

ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission by:

Australia and New Zealand Banking Group Limited
ACN 005 357 522
Level 9, 833 Collins Street, Docklands, Victoria 3008

1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

Acceptance Date means the date that this undertaking is accepted by ASIC.

AFSL means an Australian financial services licence as that term is defined in section 761A of the Corporations Act.

ANZ means Australia and New Zealand Banking Group Limited (ACN 005 357 522).

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

Audited Attestation means an attestation audited by an independent expert appointed in accordance with paragraph 3.6 to 3.12.

Corporations Act means the *Corporations Act 2001* (Cth).

Documented Annual Review has the meaning in paragraph 2.7.

Prime Access Clients has the meaning in paragraph 2.5.

Prime Access Service has the meaning in paragraph 2.4.

Reasonable Assurance means a high, but not absolute, level of assurance based on detailed testing, evidence gathering and substantiation to support the conclusion.

2. Background

ASIC's role

- 2.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

Details of Conduct

- 2.2 ANZ operates a financial services business within the meaning of Chapter 7 of the Corporations Act, including through a business known as "ANZ Financial Planning".
- 2.3 Since 1 October 2003, ANZ has held an AFSL (no. 234527), which permits it to, among other things, provide financial product advice.
- 2.4 Since around 2003, ANZ has agreed with various clients to provide them with a package of services known generally as "ANZ Prime Access" or "Prime Access" (**Prime Access Service**) in exchange for an annual fee.
- 2.5 ANZ has provided the Prime Access Service to clients under various names, specifically:
 - 2.5.1 from about 2003 to about 2008, as "ANZ Prime Access";
 - 2.5.2 from about 2009 to about August 2012, as "ANZ Prime Access Service Level 1";
 - 2.5.3 from about May 2011 to about August 2012, through either of two packages, which were known as "ANZ Prime Access Service Level 1" and "ANZ Prime Access Service Level 2"; and
 - 2.5.4 since about August 2012, through either of "ANZ Prime Access Connect", "ANZ Prime Access Essentials" and "ANZ Prime Access Tailored",
(collectively, the customers, except for clients who joined "ANZ Prime Access Connect", are referred to as the **Prime Access Clients**).
- 2.6 Once Prime Access Clients join the Prime Access Service they generally continue at that level of membership, and pay annual fees for the service, until the Prime Access Client terminates his or her membership.
- 2.7 A key component of the Prime Access Service, except for "ANZ Prime Access Connect", is the provision to the Prime Access Client of a documented annual review of his or her financial plan (the **Documented Annual Review**).
- 2.8 The Documented Annual Reviews are to be provided by financial advisers employed by ANZ.
- 2.9 On 15 August 2013, ANZ submitted a breach report to ASIC pursuant to section 912D of the Corporations Act concerning the failure to provide Documented Annual Reviews.

ASIC's investigation and analysis

- 2.10 In or about October 2013, ASIC began monitoring and engaging with ANZ in relation to the identification and remediation of Prime Access Clients who were entitled to, but had not received, Documented Annual Reviews.

- 2.11 In or about April 2015, ASIC commenced an investigation pursuant to section 13(1) of the ASIC Act into suspected contraventions of the Corporations Act and the ASIC Act by ANZ in relation to Prime Access Clients having paid for but not having received financial services during the period from 1 January 2004 to 31 December 2013.
- 2.12 ASIC's investigation, and its liaison with ANZ while it undertook the remediation program referred to at 2.17 and 2.18 below, has identified, relevantly, that in the period from at least 2006 to 2013, ANZ failed to provide Documented Annual Reviews to in excess of 10,000 Prime Access Clients.

ASIC's concerns

- 2.13 ASIC is concerned that during the period from at least 2006 to 2013, in the circumstances set out above, ANZ failed to comply with section 912A(1)(a) of the Corporations Act, which provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.
- 2.14 ASIC is concerned that ANZ did not do all things necessary to ensure that the Prime Access Service was provided efficiently, honestly and fairly, for the following reasons:
- 2.14.1 ANZ failed to provide Documented Annual Reviews to in excess of 10,000 Prime Access Clients who were entitled to, and had paid consideration for, Documented Annual Reviews;
- 2.14.2 ANZ did not have adequate systems and processes in place to ensure that the Prime Access Service, including the provision of Documented Annual Reviews, was provided to Prime Access Clients; and
- 2.14.3 from as early as 2008, ANZ Financial Planning was aware of a number of confirmed instances in which Documented Annual Reviews had not been provided to Prime Access Clients, and that there was a risk of a broader issue in relation to further Prime Access Clients not being provided with Documented Annual Reviews, but the conduct continued until 2013, and ANZ did not breach report the conduct to ASIC until August 2013.
- 2.15 ASIC is also concerned that during the period from at least 2006 to 2013, in the circumstances set out above, ANZ did not comply with Condition 3 of its AFSL, by which it was required to establish and maintain compliance measures that ensure, as far as is reasonably practicable, that it complied with the provisions of the financial services laws.

