

## NOTICE OF FILING

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ORS  
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### Important Information

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Form 17  
Rule 8.05(1)(a)

## AMENDED STATEMENT OF CLAIM

VID 9 of 202110

Federal Court of Australia  
District Registry: Victoria  
Division: General

**IAN EDO JANSSEN** and another

Applicants

**ONEPATH CUSTODIANS PTY LTD (ACN 008 508 496)** and others

Respondents

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**Note: Terms used in this Amended Statement of Claim have the meaning given to them in Schedule A.**

## **A. PARTIES**

1. The Applicants bring this proceeding as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on their own behalf and on behalf of the Group Members described in paragraphs 2 and 3.
2. The First Applicant and the persons whom he represents (**Cash Investment Group Members**) are persons who:
  - 2.1. satisfy both of the following paragraphs:
    - (a) were, as at 13 April 2019 (**Master Fund End Date**), or any time between 1 September 2011 (**Master Fund Start Date**) and the Master Fund End Date (**Master Fund Period**), members of the OnePath Master Fund (**Master Fund**); and

- (b) at any time during the Master Fund Period had units or rights in respect of investment options in the Master Fund titled (in whole or part) “Cash Advantage”, “ANZ Term Deposit” or “ANZ SmartChoice Cash”;

OR

2.2. satisfy both of the following paragraphs:

- (a) were, as at 31 January 2020 (**RPS End Date**), or any time between 14 April 2019 (**RPS Start Date**) and the RPS End Date (**RPS Period**), members of the Retirement Portfolio Service Fund (**RPS Fund**); and
- (b) at any time during the RPS Period had units or rights in respect of investment options in the RPS Fund titled (in whole or in part) “Cash Advantage”, “ANZ Term Deposits” or “ANZ SmartChoice Cash”;

OR

2.3. at any time during the Master Fund Period received payment from the Master Fund of all or part of the benefits of a deceased member who satisfied paragraph 2.1;

OR

2.4. at any time during the RPS Period received payment from the RPS Fund of all or part of the benefits of a deceased member who satisfied paragraph 2.2;

OR

2.5. satisfy both of the following paragraphs:

- (a) were the Spouse of a member of the Master Fund who satisfied paragraph 2.1; and
- (b) at any time during the Master Fund Period received a transfer from the Master Fund of all or part of the member’s account in the Master Fund pursuant to an order or settlement in a *Family Law Act 1975* proceeding or a superannuation agreement within the meaning of Part VIII B of the *Family Law Act 1975*;

OR

2.6. satisfy both of the following paragraphs:

- (a) were the Spouse of a member of the RPS Fund who satisfied paragraph 2.2; and
- (b) at any time during the RPS Fund Period received a transfer from the RPS Fund of all or part of the member's account in the RPS Fund pursuant to an order or settlement in a *Family Law Act 1975* (Cth) proceeding or a superannuation agreement within the meaning of Part VIII B of the *Family Law Act 1975* (Cth);

AND

2.7. are not:

- (a) a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia; or
- (b) a legal representative of the Applicants in this proceeding.

3. The Second Applicant and the persons whom he represents (**Commissions Group Members**) are persons who:

3.1. satisfy all of the following paragraphs:

- (a) became members of the Master Fund prior to 30 June 2013;
- (b) at any time on or after 1 July 2013 (**FOFA Start Date**) were members of the Master Fund who were invested in the following products:
  - (i) "ANZ OneAnswer Personal Super (including //Select)" or "ANZ OneAnswer Allocated Pension (including //Select)" or "ANZ OneAnswer Term Allocated Pension (including //Select)" (**ANZ OneAnswer Members**); or
  - (ii) "OnePath OneAnswer Personal Super (including //Select)" or "OnePath OneAnswer Allocated Pension (including //Select)" or "OnePath OneAnswer Term Allocated Pension (including //Select)" (**OnePath OneAnswer Members**); or
  - (iii) "ANZ Super Advantage" (**ANZ Super Advantage Members**); or

- (iv) “Integra Super” or “Integra Pension” (**Integra Members**); or
- (v) “OptiMix Allocated Pension” or “OptiMix Superannuation” or “OptiMix Term Allocated Pension” (**OptiMix Members**); and

(c) were charged one or more Contribution Fees or Excess Ongoing Fees (as defined in this Amended Statement of Claim) in the period after the FOFA Start Date;

OR

3.2. at any time after the FOFA Start Date received payment from the Master Fund or the RPS Fund as successor fund to the Master Fund of all or part of the benefits of a deceased member who satisfied paragraph 3.1;

OR

3.3. satisfy both of the following paragraphs:

- (a) were the Spouse of a member of the Master Fund or RPS Fund who satisfied paragraph 3.1; and
- (b) at any time after the FOFA Start Date received a transfer from the Master Fund or RPS Fund of all or part of the member’s account in the Master Fund or RPS Fund pursuant to an order or settlement in a *Family Law Act 1975* proceeding or a superannuation agreement within the meaning of Part VIIIIB of the *Family Law Act 1975*;

AND

3.4. are not:

- (a) a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia; or
- (b) a legal representative of the Applicants in this proceeding.

4. As at the date of commencement of this proceeding, there are seven or more persons who have claims against the Respondents in respect of the matters set out in this Amended Statement of Claim.

5. The First Respondent, OnePath Custodians Pty Ltd (the **Trustee**):

- 5.1. is and at all material times has been:
- (a) a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);
  - (b) the holder of an RSE licence under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
- 5.2. was at all material times:
- (a) until 3 June 2019 (**Zurich Transfer Date**), an Associate and Related Body Corporate of ~~the Second Respondent~~, OnePath Life Limited (**OPL**);
  - (b) until 31 January 2020 (**IOOF Transfer Date**), a subsidiary, a Closely-Held Subsidiary, a Related Body Corporate, and an Associate of the Third Respondent, Australia and New Zealand Banking Group Limited (**ANZ**);
- 5.3. was at all material times in the Master Fund Period the trustee of the Master Fund; and
- 5.4. is, and at all material times in the RPS Period has been, the trustee of the RPS Fund.

6. The Second Respondent, ~~OPL~~ Zurich Australia Limited (**ZAL**):

6.1. is and at all material times has been a company incorporated under the Corporations Act;

6.1A on 1 August 2022, pursuant to a scheme prepared under Part 9 of the *Life Insurance Act 1995* (Cth) (**Scheme**), and confirmed by the Federal Court of Australia on 6 July 2022, became liable for and assumed certain liabilities of OPL as specified in the Scheme, which includes any liability that, but for the Scheme, would have been a liability of OPL arising from the allegations made against OPL in this proceeding;

6.1B by reason of paragraph 6.1A above, is:

- (a) liable for any act or omission of OPL; and

- (b) liable for the relief claimed against it in the proceeding for which a limitations defence was unavailable to OnePath Life Limited prior to 11 August 2022,

should any liability be established for the acts or omissions of OPL as alleged in this Amended Statement of Claim.

6.2. at all material times prior to the Zurich Transfer Date, OPL was:

(a) \_\_\_\_\_ and is, a company incorporated under the Corporations Act;

~~(a)~~(b) \_\_\_\_\_ an Associate and Related Body Corporate of the Trustee and ANZ; and

(c) \_\_\_\_\_ a subsidiary and a Closely-Held Subsidiary of ANZ.

6A By reason of subparagraphs 6.1A and 6.1B above, and for convenience, any reference to OPL in this Amended Statement of Claim is to be understood as also being a reference to ZAL where appropriate, and unless otherwise specified, by reason of the effect of the Scheme.

7. The Third Respondent, ANZ:

7.1. is and at all material times has been:

(a) a company incorporated under the Corporations Act;

(b) an authorised deposit taking institution under the *Banking Act 1959* (Cth) (**ADI**); and

7.2. was at all material times:

(a) until the Zurich Transfer Date the Ultimate Holding Company, a Related Body Corporate and Associate of OPL; and

(b) until the IOOF Transfer Date, the Ultimate Holding Company, a Related Body Corporate and Associate of the Trustee.

## **B. THE TRUSTEE'S DUTIES AND OBLIGATIONS**

### **B.1 Covenants and duties under the SIS Act**



8. At all material times up to 30 June 2013, by force of s 52(1) of the SIS Act, the Master Fund Trust Deed was taken to contain the covenants set out in s 52(2) (as then in force) including covenants by the Trustee:
- 8.1. to exercise, in relation to all matters affecting the Master Fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide (**Previous Care and Skill Covenant**);
  - 8.2. to ensure that its duties and powers are performed and exercised in the best interests of the beneficiaries (**Previous Best Interests Covenant**);
  - 8.3. to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the Master Fund including, but not limited to, the following:
    - (a) the risk involved in making, holding and realising, and the likely return from, the Master Fund's investments having regard to its objectives and its expected cash flow requirements;
    - (b) the composition of the Master Fund's investments as a whole including the extent to which the investments are diverse or involve the Master Fund in being exposed to risks from inadequate diversification;
    - (c) the liquidity of the Master Fund's investments having regard to its expected cash flow requirements;
    - (d) the ability of the Master Fund to discharge its existing and prospective liabilities,

**(Previous Investment Strategy Covenant)**;
  - 8.4. not to enter into any contract, or do anything else, that would prevent it from, or hinder it in, properly performing or exercising its functions and powers (**Previous Proper Performance Covenant**).
9. Since 1 July 2013, by force of s 52(1) of the SIS Act, the Master Fund Trust Deed and the RPS Trust Deed (together, the **Trust Deeds**) have each been taken to contain the covenants set out in s 52, including covenants by the Trustee:

- 9.1. to exercise, in relation to all matters affecting the relevant fund, the same degree of care, skill and diligence as a prudent person whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments (**Care and Skill Covenant**);
- 9.2. to perform its duties and exercise its power in the best interest of the beneficiaries (**Best Interests Covenant**);
- 9.3. where there is a conflict between its duties to the beneficiaries, or the interests of the beneficiaries, and its duties to any other person of the interests of it or an Associate of it:
  - (a) to give priority to the duties to and the interests of the beneficiaries over the duties to and interests of other persons;
  - (b) to ensure that the duties to the beneficiaries are met despite the conflict;
  - (c) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
  - (d) to comply with the prudential standards in relation to conflicts;

**(Conflicts Covenant)**;
- 9.4. not to enter into any contract, or do anything else, that would prevent it from, or hinder it in, properly performing or exercising its functions and powers (**Proper Performance Covenant**);
- 9.5. to formulate, review regularly and give effect to an investment strategy for the whole of the fund and for each investment option offered by it in the relevant fund, having regard to:
  - (a) the risk involved in making, holding and realising, and the likely return from, the investments covered by the strategy, having regard to its objectives in relation to the strategy and to the expected cash flow requirements in relation to the relevant fund;

- (b) the composition of the investments covered by the strategy, including the extent to which the investments are diverse or involve the relevant fund in being exposed to risks from inadequate diversification;
- (c) the liquidity of the investments covered by the strategy, having regard to the expected cash flow requirements in relation to the relevant fund;
- (d) whether reliable valuation information is available in relation to the investments covered by the strategy;
- (e) the ability of the fund to discharge its existing and prospective liabilities;
- (f) the expected tax consequences for the fund in relation to the investments covered by the strategy;
- (g) the costs that might be incurred by the relevant fund in relation to the investments covered by the strategy;
- (h) any other relevant matters;

**(Investment Strategy Covenant);**

- 9.6. to exercise due diligence in developing, offering and reviewing regularly each investment option (**Due Diligence Covenant**).
10. From 6 April 2019, by force of s 52(1) of the SIS Act, the RPS Trust Deed has been taken to contain the covenant by the Trustee set out in s 52(12) of the SIS Act to promote the financial interests of the beneficiaries of the funds who hold a MySuper Product or a Choice Product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes) (**Financial Interests Covenants**).
11. At all material times, pursuant to s 109(1) of the SIS Act, the Trustee has been prohibited from investing in its capacity as trustee of the Master Fund and RPS Fund unless:
- 11.1. it and the other party to the relevant transaction are dealing with each other at arm's length in respect of the transaction; or
  - 11.2. both:

- (a) it and the other party to the relevant transaction are not dealing with each other at arm's length in respect of the transaction; and
- (b) the terms and conditions of the transaction are no more favourable to the other party than those which it is reasonable to expect would apply if it were dealing with the other party at arm's length in the same circumstances.

## **B.2 Duties at general law**

12. Further and in the alternative, at all material times:

- 12.1. up to 30 June 2013, each of the covenants set out in paragraph 8 above was an implied term of the Master Fund Trust Deed;
- 12.2. from 1 July 2013 to the Master Fund End Date, each of the covenants set out in paragraph 9 above was an implied term of the Master Fund Trust Deed; and
- 12.3. since 1 July 2013, each of the covenants set out in paragraph 9 above has been an implied term of the RPS Fund Trust Deed; and
- 12.4. since 6 April 2019, the covenant set out in paragraph 10 above has been an implied term of the RPS Fund Trust Deed,

(the **Implied Terms**).

### **Particulars**

These covenants were and are implied by the operation of section 52 of the SIS Act.

13. At all material times, the Trustee owed a duty to beneficiaries of the Master Fund and the RPS Fund to comply with the Implied Terms.

### **Particulars**

The duty arises at law from the relationship between the Trustee as trustee and beneficiaries of the Master Fund and RPS Fund.

14. Further and in the alternative, at all material times, the Trustee owed to beneficiaries of the Master Fund and the RPS Fund a duty:
- 14.1. to carry out the terms of the trust and to invest the assets of the fund in the best interest of beneficiaries of the fund (**Duty of Loyalty**);
  - 14.2. to exercise the care, diligence and skill of a prudent professional trustee in the management and investment of the assets of the fund (**Duty of Prudent Investment**);
  - 14.3. (subject, since 1 July 2013, to s 58B of the SIS Act), to avoid, in performing its role as trustee of the funds:
    - (a) conflicts between its duties to beneficiaries, on the one hand, and its personal interest or interests of associated third parties;
    - (b) further or alternatively, engagements with associated third parties which are inconsistent with its duties to beneficiaries and the interest of beneficiaries;**(Conflicts Duty)**;
  - 14.4. (subject, since 1 July 2013, to s 58B of the SIS Act), to avoid obtaining, and to avoid associated third parties obtaining, profits by reason of acting as trustee of the Colonial Funds (**Profits Duty**).

### **Particulars**

These duties arise at law from the relationship between the Trustee as trustee and beneficiaries of the Master Fund and RPS Fund.

## **C. THE FUNDS**

### **C.1 Master Fund**

15. The Master Fund was at all material times until the Master Fund End Date:
- 15.1. a trust established by a trust deed entered into by no later than the Master Fund Start Date, as amended from time to time (**Master Fund Trust Deed**), and which forms the, or part of the, Governing Rules of the Master Fund; and

- 15.2. a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registerable Superannuation Entity.

**Particulars**

- (i) Master Fund Trust Deed dated no later than 1 September 2011 as amended from time to time including by:
  - (a) Supplemental Deed dated 13 March 2013;
  - (b) Supplemental Deed dated 15 June 2017; and
  - (c) Supplemental Deed dated 26 March 2019.
- (ii) Further particulars may be provided following discovery.

16. At all material times, the Master Fund Trust Deed:

- 16.1. did not permit the Trustee to generate or be paid fees or other remuneration out of the Master Fund (other than pursuant to any entitlement which existed immediately before 1 March 2013, and in respect of Smart Choice Retail and Smart Choice Employer Products);
- 16.2. provided that the Trustee may appoint one or more persons to administer a part or all of the Master Fund or to manage investments of a part or all of the Master Fund or both;
- 16.3. stated that the Trustee acknowledged that OPL may be entitled to receive or deduct fees or other remuneration in accordance with arrangements between the Trustee and OPL.

**Particulars**

- (i) As to subparagraph 1, Master Fund Trust Deed clause 14.13, Schedule 7.
- (ii) As to subparagraph 2, Master Fund Trust Deed clause 14.5.
- (iii) As to subparagraph 3, Master Fund Trust Deed clause 14.14.

