supervision Industry (Supervision) Act 1993* (Cth) (**SIS Act**), and accordingly breach reported the incident to APRA and ASIC on 15 May 2018.<sup>47</sup>
48. The Trustees have acted quickly to improve their processes and remediate members. The steps they have taken are as follows.
49. First, the Trustees lowered the administration fees on the affected products to 0.5% pa for open products and 0.7% pa for mature products, to immediately stop the negative returns on a prospective basis. A special Trustee Boards meeting was convened outside the usual board meeting schedule to ensure the issue was addressed immediately. The fee reductions were approved by the Trustee Boards on 25 July 2018 and took effect two days later.<sup>48</sup>
50. Secondly, the new fee structure will be applied retrospectively for the past three years, which will cause affected members to have positive returns for those three years.<sup>49</sup> A program has been set up by AMP Life to remediate all current and exited members in the affected cash options on this basis and it is expected to be complete by November this year.
51. Thirdly, Trustee Services and the GIC are working with the Product Management team to establish investment reporting to the Trustees that is net of fees and taxes.

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<sup>44</sup> ASL and NMS Board Papers, 25 July 2018 (Exhibit 5.290, AMP.6000.0233.0172 at .0190).

<sup>45</sup> ASL and NMS Board Papers, 14 May 2018 (Exhibit 5.271, AMP.6000.0128.8719 at .8758-9).

<sup>46</sup> See, e.g. Member Statement, Super Directions for Business, Year ended 28 February 2015 (Exhibit 5.272, AMP.6000.0251.4428); Member Statement, Super Directions for Business, Year ended 30 June 2016 (Exhibit 5.294, AMP.6000.0251.4295).

<sup>47</sup> APRA and ASIC have been kept updated on the resolution of this incident. An updated breach report was provided on 8 August 2018.

<sup>48</sup> ASL and NMS Board Papers, 25 July 2018 (Exhibit 5.290, AMP.6000.0233.0172 at .0191, .0193). See also, T5094; T5100.

<sup>49</sup> T5093; T5102. See also, ASL and NMS Board Papers, 25 July 2018 (Exhibit 5.290, AMP.6000.0233.0172 at .0191).

Amongst other things, this will ensure that the Trustees are promptly aware of any net negative returns in the future in respect of low risk or cash options.<sup>50</sup>

52. Mr Allert gave evidence that he had “complete” confidence that this issue would be fully dealt with by AMP.<sup>51</sup> Consequently, he did not consider that this issue – being the negative returns in a limited number of cash products which had been rectified and would be fully remediated by AMP – warranted terminating the relationship with AMP.<sup>52</sup>
53. However, Mr Allert confirmed that termination is a step that the Trustees are able, and would be willing, to take in appropriate circumstances if necessary to protect members’ interests.<sup>53</sup>

#### *SST and SDF generic MySuper products*

54. AMP offers three generic MySuper products, in each of the SST, SDF and ART. The SST and SDF offerings are “lifecycle” products. The ART offering is a “single strategy” (balanced) investment offering. AMP also offers eight tailored MySuper offerings for certain large corporate accounts in SST: three of those are single strategy and five are lifecycle products.
55. AMP stands behind its MySuper offerings, which provide competitive returns compared with other similar offerings.
56. In particular, the MySuper lifecycle products in SDF and SST perform towards the middle to top of the pack for most cohorts compared with their peers, and significantly outperform for younger members.<sup>54</sup> For example, the SDF MySuper options for members born in the 1970s, 1980s and 1990s have received one-year returns of 13.5%, 14.25% and 14.01% respectively.<sup>55</sup> The ART generic single strategy MySuper product and the SST tailored single strategy MySuper products are in the top quartile for low-cost fees.<sup>56</sup>
57. It is true that the lifecycle products tend to have higher fees than the single strategy offerings. This difference in cost is to be expected, and is appropriate, given that lifecycle products require much more active management than single strategy products. In a lifecycle product, the portfolio is actively managed to de-risk the member’s investments as they progress to retirement. This substantially lowers the risk of the members’ retirement savings being wiped-out by an unexpected

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<sup>50</sup> ASL and NMS Board Papers, 25 July 2018 (Exhibit 5.290, AMP.6000.0233.0172 at .0191-2); T5091; T5103-4.