Acknowledgement of ASIC's concerns

- 2.16 ANZ acknowledges that the concerns expressed by ASIC at paragraphs 2.13 to 2.15 above are reasonably held and has offered an enforceable undertaking in the terms set out in part 3 below.

Acknowledgements by ASIC

Remediation

- 2.17 ASIC acknowledges that ANZ agreed with ASIC to:
- 2.17.1 review approximately 13,000 Prime Access Client files for the period 1 January 2006 to 31 December 2013 to determine whether those clients will be paid fee refunds and interest; and
 - 2.17.2 provide refunds and interest to clients where it cannot find evidence of a Documented Annual Review for each annual review period.
- 2.18 As at 8 November 2017, ANZ had paid \$46.54M in fee refunds and earnings to approximately 10,085 Prime Access Clients, and estimated the total required fee refunds and earnings at \$47.9 million.

Improved compliance

- 2.19 ASIC acknowledges that ANZ has advised that it has implemented the following changes to its systems, controls and processes for delivering the Prime Access Service:
- 2.19.1 introduced a requirement that all financial advisers create a record in ANZ's financial planning software whenever they deliver Documented Annual Reviews to Prime Access Clients;
 - 2.19.2 introduced alerts to financial advisers to prompt them to complete ongoing Prime Access Service obligations when they are due;
 - 2.19.3 introduced daily reports identifying Prime Access Clients whose Documented Annual Reviews are overdue. These reports are distributed to practice managers and financial advisers for action;
 - 2.19.4 improved its advice assurance program to have a greater focus on service delivery;
 - 2.19.5 introduced a requirement for documentary evidence that a Documented Annual Review has been completed, if this is stated in a fee disclosure statement;
 - 2.19.6 established a centralised team with responsibility for ensuring that the Prime Access Service is delivered. The team's responsibilities include monitoring and overseeing of the delivery of services,

overseeing and assessing whether systems and processes are functioning effectively and are fit for purpose, and ensuring regular and effective reporting to management to enable effective supervision of the delivery of the Prime Access Service;

- 2.19.7 revised its remuneration scheme by introducing ongoing service delivery measures that must be satisfied for financial advisers to be eligible for performance bonuses, including that there are no overdue annual review meetings for Prime Access Clients in each quarter, and that at least 95% of all Prime Access Service obligations have been met within a 12-month fee disclosure period;
- 2.19.8 introduced detailed regular reporting to ANZ Financial Planning senior management on the delivery of the Prime Access Service, with failures to be documented and remediated; and
- 2.19.9 improved training and communications to financial advisers, managers and support staff on their obligations in delivering the Prime Access Service, the changes to processes and reporting, and remuneration scheme changes.

3. Undertakings

- 3.1 Under section 93AA of the ASIC Act, ANZ has offered, and ASIC has agreed to accept as an alternative to ASIC pursuing civil or administrative action against ANZ in respect of any of the matters referred to in paragraphs 2.13 to 2.15, the following undertakings in paragraphs 3.2 to 3.17 below.

Audited Attestations

- 3.2 ANZ undertakes to, within 90 days of the Acceptance Date, or within such longer period as may be agreed by ASIC and ANZ, provide ASIC with an Audited Attestation signed by an Executive General Manager or General Manager of ANZ or his or her equivalent, or, in the event of that position being discontinued, by a member of senior management of ANZ as agreed with ASIC, to provide Reasonable Assurance that, since 1 January 2014 to the Acceptance Date it has provided Documented Annual Reviews to all Prime Access Clients who were entitled to Documented Annual Reviews.
- 3.3 ANZ undertakes to, within 90 days of the Acceptance Date, or within such longer period as may be agreed by ASIC and ANZ, provide ASIC with an Audited Attestation signed by an Executive General Manager or General Manager of ANZ or his or her equivalent, or, in the event of that position being discontinued, by a member of senior management of ANZ as agreed with ASIC, that it has implemented the changes to its systems, controls and processes set out in clause 2.19.
- 3.4 ANZ undertakes to, within 90 days of the Acceptance Date, or within such longer period as may be agreed by ASIC and ANZ, provide ASIC with an Audited Attestation signed by an Executive General Manager or General

Manager of ANZ or his or her equivalent, or, in the event of that position being discontinued, by a member of senior management of ANZ as agreed with ASIC, that he or she has taken reasonable steps to satisfy himself or herself that ANZ has:

- 3.4.1 systems, processes and controls within its financial planning business which are designed and implemented to seek to ensure that Documented Annual Reviews are being provided in accordance with the Prime Access Service;
- 3.4.2 systems, processes and controls that detect recurring instances of non-delivery of Documented Annual Reviews; and
- 3.4.3 systems, processes and controls for escalating, following up and remediating any detected instances of non-delivery of Documented Annual Reviews.

Community benefit payment

- 3.5 ANZ undertakes to, within 28 days of the Acceptance Date (or any such date agreed to by ANZ and ASIC), make a community benefit payment in the total amount of \$3 million to one or more organisations to be nominated by ASIC following good faith consultation with ANZ as to the identity of the recipients. The funds are to be used for the purpose of promoting the confident and informed participation of investors and consumers in the financial system.