17. At all material times until the Master Fund End Date, the Master Fund was marketed by the Trustee as comprising a number of superannuation products under either the “ANZ” brand or the “OnePath” brand including:
- 17.1. “ANZ OneAnswer Personal Super (including //Select)”, “ANZ OneAnswer Allocated Pension (including //Select)” and “ANZ OneAnswer Term Allocated Pension (including //Select)” (**ANZ OneAnswer Products**);
  - 17.2. “OnePath OneAnswer Personal Super (including //Select)”, “OnePath OneAnswer Allocated Pension (including //Select)” and “OnePath OneAnswer Term Allocated Pension (including //Select)” (**OnePath OneAnswer Products**);
  - 17.3. “ANZ Super Advantage” (**ANZ Super Advantage Product**);
  - 17.4. “Integra Super” or “Integra Pension” (**Integra Products**);
  - 17.5. “OptiMix Allocated Pension” or “OptiMix Superannuation” or “OptiMix Term Allocated Pension” (**OptiMix Products**);
  - 17.6. “OneAnswer Frontier Personal Super” and “OneAnswer Frontier Pension” (**Frontier Products**);
  - 17.7. “ANZ Smart Choice Super”, “ANZ Smart Choice Pension”, “ANZ Smart Choice Super – Defined Benefit Division” and “ANZ Smart Choice MySuper” (**ANZ Smart Choice Retail Products**);
  - 17.8. “ANZ Smart Choice Super for employers and their employees” (**ANZ Smart Choice Employer Product**);
- (together, the **Fund Products**).

#### **Particulars**

- (i) The products marketed under the ANZ brand were:
  - (A) ANZ OneAnswer Products;
  - (B) ANZ Super Advantage Product;
  - (C) ANZ Smart Choice Retail Products;

(D) ANZ Smart Choice Employer Product;

(E) ANZ Legacy Products;

(ii) The products marketed under the OnePath brand were:

(A) the OnePath OneAnswer Products;

(B) Integra Products;

(C) OptiMix Products;

(D) Frontier Products;

(E) Corporate Super Product;

(F) OnePath Legacy Products.

18. In accordance with the Governing Rules of the Master Fund, members and prospective members of the Master Fund were able to request or direct the Trustee that their account or part of their account in the Master Fund be allocated amongst various investment options offered by the Trustee within the fund (**Investment Options**).
19. On 13 April 2019, being the Master Fund End Date:
- 19.1. all assets of the Master Fund were transferred into the RPS Fund by way of a successor fund transfer (**Successor Fund Transfer**);
- 19.2. the Master Fund, upon the transfer, became the “OnePath” Part of the RPS Fund and subject to the rules specified for that Part in the RPS Trust Deed;
- 19.3. all members of the Master Fund became members of the RPS Fund with equivalent rights to the rights members had under the Master Fund in respect of benefits.

### Particulars

- (i) Witness Statement of Victoria Weekes dated 14 August 2018 at paragraphs 18 to 22 and 41 to 43 filed on behalf of the Trustee in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**).



- (ii) Information Booklet for OnePath Superannuation and Pension Products dated January 2019;
- (iii) Information Booklet for ANZ Superannuation and Pension Products dated January 2019;
- (iv) Further particulars may be provided following discovery.

## **C.2 RPS Fund**

20. The RPS Fund is, and at all material times has been:

- 20.1. a trust established by a trust deed dated 22 October 1997 as amended from time to time (**RPS Trust Deed**), and which forms the, or part of the, Governing Rules of the RPS Fund;
- 20.2. a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registerable Superannuation Entity.

### **Particulars**

- (i) RPS Trust Deed dated 22 October 1997 as amended from time to time including by Amending Deed dated 27 March 2019.
  - (ii) Further particulars may be provided following discovery.
21. At all material times since the RPS Start Date, the RPS Fund has been marketed by the Trustee as comprising a number of superannuation products including:
- 21.1. the ANZ OneAnswer Products;
  - 21.2. the OnePath OneAnswer Products;
  - 21.3. the ANZ Super Advantage Product;
  - 21.4. the Integra Products;
  - 21.5. the OptiMix Products;
  - 21.6. the Frontier Products;
  - 21.7. the ANZ SmartChoice Retail Products;

- 21.8. the ANZ SmartChoice Employer Product;
- 21.9. the ANZ Legacy Products; and
- 21.10. the OnePath Legacy Products,  
(together, also **Fund Products**).
22. In accordance with the Governing Rules of the RPS Fund, members and prospective members of the RPS Fund were able to request or direct the Trustee that their account or part of their account in the RPS Fund be allocated amongst various investment options offered by the Trustee within the fund (also, **Investment Options**).

## **D. INVESTMENT OPTIONS – CASH AND TERM DEPOSITS**

### **D.1 Cash Advantage Investment Option**

23. At all times from the Master Fund Start Date until the RPS End Date (**Cash Relevant Period**), there has been an Investment Option within the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products titled “Cash Advantage” (**Cash Advantage Option**).

#### **Particulars**

- (i) The Applicant refers to:
- (A) pages 2 and 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer PDS and Investment Funds Guide both dated 15 November 2010;
  - (B) page 40 of OneAnswer Investment Funds Guide dated 27 February 2012;
  - (C) page 44 of OneAnswer Investment Funds Guide dated 1 July 2014;
  - (D) page 44 of OneAnswer Investment Funds Guide dated 2 May 2016;

(E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

(ii) Further particulars may be provided following discovery.

24. At all times since 27 February 2012, the investment objective for the Cash Advantage Option has been “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts by investing in ANZ bank deposits” (**Cash Advantage Investment Objective**).

#### Particulars

(i) The investment objective is stated on:

(A) page 40 of OneAnswer Investment Funds Guide dated 27 February 2012;

(B) page 44 of OneAnswer Investment Funds Guide dated 1 July 2014;

(C) page 44 of OneAnswer Investment Funds Guide dated 2 May 2016;

(D) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

(ii) Further particulars may be provided following discovery.

25. At all times since 27 February 2012, the investment strategy for the Cash Advantage Option was stated as “ANZ Cash Advantage aims to meet its objective by investing in a portfolio of cash held by ANZ” (**Cash Advantage Investment Strategy**).

#### Particulars

(i) The investment strategy is stated on:

(A) page 40 of OneAnswer Investment Funds Guide dated 27 February 2012;

(B) page 44 of OneAnswer Investment Funds Guide dated 1 July 2014;

(C) page 44 of OneAnswer Investment Funds Guide dated 2 May 2016;

(D) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

(ii) Further particulars may be provided following discovery.

## **D.2 Term Deposit Investment Option**

26. At all times in the Cash Relevant Period, there has been an Investment Option within the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products titled "ANZ Term Deposits" (**ANZ Term Deposits Option**).

### **Particulars**

(i) The Applicant refers to:

(A) pages 2 and 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer PDS and Investment Funds Guide both dated 15 November 2010;

(B) page 41 of OneAnswer Investment Funds Guide dated 27 February 2012;

(C) page 45 of OneAnswer Investment Funds Guide dated 27 February 2014;

(D) page 45 of OneAnswer Investment Funds Guide dated 2 May 2016;

(E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

(ii) Further particulars may be provided following discovery.

27. At all times in the Cash Relevant Period, the investment objective for the ANZ Term Deposits Option was “to provide investors with a fixed rate of return with a choice of investment terms by depositing funds with ANZ” (**Term Deposits Investment Objective**).

**Particulars**

- (i) The investment objective is stated on:
  - (A) page 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer Investment Funds Guide dated 15 November 2010;
  - (B) page 41 of OneAnswer Investment Funds Guide dated 27 February 2012;
  - (C) page 45 of OneAnswer Investment Funds Guide dated 27 February 2014;
  - (D) page 45 of OneAnswer Investment Funds Guide dated 2 May 2016;
  - (E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;
- (ii) Further particulars may be provided following discovery.

28. At all times in the Cash Relevant Period, the investment strategy for ANZ Term Deposits Option has been “to invest in term deposit products issued by ANZ” (**Term Deposits Investment Strategy**).

**Particulars**

- (i) The investment strategy is stated on:
  - (A) page 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer Investment Funds Guide dated 15 November 2010;

(B) page 41 of OneAnswer Investment Funds Guide dated 27 February 2012;

(C) page 45 of OneAnswer Investment Funds Guide dated 27 February 2014;

(D) page 45 of OneAnswer Investment Funds Guide dated 2 May 2016;

(E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

(ii) Further particulars may be provided following discovery.

### **D.3 ANZ Smart Choice Cash Option**

29. At all times since 5 December 2011 until the end of the Cash Relevant Period, there has been an Investment Option within the ANZ Smart Choice Retail Products titled “ANZ Smart Cash” (**Smart Choice Cash Option**).

30. At all times since 11 November 2013 until the end of the Cash Relevant Period, there has been an Investment Option within the ANZ Smart Choice Employer Product titled “ANZ Smart Cash” (also **Smart Choice Cash Option**).

31. The investment objective for the Smart Choice Cash Option has been:

31.1. at all times from the Master Fund Start Date to around 18 February 2017, “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts and term deposits less fees, charges and taxes by investing in ANZ Bank deposits”;

31.2. at all times from around 18 February 2017 to the end of the Master Fund Period, “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts and term deposits less fees, charges and taxes”;

31.3. at all times in the RPS Fund Period, “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts less fees, charges and taxes”;

**(Smart Choice Cash Investment Objective).**

### Particulars

- (i) As to subparagraph 1, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 1 December 2012; and
  - (B) p 21 of Smart Choice Retail Products Additional Information Guide dated 11 November 2013.
- (ii) As to subparagraph 2, the investment objective is stated on:
  - (A) p 20 of the Smart Choice Retail Products Additional Information Guide dated 18 February 2017;
  - (B) p 29 of the Smart Choice Employer Product Additional Information Guide dated 18 February 2017;
- (iii) As to subparagraph 3, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 13 April 2019; and
  - (B) p 31 of the Smart Choice Employer Product Additional Information Guide dated 13 April 2019;
  - (C) p 24 of the Smart Choice Retail Products Additional Information Guide dated 14 December 2019; and
  - (D) p 31 of the Smart Choice Employer Product Additional Information Guide (Employer) dated 14 December 2019;
- (iv) Further particulars may be provided following discovery.

32. The investment strategy for the Smart Choice Cash Option:

- 32.1. at all times in the Master Fund Period, was stated as “this investment option aims to meet its objectives by having exposure to a portfolio of term deposits and cash held at ANZ Bank”;

32.2. at all times in the RPS Fund Period, was stated as “this investment option aims to meet its objectives by having exposure to a portfolio of cash held at ANZ Bank”;

**(Smart Choice Cash Investment Strategy).**

**Particulars**

- (i) As to subparagraph 1, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 1 December 2012;
  - (B) p 21 of Smart Choice Retail Products Additional Information Guide dated 11 November 2013;
  - (C) p 20 of the Smart Choice Retail Products Additional Information Guide dated 18 February 2017; and
  - (D) p 29 of the Smart Choice Employer Product Additional Information Guide dated 18 February 2017;
- (ii) As to subparagraph 2, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 13 April 2019; and
  - (B) p 31 of the Smart Choice Employer Product Additional Information Guide dated 13 April 2019;
  - (C) p 24 of the Smart Choice Retail Products Additional Information Guide dated 14 December 2019;
  - (D) p 31 of the Smart Choice Employer Product Additional Information Guide dated 14 December 2019;
- (iii) Further particulars may be provided following discovery.



## E. CASH AND TERM DEPOSIT INVESTMENTS – MASTER FUND PERIOD

### E.1 Life Policies

33. At all material times during the Master Fund Period, the Trustee invested all contributions, assets and other amounts paid into or otherwise attributable to the Cash Advantage Option (**Cash Advantage Money**) in one or more investment linked life policies issued by OPL to the Trustee as varied from time to time (**Cash Advantage Life Policies**).

#### Particulars

- (i) The Cash Advantage Life Policies are:
  - (A) prior to 6 November 2013, the life policies issued to the Trustee by OPL from time to time and defined as the “Pre-Simplification Policies” in Schedule 3 to the OnePath Master Fund Master Investment Terms (**MIT**) entered into between the Trustee and OPL on or about 6 November 2013, as further amended on 6 October 2017 (**Pre-Simplification Policies**); and
  - (B) on and after 6 November 2013, the Pre-Simplification Policies as amended by the MIT;
- (ii) Further particulars may be provided following discovery.

34. At all material times during the Master Fund Period, the Trustee invested all contributions, assets and other amounts paid into or otherwise attributable to the Term Deposits Option (**Term Deposits Money**) in one or more investment linked life policies issued by OPL to the Trustee as varied from time to time (**Term Deposits Life Policies**).

#### Particulars

- (i) The Term Deposit Life Policies are:
  - (A) prior to 6 November 2013, the life policies issued to the Trustee by OPL from time to time and defined as the Pre-Simplification Policies;

(B) on and after 6 November 2013, the Pre-Simplification Policies as amended by the MIT;

(ii) Further particulars may be provided following discovery.

35. At all material times between the Master Fund Start Date and 6 November 2013, the Trustee invested all contributions, assets and other amounts paid into or otherwise attributable to Smart Choice Cash Option (**Smart Choice Money**) directly into investment funds and underlying investments.
36. At all material times on and from 6 November 2013 until the Master Fund End Date, the Trustee invested the Smart Choice Money in one or more investment linked life policies issued by OPL to the Trustee as varied from time to time (**Smart Choice Life Policies**).

#### Particulars

(i) The Smart Choice Life Policies are the life policies issued to the Trustee by OPL from time to time referred to as the Superannuation Bond Master Policy and the Flexible Retirement Pension Master Policy, both defined as Pre-Simplification Policies, and the MIT;

(ii) Further particulars may be provided following discovery.

37. Investments under the Cash Advantage Life Policies, Term Deposit Life Policies and ANZ Smart Choice Life Policies (together, the **Life Policies**) were at all material times made on the basis that:

37.1. all amounts invested under the policies were invested by OPL in Statutory Funds, which included investments in managed investment schemes and direct assets (**Life Policy Investment Funds**);

37.2. the Trustee and members of the Master Fund (**Members**) did not have any legal or beneficial interest in any assets of the Life Policy Investment Funds (clause 15.2);

37.3. for the Cash Advantage Life Policies and Term Deposit Life Policies (clause 10):

- (a) the pool of assets to which a Life Policy Investment Fund related was divided into units for the purpose of calculating the value of each Member's investments;
- (b) OPL operated policy accounts in each Member's name for the Life Policy Investment Funds selected by the Trustee for that Member, which recorded the value of a Member's investments and transaction on the account;
- (c) OPL would add to a Member's account by allocating units for:
  - (i) all amounts invested in the relevant Life Policy Investment Fund;
  - (ii) switches from other Life Policy Investment Funds; and
  - (iii) any applicable rebates; and
- (d) OPL would deduct from a Member's account by cancelling units for:
  - (i) fees;
  - (ii) payments to or on behalf of the Trustee; and
  - (iii) switches to other Life Policy Investment Funds;

37.4. in respect of fees for the Cash Advantage Life Policies and Term Deposit Life Policies (clause 13):

- (a) OPL could charge fees in connection with the Cash Advantage Life Policies and Term Deposit Life Policies as agreed from time to time between OPL and the Trustee, which agreement may be recorded or reflected in documents or materials in the preparation or approval of which the parties had participated or acquiesced, such as product disclosure statements (**Fees**);
- (b) OPL could deduct or accrue (or both) all Fees in connection with the Commission Product Life Policies from:
  - (i) the Member's benefit account or policy account;
  - (ii) the relevant Statutory Fund or other relevant pool of assets; or

- (iii) an amount received by OPL as a premium under the Commission Product Life Policies and before allocating the balance of the amount to an Investment Option, Life Policy Investment Fund, Benefit Account or Policy Account.

37.5. for the Smart Choice Life Policies:

- (a) the assets were divided into such Life Policy Investment Funds as OPL and the Trustee agreed from time to time, and OPL was required to determine the assets which were attributable to a Life Policy Investment Fund and the value of each Life Policy Investment Fund from time to time (clauses 3.2, 3.6);
- (b) The Life Policy Investment Funds for Smart Choice Life Policies were either (clauses 3.5);
  - (i) divided into units in which case OPL allocated units to the relevant Member's account; or
  - (ii) not divided into units in which case OPL maintained an account balance for each Member;

37.6. in respect of fees for the Smart Choice Life Policies, OPL was entitled to charge and be paid (clause 8):

- (a) fees specified in the Smart Choice Life Policies being contribution fees, administration fees, investment management fees and switching fees;
- (b) any other fees, or increases to any fee, as agreed with the Trustee from time to time.

