

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

HEARING ROUND 5: SUPERANNUATION

SUBMISSIONS ON FINDINGS CONCERNING CASE STUDIES INVOLVING ANZ

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 section J.2 of Counsel Assisting's Round 5 Closing Submissions.

THE A-Z REVIEW ISSUE

2. Paragraphs 469-471 of Counsel Assisting's Round 5 Closing Submissions set out findings submitted by Counsel Assisting as being open in relation to the branch selling practices outlined in paragraphs 459-467 of the Round 5 Closing Submissions.
3. These submissions:
 - (a) set out a summary of the evidence which, in the submission of ANZ and OPC, is relevant to the findings that Counsel Assisting has submitted are open; and
 - (b) address whether or not each of those findings is open on the basis of that evidence.

Summary of evidence

Retail Smart Choice Super

4. Retail Smart Choice Super is a Tier 1,¹ basic, low fee superannuation product² that is designed to be used by a broad range of people irrespective of their age and income.³ It has won multiple awards recognising its merit for people in all stages of their life.⁴
5. Retail Smart Choice Super was distributed through ANZ's retail branch network between about 2012⁵ and August 2018. Evidence before the Commission focused upon the provision of information about Retail Smart Choice Super to ANZ customers after the conclusion of a review of the customer's financial situation, goals and needs, known as an **A-Z Review**.⁶

Risk assessment

6. Before implementing this distribution model, ANZ identified risks associated with it and implemented controls to mitigate those risks.
7. In July 2011, an ANZ risk paper advised that a general advice warning would be needed to ensure a clear separation between the A-Z Review and the distribution of any product

¹ T5064.6

² Statement of Mark James Pankhurst dated 1 August 2018 (**First Pankhurst Statement**) (Ex. 5.256) at [290] (ANZ.999.019.0001 at 0105).

³ Exhibit TM-3 (ASIC.0041.0006.0051 at 0076) to the witness statement of Tim Mullaly dated 3 August 2018 (Ex.5.310) (**Mullaly Statement**).

⁴ Ibid.

⁵ First Pankhurst Statement (Ex. 5.256) at [2.4] of MP-221 (ANZ.800.870.0001).

⁶ See [10] below.

disclosure statement (**PDS**) for a wealth product.⁷ That paper also noted the view of ASIC (obtained in 2009 in respect of a previous potential scripted general advice distribution model through branches), that a customer fact finding process did not compromise the ability to provide concurrent or subsequent general advice. As noted by ASIC, the absence of a personal recommendation as to the suitability of, or to acquire, the product was the crucial factor.⁸

8. In September 2011, ANZ's Managing Director of Distribution for Australia Division, in a presentation to the Chief Risk Officer of ANZ's Australia Division, proposed a control framework that included: (a) general advice training; (b) the introduction of standardised scripted general advice (including training as part of the Wealth Accreditation Program (**WAP**) for branch staff members); (c) a "mystery shopping" program; and (d) customer surveys.⁹
9. This control framework, which is discussed further below, was implemented.¹⁰

The distribution process and control framework

10. The distribution of Retail Smart Choice Super occurred by means of a "scripted general advice model"¹¹ after the conclusion of an A-Z Review. An A-Z Review is a structured conversation between the branch staff member and customer in which the branch staff member asks about the customer's financial situation and has a discussion about the customer's goals and needs.¹²
11. The distribution of Retail Smart Choice Super was set up to be distinct and separate from the A-Z Review, and to operate as follows:¹³
 - (a) The branch staff member would conduct the A-Z Review with the customer.
 - (b) At the end of the A-Z Review, and following any recommendations made in respect of retail banking products, the branch staff member would (by reading from a script) state that the review was completed and ask the customer whether she or he would like to be provided with general information about Retail Smart Choice Super, which was designed to be a simple low cost way for customers to manage their superannuation.¹⁴ This was the first point at which the branch staff member could raise Retail Smart Choice Super with the customer. The script included following:

⁷ Ex. 5.263, Wealth Risk Mass Market Wealth Australian Distribution, July 2011 (ANZ.801.096.0013 at 0028).

⁸ Ex. 5.263, Wealth Risk Mass Market Wealth Australian Distribution, July 2011 (ANZ.801.096.0013 at 0031).