<sup>51</sup> T5103.24.

<sup>52</sup> T5099.1 and .30. Contra. Counsel Assisting, Closing Submissions for Module 5: Superannuation, [517].

<sup>53</sup> T5098.45; T5099.34-41.

<sup>54</sup> ASL and NMS Board Papers, 6 December 2017 (Exhibit 5.289, AMP.6000.0128.8032 at .8100).

<sup>55</sup> Allert Statement 5-06, 11 [41], “MySuper” table.

<sup>56</sup> ASL and NMS Board Papers, 6 December 2017 (Exhibit 5.289, AMP.6000.0128.8032 at .8099).

economic event close to their retirement, such as many Australians experienced in the GFC. So, whilst members may pay more fees in the lifecycle products, this is in return for additional portfolio management and additional comfort that their savings are less likely to be adversely affected by an economic downturn. The Trustees consider lifecycle products to be particularly appropriate for members who are disengaged from their superannuation, so are not regularly reviewing the continued suitability of their investment options.<sup>57</sup>

58. For the past couple of years, the performance of the generic SDF and SST MySuper offerings has been closely monitored as it was observed that the fees were becoming less competitive in the market compared with similar products. However, once investment returns were taken into account, the performance of these options improved such that the Trustees were satisfied that the products passed the MySuper Scale Test.<sup>58</sup> Despite this, the Trustees continued to advocate for the fees to be lowered in the interests of members.<sup>59</sup>
59. That occurred on 25 July 2018, when the Trustee Boards resolved to lower the fees on generic MySuper offers within the SST, SDF and the choice lifecycle option in ART. The reductions were very significant. The administration fees for the generic SST and SDF MySuper offers were halved to 0.29%. The reductions will come into effect in the next quarter (September 2018) and will result in an immediate improvement in outcomes for approximately 700,000 members.<sup>60</sup>
60. Given the size and scale of the fee reductions, the reductions were also considered by the AMP Life Appointed Actuary and approved by the AMP Limited Board, to ensure their sustainability. This was necessary and entirely appropriate because, as Ms Rowell explained in her evidence before the Commission, “the ongoing viability and sustainability of the RSE itself” is an important consideration in determining what is in the best interests of members.<sup>61</sup>
61. This also explains why the Trustees cannot lower fees immediately and unilaterally whenever they consider that fees may be too high. It would be irresponsible for the Trustees to do so because they would have no way of knowing what negative impacts that could have on the long-term viability of the funds and the outsource providers who service the funds. The Trustees must act prudently and ensure that any action that would significantly affect their funds or products is properly considered before it is implemented. This is the case regardless of whether or not the outsource provider is a related entity.

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<sup>57</sup> See generally, T5130-1.

<sup>58</sup> ASL and NMS Board Papers, 6 December 2017 (Exhibit 5.289, AMP.6000.0128.8032 at .8100).

<sup>59</sup> T5103.1; T5140.

<sup>60</sup> ASL and NMS Board Papers, 25 July 2018 (Exhibit 5.290, AMP.6000.0233.0172 at .0181-0185).

<sup>61</sup> Transcript, Helen Rowell (APRA), 17 August 2018, T5195.25.

62. The Trustees are always looking for ways to reduce fees without impacting member service or outcomes or the sustainability of the funds. The lowering of the fees of the SDF and SST generic MySuper offers is one outcome of AMP's ongoing product simplification project.