## **E.2 Administration Agreement**

38. At all material times in the Master Fund Period, OPL provided fund administration services to the Trustee in respect of the Master Fund (**Master Fund Administration Agreement**).

### **Particulars**

- (i) Master Life Policy – Superannuation Fund Administration Agreement between the Trustee and OPL, dated 2005.

- (ii) Master Life Policy- Superannuation Fund Administration Agreement between the Trustee and OPL, dated 2013.
- (iii) Master Investment Terms- Superannuation Fund Administration Agreement between the Trustee and OPL dated 4 February 2015;
- (iv) Master Investment Terms – Superannuation Fund Administration agreement between the Trustee and OPL dated 6 December 2017;
- (v) Deed of Amendment dated 17 July 2018.

39. The Master Fund Administration Agreement provided that:

39.1. The Trustee appointed OPL to provide specified services in relation to the Master Fund (**Administration Services**);

39.2. In consideration for OPL providing the Administration Services:

- (a) where the MIT provided for the Trustee to pay fees or other amounts to OPL in relation to Administration Services, the Trustee shall pay OPL those fees or other amounts in accordance with the relevant terms of the MIT;
- (b) where the MIT did not provide for the Trustee to pay any fees or other amounts to OPL in relation to Administration Services, the Trustee shall pay OPL any costs, charges and expenses reasonably incurred by OPL in relation to provision of those services; and
- (c) where OPL provides Administration Services in relation to the Master Fund other than in accordance with sub-paragraphs (a) or (b) above, the Trustee shall pay OPL such fees or other amounts as agreed between the parties from time to time.

39.3. The Trustee and OPL could agree to vary the Administration Services and the fees or other amounts payable in respect of those services at any time.

#### **Particulars**

- (i) As to subparagraph 1: clause 2.1(a) and Schedule 1 and Schedule 5 of the Deed of Amendment dated 17 July 2018;

- (ii) As to subparagraphs 2 and 3: clause 5 of the Deed of Amendment dated 17 July 2018;
- (iii) As to subparagraph 3: the fees as listed in the applicable PDSs;
- (iv) Further particulars may be provided following discovery.

### **E.3 Underlying investments**

40. At all material times in the Master Fund Period alternatively, at all material times from 5 January 2015 until the end of the Master Fund Period, and in accordance with the terms of the Cash Advantage Life Policies, OPL agreed with ANZ to invest all of the Cash Advantage Money in the form of cash deposits with ANZ (**Cash Advantage Agreement**).

#### **Particulars**

- (i) Services Agreement dated 5 January 2015 between ANZ and OPL in respect of the Cash Advantage Money attributable to the OnePath OneAnswer Products.
- (ii) The Applicants refer to and repeat paragraph 25 and the particulars therefore.
- (iii) The Applicants also refer to:
  - (A) OneAnswer Supplementary Product Disclosure dated 1 September 2011, page 11;
  - (B) OneAnswer Fees Guide dated 27 February 2012, page 19;
  - (C) OneAnswer Fees Guide dated 1 July 2013, page 18;
  - (D) Frontier Fees Guide dated 1 July 2013, page 11;
  - (E) OneAnswer Fees Guide dated 2 May 2016, page 15;
  - (F) Frontier Fees Guide dated 2 May 2016, page 12;

(G) OneAnswer PDS dated 18 September 2017, page 4;

(H) Frontier PDS dated 18 September 2017, page 4;

(iv) Further particulars may be provided following discovery.

41. At all material times in the Master Fund Period, and pursuant to the Cash Advantage Agreement:

41.1. OPL invested the Cash Advantage Money with ANZ in cash deposit accounts;

41.2. ANZ set the interest rate payable on the Cash Advantage Money deposited with it, which OPL accepted (**Cash Advantage Master Fund Interest Rates**);

41.3. each month, ANZ paid to OPL a fee calculated as up to 0.45% of the total Cash Advantage Money deposited with ANZ (**Cash Advantage Fee**).

#### Particulars

(i) Clauses 2.1(a), 2.3, 2.5, Schedule 1 of the Services Agreement dated 5 January 2015 between ANZ and OPL in respect of the Cash Advantage Money attributable to the OnePath OneAnswer Products.

(ii) As to subparagraph 2, the Applicants infer that in accordance with standard banking practice, ANZ set the Cash Advantage Master Fund Interest Rates.

(iii) As to subparagraph 3, the Applicants refer to:

(A) OneAnswer Supplementary Product Disclosure dated 1 September 2011, p11;

(B) OneAnswer Fees Guide dated 27 February 2012, page 19;

(C) OneAnswer Fees Guide dated 1 July 2013, page 18;

(D) Frontier Fees Guide dated 1 July 2013, page 11;

(E) OneAnswer Fees Guide dated 2 May 2016, page 15;

(F) Frontier Fees Guide dated 2 May 2016, page 12;

(G) OneAnswer PDS dated 18 September 2017, page 4;

(H) Frontier PDS dated 18 September 2017, page 4;

(iv) Further particulars may be provided following discovery.

42. At all times in the Master Fund Period:

42.1. OPL invested all of the Term Deposits Money with ANZ in term deposit accounts offered by ANZ;

42.2. ANZ set the interest rates applicable to the ANZ Term Deposits, which OPC accepted (**ANZ Term Deposits Master Fund Interest Rates**);

42.3. each month, ANZ paid to OPL a fee calculated as up to 0.45% of the Term Deposits Money deposited with ANZ (**Term Deposits Fee**).

#### Particulars

(i) The Applicants refer to and repeat paragraph 28 above.

(ii) As to subparagraph 2, the Applicants infer that in accordance with standard banking practice, ANZ set the ANZ Term Deposit Master Fund Interest Rates.

(iii) As to subparagraph 3, the Applicants refer to:

(A) OneAnswer Supplementary PDS dated 1 September 2011, p11;

(B) OneAnswer Fees Guide dated 27 February 2012, page 19;

(C) OneAnswer Fees Guide dated 1 July 2013, page 18;

(D) Frontier Fees Guide dated 1 July 2013, page 11;

(E) OneAnswer Fees Guide dated 2 May 2016, page 15;

(F) Frontier Fees Guide dated 2 May 2016, page 12;

(G) OneAnswer PDS dated 18 September 2017, page 4;



(H) Frontier PDS dated 18 September 2017, page 4;

(iii) Further particulars may be provided following discovery.

43. At all material times between the Master Fund Start Date and 6 November 2013, the Trustee agreed with ANZ to invest all of the Smart Choice Money in the form of cash deposits with or loans to ANZ (**Master Fund Smart Choice Cash Direct Investments**).
44. ANZ set the interest rates payable on the Master Fund Smart Choice Cash Direct Investments deposited with it, which the Trustee accepted.

#### Particulars

The Applicants infer that in accordance with standard banking practice, ANZ set the interest rates applicable to the Master Fund Smart Choice Cash Direct Investments.

45. At all material times from 6 November 2013 to the end of the Master Fund Period, and in accordance with the terms of the Smart Choice Life Policies, OPL agreed with ANZ to invest the Smart Choice Money in the form of cash deposits with ANZ (**Smart Choice Agreement**).

#### Particulars

- (i) Undated Services Agreement between ANZ and OPL which is stated to document an existing arrangement between the parties which commenced prior to 1 July 2013.
- (ii) Further particulars may be provided following discovery.

46. At all material times between 6 November 2013 and the end of the Master Fund Period and pursuant to the Smart Choice Agreement:
- 46.1. OPL invested the Smart Choice Money with ANZ in a cash deposit account titled "ANZ V2 Plus", via the OneAnswer Cash Advantage Trust for which OnePath Funds Management Limited was the Responsible Entity;

- 46.2. ANZ set the interest rate payable on the Smart Choice Money deposited in the ANZ V2 Plus account, which OPL accepted (**Smart Choice Cash Master Fund Interest Rates**);
- 46.3. each month, ANZ paid to OPL a fee calculated as a proportion of up to 0.50%, alternatively up to 0.45%, per annum of the total Smart Choice Money invested in the pooled ANZ v2 Plus Account (**Smart Choice Cash Fee**).

#### **Particulars**

- (i) Smart Choice Agreement clauses 2.1(a), 2.3, Schedule 1
- (ii) The Applicants infer that in accordance with standard banking practice, ANZ set the Smart Choice Cash Master Fund Interest Rates.
- (iii) As to subparagraph 3, the Applicants refer to:
  - (A) ANZ Smart Choice Retail Products PDS dated 11 November 2013, page 9.
  - (B) ANZ Smart Choice Retail Products PDS dated 18 February 2017, page 9.
  - (C) ANZ Smart Choice Retail Products PDS dated 17 March 2018, page 8.
  - (D) ANZ Smart Choice Employer Product PDS dated 25 May 2015, page 7
  - (E) ANZ Smart Choice Employer Product PDS dated 18 February 2017, page 8.

#### **E.4 Payment of Fees to OPL**

47. At all material times in the Master Fund Period, the Cash Advantage Fee, the Term Deposits Fee and the Smart Choice Fee (together the **Cash Investment Fees**), were well in excess of the value of the benefits or services, if any, provided by OPL in respect of the investments with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money.

**Particulars**

- (i) The benefits or services, if any, provided by OPL in connection the investment with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money with ANZ were covered by, in whole or part, its obligations as issuer of the Life Policies, and/or its obligations as provider of the Administration Services under the Master Fund Administration Agreement, and it was fully remunerated for those benefits and services by way of:
  - (A) the remuneration and fees it received as issuer of the Life Policies, as pleaded in paragraphs 37.4 and 37.6;
  - (B) the remuneration and fees it received in connection with its role as the provider of Administration Services under the Master Fund Administration Agreement, as pleaded in paragraph 39.2 and 39.3.
- (ii) Further particulars may be provided prior to trial.

48. Further or alternatively to paragraph 47 above, at all material times in the Master Fund Period, OPL was already paid remuneration or fees in consideration for the benefits or services, if any, provided by OPL in respect of the investments with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money.

**Particulars**

- (i) OPL was sufficiently remunerated for the benefits or services, if any, it provided in connection with the investment with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money by way of:
  - (A) the remuneration and fees it received as issuer of the Life Policies, as pleaded in paragraph 37.4 and 37.6;
  - (B) the remuneration and fees it received in connection with its role as the provider of Administration Services under the Master Fund Administration Agreement, as pleaded in paragraph 39.2 and 39.3.

(ii) Further particulars may be provided prior to trial.

49. The payment by ANZ to OPL of the Cash Advantage Fee reduced the Cash Advantage Master Fund Interest Rate which otherwise would have been offered and paid on the Cash Advantage Money in the absence of the Cash Advantage Fee.
50. The payment by ANZ to OPL of the Term Deposits Fee reduced the applicable Term Deposits Master Fund Interest Rates which otherwise would have been offered and paid on the Term Deposits Money in the absence of the Term Deposits Fee.
51. The payment by ANZ to OPL of the Smart Choice Fee reduced the Smart Choice Cash Master Fund Interest Rate which otherwise would have been offered and paid on the Smart Choice Money in the absence of the Smart Choice Cash Fee.
52. By reason of the matters pleaded in paragraphs 47 to 51 above, at all material times in the Master Fund Period, the returns to members of the Master Fund invested in the Cash Advantage Option, the Term Deposits Option and the Smart Choice Cash Option were reduced by the payment by ANZ to OPL of the Cash Investment Fees.
53. At all material times in the Master Fund Period, the Trustee knew:
  - 53.1. that OPL was paid by ANZ the Cash Investment Fees;
  - 53.2. the amount of the Cash Investment Fees;
  - 53.3. the matters in paragraphs 47 to 52 above.

### **Particulars**

- (i) That the Trustee knew of these matters is to be inferred from
  - (A) the PDSs, Fee Guides and other disclosure documents issued jointly by the Trustee and OPL in relation to the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products which disclosed the fact and amount of the Cash Investment Fees as particularised in paragraphs 40 to 42.
  - (B) the fact the Trustee was a party to the Master Fund Administration Agreement and the recipient of the Administration Services provided by OPL, pursuant to which

the Trustee was aware of the nature and the value of the services provided by OPL under the agreement, and the fees and remuneration OPL received under the agreement;

(C) the fact the Trustee was a party to the Life Policies issued by OPL in respect of the Investment Options, pursuant to which it was aware of the nature and the value of the services provided by OPL under those policies, and the fees and remuneration OPL received under those policies.

(ii) Further particulars may be provided following discovery

## **E.5 Interest Rates – Cash and Term Deposits**

54. The Cash Advantage Master Fund Interest Rates for the Frontier Products:

54.1. from 1 January 2013 until 1 July 2014, were for most of the time, 0.20% above the Reserve Bank of Australia cash rate that applied during the corresponding period (**RBA Cash Rate**);

54.2. from 1 July 2014 to 1 February 2017, were for most of the time, 0.15% above the RBA Cash Rate; and

54.3. from 1 February 2017 to the end of the Master Fund Period, were for most of the time 0.05% above the RBA Cash Rate.

### **Particulars**

(i) The Applicants refer to:

(A) the Cash Advantage Interest Rates published by the Trustee from time to time on the OnePath Website;

(B) the OnePath Master Fund Annual Reports for FY2013 to FY2019.

(ii) Further particulars may be provided following discovery

55. The Cash Advantage Master Fund Interest Rates for the ANZ OneAnswer Products and OnePath OneAnswer Products were at all times from 1 January 2013 until the end

of the Master Fund Period around 0.30% lower than the Cash Advantage Master Fund Interest Rates for the Frontier Product.

#### **Particulars**

- (i) The Applicants refer to:
  - (A) the Cash Advantage Interest Rates published by the Trustee from time to time on the OnePath Website;
  - (B) the OnePath Master Fund Annual Reports for FY2013 to FY2019.
- (ii) Further particulars may be provided following discovery

- 56. At all material times from 1 January 2013 to the end of the Master Fund Period, the Cash Advantage Master Fund Interest Rates were lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.
- 57. From 1 June 2012 to the end of the Master Fund Period, the Term Deposits Master Fund Interest Rates for six month and twelve month term deposits were on average lower than rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

#### **Particulars**

- (i) The Applicants refer to the Term Deposits Interest Rates published by the Trustee from time to time on the OnePath Website;
- (ii) Further particulars may be provided following discovery.

- 58. At all material times from the Master Fund Start Date until 6 November 2013, the interest rate paid by ANZ on the Master Fund Smart Choice Cash Direct Investments:
  - 58.1. was for most of the time, 0.20% above RBA Cash Rate; and
  - 58.2. was lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

#### **Particulars**

- (i) The Applicants refer to:
  - (A) the Smart Choice Interest Rates published by the Trustee from time to time on the ANZ Website;
  - (B) the Quarterly Reports on Smart Choice Returns published on the ANZ Website;
  - (C) the OnePath Master Fund Annual Reports for FY2013 to FY2014.
- (ii) Further particulars may be provided following discovery.

59. The Smart Choice Cash Master Fund Interest Rates:

- 59.1. from 6 November 2013 until 1 January 2017, were for most of the time, 0.20% above the RBA Cash Rate;
- 59.2. from 1 January 2017 to the end of the Master Fund Period, were for most of the time, 0.10% above the RBA Cash Rate.
- 59.3. at all material times from 6 November 2013 to the Master Fund End Date, were lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

**Particulars**

- (i) The Applicants refer to:
  - (A) the Smart Choice Interest Rates published by the Trustee from time to time on the ANZ Website;
  - (B) the Quarterly Reports on Smart Choice Returns published on the ANZ Website;
  - (C) the OnePath Master Fund Annual Reports for FY2014 to FY2019.
- (ii) Further particulars may be provided following discovery

## F. CASH AND TERM DEPOSIT INVESTMENTS – RPS PERIOD

### F.1 Direct Investments

60. On or before 13 April 2019, as a condition precedent to the Successor Fund Transfer, the Trustee redeemed the Life Policies it held with OPL.

#### Particulars

- (i) The witness statement of Victoria Weekes dated 14 August 2018, filed on behalf of the Trustee in the Banking Royal Commission, paragraph 19(a);
  - (ii) Further particulars may be provided following discovery.
61. On or before 13 April 2019, OPL ceased providing Administration Services to the Trustee in respect of ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products.