⁹ Ex. 5.262, 30 September 2011, Retail Distribution Advisory Network, Australia Division (ANZ.801.096.0002 at 0004 and 0007-0008).

¹⁰ First Pankhurst Statement (Ex. 5.256) at [306] (ANZ.999.019.0001 at 0107-0108). The risk identified by the presentation given by the Managing Director of Distribution of ANZ's Australia Division (referred to in paragraph 462 of the Round 5 Closing Submissions as being a risk identified by ANZ's Chief Risk officer) was that it was possible that regular breaches would be seen by the regulator as "systemic" putting ANZ's licence at risk, if this control framework was not effectively implemented (see ANZ.801.096.0002 at 0004).

¹¹ First Pankhurst Statement (Ex. 5.256) at [291] (ANZ.999.019.0001); T5055.24 and ANZ Submission to ASIC at TM-3 of the Mullaly Statement) (ASIC.0041.0006.0051 at 0053).

¹² First Pankhurst Statement (Ex. 5.256) at [289] (ANZ.999.019.0001 at 0104).

¹³ First Pankhurst Statement (Ex. 5.256) at [291]

¹⁴ First Pankhurst Statement (Ex. 5.256) at [291(b)] and [292(a)] (ANZ.999.019.0001 at 0105-0106) and MP-215 (ANZ.800.873.0025); T5054.17-20. This communication is referred to in the First Pankhurst Statement as a "de-linking statement".

"Now that we've completed the A-Z Review, would you like me to provide you with some general information on ANZ Smart Choice Super, which is designed to be a simple low cost way for customers to manage their superannuation.

Please be aware that I won't be able to use or reference any of the information you've already provided me when discussing this product with you."

This statement also appeared on a screen in front of the customer.

- (c) If the customer declined the offer to be provided with additional information, that was the end of the process.
- (d) If the customer indicated that she or he would like to be provided with additional information about Retail Smart Choice Super, the branch staff member was to offer to arrange an appointment for the customer to see an ANZ financial planner. From June 2015 onwards, the offer for an appointment was only made to customers with funds under management or gross yearly salary of greater than \$50,000.¹⁵
- (e) If the customer indicated that she or he wanted additional information about Retail Smart Choice Super but did not want, or was not offered, an appointment with a financial planner, the branch staff member then provided documents including the PDS and a brochure in relation to Retail Smart Choice Super to the customer. The branch staff member then, as a mandatory feature of the process, read verbatim the first two pages of the brochure.¹⁶ Those two pages included:
 - (i) The "General Advice Disclosure", which was intended to mitigate the risk that the customer would believe that their personal information and circumstances were considered before being offered Retail Smart Choice Super. The general advice disclosure read to the customer, as set out in the brochures for 2014 to 2018, was:

"Please note I can only provide general advice on this product. This means that any information I do provide has been prepared without taking into account your personal circumstances, objectives or needs. Therefore, you need to consider if it's right for you.

You should consider the Product Disclosure Statement and Additional Information Guide before deciding to purchase the product."

- (ii) A statement of the "things you need to know", being the matters that the customer must consider before moving their superannuation into a Retail Smart Choice Super account. This statement was intended to mitigate the risk that the customer would switch their superannuation without understanding the potential consequences of doing so¹⁷ and included consideration of:

Exit fees from your existing super fund or additional costs.

Change in your investment risk exposure.

¹⁵ First Pankhurst Statement (Ex. 5.256) at [291(d)] (ANZ.999.019.0001 at 0105).

¹⁶ First Pankhurst Statement (Ex. 5.256) at [291(e)] and [292(b)] (ANZ.999.019.0001 at 0105-0106) and MP-216 (ANZ.800.873.0001), MP-217 (ANZ.800.873.0009), MP-218 (ANZ.800.873.0017), MP-219 (ANZ.800.891.0038) and MP-220 (ANZ.800.875.0001).

¹⁷ Identified as the "key risk" in Ex. 5.261, Sale of Wealth Products via Retail Distribution, September 2013 (ASIC.0041.0002.8478 at 8482), referred to in paragraph 462 of Counsel Assisting's Round 5 Closing Submissions.