#### *CPI+ targets for MySuper products*

63. In closing submissions, Counsel Assisting criticised the reductions in the CPI+ performance targets for the MySuper investment options in 2016 and 2017.<sup>62</sup> This criticism reflects a fundamental misunderstanding about the meaning and role of the CPI+ target, and also appears to suggest that the reductions applied to all of the Trustees' MySuper options in those years, which they did not.

64. The CPI+ target aims to give members a realistic estimate of the likely return they will achieve on investments in their MySuper products. The target is required to be published on the MySuper Dashboards for this purpose.<sup>63</sup>

65. With this in mind, it is obvious why there have been reductions to the CPI+ targets in the current low return environment. It would not be appropriate for the Trustees to maintain an unrealistically high target set years ago in different market conditions. Such an aspirational target would mislead consumers who are using the MySuper Dashboards to obtain a realistic picture of the likely return they will receive in current market conditions.

66. Further, the CPI+ target represents the expected return on the investment option if it is kept within the risk parameters of that investment option. In the persistently low return environment that has existed since the inception of the MySuper products, if the targets had not been decreased, then the only other option would have been to take on more risk.<sup>64</sup> That would not be acting in the interests of members.

67. Accordingly, properly understood, the gradual reduction in the CPI+ targets for some of AMP's MySuper products in 2016 and 2017 is an example of the Trustees complying with their regulatory and disclosure obligations and acting prudently to ensure their members' retirement savings are protected by responsible investing and reflects the glidepath for lifecycle products.

68. Finally, the CPI+ targets for AMP's MySuper products are competitive with other similar offerings in the market.<sup>65</sup>

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<sup>62</sup> Counsel Assisting's Closing Submissions for Module 5: Superannuation, [545].

<sup>63</sup> Corporations Act, s 1017BA.

<sup>64</sup> T5129.35-42.

<sup>65</sup> T5130.13.

## Counsel Assisting's open findings

69. In Counsel Assisting's closing submission, the following findings were said to be open.

**Open finding:** *it is open to the Commissioner to find that, in outsourcing the day-to-day functions and operations of the Funds:*

- (a) the trustees were wholly dependent on the information provided to them by Trustee Services, either through the BMM reporting or by Trustee Services directly notifying them of issues; and, in turn,*
- (b) Trustee Services were wholly dependent on the information provided to them by the related entities to whom the services had been outsourced.*

70. This finding is not open on the evidence. Trustee Services and the Trustees are not simply reliant upon the information provided to them by related entities but, rather, receive information in all of the ways described above at [14] and [16]-[17]. They are not mere passive recipients of information, but rather actively determine information to be received and interrogate the reports they receive and regularly meet with representatives of their outsource providers as part of their relationship management approach.<sup>66</sup>

71. Moreover, the evidence shows that the BMM framework and its required certification process have been generally effective in bringing issues to the Trustees' attention. The Trustees are entitled to rely upon the BMM framework, including its assurance mechanisms (ERM frameworks, policies and oversight, and Internal Audit) in discharge of their obligations.

**Open finding:** *it is open to the Commissioner to find that the fact that the flow of information to the trustees was dependent on others in this way may have presented a number of challenges to the trustees in performing their duties and exercising their powers:*

- (a) in the best interests of their members in accordance with s 52(2)(c) of the SIS Act; and*
- (b) to ensure that, where there was a conflict between the duties of the trustee to the members, or the interests of the members, and interests of an associate of the trustee, the interests of the members could and would be given priority in accordance with s 52(2)(d) of the SIS Act.*

72. This finding is also not open on the evidence. The Trustees are not mere passive recipients of whatever information their outsource providers choose to share, for the reasons explained above.

73. Counsel Assisting does not articulate how the Trustees have exercised their powers in a way that is *contrary* to the interests of members by relying upon the BMM framework. The framework is plainly a prudent exercise of the Trustees' responsibility to provide proper governance. Further, as described at [21] above,

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<sup>66</sup> See [14] above.

the outsourcing arrangements clearly provide for the management of any conflicts and require the interests of members to be given priority.