#### Particulars

- (i) ANZ Retirement Portfolio Service Annual Report for period to 30 June 2019, issued December 2019, page 45
  - (ii) OnePath Retirement Portfolio Service Annual Report for period to 30 June 2019, issued December 2019, page 54.
  - (iii) Further particulars may be provided following discovery.
62. In respect of the Cash Advantage Money, at all times in the RPS Period:
- 62.1. the Trustee invested all of the Cash Advantage Money directly in the form of cash deposits with or loans to ANZ (**Cash Advantage Direct Investments**).
  - 62.2. ANZ set the interest rates paid on the Cash Advantage Direct Investments which the Trustee accepted (**Cash Advantage RPS Interest Rates**).

#### Particulars

- (i) Frontier Product PDS dated 13 April 2019, p3;
- (ii) Frontier Product PDS dated 14 December 2019, p3;



- (iii) Frontier Investment Funds Guide dated 14 December 2019, p36;
- (iv) As to subparagraph 2, the Applicants inter that in accordance with standard banking practice, ANZ set the Cash Advantage RPS Interest Rates;
- (v) Further particulars may be provided following discovery.

63. In respect of the Term Deposit Money, at all times in the RPS Period:

- 63.1. The Trustee invested all of the Term Deposits Money with ANZ in term deposit accounts offered by ANZ; (**Term Deposits Direct Investments**).
- 63.2. ANZ set the interest rates applicable to the Term Deposit Direct Investments which the Trustee accepted (**Term Deposits RPS Interest Rates**).

#### Particulars

- (i) Frontier Product PDS dated 13 April 2019, p3;
- (ii) Frontier Product PDS dated 14 December 2019, p3;
- (iii) Frontier Investment Funds Guide dated 14 December 2019, p36;
- (iv) As to subparagraph 2, the Applicants inter that in accordance with standard banking practice, ANZ set the Term Deposits RPS Interest Rates;
- (v) Further particulars may be provided following discovery.

64. In respect of the Smart Choice Money, at all times in the RPS Period

- 64.1. The Trustee invested all of the Smart Choice Money in the RPS Fund in the form of cash deposits with or loans to ANZ (**RPS Smart Choice Cash Direct Investments**).

- 64.2. ANZ set the interest rates applicable to the RPS Smart Choice Cash Direct Investments which the Trustee accepted (**Smart Choice Cash RPS Interest Rates**) were set by ANZ and accepted by the Trustee.

#### **Particulars**

- (i) Smart Choice Retail Products Additional Information Guide dated 13 April 2019, pages 2-3, 17 and 24;
- (ii) Smart Choice Retail Products Additional Information Guide dated 14 December 2019, pages 2-3, 18, 24
- (iii) Smart Choice Employer Product Additional Information Guide dated 13 April 2019, pages 2-3, 18, 31;
- (iv) Smart Choice Employer Product Additional Information Guide dated 14 December 2019, pages 2-3, 18, 31;
- (v) As to subparagraph 2, the Applicants infer that in accordance with standard banking practice, ANZ set the Smart Choice Cash RPS Interest Rates;
- (vi) Further particulars may be provided following discovery.

## **F.2 Interest Rates**

65. The Cash Advantage RPS Interest Rates, at all material times in the RPS Period:
- 65.1. were 0.05% above the RBA Cash Rate
  - 65.2. were lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

#### **Particulars**

- (i) The Applicants refer to:

(A) the Cash Advantage Interest Rates published by the Trustee from time to time on the OnePath Website;

(B) the OnePath Master Fund Annual Reports for FY2019 to FY2020.

(ii) Further particulars may be provided following discovery.

66. The Term Deposits RPS Interest Rates for six month and twelve month term deposits at all material times in the RPS Period, were lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

#### **Particulars**

(i) The Applicants refer to the Term Deposits Interest Rates published by the Trustee from time to time on the OnePath Website;

(ii) Further particulars may be provided following discovery.

67. The Smart Choice Cash RPS Interest Rates:

67.1. from the RPS Start Date until 31 December 2019, were for most of the time 0.10% above the RBA Cash Rate;

67.2. from 1 January 2020 to the RPS End Date, were for most of the time equal to the RBA Cash Rate;

67.3. at all material times in the RPS Period, were lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds.

#### **Particulars**

(i) The Applicants refer to:

(A) the Smart Choice Interest Rates published by the Trustee from time to time on the ANZ Website;

(B) the Quarterly Reports on Smart Choice Returns published on the ANZ Website;

(C) the OnePath Master Fund Annual Reports for FY2019 to FY2020.

(ii) Further particulars may be provided following discovery

## **G. CONTRAVENTION OF TRUSTEE COVENANTS AND DUTIES – CASH INVESTMENTS**

### **G.1 Contraventions of s 109**

68. At all material times in the Master Fund Period, in respect of investments of the Cash Advantage Money, the Term Deposits Money and the Smart Choice Money (together, **Cash Money**) in the Life Policies, the Trustee was not dealing with OPL at arm's length.

#### **Particulars**

(i) At all material times in the Master Fund Period, the Trustee was an Associate and Related Body Corporate of OPL, and the Trustee and OPL were both Closely-Held Subsidiaries of ANZ.

(ii) Further particulars may be provided following discovery.

69. At all material times in the Master Fund Period, the terms and conditions of the investments pleaded in paragraph 68 above were more favourable to OPL than those which it is reasonable to expect would have applied if the Trustee were dealing with OPL at arm's length in the same circumstances.

#### **Particulars**

(i) The fees payable by the Trustee to OPL under the Life Policies, and the fees which OPL was entitled to receive from third parties in connection with the investments made under the Life Policies, were higher than would be reasonable to expect would have applied if the Trustee were dealing with OPL at arm's length in the same circumstances.

- (ii) Further particulars may be provided following discovery and service of lay and expert evidence.

70. By reason of the matters pleaded in paragraphs 68 and 69, in making the investments of the Cash Money in the Life Policies, at all material times in the Master Fund Period, the Trustee contravened s 109(1) of the SIS Act (**Master Fund Arm's Length Contravention**).
71. Further, at all material times from the Master Fund Start Date to 6 November 2013, in respect of the Master Fund Smart Choice Cash Direct Investments, the Trustee was not dealing with ANZ at arm's length.

#### Particulars

- (i) At all material times in the Master Fund Period, the Trustee was a Closely-Held Subsidiary of ANZ.
  - (ii) Further particulars may be provided following discovery.
72. The rate of interest the Trustee agreed to accept from ANZ in respect of the Master Fund Smart Choice Cash Direct Investments was lower, and therefore the terms and conditions of the transactions were more favourable to ANZ, than it is reasonable to expect would apply if the Trustee were dealing with ANZ at arm's length in the same circumstances.

#### Particulars

- (i) The Applicants refer to and repeat paragraph 58 above.
  - (ii) Further particulars may be provided following discovery and service of lay and expert evidence.
73. By reason of the matters pleaded in paragraphs 71 and 72, in making the Master Fund Smart Choice Cash Direct Investments, at all material times from the Master Fund Start Date to 6 November 2013, the Trustee contravened s 109(1) of the SIS Act (**Smart Choice Arm's Length Contravention**).
74. At all material times in the RPS Period, in respect of investment of the Cash Money, the Trustee was not dealing with ANZ at arm's length.

### Particulars

- (i) At all material times in the RPS Period, the Trustee was a Closely-Held Subsidiary of ANZ.
- (ii) Further particulars may be provided following discovery.

75. At all material times in the RPS Period, the rate of interest the Trustee agreed to accept from ANZ in respect of the above investments was lower, and therefore the terms and conditions of the transactions were more favourable to ANZ, than it is reasonable to expect would apply if the Trustee were dealing with ANZ at arm's length in the same circumstances.

### Particulars

- (i) The Applicants refer to and repeat paragraphs 65 to 67 above.
- (ii) Further particulars may be provided following discovery and service of lay and expert evidence.

76. By reason of the matters pleaded in paragraphs 74 and 75, in making the investments of the Cash Money with ANZ, at all material times in the RPS Period, the Trustee contravened s 109(1) of the SIS Act (**RPS Arm's Length Contravention**).

## G.2 Care and skill contraventions

77. At all material times from the Master Fund Start Date up to 30 June 2013, an ordinary prudent person in the position of the Trustee, dealing with property of another for whom the person felt morally bound to provide, would:

77.1. not have invested the Cash Money, or retained such investments, in:

- (a) Life Policies which:
  - (i) provided OPL broad discretion to invest the funds;
  - (ii) entitled OPL to receive and retain fees; and

- (b) in the circumstances (as applicable prior to 30 June 2013) set out in paragraphs 37.4, 47 to 53 and 69 above;

77.2. have:

- (a) invested the Cash Money directly:
  - (i) in a fund, or similar investment, which adopted a strategy of investing in a mix of money market instruments issued by one or more ADIs;
  - (ii) alternatively, in interest-bearing accounts with one or more ADIs, based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Cash Money commensurate with the risk of the investment;
- (b) alternatively, continued to invest the Cash Money in life policies issued by OPL, but only the basis that OPL would:
  - (i) not otherwise be paid the Cash Investment Fees by ANZ, alternatively, would credit or rebate the amount of the Cash Investment Fees to Members' accounts;
  - (ii) not otherwise charge or be paid any other fees or other amounts in reduction of returns in respect of Cash Money; and
  - (iii) invest in underlying investments of the kind set out in subparagraph (a) above;
- (c) formulated and given effect to an investment strategy, for the purpose of complying with the Previous Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of the Cash Money.

78. The Trustee did not take any of the steps referred to in subparagraph 77.2 above.

79. In the premises, by:

79.1. investing the Cash Money in the Life Policies;

79.2. retaining earlier such investments; and/or

79.3. failing to take the steps set out in subparagraph 77.2 above,

up to 30 June 2013, the Trustee contravened the Previous Care and Skill Covenant, and thereby contravened s 55(1) of the SIS Act (**Master Fund Previous Care and Skill Contravention**).

80. At all material times from the Master Fund Start Date to 30 June 2013, an ordinary prudent person in the position of the Trustee, dealing with property of another for whom the person felt morally bound to provide, would:

80.1. not have invested the Smart Choice Cash Money, or retained such investments, exclusively in deposits with ANZ in the circumstances (as applicable prior to 30 June 2013) set out in paragraphs 58 and 72 above.

80.2. have:

(a) invested the Smart Choice Cash Money:

(i) in a fund, or similar investment, which adopted a strategy of investing in a mix of money market instruments issued by one or more ADIs;

(ii) alternatively, in interest-bearing accounts with one or more ADIs, based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Smart Choice Cash Money commensurate with the risk of the investment;

(b) alternatively, continued to invest the Smart Choice Cash Money in deposits with ANZ, but only on the basis that ANZ would offer market leading interest rates;

(c) formulated and given effect to an investment strategy, for the purpose of complying with the Previous Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of Smart Choice Cash Money.

81. The Trustee did not take any of the steps referred to in subparagraph 80.2 above.

82. In the premises, by:



- 82.1. investing the Smart Choice Cash Money exclusively in deposits offered by ANZ;
- 82.2. retaining earlier such investments; and/or
- 82.3. failing to take the steps set out in subparagraph 80.2 above,

up to 30 June 2013, the Trustee contravened the Previous Care and Skill Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Previous Care and Skill Contravention**).

- 83. At all material times from 30 June 2013 to the end of the Master Fund Period, a prudent person in the position of the Trustee, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments, would:

- 83.1. not have invested the Cash Money, or retained such investments in:

- (a) Life Policies which:

- (i) provided OPL broad discretion to invest the funds; and
- (ii) entitled OPL to receive and retain fees; and

- (b) the circumstances (as applicable after 30 June 2013) set out in paragraph 37.4, 37.6, 47 to 53 and 69 above;

- 83.2. have:

- (a) invested the Cash Money directly:

- (i) in a fund, or similar investment, which adopted a strategy of investing in a mix of money market instruments issues by ADIs;
- (ii) alternatively, in interest-bearing accounts with one or more ADIs,

based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Cash Money commensurate with the risk of the investment;

- (b) alternatively, continued to invest the Cash Money in life policies issued by OPL, but only the basis that OPL would:

- (i) not otherwise be paid the Cash Investment Fees by ANZ, alternatively, credit or rebate the amount of the Cash Investment Fees to Members' accounts;
  - (ii) not otherwise charge or be paid any other fees or amounts in reduction of returns in respect of Cash Money; and
  - (iii) invest in underlying investments of the kind set out in subparagraph (a) above;
- (c) formulated and given effect to an investment strategy, for the purpose of complying with the Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of Cash Money.

84. The Trustee did not take any of the steps referred to in subparagraph 83.2 above.

85. In the premises, by:

85.1. investing the Cash Money in the Life Policies;

85.2. retaining earlier such investments; and/or

85.3. failing to take the steps set out in subparagraph 83.2 above,

from 30 June 2013 to the end of the Master Fund Period, the Trustee contravened the Care and Skill Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) **(Master Fund Care and Skill Contravention)**.

86. At all material times from 30 June 2013 to 6 November 2013, a prudent person in the position of the Trustee, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments, would:

86.1. not have invested the Smart Choice Cash Money, or retained such investments, exclusively in deposits with ANZ in the circumstances (as applicable after 30 June 2013) set out in paragraph 58 and 72 above.

86.2. have:

- (a) invested the Smart Choice Cash Money:
  - (i) in a fund, or similar investment, which adopted a strategy of investing in a mix of money market instruments issued by one or more ADIs;
  - (ii) alternatively, in interest-bearing accounts with one or more ADIs, based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Smart Choice Cash Money commensurate with the risk of the investment;
- (b) alternatively, continued to invest the Smart Choice Cash Money in deposits with ANZ, but only the basis that ANZ would offer market leading interest rates;
- (c) formulated and given effect to an investment strategy, for the purpose of complying with the Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of Smart Choice Cash Money.

87. The Trustee did not take any of the steps referred to in subparagraph 86.2 above.

88. In the premises, by:

88.1. investing the Smart Choice Cash Money exclusively in deposits offered by ANZ;

88.2. retaining earlier such investments; and/or

88.3. failing to take the steps set out in subparagraph 86.2 above,

from 30 June 2013 to 6 November 2013, the Trustee contravened the Care and Skill Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Care and Skill Contravention**).

89. At all material times in the RPS Period, a prudent person in the position of the Trustee, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments, would:

89.1. not have invested the Cash Money, or retained such investments exclusively in direct deposits with ANZ in the circumstances set out in paragraphs 65.2, 66, 67.3 and 72 above.

89.2. have:

(a) invested the Cash Money:

(i) in a fund, or similar investment, which adopted a strategy of investing in a mix of money market instruments issues by one or more ADIs;

(ii) alternatively, in interest-bearing accounts with one or more ADIs, based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Cash Money commensurate with the risk of the investment;

(b) formulated and given effect to an investment strategy, for the purpose of complying with the Investment Strategy Covenant, that reflect the above approach (as applicable) to the investment of the Cash Money.

90. The Trustee did not take any of the steps referred to in subparagraph 89.2 above.

91. In the premises, by:

91.1. investing the Cash Money exclusively with ANZ in cash and term deposits;

91.2. retaining earlier such investments; and/or

91.3. failing to take the steps set out in subparagraph 89.2 above,

in the RPS Period, the Trustee contravened the Care and Skill Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Care and Skill Contravention**).

### **G.3 Best Interests Contraventions**

92. At all material times in the Master Fund Period, it was not in the best interests of beneficiaries of the Master Fund for the Trustee to:

92.1. have invested the Cash Money, and have retained earlier such investments, in Life Policies in the manner and in the circumstances set out in paragraph 77.1

above (up to 30 June 2013) and paragraph 83.1 above (from 30 June 2013 to the end of the Master Fund Period); and / or

- 92.2. have failed to take the steps set out in paragraph 77.2 above (up to 30 June 2013) and paragraph 83.2 above (from 30 June 2013 to the end of the Master Fund Period).

### Particulars

- (i) The best interests of the members are their best financial interests.
- (ii) The Applicants refer to and repeat paragraphs 47 to 52.