By moving your super into [Retail Smart Choice Super] you will lose any existing insurance coverage or other benefits held within your other super.¹⁸

- (f) Only then, if the customer instructed them to do so, did the branch staff member (if appropriately qualified to do so – see further below) assist the customer to open a Retail Smart Choice Super account. Once opened, a Retail Smart Choice Super account did not become active until the customer either completed a rollover of funds into the account or commenced making contributions into it.¹⁹
12. The only branch staff members permitted by ANZ to discuss Retail Smart Choice Super with customers following an A-Z Review were those who received comprehensive training on the use of the script and had completed annual recertification.²⁰ Retail Smart Choice Super was the sole superannuation product about which “wealth accredited” branch staff members were permitted to provide information.²¹ In the Australian Compliance Division presentation dated September 2013, it was reported that over 1300 branch staff members across 300 branches had participated in the WAP, with a further 600 branch staff members to be trained in October 2013.²² Training in the execution of scripted general advice was a key component of the WAP.²³
13. An internal compliance team conducted "observational checks".²⁴ These checks involved branch staff members being tested on their scripted general advice process compliance knowledge.
14. A monthly "mystery shopping" program was introduced, conducted by a third party service provider.²⁵ Pursuant to that program, the provider's trained staff members acted as customers, went through the A-Z Review process, and subsequently completed questionnaires that included a question directed towards ascertaining whether the statement referred to in [11(b)] above was read, whether the general advice disclosure referred to in [11(e)(i)] above was read, and whether the branch staff member recommended the product based on the customer's personal circumstances. Between 2013 and 30 June 2018, 6,582 mystery shops were performed.²⁶ While ANZ considers any failure to follow its processes to be unacceptable, it should be noted that the statement²⁷ and the general advice disclosure were read in over 99% of cases,²⁸ and branch staff members only recommended Retail Smart Choice Super in 0.15% of cases.²⁹ Each time an incident of non-compliance with the script was identified, an internal compliance team emailed the relevant branch manager (copied to the District Manager

¹⁸ Ex. 5.261, Sale of Wealth Products via Retail Distribution, September 2013 at page 4 and Appendix 2 (ASIC.0041.0002.8478 at 8482 and 8490). See also First Pankhurst Statement at MP-216 (ANZ.800.873.0001 at 0004), MP-217 (ANZ.800.873.0009 at 0011), MP-218 (ANZ.800.873.0017 at 0019), MP-219 (ANZ.800.891.0038 at 0040) and MP-220 (ANZ.800.875.0001 at 0003).

¹⁹ First Pankhurst Statement (Ex. 5.256) at [307].

²⁰ First Pankhurst Statement (Ex. 5.256) at [306(a)], [342] (ANZ.999.019.0001 at 0107).

²¹ First Pankhurst Statement (Ex. 5.256) at [311] (ANZ.999.019.0001 at 0108); Mullaly Statement (Ex.5.310) at TM-3 (ASIC.0041.0006.0051 at 0053).

²² Ex. 5.261, Sale of Wealth Products via Retail Distribution, September 2013 (ASIC.0041.0002.8478 at 8479).

²³ Ibid at 8482 and at 8491.

²⁴ First Pankhurst Statement (Ex. 5.256) at [306(b)] (ANZ.999.019.0001 at 0107).

²⁵ First Pankhurst Statement (Ex. 5.256) at [306(c)] (ANZ.999.019.0001 at 0107).

²⁶ Statement of Mark James Pankhurst dated 14 August 2018 (**Second Pankhurst Statement**) (Ex. 5.257) in the table provided in response to question 2 (ANZ.999.020.0001 at 0003).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

and Sales and Governance Manager), detailing the non-compliance and requiring refresher training to be completed.³⁰

15. A third party service provider also conducted surveys of customers who opened a Retail Smart Choice Super account in branch.³¹ Each month at least 100 customers who had opened a Retail Smart Choice Super account were surveyed, including being asked whether the branch staff member had read out a statement advising that they will only be providing general advice and that the customer's personal financial situation, needs or objectives were not being taken into account. Between June 2015 and November 2016,³² 96.5% of respondents either answered "yes" to that question, or could not recall.