74. It should be borne in mind that s 52(2)(c) is not a duty to achieve particular outcomes for members, and, although the Trustees will always strive to achieve this, the provision certainly does not impose a strict duty to achieve *the best* outcome for members. Rather, s 52(2)(c) is the statutory embodiment of the general law fiduciary duty, meaning the covenant is concerned with ensuring the trustee is free to exercise its powers and discharge its duties for their proper purpose (that is, without any unauthorised conflict or profit). It is directed at proper process, not at particular outcomes.<sup>67</sup>

**Open finding:** *in particular, it is open to the Commissioner to find that the trustees may have breached their duties under ss 52(2)(c) and 52(2)(d) of the SIS Act by:*

- (a) being unable to lower the fees and charges to members on their investments in cash through the SDF Cash Management Trust, or with respect to the MySuper products of the Funds, in that the lowering of fees was a decision to be made ultimately by others in the AMP Group;*
- (b) not turning their mind to whether a member who has received no meaningful return on their cash investment was receiving advice in accordance with the best interests obligations under s 961B of the Corporations Act, in circumstances where adviser services fees continued to be deducted from the member's account;*
- (c) being unable or unwilling to terminate agreements between related entities where the fees and charges of those entities are so high that it results in poor performance of the investments in which their members' funds are invested;*
- (d) failing to address underperformance in the SDF and SST MySuper products despite the information provided to the trustees regarding the high fees and underperformance of those products through the annual scale assessments performed in 2016 and 2017 under s 29VN of the SIS Act; and*
- (e) failing to identify that, until recently, the reporting being received by the trustees regarding the performance of the investment of members' funds did not reflect the net or overall performance of the investments and, as such, did not reflect the performance of the investment from the member's perspective.*

75. Finding (a) is not open. The evidence (see especially, [49], [58]-[59] above) demonstrates that the Trustees can, and do, cause their outsource providers to lower fees.<sup>68</sup>

76. The fact that some reductions in fees are also approved by other parts of the AMP Group (such as the AMP Actuary or AMP Limited Board) is appropriate. It is important to ensure that fee reductions do not impact the long-term sustainability of the funds or their outsource providers in circumstances where the Trustees do not consider it is in their members' best interests to terminate those relationships.

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<sup>67</sup> *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159 at [51] per Rein J, affirmed (2011) 282 ALR 167, see especially at [118]-[121]; *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 692 at [136]. See also, Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (8<sup>th</sup> ed, 2016) at [29-21].

<sup>68</sup> See similarly, Sansom Statement 5-35 (Exhibit 5.277), [176]-[182].

77. Further, even if the Trustees used non-AMP outsource providers, the Trustees would be restricted from immediately and unilaterally changing the fees by provisions in the contractual arrangements. Indeed, it is likely that the Trustees are in a better position to agitate for change in circumstances where the services are provided by related entities.
78. As to finding (b), the Trustees do not have an obligation to monitor the appropriateness of individual advice provided to each one of their millions of members by those members' financial advisers. There is a separate regulatory framework that regulates the provision of advice. Under that framework, the obligation to monitor the receipt and appropriateness of advice lies with advice licensees. RSE licensees are not able to undertake the same monitoring as they do not have information about their members' individual circumstances, including their full investment portfolio outside of their AMP superannuation portfolio. Further, imposing such an onerous obligation on RSE licensees would not be in members' best interests because it would dramatically increase their costs of compliance, and thus the costs to members, and is unlikely to significantly improve member outcomes.
79. Finding (c) is not open. The evidence (see [22]-[23], [52]-[53] above) establishes that the Trustees are able, and would be willing, to terminate agreements with related entities (including if fees became too high), if that was in members' best interests. Mr Allert's evidence was that the Trustees did not consider that the fee issues with certain cash and MySuper options dealt with above (which have been or are being addressed to the Trustees' satisfaction) warranted such a serious step, which would clearly be extremely costly and disruptive to the funds' operation, with potentially very serious consequences for the funds' members. There is no evidence which suggests that Mr Allert's conclusion is unjustified.
80. Finding (d) is also not open. The evidence demonstrates that, although the fees in the SDF and SST generic MySuper products were high compared with their peers, after investment performance was taken into account, the MySuper Scale Test was passed. Despite this, the Trustees continued to advocate for a reduction in those fees and that has occurred. Of course, the Trustees would always like fee reductions to occur sooner, but, as noted above, processing fee reductions takes some time because it is necessary to ensure that any reduction is sustainable and does not impact on the viability of the funds or their outsource providers in circumstances where it is not appropriate to terminate those relationships.
81. As to finding (e), as per the breach report to APRA and ASIC on 15 May 2018, NMS accepts that it is open to find it has breached its obligations under s 912A(1)(a) of the Corporations Act and s 52(2)(b) of the SIS Act with respect to monitoring the performance of a limited number of cash investment options offered by SDF and NMRF. As explained above, affected customers are being