93. In the premises, by:

93.1. investing the Cash Money in the Life Policies;

93.2. retaining earlier such investments; and/or

93.3. failing to take the steps set out in paragraph 77.2 above (up to 30 June 2013) and paragraph 83.2 above (from 30 June 2013 to the end of the Master Fund Period),

the Trustee:

93.4. up to 30 June 2013, contravened the Previous Best Interests Covenant, and therefore contravened s 55(1) of the SIS Act (**Master Fund Previous Best Interests Contravention**);

93.5. from 30 June 2013 to the end of the Master Fund Period, contravened the Best Interests Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Best Interests Contravention**).

94. At all material times in the Master Fund Period, it was not in the best interests of beneficiaries of the Master Fund for the Trustee to:

94.1. have invested the Smart Choice Cash Money, and have retained earlier such investments exclusively with ANZ in the manner and in the circumstances set

out in paragraph 80.1 above (up to 30 June 2013) and paragraph 86.1 above (from 30 June 2013 to 6 November 2013); and / or

- 94.2. have failed to take the steps set out in paragraph 80.2 above (up to 30 June 2013) and paragraph 86.2 above (from 30 June 2013 to 6 November 2013).

### Particulars

- (i) The best interests of the members are their best financial interests.
- (ii) The Applicants refer to and repeat paragraph 58 above.

95. In the premises, by:

- 95.1. investing the Smart Choice Cash Money exclusively with ANZ in the above circumstances;
- 95.2. retaining earlier such investments; and/or
- 95.3. failing to take the steps set out in paragraph 80.2 above (up to 30 June 2013) and paragraph 86.2 above (from 30 June 2013 to 6 November 2013),

the Trustee:

- 95.4. up to 30 June 2013, contravened the Previous Best Interests Covenant, and therefore contravened s 55(1) of the SIS Act (**Smart Choice Previous Best Interests Contravention**);
  - 95.5. from 30 June 2013 to 6 November 2013 contravened the Bests Interests Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Best Interests Contravention**).
96. At all material times in the RPS Fund Period, it was not in the best interests of beneficiaries of the RPS Fund for the Trustee to:
- 96.1. have invested the Cash Money, and have retained earlier such investment, with ANZ in the manner and in the circumstances set out in paragraphs 89.1 above; and or
  - 96.2. have failed to take the steps set out in paragraphs 89.2 above.

### Particulars

- (i) The best interests of the members are their best financial interests.
- (ii) The Applicants refer to and repeats paragraphs 65.2, 66 and 67.3.

97. In the premises, by:

97.1. investing the Cash Money with ANZ in the circumstances set out above;

97.2. retaining earlier such investments; and/or

97.3. failing to take the steps set out in paragraphs 89.2 above,

the Trustee contravened the Bests Interests Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Best Interests Contravention**).

#### G.4 Investment Strategy Contraventions

98. Prior to 1 July 2013, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 8.3(a) to 8.3(d) above, would:

98.1. have identified the matters referred to in paragraphs 47 to 57;

98.2. have formulated and given effect to an investment strategy as set out in paragraph 77.2 above;

99. Prior to 1 July 2013, the Trustee did not take the steps set out in paragraph 98, alternatively did not take the steps set out in sub-paragraph 98.2 above.

100. In the premises, prior to 1 July 2013, the Trustee contravened the Previous Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (**Master Fund Previous Investment Strategy Contravention**).

101. At all material times from 1 July 2013 to the end of the Master Fund Period, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 9.5(a) to 9.5(h) above, would have:

101.1. identified the matters referred to in paragraphs 47 to 57;

- 101.2. formulated and given effect to an investment strategy as set out in paragraph 83.2 above;
102. At all times from 1 July 2013 to the end of the Master Fund Period, the Trustee did not take the steps set out in paragraph 101, alternatively did not take the steps set out in sub-paragraph 101.2 above.
103. In the premises, all material times from 1 July 2013 to the end of the Master Fund Period, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Investment Strategy Contravention**).
104. In relation to the Smart Choice Cash Money, prior to 1 July 2013, a trustee in the Trustee's position, having regard to the matters set out in paragraph 8.3(a) to 8.3(d) above, would have:
- 104.1. identified the matters referred to in paragraphs 58 to 59;
- 104.2. formulated and given effect to an investment strategy as set out in paragraph 80.2 above;
105. Prior to 1 July 2013, the Trustee did not take the steps set out in paragraph 104, alternatively did not take the steps set out in sub-paragraph 104.2 above.
106. In the premises, prior to 1 July 2013, in relation to the Smart Choice Cash Money, the Trustee contravened the Previous Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Previous Investment Strategy Contravention**).
107. In relation to the Smart Choice Cash Money, at all material times from 1 July 2013 to 6 November 2013, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 9.5(a) to 9.5(h) above, would have:
- 107.1. identified the matters referred to in paragraphs 58 to 59;
- 107.2. formulated and given effect to an investment strategy as set out in paragraph 86.2 above.



108. At all times from 1 July 2013 to 6 November 2013, in relation to the Smart Choice Cash Money, the Trustee did not take the steps set out in paragraph 107, alternatively did not take the steps set out in sub-paragraph 107.2 above.
109. In the premises, all material times from 1 July 2013 to 6 November 2013, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Smart Choice Investment Strategy Contravention**).
110. At all material times in the RPS Period, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 9.5(a) to 9.5(h) above, would:
- 110.1. have identified the matters referred to in paragraphs 62 to 67;
- 110.2. have formulated and given effect to an investment strategy as set out in paragraph 89.2 above;
111. At all times in the RPS Period, the Trustee did not take the steps set out in paragraph 110, alternatively did not take the steps set out in sub-paragraph 110.2 above.
112. In the premises, all material times in the RPS Period, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Investment Strategy Contravention**).

#### **G.5 Due Diligence Contraventions**

113. At all material times from 1 July 2013 to the end of the Master Fund Period, a trustee in the Trustee's position, exercising due diligence in developing, offering and reviewing regularly the Cash Advantage Option, the Smart Choice Option and the Term Deposits Option, would have taken each of the steps set out in paragraphs 101 and 107 above.
114. At all material times from 1 July 2013 to the end of the Master Fund Period, the Trustee did not take the steps set out in paragraphs 101 and 107 above, alternatively did not take the steps set out in paragraph 101.2 and 107.2 above.
115. In the premises, the Trustee contravened the Due Diligence Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Due Diligence Contraventions**).

116. At all material times in the RPS Period, a trustee in the Trustee's position, exercising due diligence in developing, offering and reviewing regularly the Cash Advantage Option, the Smart Choice Option and the Term Deposits Option, would have taken each of the steps set out in paragraph 110 above.
117. At all material times in the RPS Period, the Trustee did not take the steps set out in paragraph 110 above, alternatively did not take the steps set out in paragraph 110.2 above.
118. In the premises, the Trustee contravened the Due Diligence Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Due Diligence Contravention**).

## **G.6 Conflicts Contraventions**

119. At all material times from 1 July 2013 to the end of the Master Fund Period, there was a conflict between the Trustee's duties to, and the interests of, beneficiaries of the Master Fund on the one hand, and the interests of OPL on the other, in respect of the payment to OPL of the Cash Investment Fees.

### **Particulars**

- (i) It was the Trustee's duty to take reasonable steps to seek, and it was in interests of beneficiaries to obtain, the highest obtainable net earnings on the investment of the Cash Money within an appropriate risk profile.
  - (ii) It was in OPL's interests to maximise the amount of the Cash Investments Fees it was paid.
120. Further, at all material times from 1 July 2013 to the end of the Master Fund Period, there was a conflict between the Trustee's duties to, and the interests of, beneficiaries of the Master Fund on the one hand, and the interests of ANZ on the other, in respect of the investment of the Cash Money, including the Smart Choice Cash Money, with ANZ.

### **Particulars**

- (i) It was the Trustee's duty to take reasonable steps to seek, and it was in interests of beneficiaries to obtain, the highest obtainable

net earnings on the investment of the Cash Money within an appropriate risk profile.

- (ii) It was in ANZ interests to minimise the interest rate payable on the Cash Money including the Smart Choice Cash Money.

121. By the acts and omissions set out in paragraphs 85.1 to 85.3, and 88.1 to 88.3 above, from 1 July 2013 to the end of the Master Fund Period, the Trustee:

121.1. did not prioritise its duties to and the interests of beneficiaries over the interests of OPL;

121.2. did not prioritise its duties to and the interests of beneficiaries over the interests of ANZ;

121.3. did not ensure that its duties to beneficiaries were met despite the above conflicts;

121.4. did not ensure that the interests of beneficiaries were not adversely affected by the above conduct.

122. In the premises, the Trustee contravened the Conflicts Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Conflicts Contravention**).

123. At all material times in the RPS Period, there was a conflict between the Trustee's duties to, and the interests of, beneficiaries of the RPS Fund on the one hand, and the interests of ANZ on the other, in respect of the investment of the Cash Money with ANZ.

### Particulars

- (i) It was the Trustee's duty to take reasonable steps to seek, and it was in interests of beneficiaries to obtain, the highest obtainable net earnings on the investment of the Cash Money within an appropriate risk profile.
- (ii) It was in ANZ interests to pay a lower rate of interest on the Cash Money.

124. By the acts and omissions set out in paragraphs 91.1 to 91.3 above, at all times in the RPS Period, the Trustee:

124.1. did not prioritise its duties to and the interests of beneficiaries over the interests of ANZ;

124.2. did not ensure that its duties to beneficiaries were met despite the above conflict;

124.3. did not ensure that the interests of beneficiaries were not adversely affected by the above conflict.

125. In the premises, the Trustee contravened the Conflicts Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Conflicts Contravention**).

#### **G.7 Financial Interests Contraventions**

126. At all material times in the RPS Period, it was not in the financial interests of beneficiaries of the RPS Fund for the Trustee to:

126.1. have invested the Cash Money with ANZ, and retained such investments, in the manner and circumstances set out in paragraph 89.1 above; and/or

126.2. failed to take the steps set out in paragraph 89.2 above.

127. In the premises, by:

127.1. investing the Cash Money with ANZ;

127.2. retaining earlier such investments; and/or

127.3. failing to take the steps set out in paragraph 89.2 above,

during the RPS Period, the Trustee contravened the Financial Interests Covenant and thereby contravened s 54B(1) of the SIS Act (**Financial Interests Contravention**).

#### **G.8 Proper Performance Contravention**

128. Further or alternatively, at all material times in the Master Fund Period, the Trustee doing the things referred to in paragraphs 33, 34, 36 and 37 prevented the Trustee from, or hindered the Trustee in, properly performing or exercising the Trustee's

functions and powers, including taking reasonable steps to maximise the returns to members of the Master Fund on the Cash Money.

129. In the premises, by doing the things referred to:

129.1. in paragraphs 33, 34 and 37 (up to 30 June 2013), the Trustee contravened the Previous Proper Performance Covenant, and therefore contravened s 55(1) of the SIS Act (**Previous Proper Performance Contravention**);

129.2. in paragraphs 33, 34, 36 and 37 (from 1 July 2013 to the end of the Master Fund Period), the Trustee contravened the Proper Performance Covenant, and therefore contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Proper Performance Contravention**).

#### H. THE TRUSTEE'S BREACHES OF TRUST – CASH INVESTMENTS

130. Further and alternatively, in respect of each contravention of a covenant in s 52 of the SIS Act set out in Section G above, by engaging in conduct giving rise to the contravention, the Trustee breached the Implied Terms of the Master Fund Trust Deed and the RPS Fund Trust Deed (**Trustee's Cash Investments Breach of Trust**).

131. In respect of:

131.1. the Master Fund Previous Best Interests Contravention; and

131.2. the Master Fund Best Interests Contravention,

(together, the **Master Fund SIS Best Interests Contraventions**),

by engaging in conduct giving rise to each contravention, the Trustee breached its Duty of Loyalty (**Master Fund Loyalty Breaches of Trust**).

132. In respect of:

132.1. the Smart Choice Previous Best Interests Contravention;

132.2. the Smart Choice Best Interests Contravention; and

132.3. the RPS Best Interests Contravention,

(together, the **RPS and Smart Choice SIS Best Interests Contraventions**),

by engaging in conduct giving rise to each contravention, the Trustee breached its Duty of Loyalty (**RPS and Smart Choice Loyalty Breaches of Trust**).

133. In respect of:

133.1. the Master Fund Previous Care and Skill Contravention;

133.2. the Master Fund Care and Skill Contravention

133.3. the Master Fund Previous Investment Strategy Contravention;

133.4. the Master Fund Investment Strategy Contravention; and

133.5. the Master Fund Due Diligence Contravention,

(together, **Master Fund Further SIS Contraventions**)

by engaging in conduct giving rise to each of the contraventions, the Trustee breached its Duty of Prudent Investment (**Master Fund Prudent Investment Breaches of Trust**).

134. In respect of:

134.1. the Smart Choice Previous Care and Skill Contravention;

134.2. the Smart Choice Care and Skill Contravention;

134.3. the RPS Care and Skill Contravention;

134.4. the Smart Choice Previous Investment Strategy Contravention;

134.5. the Smart Choice Investment Strategy Contravention;

134.6. the RPS Investment Strategy Contravention; and

134.7. the RPS Due Diligence Contravention,

(together, the **RPS and Smart Choice Further SIS Contraventions**),

by engaging in conduct giving rise to each of the contraventions, the Trustee breached its Duty of Prudent Investment (**RPS and Smart Choice Prudent Investment Breaches of Trust**).

135. At all material times during the Master Fund Period, in investing the Cash Money in the Life Policies, the Trustee breached its Conflicts Duty (**Master Fund Conflicts Breaches of Trust**).

**Particulars**

- (i) The Applicants refer to and repeat paragraphs 119 to 122 and the particulars thereto.

136. At all material times from the Master Fund Start Date to 6 November 2013, in making the Smart Choice Direct Investments with ANZ, the Trustee breached its Conflicts Duty (**Smart Choice Conflicts Breaches of Trust**).

**Particulars**

- (i) The Applicants refer to and repeats paragraphs 120 to 122 and the particulars thereto.

137. At all material times during the RPS Period, in investing the Cash Money exclusively with ANZ, the Trustee breached its Conflicts Duty (**RPS Conflicts Breaches of Trust**).

**Particulars**

- (i) The Applicants refer to and repeats paragraphs 123 to 125 and the particulars thereto.

138. At all material times during the Master Fund Period, in investing the Cash Money in the Life Policies, the Trustee breached its Profits Duty (**Master Fund Profits Breaches of Trust**).

**Particulars**

- (i) As a result of the Trustee's investment of the Cash Money in the Life Policies, OPL was paid the Cash Investment Fees;
- (ii) the Applicants refer to and repeat paragraphs 119 to 122 and the particulars thereto;
- (iii) at all times in the Master Fund Period, OPL was an Associate and Related Body Corporate of the Trustee.

## I. ACCESSORIAL LIABILITY OF OPL – MASTER FUND PERIOD

### I.1 Involvement in statutory contraventions

139. At all material times in the Master Fund Period, OPL was directly or indirectly:

139.1. knowingly concerned in; and/or

139.2. party to,

each of the following contraventions of the SIS Act by the Trustee:

139.3. the Master Fund Arm's Length Contraventions;

139.4. the Master Fund Best Interests SIS Contraventions;

139.5. the Master Fund Further SIS Contraventions.

#### Particulars

- (i) OPL was concerned in, or party to, each of the contraventions by reason of having accepted investments of the Cash Money by the Trustee under the Life Policies, where the conduct of the Trustee in making such investments, and retaining such earlier investments, gave rise to the contraventions for the reasons set out in section G.
- (ii) OPL knew of or was wilfully blind to, at least the following:
  - (A) the matters in paragraphs 5.2, 6.2, 7.2 and 68 above, which knowledge is inferred, among other matters, from OPL's membership of the ANZ group and consequential knowledge of other members of that group.
  - (B) the matters set out in paragraph 5.1(b) and 5.3 above, which knowledge is inferred, among other matters, from the Trustee transacting with OPL in the stated capacity as trustee of the Master Fund;
  - (C) the matters set out in paragraphs 33, 34, 36 and 37 above, by reason of OPL being a party to the Life Policies and having



received the investments of the Cash Money under the Life Policies;

- (D) the matters set out in paragraphs 38 and 39 above, by reason of OPL being a party to the Master Administration Services Agreement, and having provided the Administration Services to the Trustee in respect of the Master Fund under that agreement;
- (E) the matters set out in paragraphs 40, 41, 42, 45 and 46 above, which knowledge is inferred, among other matters, from one or more of the following:
  - a. OPL having entered into the agreements with ANZ regarding the investments;
  - b. OPL having made the investments with ANZ;
  - c. OPL having been paid Cash Investment Fees by ANZ in connection with the investments;
- (F) the matters set out in paragraphs 47 and 48 above, which knowledge is inferred, among other matters, from one or more of the following:
  - a. OPL's knowledge of the matters set out in particulars (C) and (D) above;
  - b. OPL's provision of the Administration Services to the Trustee under the Master Fund Administration Agreement, such that OPL was aware of the nature and the value of the services it provided, and the fees and remuneration it received under the agreement;
  - c. OPL's issue of the Life Policies in respect of the Investment Options, pursuant to which it was aware of the nature and the value of the services it provided under those policies, and the fees and remuneration it received under those policies.