The Services Deed

16. The distribution model described above was implemented by ANZ pursuant to the terms of a Services Deed entered into by ANZ and OPC. Counsel Assisting's submissions noted at paragraph 465 that on execution in August 2012, the Services Deed referred to wealth accredited branch staff providing customers with Retail Smart Choice Super product information using scripted general advice protocols *within* the A-Z Review process.³³ In September 2016, the Services Deed was amended to refer to the provision of information *after* the A-Z Review had been completed.³⁴
17. In giving evidence, Mr Pankhurst expressed surprise at the reference in the August 2012 Services Deed to the provision of information *within* the A-Z Review.³⁵ Mr Pankhurst said that in preparing to give evidence on this issue it had been explained to him that the information regarding Retail Smart Choice Super had always been provided *after* the A-Z Review.³⁶ This is reflected in paragraph 291 of Mr Pankhurst's statement dated 1 August 2018.
18. The contemporaneous business records confirm that the information regarding Retail Smart Choice Super was provided *after* the completion of the A-Z Review. For instance, the Advice and Distribution Risk paper from July 2011 specified that a general advice warning would be needed to ensure a clear separation between the A-Z Review and the distribution of any PDS for a wealth product.³⁷ The Australian Compliance Division presentation dated September 2013 similarly refers to the information regarding Retail Smart Choice Super being provided *after* the A-Z Review.³⁸ The "mystery shopping" program and customer surveys referred to in [14] and [15] above – directed towards testing that the statement referred to in [11(b)] above and the general advice disclosure referred to in [11(e)(i)] above were read out – are also consistent with this, particularly noting that one of the statements being checked was to the effect that the A-Z Review

³⁰ Second Pankhurst Statement (Ex. 5.257) at [9] (ANZ.999.020.0001 at 0003).

³¹ First Pankhurst Statement (Ex. 5.256) at [306(d)] (ANZ.999.019.0001 at 0108).

³² Being the period for which there is evidence before the Commission: ANZ Submission to ASIC at TM-3 of the Mullaly Statement) (ASIC.0041.0006.0051 at 0084)

³³ Ex. 5.260, Deed of Amendment to the Services Deed between ANZ and OPC, 3 August 2012 (ANZ.800.778.0001 at .0029).

³⁴ First Pankhurst Statement (Ex. 5.256) at [188(d)] (ANZ.999.019.0001 at 0088) and at Exhibit MP-153 (ANZ.800.778.0254 at 0282).

³⁵ T5059.11-15.

³⁶ T5059.17-21.

³⁷ Ex. 5.263, Wealth Risk Mass Market Wealth Australian Distribution, July 2011 (ANZ.801.096.0013).

³⁸ Ex. 5.261, Sale of Wealth Products via Retail Distribution, September 2013 (ASIC.0041.0002.8478 at 8483) ("After discussing customer needs").

had been completed before then asking whether the customer would like information on Retail Smart Choice Super.³⁹

19. In these circumstances, ANZ submits that the Commissioner should draw the inference that the August 2012 version of the Services Deed contained an error, or an infelicity of expression, and that it did not reflect the arrangements actually in place. The amendment to the Services Deed in September 2016 reflected the actual practice of ANZ and its accredited branch staff members, which had at all times been to provide information about Retail Smart Choice Super after the conclusion of the A-Z Review.

End of distribution following Enforceable Undertaking

20. ANZ has now ceased using this distribution model for Retail Smart Choice Super. In accordance with an Enforceable Undertaking between ANZ and ASIC (accepted by ASIC on 6 July 2018) (**EU**), from 18 August 2018 ANZ no longer distributes Retail Smart Choice Super (or any other superannuation product) following an A-Z Review or any other needs-based discussion.⁴⁰
21. ASIC's concerns regarding the distribution of Retail Smart Choice Super following an A-Z Review are set out in the EU (paragraph 2.9) and ASIC's media release regarding the EU. The media release describes ASIC's concerns as:
- (a) the proximity between the fact-finding process of the A-Z Review and the discussion about Retail Smart Choice Super was leading branch staff members to provide personal advice to customers about their superannuation in circumstances where branch staff members were only authorised to provide scripted general advice; and
 - (b) that customers may have thought, due to the proximity of the fact-finding process (in the A-Z Review) to the offer of Retail Smart Choice Super, that the branch staff members were considering risks specific to the customer when this was not the case.⁴¹
22. While ANZ does not believe that its practices breached the *Corporations Act 2001* (Cth) (**Corporations Act**) or fell below community standards and expectations (**CSEs**), ANZ acknowledges that ASIC's concerns were reasonably held and it entered into the EU to resolve them. ANZ made no admissions in respect of any contraventions of the Corporations Act.
23. During ASIC's investigation of the A-Z Review Issue, ASIC did not form a definitive view that any customers were worse off overall as a result of consolidation into Retail Smart Choice Super. Notably, ASIC considered that all customers it reviewed were paying lower fees with ANZ than in the products rolled out of, except for a single customer who rolled out of an eligible rollover fund.⁴²