Independent expert

- 3.6 ANZ undertakes to request ASIC to approve, within 15 business days of the Acceptance Date or within such longer period as may be agreed by ASIC and ANZ:
 - 3.6.1 the appointment of an independent expert that meets the criteria in paragraph 3.9 below; and
 - 3.6.2 draft terms of engagement for that independent expert that meet the requirements of this enforceable undertaking.
- 3.7 The independent expert will be appointed by ANZ as the relevant auditor for the purposes of Audited Attestations that ANZ undertakes to provide in paragraphs 3.2 to 3.4 above.
- 3.8 If ASIC approves the draft terms of engagement and the independent expert following a request by ANZ under paragraph 3.6, ANZ undertakes to appoint the approved independent expert on the terms approved by ASIC, within 10 business days of receiving ASIC's approval, or within such longer period as may be agreed by ASIC and ANZ.
- 3.9 ANZ undertakes to nominate, under paragraph 3.6 above, an independent

expert who, in ANZ's opinion:

- 3.9.1 has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking; and
 - 3.9.2 is independent of ANZ, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 3.10 ANZ undertakes to ensure the terms of the independent expert's engagement provided to ASIC for approval under paragraph 3.6:
- 3.10.1 include a statement to the effect that the work of the independent expert is being carried out for ANZ and ASIC, and acknowledging that ASIC is relying on the work of the independent expert;
 - 3.10.2 include a statement that upon request by ASIC, ASIC is to be copied into all or some communications between ANZ and the independent expert;
 - 3.10.3 require the independent expert to notify ASIC where a conflict of interest arises during the engagement or when the independent expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement;
 - 3.10.4 include an acknowledgement that in relation to the Audited Attestation to be provided to ASIC by ANZ as described in paragraphs 3.2 to 3.4 ASIC may, subject to paragraph 4.2, from time to time publicly refer to the content of the Audited Attestation, and may make a summary of the content of the Audited Attestation or a statement that refers to the content of the Audited Attestation public.
- 3.11 Subject to paragraph 3.17, ANZ undertakes to:
- 3.11.1 permit the independent expert, to the extent that it is reasonable having regard to the requirements of this enforceable undertaking, to have access to its books and to interview current employees;
 - 3.11.2 give the independent expert any information or explanation reasonably requested by the independent expert of any matter in any way connected with the Audited Attestation required to be prepared by the independent expert under this enforceable undertaking; and
 - 3.11.3 otherwise reasonably assist the independent expert in carrying out the terms of its engagement to assist ANZ to provide the Audited Attestations required under this enforceable undertaking.
- 3.12 ANZ undertakes to seek approval under paragraph 3.6 for the appointment

of a new independent expert, within 15 business days of becoming aware that the appointed independent expert is unable to continue its appointment.

Other undertakings

- 3.13 ANZ undertakes that it will pay the costs of its compliance with this enforceable undertaking.
- 3.14 ANZ undertakes that it will not seek reimbursement or pass on to its clients the costs incurred in carrying out this enforceable undertaking.
- 3.15 Subject to paragraph 3.17, ANZ undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing its compliance with the terms of this enforceable undertaking.
- 3.16 ANZ undertakes to notify ASIC as soon as reasonably practicable and in any event within five business days of becoming aware of any failure by it to comply with a term of this enforceable undertaking.
- 3.17 For the avoidance of doubt, ANZ is not required to provide the independent expert or ASIC with any document or information that is reasonably the subject of a claim by ANZ of legal professional privilege.

4. Acknowledgements

- 4.1 Subject to paragraph 4.2, ANZ acknowledges that ASIC:
 - 4.1.1 may issue a media release on execution of this enforceable undertaking referring to its terms and to the concerns of ASIC which led to its execution;
 - 4.1.2 may from time to time publicly refer to this enforceable undertaking;
 - 4.1.3 will from time to time publicly report about compliance with this enforceable undertaking;
 - 4.1.4 will make this undertaking available for public inspection;
 - 4.1.5 may issue a media release referring to the content of an Audited Attestation as described in paragraphs 3.2 to 3.4;
 - 4.1.6 may from time to time publicly refer to the content of an Audited Attestation as described in paragraphs 3.2 to 3.4;
 - 4.1.7 will make available for public inspection a summary of the content of the Audited Attestations as described in paragraphs 3.2 to 3.4 or statements that refer to the content of those Audited Attestations.
- 4.2 ASIC acknowledges that it will not refer to any information from an Audited Attestation that:

- 4.2.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the enforceable undertaking;
 - 4.2.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of ANZ or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking;
 - 4.2.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or
 - 4.2.4 ANZ has asked not to be released if ASIC is satisfied:
 - i. it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of ANZ otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
 - ii. it should not be released because it would be against the public interest to do so.
- 4.3 Further, ANZ acknowledges that:
- 4.3.1 ASIC's acceptance of this enforceable undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
 - 4.3.2 this enforceable undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.
- 4.4 ANZ acknowledges that this undertaking has no operative force until accepted by ASIC, and ANZ and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