- (G) the matters set out in paragraphs 49 to 52 above, which knowledge is inferred, among other matters, from OPL having made the investments of the Cash Money with ANZ and OPL having being paid the Cash Investment Fees;
- (H) the matters set out in paragraphs 54 to 57 and 59 above, which knowledge is inferred, among other matters, from:
- a. OPL having made the investments of the Cash Money with ANZ at the interest rates offered by ANZ;
  - b. OPL, and/or OPL's directors, have at all material times been subject to duties under the Life Insurance Act 1995 (Cth) and associated regulations and prudential standards, compliance with which required OPL to have a detailed understanding of the underlying investments being made of the Cash Money;
  - c. OPL having been at all material times a sophisticated investor responsible for hundreds of millions of dollars in investments, from which it is inferred that OPL developed a detailed understanding of, among other matters, the underlying investments being made of the Cash Money;
- (I) The matters set out in paragraph 69 above, which knowledge of or wilful blindness to is inferred, among other matters, from OPL's knowledge or wilful blindness of the matters set out in particulars (C) above, alternatively the matters set out in particulars (C) and (E) and/or (F) above.
- (J) that the Trustee had not taken any of the steps in paragraphs 77.2 and 83.2 above, where it was self-evident that the Trustee had not taken those steps;
- (K) that the Trustee had not formulated and/or given effect to an investment strategy as set out in paragraphs 77.2 and 83.2, where it was self-evident that the Trustee had not formulated and/or given effect to such an investment strategy;

(L) that the Trustee's investment of the Cash Money, and retention of such investments, in the Life Policies was not in the best interests of beneficiaries of the Master Fund, which knowledge of or wilful blindness to is inferred from OPL's knowledge of or wilful blindness to of the matters set out in particulars (A) to (K) above and (N) below;

(M) that the Trustee's investment of the Cash Money, and retention of such investments, in the Life Policies was imprudent, which knowledge of or wilful blindness to is inferred from OPL's knowledge of or wilful blindness to the matters set out in the particulars (A) to (K) above and (N) below;

(N) the matters set out in paragraphs 119 and 121 above, which knowledge of is inferred, among other matters, from the fact that the conflicts referred to therein were inherent in the manner in which OPL was paid the Cash Investment Fees.

(iii) Further particulars may be provided following discovery.

140. In the premises, OPL:

140.1. has been involved in each of the Master Fund Best Interests SIS Contraventions and Master Fund Further SIS Contraventions, within the meaning of section 55 of the SIS Act;

140.2. has been directly or indirectly, knowingly concerned in, or party to, the Master Fund Arm's Length Contravention within the meaning of section 315 of the SIS Act.

## **I.2 Knowing receipt in respect of general law breaches by the Trustee**

141. The Applicants refer to and repeat each of the matters set out in paragraphs 139 and 140 above.

142. At all material times in the Master Fund Period, OPL received property held on trust by the Trustee, being the Cash Money invested under the Life Policies.

143. At all material times in the Master Fund Period, OPL knew that the Cash Money invested under the Life Policies constituted trust property.

**Particulars**

- (i) The Applicants refer to and repeat the particulars subjoined at (ii)(B) to paragraph 139 above.
- (ii) Further particulars may be provided following discovery.

144. At all material times in the Master Fund Period, in receiving the above property, OPL has:

144.1. actually known;

144.2. alternatively, wilfully shut its eyes to the obvious in relation to;

144.3. alternatively, wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make in relation to;

144.4. alternatively, known of circumstances which would indicate the facts to an honest and reasonable person of,

the fact that the Cash Money were transferred to it pursuant to a breach of trust and/or fiduciary duties by the Trustee.

**Particulars**

- (i) The Applicants refer to and repeat the particulars subjoined at paragraph 139 above.
- (ii) Further particulars may be provided following discovery.

145. In the premises:

145.1. OPL (and therefore, by reason of subparagraphs 6.1A and 6.1B above, ZAL) is liable as an accessory to the breaches of general law obligations set out in paragraphs 131 and 133 above;

145.2. as a result of OPL's knowing receipt, OPL (and therefore, by reason of subparagraphs 6.1A and 6.1B above, ZAL) has made gains constituted by the Cash Investment Fees;

145.3. OPL (and therefore, by reason of subparagraphs 6.1A and 6.1B above, ZAL) is liable to account as a constructive trustee for the Cash Investment Fees it has received and their traceable proceeds.

## **J. ACCESSORIAL LIABILITY OF ANZ**

146. At all material times in the Master Fund Period and RPS Period, ANZ was directly or indirectly:

146.1. knowingly concerned in; and/or

146.2. party to,

each of the following contraventions of the SIS Act by the Trustee:

146.3. the Smart Choice Arm's Length Contraventions;

146.4. the RPS Arm's Length Contraventions;

146.5. RPS and Smart Choice SIS Best Interests Contraventions; and

146.6. RPS and Smart Choice Further SIS Contraventions.

### **Particulars**

(i) ANZ was concerned in, or party to, each of the contraventions by reason of having accepted investments of Cash Money, including the Smart Choice Cash Money by the Trustee, where the conduct of the Trustee in making such investments, and retaining such earlier investments, gave rise to the contraventions for the reasons set out in section G.

(A) ANZ knew or was wilfully blind to, at least the following: the matters in paragraphs 5.2(b), 7.2(b), 71 and 74 above, which knowledge is inferred, among other matters, from ANZ's position as ultimate holding company of the Trustee and consequential knowledge of its subsidiary companies.

(B) the matters set out in paragraph 5.1(b) and 5.3 above, which knowledge is inferred, among other matters, from the

Trustee transacting with ANZ in the stated capacity as trustee of the Master Fund;

- (C) the matters set out in paragraphs 43, 44, 62 to 64 above, by reason of ANZ having received the investments of the Smart Choice Money, Cash Advantage Money and Term Deposits Money from the Trustee and offered and paid the interest rates on those investments;
- (D) the matters set out in paragraphs 58, 65 to 67, 72 and 75 by reason that ANZ knew that the rates of interest the Trustee agreed to accept from it in respect of the Smart Choice Money, Cash Advantage Money and Term Deposits Money was lower and therefore the terms and conditions of the transactions were more favourable to ANZ than it is reasonable to expect would apply if the Trustee were dealing with ANZ at arm's length in the same circumstances.
- (E) that the Trustee had not taken any of the steps in paragraphs 80.2, 86.2 and 89.2 above, where it was self-evident that the Trustee had not taken those steps;
- (F) that the Trustee had not formulated and/or given effect to an investment strategy as set out in paragraphs 80.2, 86.2 and 89.2, where it was self-evident that the Trustee had not formulated and/or given effect to such an investment strategy;
- (G) that the Trustee's investment of the Cash Money, and retention of such investments, with ANZ at the rates of interest paid was not in the best interests of beneficiaries of the Master Fund, which knowledge of or wilful blindness to is inferred from:
  - a. ANZ's knowledge of or wilful blindness to the matters set out in particulars (A) to (F) above and (I) below;

- b. ANZ's knowledge that the rate of interest it had agreed to pay the Trustee in respect of the Cash Money was below the rate that would apply if ANZ was dealing with the Trustee at arm's length in the same circumstances;
- c. ANZ's knowledge that the Trustee had not sought to invest the Cash Money with an ADI at the highest interest rate obtainable in the market commensurate with the risk associated with the investment;
- d. ANZ's knowledge that the Trustee had not sought to obtain ANZ's agreement to pay a rate of interest in respect of the investment of the Cash Money no lower than the rate of interest obtainable in the market from another ADI with comparable risk;

(H) that the Trustee's investment of the Cash Money, and retention of such investments, with ANZ was imprudent, which knowledge of or wilful blindness to is inferred from ANZ's knowledge of or wilful blindness to the matters set out in the particulars (A) to (G) above and (I) below;

(I) the matters set out in paragraphs 120, 121.2 to 121.4, 123 and 124 above, which knowledge of is inferred, among other matters, from:

- a. ANZ's knowledge that there was a conflict between the Trustee's duties to and the interests of beneficiaries on the one hand, and the interests of ANZ on the other, in that it was the Trustee's duty to seek to obtain, and it was in the beneficiaries interests to obtain, the highest obtainable interest rate on the investments of the Cash Money commensurate with the risk associated with the investment, whereas it was ANZ's interest for ANZ to pay a lower rate of interest on the Cash Money;

- b. ANZ's knowledge that the Trustee did not prioritise its duties to and the interests of beneficiaries over the interests of ANZ, did not ensure that its duties to beneficiaries were met despite the conflict, and did not ensure that the interests of beneficiaries were not adversely affected by the conflict, as it did not seek to obtain the highest obtainable interest rate on the investment of the Cash Money and in fact obtained an interest rate from ANZ below what was obtainable in the market from another ADI with comparable risk and below that which would have been paid by ANZ if it had been dealing with ANZ at arm's length.

(ii) Further particulars may be provided following discovery.

147. In the premises, ANZ:

147.1. has been involved in each of the RPS and Smart Choice SIS Best Interests Contraventions and RPS and Smart Choice Further SIS Contraventions, within the meaning of section 55 of the SIS Act; -and

147.2. has been directly or indirectly, knowingly concerned in, or party to, the Smart Choice Arm's Length Contraventions and the RPS Arm's Length Contraventions within the meaning of section 315 of the SIS Act.

## **K. THE PRE-FOFA REFORM COMMISSIONS PAID AND FEES CHARGED**

### **K.1 Life Policies**

148. At all material times prior to the FOFA Start Date and at all material times in the Master Fund Period, the Trustee invested all contributions, assets and other amounts paid into or otherwise attributable to the Investment Options offered by the Trustee within the following products:

148.1. ANZ OneAnswer Products;



148.2. OnePath OneAnswer Products;

148.3. OptiMix Products;

148.4. Integra Products; and

148.5. ANZ Super Advantage Products,

in one or more invested linked life policies issued by OPL to the trustee (**Commission Products Life Policies**).

### Particulars

(i) The Commission Products Life Policies are:

(A) prior to 6 November 2013, the life policies issued to the Trustee by OPL from time to time and defined as the Pre-Simplification Policies; and

(B) on and after 6 November 2013, the Pre-Simplification Policies as amended by the MIT;

(ii) Further particulars may be provided following discovery.

149. Investments under the Commission Products Life Policies were at all material times made on the basis that:

149.1. all amounts invested under the policies were invested by OPL in Statutory Funds, which included investments in managed investment schemes and direct assets (also **Life Policy Investment Funds**);

149.2. the Trustee and Members did not have any legal or beneficial interest in any assets of the Life Policy Investment Funds (clause 15.2);

149.3. the pool of assets to which a Life Policy Investment Fund related was divided into units for the purpose of calculating the value of each Member's investments (clause 10);

149.4. OPL operated policy accounts in each Member's name for the Life Policy Investment Funds selected by the Trustee for that Member, which recorded the value of a Member's investments and transaction on the account (clause 10);

149.5. OPL would add to a Member's account by allocating units for (clause 10):

- (a) all amounts invested in the relevant Life Policy Investment Fund;
- (b) switches from other Life Policy Investment Funds; and
- (c) any applicable rebates;

149.6. OPL would deduct from a Member's account by cancelling units for (clause 10):

- (a) fees;
- (b) payments to or on behalf of the Trustee; and
- (c) switches to other Life Policy Investment Funds.

149.7. in respect to fees (clause 13):

- (a) OPL could charge fees in connection with the Commission Product Life Policies as agreed from time to time between OPL and the Trustee, which agreement may be recorded or reflected in documents or materials in the preparation or approval of which the parties had participated or acquiesced, such as product disclosure statements (also **Fees**);
- (b) the Fees OPL could charge included fees charged by OPL to support its obligations to pay adviser service fees;
- (c) OPL could deduct or accrue (or both) all Fees in connection with the Commission Product Life Policies from:
  - (i) the Member's benefit account or policy account;
  - (ii) the relevant Statutory Fund or other relevant pool of assets; or
  - (iii) an amount received by OPL as a premium under the Commission Product Life Policies and before allocating the balance of the amount to an Investment Option, Life Policy Investment Fund, Benefit Account or Policy Account.

## K.2 OneAnswer Members

150. At all material times prior to the FOFA Start Date, OPL had arrangements with financial advisers (or a person or company of which the financial adviser was an employee, director, Representative or Authorised Representative, who together with the financial advisers are hereafter collectively referred to as **Financial Advisers**) (**Adviser Arrangements**) pursuant to which OPL paid commissions to Financial Advisers in respect of persons who become OnePath OneAnswer Members or ANZ OneAnswer Members for whom a financial adviser was linked to their account (**OnePath OneAnswer Members with Linked Advisers** and **ANZ OneAnswer Members with Linked Advisers** respectively, and collectively referred to as **OneAnswer Members with Linked Advisers**), being:

150.1. percentage contribution commissions calculated as:

- (a) a maximum of 4.4% (where the member selected the “Entry Fee Option”); and
- (b) a maximum of 3.3% (where the member selected the “Nil Entry Fee Option” or “Deferred Entry Fee Option”),

of amounts contributed or transferred by or for the benefit of OneAnswer Members with Linked Advisers to the applicable OnePath OneAnswer Product or ANZ OneAnswer Product (save for amounts contributed to the Cash Advantage Investment Option, Term Deposit Investment Option, and investment options titled “OnePath Cash” (**OnePath Cash Investment Option**) and “ANZ Prime Cash Management Account” (together **Cash Investment Funds**)) (**Contribution Commissions**); and

150.2. percentage per annum trail commissions calculated as:

- (a) a maximum of 0.60% of the total balance from time to time of the investments of OneAnswer Members with Linked Advisers in OnePath OneAnswer products or ANZ OneAnswer Products (save for amounts contributed to Cash Investment Funds); and
- (b) a maximum of 0.33% of the total balance from time to time of the investment of OneAnswer Members with Linked Advisers in each of the OnePath Cash Investment Option and the Cash Advantage Investment Option

**(Trail Commissions).**

(together, **Adviser Commissions**).

**Particulars**

- (i) PDS OneAnswer Personal Super and Pension dated 15 November 2010 p 41, 51;
- (ii) Supplementary PDS OneAnswer Personal Super and Pension dated 11 September 2011, p.10;
- (iii) OneAnswer Fees Guide dated 27 February 2012 p16
- (iv) PDS OneAnswer Personal Super and Pension dated 27 Feb 2012 p 5
- (v) Further particulars may be provided following discovery.

151. At all material times from the Master Fund Start Date, OPL charged fees to OnePath OneAnswer Members and ANZ OneAnswer Members, including the following kinds of fees:

151.1. fees described as “contribution fees” being amounts equal to a maximum of 4.71% of all amounts contributed or transferred by or for the benefit of a member to the OnePath OneAnswer Product or ANZ OneAnswer Product (other than amounts contributed to Cash Investment Funds) where that member selected the “Entry Fee Option” (**Contribution Fees**);

151.2. fees described as “ongoing fees” being amounts equal to:

- (a) a maximum of 1.12% of the funds invested in the OnePath Cash Investment Option for members of OnePath OneAnswer Personal Super or ANZ OneAnswer Personal Super; and
- (b) a maximum of 2.90% (where the member selected the Entry Fee Option) and equal to a maximum of 3.65% (where the member selected the Nil Entry Fee Option or Deferred Entry Fee Option), of the member’s funds under management (other than Cash Investment Funds);

**(Ongoing Fees);**

151.3. fees described as “Adviser Service Fees”, being a fee paid to a Financial Adviser pursuant to agreement between the Financial Adviser and the member **(Adviser Fees)**.