Proposed findings in relation to A-Z Review Issue

24. Counsel Assisting have submitted that it is open to the Commissioner to find that ANZ may not have done all things necessary to ensure that the financial services covered by

³⁹ First Pankhurst Statement (Ex. 5.256) at [291(b)] (ANZ.999.019.0001 at 0105) and at Exhibit MP-215 (ANZ.800.873.0025).

⁴⁰ First Pankhurst Statement (Ex. 5.256) at [290] (ANZ.999.019.0001 at 0105) and MP-221 (ANZ.800.870.0001).

⁴¹ First Pankhurst Statement (Ex. 5.256) at [293] (ANZ.999.019.0001 at 0106); ASIC's media release at First Pankhurst Statement (Ex. 5.256) at MP-222 (ANZ.800.878.0001).

⁴² Mullaly Statement (Ex.5.310) at [76] (ASIC.0800.0014.0001 at 0016).

its license were provided efficiently, honestly, and fairly in breach of s 912A(1)(a) of the Corporations Act, because it was aware there was a risk that:

- (a) customers would believe that branch staff had taken their relevant circumstances into account and were recommending Retail Smart Choice Super; and
 - (b) as a result, customers would switch their superannuation and end up with a less suitable product.
25. Counsel Assisting have also submitted that it is open to the Commissioner to find that the conduct involved in the A-Z Review Issue departed from CSEs.
26. ANZ submits that no such findings are open on the evidence before the Commission.
27. Counsel Assisting have also submitted that it is open to the Commissioner to find that OPC engaged in conduct falling below CSEs by engaging ANZ to sell Retail Smart Choice Super through the distribution program described above.
28. OPC submits that no such finding is open on the evidence before the Commission.

ANZ's response to submission that it breached section 912A(1)(a) and departed from CSEs

29. The standard in s 912(A)(1)(a) – “efficiently, honestly and fairly” – is recognised as a single, composite concept, rather than three discrete behavioural norms.⁴³ The question is whether ANZ did all things necessary to ensure that the financial services covered by its licence were provided efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.⁴⁴
30. For the following five reasons, even if offering Retail Smart Choice Super in branch after the end of an A-Z Review involved financial product advice,⁴⁵ and therefore a financial service, ANZ submits there is no basis for a finding of the kind submitted by Counsel Assisting.
31. **First**, it does not follow from the fact that, in isolation, ANZ identified potential risks with a proposed course of action that it has breached s 912A(1)(a).
32. **Secondly**, and relatedly, the fact that ANZ took steps to identify risks and then manage the risks that it identified evidences a prudent approach, consistent with it complying with rather than breaching its obligations, including those under s 912A(1)(a). ANZ implemented the control framework outlined in [8] to [15] above with the intention of mitigating the risks it had identified.⁴⁶ The nature of the risks identified was not such as to dictate that they could not be appropriately managed in the way that ANZ sought to do by its control framework.

⁴³ *Australian Securities and Investments Commission v Avestra Asset Management Limited (in liq)* [2017] FCA 497 at [191] per Beach J.

⁴⁴ *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672; *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206; [2012] FCA 414 at [69]-[70] per Foster J.

⁴⁵ For the reasons identified in ANZ’s submission to ASIC in February 2017, exhibit TM-3 to the Mullaly Statement (Ex.5.310) (ASIC.0041.0006.0051), it is not clear that distributing Retail Smart Choice Super in branch after the end of an A-Z Review did involve the provision of financial product advice.

⁴⁶ Identified as the “key risk” in Exhibit 5.261, Sale of Wealth Products via Retail Distribution, September 2013 (ASIC.0041.0002.8478 at 8482), with the mitigants in the control framework specified at (ASIC.0041.0002.8478 at 8482 and 8483).