remediated, fees in the relevant cash products have been reduced, and the Trustees are in the process of strengthening performance monitoring to take account of net returns.

82. There is no evidence that the Trustees failed to exercise their powers or perform their duties for a proper purpose, or that the monitoring failure with respect to cash investments was a result of any conflict, and therefore there can be no reasonable suggestion that the Trustees may have breached s 52(2)(c) or (d) of the SIS Act.

**Open finding:** *it is also open to the Commissioner to find that, by reason of the above, by entering into the agreements for the outsourcing of the day-to-day administration and operation of the Funds, the trustees may have breached their duties under s 52(2)(h) of the SIS Act not to enter into any contract that would prevent the trustees from, or hinder the trustees in, properly performing or exercising the trustees' functions and powers.*

83. Such a finding is not open. The Trustees' outsourcing agreements do not prevent or hinder the Trustees from exercising their powers and functions and those agreements are consistent with their duties under the SIS Act. Rather, the outsourcing agreements are the means by which the Trustees properly perform and exercise many of their functions, and as described above (at [11]) they explicitly require the outsource providers to act in accordance with the Trustees' obligations.
84. Further, s 52(5) of the SIS Act provides that s 52(2)(h) does not prevent the trustee from engaging or authorising persons to do acts or things on behalf of the trustee. Plainly, therefore, the mere fact of the outsourcing arrangements cannot of itself constitute a breach of s 52(2)(h) of the SIS Act. This is particularly so in circumstances where APRA has produced SPS 231 in respect of outsourcing, and the Trustees' outsourcing arrangements, and monitoring of those arrangements, is guided by and in compliance with that prudential standard.

**Open finding:** *in particular, it is open to the Commissioner to find that the trustees may have breached s 52(2)(h) of the SIS Act by maintaining arrangements with related parties that:*

- (a) had the effect of rendering the trustees unable to make the ultimate decision as to the pricing of the MySuper products of the Funds;*
- (b) allowed others in the AMP Group to make decisions as to the timing of the transfer of ADAs to MySuper products that may ultimately not have been in the best interests of members;*
- (c) limited oversight over the conduct of advisers, and advice given, in connection with the distribution of its products; and*
- (d) quarantined the trustees from owing duties to their members under s 102(1) of the SIS Act to seek information from the investment manager of the Funds.*

85. There is no basis for a finding that the Trustees may have breached s 52(2)(h) of the SIS Act. There is no evidence that the Trustees' outsourcing arrangements had any of the effects suggested by Counsel Assisting.