**Particulars**

- (i) PDS OneAnswer Personal Super and Pension dated 15 November 2010, pp 33-53 as amended by the Supplementary PDS OneAnswer Personal Super and Pension dated 1 September 2011, p2;
- (ii) PDS OneAnswer Personal Super and Pension dated 27 Feb 2012 p 4;
- (iii) Fees Guide OneAnswer Personal Super and Pension dated 27 February 2012, pp4-17.
- (iv) Further particulars may be provided following discovery.

152. At all material times from the Master Fund Start Date to the FOFA Reform Start Date, where a Financial Adviser for a particular OneAnswer Member with Linked Adviser agreed to receive lower or nil Contribution Commission or Trail Commission, OPL rebated the Contribution Commission or Trail Commission to the member as follows:

152.1. a rebate of the Contribution Commission:

- (a) for the Entry Fee Option, by charging a lower Contribution Fee;
- (b) for the Nil Entry Fee Option or Deferred Entry Fee Option, by adding additional units to the member’s account at the time of investment;

152.2. a rebate of the Trail Commission for both the Entry Fee Option, Nil Entry Fee Option and Deferred Entry Fee Option, by crediting additional units to the member’s account each month.

### Particulars

- (i) PDS OneAnswer Personal Super and Pension dated 15 November 2010 pp 34, 38, 41, 44, 52, as amended by the Supplementary PDS OneAnswer Personal Super and Pension dated 1 September 2011;
- (ii) PDS OneAnswer Personal Super and Pension dated 27 February 2012 pp 5;
- (iii) Fees Guide OneAnswer Personal Super and Pension dated 27 February 2012 pp4, 12, 16
- (iv) Further particulars may be provided following discovery.

153. At all material times, the Adviser Arrangements in relation to ANZ OneAnswer Members with Linked Advisers were with Financial Advisers who were employees, Representatives or Authorised Representatives of ANZ (**ANZ Financial Advisers**).

### Particulars

- (i) ANZ OneAnswer PDS dated 15 November 2011 with cover page "Special arrangements";
- (ii) ANZ OneAnswer Supplementary PDS dated 1 September 2011 with cover page "Special arrangements";
- (iii) ANZ OneAnswer PDS dated 27 Feb 2012 with cover page "Special arrangements".
- (iv) Further particulars may be provided following discovery.

154. At all material times from the Master Fund Start Date, the ANZ Financial Advisers agreed to receive a lower Trail Commission under the Adviser Arrangements in respect of ANZ OneAnswer Members with Linked Advisers, by reason of which OPL provided:

154.1. a rebate of 0.176% of the Ongoing Fees for those members with ANZ OneAnswer Personal Super; and

154.2. a rebate of 0.15% of the Ongoing Fees for those members with ANZ OneAnswer Pension.

### Particulars

(i) The Applicants refer to and repeat particulars to paragraph 153.

155. At all material times from the Master Fund Start Date in relation to OneAnswer Members with Linked Advisers:

155.1. the Contribution Commissions were paid from the Contribution Fees deducted from members' accounts;

155.2. the Trail Commissions were paid from the Ongoing Fees deducted from members' accounts.

156. On and from 1 July 2013, OnePath OneAnswer Products and ANZ OneAnswer Products:

156.1. were open only to members of the following products transferring balances between superannuation and pension accounts:

(a) OnePath OneAnswer Personal Super and Pension (Nil Entry Fee Option);

(b) ANZ OneAnswer Personal Super and Pension (Deferred Entry Fee Option); and

(c) OptiMix Superannuation and Pension (Nil Entry Fee Option);

**(Transferring OneAnswer Members)**, and

156.2. otherwise became closed to new members.

### Particulars

(i) PDS OneAnswer Personal Super and Pension dated 1 July 2013, p 1.

(ii) Further particulars may be provided following discovery.

### K.3 OptiMix Members

157. At all material times prior to the FOFA Start Date, OPL had Adviser Arrangements pursuant to which OPL paid commissions to Financial Advisers in respect of persons who become OptiMix Members for whom a financial adviser was linked to their account (**OptiMix Members with Linked Advisers**), being:

157.1. percentage contribution commissions calculated as:

- (a) a maximum of 4.4% (where the member selected the "Entry Fee Option");  
and
- (b) a maximum of 3.3% (where the member selected the "Nil Entry Fee Option")

of amounts contributed or transferred by or for the benefit of OptiMix Members with Linked Advisers to the applicable OptiMix Product (save for amounts contributed to investment options titled "OptiMix Enhanced Cash" (**OptiMix Enhanced Cash Investment Option**)) (also **Contribution Commissions**);  
and

157.2. percentage per annum trail commissions calculated as:

- (a) a maximum of 0.60% of the total balance from time to time of the investment of OptiMix Members with Linked Advisers in OptiMix Products (other than in the OptiMix Enhanced Cash Investment Option);
- (b) a maximum of 0.33% of the total balance from time to time of the investment of OptiMix Members with Linked Advisers in the OptiMix Enhanced Cash Investment Option;

(also **Trail Commissions**),

(together, also **Adviser Commissions**).

#### Particulars

- (i) OptiMix Superannuation PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006 p 13.



(ii) OptiMix Pension PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006 p14.

(iii) Further particulars may be provided following discovery.

158. At all material times from the Master Fund Start Date, OPL charged fees to OptiMix Members, including the following kinds of fees:

158.1. fees described as “contribution fees” being amounts equal to a maximum of 4.71% of all amounts contributed or transferred by or for the benefit of a member to the OptiMix Product where that member selected the “Entry Fee Option” (also **Contribution Fees**);

158.2. fees described as “ongoing fee” being amounts equal to a maximum of 2.90% (where the member selected the “Entry Fee Option”) and equal to a maximum of 3.65% (where the member selected the “Nil” or “Deferred Entry Fee Option”), of the member’s funds under management (also **Ongoing Fees**); and

158.3. fees described as “Adviser Service Fees”, being a fee paid to a Financial Adviser pursuant to agreement between the Financial Adviser and the member (also **Adviser Fees**).

#### **Particulars**

(i) OptiMix Superannuation PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006 pp 8-12.

(ii) OptiMix Pension PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006, pp 8-13;

(iii) Further particulars may be provided following discovery.

159. At all material times from the Master Fund Start Date to the FOFA Reform Start Date, where a Financial Adviser for a particular OptiMix Member with Linked Adviser agreed to receive lower or nil Contribution Commission or Trail Commission, OPL rebated the Contribution or Ongoing Commission to the member as follows:

159.1. a rebate of the Contribution Commission:

- (a) for the “Entry Fee Option”, by charging a lower Contribution Fee;
- (b) for the “Nil Entry Fee Option”, by adding additional units to the member’s account at the time of investment;

159.2. a rebate of the Trail Commission for both the Entry Fee Option and Nil Entry Fee Option, by crediting additional units to the member’s account each month.

#### **Particulars**

- (i) OptiMix Superannuation PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006 p 13.
- (ii) OptiMix Pension PDS dated 12 June 2006 with Supplementary PDS dated 11 December 2006 p14.

160. At all material times from the Master Fund Start Date in relation to OptiMix Members with Linked Advisers:

160.1. the Contribution Commissions were paid from the Contribution Fees deducted from members’ accounts;

160.2. the Trail Commissions were paid from the Ongoing Fees deducted from members’ accounts.

161. By on or about 30 June 2009, or alternatively by 1 July 2013 the OptiMix Products were closed to new members.

#### **K.4 ANZ Super Advantage**

162. At all material times prior to the FOFA Start Date, OPL had Adviser Arrangements pursuant to which OPL paid commissions to Financial Advisers in respect of persons who become ANZ Super Advantage Members as part of an employer plan that had a linked financial adviser (**ANZ Super Advantage Members with Linked Advisers**), being:

162.1. percentage contribution commissions calculated as a maximum of 3.3% (where the member selected the “Entry Fee Option”) of amounts contributed or

transferred by or for the benefit of ANZ Super Advantage Members with Linked Advisers (also **Contribution Commissions**); and

162.2. percentage monthly trail commissions, described as “Administration Fee commissions”, calculated as a maximum of 0.78% of the total balance of each members’ account at the end of the previous month (also, **Trail Commissions**).

(together, also **Adviser Commissions**).

#### Particulars

- (i) ANZ Super Advantage PDS dated 27 February 2012 pp3-4;
- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18- 21.
- (iii) Further particulars may be provided following discovery.

163. At all material times from the Master Fund Start Date, OPL charged fees to ANZ Super Advantage Members, including the following kinds of fees:

163.1. fees described as “contribution fees” being amounts equal to a maximum of 3.53% of all amounts contributed or transferred by or for the benefit of a member to the ANZ Super Advantage Product where that member selected the “Entry Fee Option” (also **Contribution Fees**);

163.2. fees described as:

- (a) “administration fees” being amounts equal to a maximum of 1.65%, and
- (b) “additional administration fees” being amounts equal to a maximum of 0.70%,

of the member’s funds under management in the ANZ Super Advantage Product (also, **Ongoing Fees**);

163.3. fees described as “Adviser Service Fees”, being a fee paid to a Financial Adviser pursuant to agreement between the Financial Adviser and the member (also **Adviser Fees**).

**Particulars**

- (i) ANZ Super Advantage PDS dated 27 February 2012 pp3-4;
- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18- 24.
- (iii) Further particulars may be provided following discovery.

164. At all material times, the Adviser Commissions, Contribution Fees and Ongoing Fees applicable to ANZ Super Advantage Members with Linked Advisers were negotiable between OPL, the Financial Adviser and the members' employer.

**Particulars**

- (i) ANZ Super Advantage PDS and Member Guide dated 27 February 2012 pp3-4;
- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18-23.
- (iii) Further particulars may be provided following discovery.

165. At all material times from the Master Fund Start Date in relation to ANZ Super Advantage Members with Linked Advisers:

165.1. the Contribution Commissions were paid from the Contribution Fees deducted from members' accounts;

165.2. the Trail Commissions were paid from the Ongoing Fees deducted from members' accounts.

166. By 1 July 2013, ANZ Super Advantage had closed to new employer plans.

**K.5 Integra**

167. At all material times prior to the FOFA Start Date, OPL had Adviser Arrangements pursuant to which OPL paid commissions to Financial Advisers in respect of persons who become Integra Members as part of an employer plan that had a linked financial adviser (**Integra Members with Linked Advisers**), being percentage monthly trail commissions, described as “Administration Fee commissions”, calculated as a maximum of 0.44% of the total balance of each members’ account at the end of the previous month (also, **Trail Commissions** and **Adviser Commissions**).

**Particulars**

- (i) Member Guide dated 27 February 2012 p20-26;
- (ii) Investment Choice Guide dated 27 February 2012, p48
- (iii) Further particulars may be provided following discovery.

168. At all material times from the Master Fund Start Date, OPL charged fees to Integra Members, including the following kinds of fees:

168.1. fees described as “administration fees” being amounts equal to a maximum of 1.29% (also, **Ongoing Fees**); and

168.2. fees described as “Adviser Service Fees”, being a fee paid to a Financial Adviser pursuant to agreement between the Financial Adviser and the member (**Adviser Fees**).

**Particulars**

- (i) PDS dated 27 February 2012 p6;
- (ii) Member Guide dated 27 February 2012 p20-26;
- (iii) Investment Choice Guide dated 27 February 2012, p48;
- (iv) Further particulars may be provided following discovery.

169. At all material times, the Adviser Commissions and Ongoing Fees applicable to Integra Members with Linked Advisers were negotiable between OPL, the Financial Adviser and the members’ employer.

### **Particulars**

- (i) PDS and Member Guide dated 27 February 2012 p6;
- (ii) Member Guide dated 27 February 2012 p20-26;
- (iii) Investment Choice Guide dated 27 February 2012, p48;
- (iv) Further particulars may be provided following discovery.

170. At all material times from the Master Fund Start Date, in relation to Integra Members with Linked Advisers, the Trail Commissions were paid from the Ongoing Fees deducted from members' accounts.

171. By 1 July 2013, Integra had closed to new employer plans.

#### **K.6 Trustee's agreement to Pre-FOFA Fees**

172. At all material times before the FOFA Start Date, the Trustee agreed that OPL could charge:

172.1. the Contribution Fees as pleaded in paragraphs 151.1, 158.1 and 163.1 above;  
and

172.2. the Ongoing Fees as pleaded in paragraphs 151.2, 154, 158.2, 163.2 and 168.1 above.

### **Particulars**

- (i) The Trustee's agreement is to be inferred from:
  - (A) Clause 13 of the MIT;
  - (B) Each PDS for the relevant Fund Products issued by both OPL and the Trustee which refer to the fees.
- (ii) Further particulars may be provided following discovery.

## L. THE FOFA REFORMS

173. On 25 June 2012, the Commonwealth Parliament passed:

173.1. the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); and

173.2. the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth),

**(FOFA Reforms)** both of which commenced on 1 July 2012.

174. The FOFA Reforms made amendments to the Corporations Act by, among other things, introducing Part 7.7A entitled “Best interest obligations and remuneration” (sections 960 – 968) (**Conflicted Remuneration Provisions**).

175. The Conflicted Remuneration Provisions:

175.1. defined “conflicted remuneration” as any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit of the circumstances in which it is given could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients, or could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative (but not including the benefits specified by section 963B to 963C) (**Conflicted Remuneration**); and

175.2. prohibited Conflicted Remuneration by providing that:

- (a) financial services licensees must not accept Conflicted Remuneration;
- (b) authorised representatives of financial services licensees must not accept Conflicted Remuneration;
- (c) other representatives of financial services licensees must not accept Conflicted Remuneration (unless it is in circumstances for which an employer is liable as referred to in (d) below);
- (d) employers of financial services licensees, or representatives of financial services licensees, must not give Conflicted Remuneration to the licensee

or representative for work carried out, or to be carried out by the licensee or representative as an employee;

- (e) issuers or sellers of financial products must not give financial services licensees, or their representatives, Conflicted Remuneration; and

175.3. obliged financial services licensees to take reasonable steps to ensure that their representatives do not accept Conflicted Remuneration.

#### **Particulars**

Corporations Act, Part 7.7A, sections 963A, 963E – 963K.

176. The obligations and prohibitions imposed by the Conflicted Remuneration Provisions applied:

176.1. to financial services licensees (and persons acting on their behalf) who lodged a notice with ASIC during the “transition period” from 1 July 2012 to 30 June 2013 from the date specified in that notice (**Early FOFA Start Date**); and

176.2. to all financial services licensees, on and from the FOFA Start Date.

#### **Particulars**

Corporations Act, Part 7.7A, Div 7.

177. The obligations and prohibitions imposed by the Conflicted Remuneration Provisions did not apply to:

177.1. benefits given to a financial services licensee, or a representative of a financial services licensee if the benefit (not being a benefit given by a platform operator) was given under an arrangement entered into before the Early FOFA Start Date or FOFA Start Date (excluding benefits given in respect of new retail clients after 1 July 2014), as applicable to that licensee, or representative; or

177.2. certain benefits prescribed by the Corporations Regulations,

**(Grandfathered Commissions).**

#### **Particulars**



Corporations Act, s 1528 and Corporations Regulations, regs 7.7A, 15B to 7.7A, 16F.

## **M. THE POST-FOFA REFORM COMMISSIONS PAID AND FEES CHARGED**

178. At all material times from the Master Fund Start Date, the Adviser Commissions were monetary benefits given to a financial services licensee, or a representative of a financial services licensee (namely the Financial Advisers of OneAnswer Members with Linked Advisers, of OptiMix Members with Linked Advisers, or engaged by the employers or former employers of ANZ Super Advantage Members with Linked Advisers or Integra Members with Linked Advisers) that could reasonably be expected to influence the choice of financial products recommended by that licensee or representative to retail clients, or could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.
179. By reason of the matters pleaded in paragraphs 178 above, at all material times on and from 1 July 2012, Adviser Commissions were Conflicted Remuneration within the meaning of the Conflicted Remuneration Provisions.
180. By reason of the matters pleaded in paragraph 179 above, at all material times on and from the FOFA Start Date, OPL and the Trustee were each prohibited from giving financial services licensees, or their representatives, Adviser Commissions save where they were Grandfathered Commissions.