33. **Thirdly**, the risk that customers would believe that branch staff had taken their relevant circumstances into account and were recommending Retail Smart Choice Super was mitigated by controls which included specifically telling customers that branch staff were not doing so. In that regard:

(a) The provision of information about Retail Smart Choice Super was distinct and separate to the A-Z Review. This was communicated to the customer through the statement referred to in [11(b)] above⁴⁷ – which was both read out and displayed on a screen in front of the customer – in which the customer was told that the A-Z Review was completed and that the branch member was not able to use or reference any of the information the customer had already provided to the branch member when discussing the Retail Smart Choice Super product (see further [11(b)] above).

(b) A "general advice disclosure" was read to the customer, displayed on a screen visible to the customer, and included in the Retail Smart Choice Super brochure that was provided to the customer.⁴⁸ In that general advice disclosure, the customer was expressly told that the information provided by the branch member had been prepared without taking into account the customer's personal circumstances, objectives or needs (see further [11(e)(i)] above).

There is no, and nor could there be, criticism that the statements and disclosures referred to in (a) and (b) above were confusing.

(c) The customer was also told they must consider their own existing superannuation product before making any decisions, including any exit fees or additional costs, any change in investment risk exposure, and the loss of any existing insurance coverage or other benefits in their existing super.⁴⁹

(d) The statements made by the branch staff member in relation to Retail Smart Choice Super were generic, read verbatim from a screen that the customer could see, and were clearly displayed on the printed Retail Smart Choice Super brochure provided to the customer.⁵⁰

34. In this context it is worth noting the information provided by ASIC referred to in [7] above, and also ASIC's statement in RG 244 (page 9) that:

We will not consider general advice to be personal advice if you clarify with the client when you give the advice that you are not giving personal advice, and you do not in fact consider the client's relevant circumstances (ie their objectives, financial situation and needs).

35. These matters – and in particular the express disclosure of the matters referred to in [33(c)] above – also mitigated the risk referred to in paragraph 469.2 of Counsel Assisting's closing submissions that customers, if they (mistakenly) believed staff had taken their relevant circumstances into account in discussing Retail Smart Choice Super, would "as a result ... switch their superannuation and end up with a less suitable product".

⁴⁷ First Pankhurst Statement (Ex. 5.256) at [291(b)] and [292(a)] (ANZ.999.019.0001 at 0105-0106); First Pankhurst Statement (Ex. 5.256) at MP-215 (ANZ.800.873.0025); T5054.24-30.

⁴⁸ First Pankhurst Statement (Ex. 5.256) at [291(e)] and [292(b)] (ANZ.999.019.0001 at 0105-0106); First Pankhurst Statement (Ex. 5.256) at MP-220 (ANZ.800.875.0001) (being one example of the Retail Smart Choice Super brochures exhibited to Mr Pankhurst's statement).

⁴⁹ Exhibit 5.261, Sale of Wealth Products via Retail Distribution, September 2013 (ASIC.0041.0002.8478 at 8482 and 8490). See also MP-216 (ANZ.800.873.0001 at 0004), MP-217 (ANZ.800.873.0009 at 0011), MP-218 (ANZ.800.873.0017 at 0019), MP-219 (ANZ.800.891.0038 at 0040) and MP-220 (ANZ.800.875.0001 at 0003).

⁵⁰ First Pankhurst Statement (Ex. 5.256) at [292] (ANZ.999.019.0001 at 0106).

36. **Fourthly**, by limiting the branch staff members who could provide information about Retail Smart Choice Super to trained, annually recertified WAP accredited branch staff members, ANZ exceeded the minimum requirements of ASIC Regulatory Guidance 146. By paragraphs 146.22-146.23 of Regulatory Guidance 146, any customer service representative is permitted to provide financial product advice in respect of a Tier 1 financial product provided that advice is derived from a script approved by a person who meets training standards contained in the guide.
37. **Fifthly**, the available evidence demonstrates the success of the control framework. The mystery-shopping program results are indicative of the branch staff members keeping to their scripts (see [14] above). Furthermore, as referred to above, ASIC did not identify any customers who were worse off overall as a result of consolidation into Retail Smart Choice Super. ASIC considered that all customers it reviewed were paying lower fees with ANZ than in the products rolled out of, except for a single customer who rolled out of an eligible rollover fund.⁵¹
38. ANZ submits the proposed finding in relation to s 912A(1)(a) should accordingly not be made.
39. For the same reasons, it is submitted that the evidence does not establish that the distribution of Smart Choice Super in branch after an A-Z Review fell below CSEs.