86. With regard to the pricing of MySuper products, as described at [26] above, the Trustees did have the ultimate decision regarding pricing and the products could not have been offered without their approval. The fact that other parts of the AMP Group also needed to sign off on the proposed pricing is not inconsistent with that position. The Trustees were not forced to accept the pricing offered or approved elsewhere. There is no evidence that the arrangements with related parties had the effect of rendering the Trustees unable to approve pricing.
87. As described at [27] above, the Trustees gave approval for ADA transfers based upon their assessment of what was in members' best interests, particularly with regard to minimising operational risk and the lack of CGT relief. The process of planning and implementing the transfers was thorough and very complex and was discussed with APRA. The fact that other parts of the Group analysed the timing from the perspective of their stakeholders does not mean the Trustees breached their duties. There is no evidence that these other analyses were the basis for the ADA transfer timetable. The material appears only to be modelling of the impacts on other parts of the business.
88. The Trustees have more oversight of advice/advisers within the AMP network than they would have in relation to non-aligned advisers. As discussed above at [15], the Trustees accept there are opportunities for enhancement of their oversight of distribution of their products and are taking steps to do so. There is no evidence that any arrangement with a related party has limited the Trustees' monitoring of distribution in such a way as to breach of s 52(2)(h).
89. The suggestion that the Trustees have sought to quarantine themselves from owing duties under s 102(1) of the SIS Act has no basis. The Trustees' outsourcing arrangements are in full compliance with s 102(1) – the agreement with AMP Life requires it to comply with this obligation and that is reflected in the terms of the Investment Management Agreement between AMP Life and AMP Capital. Information is sought from the investment manager whenever it is necessary or desirable to do so, by the GIC to whom the task of investment performance monitoring has been delegated.<sup>69</sup>

**Open finding:** *As a result of these matters, it is open to the Commissioner to find that the trustees may have breached their duties to ensure that, where there was a conflict between the duties of the trustee to the members, or the interests of the members, and interests of an associate of the trustee, the interests of the members could and would be given priority in accordance with s 52(2)(d) of the SIS Act.*

90. There is no evidence of a failure to give priority to the interests of members in circumstances where those interests conflicted with those of an associated entity of the Trustees. As described at [21] above, conflicts are appropriately managed.

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<sup>69</sup> Exhibit RHA-1, Tab 17; Exhibit RHA-2 to Allert Statement 5-15, Tab 13; Exhibit RHA-3, Tab 13 (AMP.6000.0156.1078).

There is no basis for a finding that the Trustees may have breached s 52(2)(d) of the SIS Act.

**Open finding:** *It is open to the Commissioner to find that by generating a negative return on cash investments in the SDF Cash Management Trust, the trustees may have breached their duties under s 52(2)(b) and s 52(6) of the SIS Act, and their obligations under Prudential Standard SPS 530 and s 912A of the Corporations Act.*

91. Again, as noted above, in accordance with the breach report to APRA and ASIC on this issue, NMS accepts that it is open to find that it has breached its obligations under s 912A(1)(a) of the Corporations Act and s 52(2)(b) of the SIS Act, with respect to cash investments in SDF.
92. There is no basis for a finding that the Trustees may have breached s 52(6) of the SIS Act or SPS 530. There is no evidence that the Trustees failed to formulate, review regularly and give effect to an appropriate investment strategy for their funds. As noted above, the Trustees have formulated an appropriate investment strategy and regularly review it in accordance with their obligations under SPS 530.

**Open finding:** *It is also open to the Commission to find that the trustees may have breached their obligation under s 29VN(a) of the SIS Act to promote the financial interests of the beneficiaries of the Funds who hold a MySuper product, in particular returns to those beneficiaries after the deduction of fees, costs and taxes in respect of the MySuper products offered through the SST and SDF.*

93. This finding is not open. The evidence shows that the Trustees have consistently advocated for the financial interests of the members in their MySuper products, including to improve the outcomes of members in the SST and SDF generic MySuper products by securing a significant reduction in fees. Further, as noted above, the members in the younger SDF MySuper cohorts have received very strong investment returns.

31 August 2018