OPC's response to submission that it engaged in conduct falling below CSEs

40. It is also submitted that it is not open to the Commissioner to find that OPC engaged in conduct falling below CSEs by engaging ANZ to distribute Retail Smart Choice Super in branch after an A-Z Review.
- (a) First, for the reasons outlined above in paragraphs 29 to 39, the evidence does not establish that ANZ was in breach of s 912A(1)(a) of the Corporations Act or departed from CSEs in distributing Retail Smart Choice Super in branches after an A-Z Review.
- (b) Secondly, OPC was entitled to rely on ANZ complying with all legal and regulatory obligations with respect to the distribution of Retail Smart Choice Super. OPC was assured, including by clause 2.2 of the Services Deed, that ANZ would provide the Services only in accordance with and as permitted by the relevant law. Pursuant to clause 7.1(c)(ii) of the Services Deed, ANZ warranted and represented to OPC that it would use its best endeavours to ensure that ANZ would maintain at all times "proper internal control structures and compliance systems that are designed to prevent any breaches of legislative and regulatory obligations of ANZ and to ensure that the internal compliance and control structures support compliance by ANZ of ANZ's legislative and regulatory obligations".⁵² The evidence does not establish any basis to suggest that OPC fell short of CSEs by relying on ANZ and ANZ's warranty to comply with all legal and regulatory obligations with respect to the distribution of Retail Smart Choice Super.

ADVISER SERVICE FEES

41. Counsel Assisting have referred in paragraphs 472-473 of the Round 5 Closing Submissions to the acknowledgement in ANZ's submissions to the Commission that OPC deducted Adviser Service Fees in the period 2003 to 2015 from certain accounts after those accounts ceased to be allocated to an adviser. Counsel Assisting have not made any submissions in respect of that acknowledgement. Nonetheless, for completeness, it is

⁵¹ Mullaly Statement (Ex.5.310) at [76] (ASIC.0800.0014.0001 at 0016).

⁵² Exhibit 5.260 (ANZ.800.778.0001 at 0015).

noted that those deductions were the result of an operational processing error⁵³ and remediation was made to all affected members, except for exited members whose compensation amount was less than \$20, consistent with the joint ASIC and APRA guide entitled "Unit Pricing: Guide to good practice".⁵⁴ The remediation program was developed with oversight from the OPC Board, ASIC and in consultation with PwC.⁵⁵ The collective value of the Adviser Service Fees deducted from those exited members' accounts of \$1,406.16 has been paid into the OnePath MasterFund.⁵⁶

IOOF TRANSACTION

42. Counsel Assisting have submitted that it is not open to the Commissioner to find that OPC or Oasis have engaged in misconduct or conduct falling below CSEs in respect of the IOOF Transaction. The Addendum published on 28 August 2018 stated that this submission should be understood as meaning that Counsel Assisting submit that the preferable conclusion on the relevant evidence is that the conduct was not misconduct or conduct falling short of CSEs. By letter dated 28 August 2018, the Solicitor Assisting the Royal Commission invited OPC and Oasis to address whether that submission ought to be accepted, and if so, on what grounds.
43. OPC and Oasis submit that the Commissioner ought to accept that submission.
44. OPC and Oasis submit that there is no basis on which a contrary finding could be made. However, OPC and Oasis seek to assist the Commission by noting the following matters that support Counsel Assisting's submission:
 - (a) As Counsel Assisting have noted, the boards of OPC and Oasis were not consulted before the transaction was entered into.⁵⁷ The OPC Board is considering the Redemption and the Successor Fund Transfer,⁵⁸ which is a condition precedent to the completion of the IOOF Transaction.⁵⁹ The current proposal for the Successor Fund Transfer, known as the SFT Proposal, is a Successor Fund Transfer to RPS (of which OPC is also trustee).
 - (b) As Counsel Assisting have noted, no decision has been made by OPC to proceed with the proposal.⁶⁰ Having identified possible positive impacts (including those referred to by Counsel Assisting at paragraph 447), the OPC Board has given "in-principle" approval only to further considering the SFT Proposal.⁶¹
 - (c) The OPC Board will only approve the SFT Proposal if, amongst other things, as trustee of both the OnePath MasterFund (as transferring licensee) and RPS (as receiving licensee):⁶²

⁵³ First Pankhurst Statement (Ex. 5.256) at [253] (ANZ.999.019.0001 at 0099).

⁵⁴ Ibid at [255] (ANZ.999.019.0001 at 0099).

⁵⁵ Ibid at [286] (ANZ.999.019.0001 at 0104).

⁵⁶ Ibid at [255] (ANZ.999.019.0001 at 0100).

⁵⁷ Round 5 Closing Submissions at [446]. See also Statement of Victoria Sophia Mary Weekes dated 14 August 2018 (**Weekes Statement**) (Ex. 5.251) at [14] (ANZ.999.020.0006 at 0012).

⁵⁸ As defined in the Weekes Statement (Ex 5.251) at [19] (ANZ.999.020.0006 at 0012-0013).

⁵⁹ Weekes Statement (Ex 5.251) at [19] and [22] (ANZ.999.020.0006 at 0013). In respect of Oasis, see Weekes Statement (Ex 5.251) at [24] (ANZ.999.020.0006 at 0014).

⁶⁰ Round 5 Closing Submissions at [447]. See also Weekes Statement (Ex 5.251) at [106] (ANZ.999.020.0006 at 0027).

⁶¹ Weekes Statement (Ex 5.251) at [36] (ANZ.999.020.0006 at 0016) and Exhibit VW-8 (ANZ.801.033.0051).

⁶² Weekes Statement (Ex 5.251) at [22], [36] and [106] (ANZ.999.020.0006 at 0013, 0016 and 0027, respectively).

- (i) it is satisfied that RPS (as the successor fund) confers on members equivalent rights that the members had under the OnePath MasterFund in respect of benefits; and
 - (ii) it considers the Redemption (in the case of OnePath MasterFund) and Successor Fund Transfer (in the case of RPS and OnePath MasterFund) to be in the best interest of members.
- (d) The OPC Board is in the process of considering various matters relating to the Successor Fund Transfer and Redemption, directed towards considering the matters referred to in [44(c)].⁶³ In doing so, it has demonstrated its preparedness to challenge information or views provided to it (a matter noted by Counsel Assisting),⁶⁴ and obtain expert advice as necessary.⁶⁵ Its consideration includes needing to be satisfied of (i) factors in relation to IOOF;⁶⁶ (ii) IOOF's views about the business and the future;⁶⁷ (iii) the team structures, investment frameworks, risk frameworks and governance frameworks that will exist;⁶⁸ and (iv) various information reported in the media and testimony given during the hearings.⁶⁹
- (e) As Counsel Assisting identified, Ms Weekes demonstrated an understanding of the issues and made clear that the trustee Board would act independently of the wishes and interests of ANZ or IOOF.⁷⁰

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31 August 2018

⁶³ Weekes Statement (Ex 5.251) at [28]-[29], [61]-[72], [77]-[105], [106]-[108], [157]-[159] and [161]-[162] (ANZ.999.020.0006 at 0014-0015, 0020-0022, 0024-0026, 0027, 0032-0033 and 0033, respectively); T5027.23-29, T5027.40-41, T5028.46-T5029.16, T5030.45-T5032.31, T5033.33-37, T5034.43-T5035.29.

⁶⁴ Round 5 Closing Submissions at [452], [758], [805]; Weekes Statement (Ex 5.251) at [88]-[89] (ANZ.999.020.0006 at 0025); T5030.45-T5032.31.

⁶⁵ Weekes Statement (Ex 5.251) at [67] and [107(b)-(c)] (ANZ.999.020.0006 at 0021 and 0027, respectively).

⁶⁶ T5028.46-T5029.6.

⁶⁷ T5029.14-16.

⁶⁸ T5033.33-27; Weekes Statement (Ex 5.251) at [62(c)] (ANZ.999.020.0006 at 0020).

⁶⁹ T5034.43-T5035.29; Weekes Statement (Ex 5.251) at [157]-[159] (ANZ.999.020.0006 at 0032-0033).

⁷⁰ Round 5 Closing Submissions at [451] and [805].