### **M.1 OneAnswer Members**

181. At all material times in the period on and from the FOFA Start Date until the Master Fund End Date, OPL continued to have Adviser Arrangements pursuant to which OPL continued to pay Adviser Commissions in respect of persons who had become:

181.1. OnePath OneAnswer Members before 30 June 2013;

181.2. ANZ OneAnswer Members before 30 June 2013; and

181.3. Transferred OneAnswer Members at any time,

**(Pre-FOFA OneAnswer Members).**

**Particulars**

- (i) In relation to Entry Fee option Pre-FOFA OneAnswer Members:
  - (A) ANZ OneAnswer PDS dated 27 February 2012, p1,5;
  - (B) OnePath OneAnswer PDS dated 27 February 2012, p5;
  - (C) OneAnswer Personal Super and Pension Fees Guide dated 27 February 2012, p16;
- (ii) In relation to Nil or Deferred Entry Fee option Pre-FOFA OneAnswer Members:
  - (A) PDS OneAnswer Personal Super and Pension dated 1 July 2013, p4
  - (B) Fees Guide OneAnswer Personal Super and Pension dated 1 July 2013, pp4-16;
  - (C) PDS OneAnswer Personal Super and Pension dated 2 May 2016, p4;
  - (D) Fees Guide OneAnswer Personal Super and Pension dated 2 May 2016, pp4-13;
  - (E) PDS OneAnswer Personal Super and Pension dated 18 September 2017, p4;
  - (F) Fees Guide OneAnswer Personal Super and Pension dated 18 September 2017, pp4-16;
- (iii) Further particulars may be provided after discovery.

182. At all material times from the FOFA Start Date, in respect of Pre-FOFA OneAnswer Members, OPL:

182.1. continued to charge Contribution Fees as pleaded in paragraph 151.1 above;  
and

182.2. continued to charge Ongoing Fees as pleaded in paragraph 151.2 and paragraph 154 in respect of ANZ OnePath Members inflated by an amount equal to the Trail Commissions (**Excess Ongoing Fees**).

**Particulars**

- (i) The applicants refer to and repeat the particulars to paragraph 181.

**M.2 OptiMix Members**

183. At all material times in the period on and from the FOFA Start Date until the Master Fund End Date, OPL continued to have Adviser Arrangements pursuant to which OPL continued to pay Adviser Commissions in respect of OptiMix Members.

**Particulars**

- (i) The Applicants refer to:
  - (A) Information Booklet for OnePath Superannuation and Pension Products dated January 2019 p 4;
  - (B) Adviser Frequently Asked Questions Document dated June 2019, p 3.
  - (C) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 140;
- (ii) Further particulars may be provided following discovery.

184. At all material time from the FOFA Start Date, in respect of OptiMix Members, OPL:

184.1. continued to charge Contribution Fees as pleaded in paragraph 158.1 above;  
and

184.2. continued to charge Ongoing Fees as pleaded in paragraph 158.2 above inflated by an amount equal to the Trail Commissions (also **Excess Ongoing Fees**).

### Particulars

The Applicants refer to and repeat the particulars to paragraph 183 above.

#### M.3 ANZ Super Advantage Members

185. At all material times in the period on and from the FOFA Start Date until the Master Fund End Date, OPL continued to have Adviser Arrangements pursuant to which OPL continued to pay Adviser Commissions in respect of ANZ Super Advantage Members.

### Particulars

(i) The Applicants refer to:

(A) Information Booklet for ANZ Superannuation and Pension Products dated January 2019 p 4;

(B) Adviser Frequently Asked Questions Document dated June 2019, p 3.

(C) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 140;

(ii) Further particulars may be provided following discovery.

186. At all material time from the FOFA Start Date, in respect of ANZ Super Advantage Members, OPL:

186.1. continued to charge Contribution Fees as pleaded in paragraph 163.1 above;  
and

186.2. continued to charge Ongoing Fees inflated by an amount equal to the Trail Commissions (also **Excess Ongoing Fees**) as pleaded in paragraph 163.2 above.

### Particulars

The Applicants refer to and repeat the particulars to paragraph 185 above.

#### M.4 Integra Members

187. At all material times in the period on and from the FOFA Start Date until the Master Fund End Date, OPL continued to have Adviser Arrangements pursuant to which OPL continued to pay Adviser Commissions in respect of Integra Members.

**Particulars**

- (i) The Applicants refer to:
- (A) Information Booklet for OnePath Superannuation and Pension Products dated January 2019 p 4;
- (B) Adviser Frequently Asked Questions Document dated June 2019, p 3.
- (C) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 140;
- (ii) Further particulars may be provided following discovery.

188. At all material time from the FOFA Start Date, in respect of Integra Members, OPL continued to charge Ongoing Fees as pleaded in paragraph 168.1 which were inflated by an amount equal to the Trail Commissions (also **Excess Ongoing Fees**).

**Particulars**

The Applicants refer to and repeat the particulars to paragraph 187 above.

**M.5 Trustee's agreement to Post-FOFA Fees**

189. At all material times from the FOFA Start Date, the Trustee agreed, alternatively did not withdraw its prior agreement, that OPL could continue to charge:

189.1. the Contribution Fees as pleaded in paragraphs 182.1, 184.1 and 186.1 above;  
and

189.2. the Excess Ongoing Fees as pleaded in paragraphs 182.2, 184.2, 186.2 and 188 above.

**Particulars**

- (i) The Trustee's agreement is to be inferred from:
  - (A) Clause 13 of the MIT;
  - (B) Each PDS or Fees Guide for the relevant Fund Products issued by both OPL and the Trustee which refer to the fees.
- (ii) Further particulars may be provided following discovery.

**N. THE CIRCUMSTANCES IN WHICH FEES WERE CHARGED AND COMMISSIONS WERE PAID AFTER FOFA REFORM START DATE**

190. At all material times:

190.1. from the Master Fund Start Date to the FOFA Start Date, OPL's purpose in:

- (a) charging Contribution Fees as pleaded in paragraphs 151.1, 158.1 and 163.1 above, was to fund the payment by OPL of the Contribution Commissions pleaded in paragraphs 150.1, 157.1 and 162.1 respectively;
- (b) charging Ongoing Fees at the level it in fact charged them as pleaded in paragraphs 151.2, 154, 158.2, 163.2 and 168.1 above, was to fund the payments by OPL of Trail Commissions pleaded in paragraphs 150.2, 157.2, 162.2 and 167 respectively;

190.2. from the FOFA Start Date to the Master Fund End Date, OPL's purpose in:

- (a) continuing to charge Contribution Fees as pleaded in paragraphs 182.1, 184.1 and 186.1 above was to fund the payment by OPL of Contribution Commissions (being Grandfathered Commissions) as pleaded in paragraphs 181, 183 and 185 respectively; and
- (b) continuing to charge Excess Ongoing Fees as pleaded in paragraphs 182.2, 184.2, 186.2 and 188 above was to fund the payment by OPL of Trail Commissions (being Grandfathered Commissions) as pleaded in paragraphs 181, 183, 185 and 187 respectively,

**(OPL's Purpose).**

### Particulars

- (i) OPL's purpose is to be inferred from:
  - (A) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraphs 140-144;
  - (B) the circumstances in which the Adviser Commissions were paid and the Fees were charged;
  - (C) PDS and Fees Guides which state that commissions are already incorporated into the Entry and Ongoing Fees (as applicable) including:
    - a. OneAnswer PDS dated 15 November 2010, p1 and p41;
    - b. OneAnswer SPDS dated 1 September 2011, p1 and p41;
    - c. OneAnswer Fees Guide dated 27 February 2012, p.16;
    - d. OneAnswer Fees Guide dated 1 July 2013, p16
    - e. OneAnswer Fees Guide dated 2 May 2016, p13
    - f. OneAnswer Fees Guide OneAnswer Fees Guide 18 September 2017, p16.
- (ii) Further particulars may be provided following discovery

191. At all material times:

191.1. from the Master Fund Start Date to the FOFA Start Date, the Trustee's purpose in:

- (a) agreeing OPL could charge Contribution Fees as pleaded in paragraph 172.1 above, was to enable OPL to fund the payment of the Contribution Commissions pleaded in paragraphs 150.1, 157.1 and 162.1 respectively;

- (b) agreeing OPL could Ongoing Fees at the level it in fact charged them as pleaded in paragraph 172.2 above, was to enable OPL to fund the payments of Trail Commissions pleaded in paragraphs 150.2, 157.2, 162.2 and 167 respectively;

191.2. from the FOFA Start Date to the Master Fund End Date, the Trustee's purpose in:

- (a) agreeing that OPL could continue to charge Contribution Fees as pleaded in paragraph 189.1 above was to enable OPL to fund the payment of Contribution Commissions (being Grandfathered Commissions) as pleaded in paragraphs 181, 183 and 185 respectively; and
- (b) agreeing that OPL could continue to charge Excess Ongoing Fees as pleaded in paragraph 189.2 above was to enable OPL to fund the payment of Trail Commissions (being Grandfathered Commissions) as pleaded in paragraphs 181, 183, 185 and 187 respectively,

**(Trustee's Purpose).**

#### **Particulars**

- (i) The applicants refer to and repeat the particulars at paragraph 190;
- (ii) Further particulars may be provided following discovery.

192. At all material times on and from the FOFA Start Date, Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members received no benefit in return for OPL's conduct in continuing to pay Adviser Commissions as pleaded in paragraphs 181, 183, 185 and 187 above.

#### **Particulars**

- (i) In the case of OneAnswer Members with Linked Advisers and OptiMix Members with Linked Advisers, the Contribution Commissions and Trail Commissions were in the nature of "introducer fees" for the Financial Adviser having introduced the relevant products to the member, and did not involve any



additional or ongoing service being provided by the Financial Adviser to the member;

- (ii) In the case of ANZ Super Advantage Members with Linked Advisers, Contribution Commissions and Trail Commissions were in the nature of “introducer fees” for the Financial Adviser having introduced the employer or former employer of the member to the products, and did not involve any additional or ongoing service being provided by the Financial Adviser to the Member;
- (iii) In the case of Integra Advantage Members with Linked Advisers, Trail Commissions were in the nature of “introducer fees” for the Financial Adviser having introduced the employer or former employer of the member to the products, and did not involve any additional or ongoing service being provided by the Financial Adviser to the Member.
- (iv) Further particulars may be provided following discovery.

193. At all material times on and from the FOFA Start Date:

193.1. Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members received no benefit in return for:

- (a) OPL’s conduct in continuing to charge Contribution Fees as pleaded in paragraphs 182.1, 184.1 and 186.1 above; and
- (b) the Trustee’s conduct in agreeing that OPL could continue to charge Contribution Fees as pleaded in paragraph 189.1 above;

193.2. Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members received no benefit in return for:

- (a) OPL’s conduct in continuing to charge Ongoing Fees as pleaded in paragraphs 182.2, 184.2, 186.2 and 188 above; and
- (b) the Trustee’s conduct in agreeing that OPL could continue to charge Excess Ongoing Fees as pleaded in paragraph 189.2;

### Particulars

The Applicants refer to and repeat the particulars to paragraph 192.

194. At a time in or about 2013 (and no later than 30 June 2013), the Trustee and OPL agreed and decided that OPL would continue to pay Grandfathered Commissions after the FOFA Start Date (**Grandfathered Commission Payment Decision**).

### Particulars

- (i) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 142;
  - (ii) Further particulars may be provided following discovery.
195. The Grandfathered Commission Payment Decision was made based upon:
- 195.1. the interests of Financial Advisers continuing to receive the commissions;
  - 195.2. further or alternatively, the interests of OPL in not paying compensation to Financial Advisers under Adviser Arrangements for terminating or amending those agreements.

### Particulars

- (i) The applicants refer to and repeat the particulars to paragraph 194.
196. The Trustee and OPL's decision to:
- 196.1. continue to charge Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;
  - 196.2. continue to charge Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members;
- was made by reason of the Trustee's and OPL's Grandfathered Payment Decision, and therefore was made having regard to:

- 196.3. the interests of Financial Advisers in continuing to receive commission payment (by receipt from OPL of Adviser Commissions being Grandfathered Commissions);
- 196.4. further or alternatively, the interests of OPL in not being obliged to pay compensation to Financial Advisers under Adviser Arrangements for terminating or amending those agreements.
197. At all material times on and from the FOFA Start Date, the deduction by OPL of Contribution Fees and Ongoing Fees and the payment by OPL of Contribution Commissions and Trail Commissions:
- 197.1. reduced the benefits of Members in the Master Fund;
- 197.2. reduced the benefits of Members in the RPS Fund from the Master Fund End Date; and
- 197.3. enriched the Financial Advisers to whom OPL paid Contribution Commissions and Trail Commissions.

#### **Particulars**

- (i) The particulars to paragraphs 191 and 193 are repeated.
  - (ii) The OnePath OneAnswer Members' benefits, ANZ OneAnswer Members' benefits, OptiMix Members benefits and ANZ Super Advantage Members' benefits were reduced by at least the amount of the Contribution Fees and the amount of the Excess Ongoing Fee.
  - (iii) The Integra Members' benefits were reduced by at least the amount of the Excess Ongoing Fees.
  - (iv) Financial Advisers were enriched to the extent OPL paid them Contribution Commissions and Trail Commissions.
198. At all material times in the period on and after the FOFA Start Date:
- 198.1. it was not in the best interests of members of the Master Fund and/or the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members for:

- (a) the Trustee and OPL to maintain and adhere to the Trustee and OPL's Grandfathered Commission Payment Decision; and
- (b) the Trustee and OPL to agree that OPL to continue to, and for OPL to in fact continue to:
  - (i) pay Adviser Commissions in respect of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members; and
  - (ii) charge Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members; and
  - (iii) charge Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members;

198.2. it was in the best interests of the members of the Master Fund and/or the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members for:

- (a) the Trustee and OPL to agree and decide that OPL:
  - (i) cease paying Adviser Commissions;
  - (ii) alternatively to (i), absorb the cost of the Adviser Commissions;
  - (iii) cease charging Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;
  - (iv) cease charging Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members and Integra Members; and
- (b) OPL to in fact cease to charge:
  - (i) Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;
  - (ii) Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members;

- (c) the Trustee to restructure the investment and administrative structure of the Master Fund such that it no longer agreed that OPC may charge Contribution Fees and Ongoing Excess Fees to members in order to pass on the cost (in whole or in part) of the Adviser Commissions.

#### **Particulars**

- (i) The best interests of the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members were their best financial interests;
- (ii) The best financial interests of the Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members were not served by the deduction of Contribution Fees and/or Excess Ongoing Fees to fund Adviser Commissions, in circumstances where they received no benefits, as pleaded in paragraphs 193.1 and 193.2 above.
- (iii) The best financial interests of the Integra Members were not served by the deduction of Excess Ongoing Fees to fund Adviser Commissions, in circumstances where they received no benefits, as pleaded in paragraph 193.2 above.
- (iv) The best financial interests of the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members were not served by OPL and the Trustee's adherence to a decision to promote the business interests of Financial Advisers and/or OPL's business interests, as pleaded in paragraphs 194 and 196 above.
- (v) The Trustee's ability to restructure the Master Fund is evidenced from the fact of the restructure on and from the RPS Start Date, including the revocation of the Life Policies and Administration Agreement.

199. At all material times after the FOFA Start Date:

199.1. The Trustee and OPL were able to cease to maintain and adhere to the Trustee's and OPL's Grandfathered Commission Payment Decision;

199.2. OPL was able to cease to pay Adviser Commissions;

199.3. OPL was able to absorb the cost of Adviser Commissions;

199.4. OPL and the Trustee were able to agree that OPL cease to charge:

- (a) Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;
- (b) Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members;

199.5. OPL was able to cease to charge:

- (a) Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;
- (b) Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members.

#### **Particulars**

- (i) The Trustee and/or OPL ceased to maintain and adhere to the Grandfathered Commission Payment Decision in respect of Corporate Super Members by 30 June 2017.
- (ii) The Trustee and/or OPL could cease to maintain and adhere to the Grandfathered Commission Payment Decision in respect of OnePath OneAnswer Products, ANZ OneAnswer Products, ANZ Super Advantage Products and Intergra Products.
- (iii) Further particulars may be provided following discovery.

## **O. COMMISSION FREE ALTERNATIVES FOR MEMBERS AFTER FOFA REFORM DATE**

### **O.1 Alternatives to Retail Products**

200. At all material times after the FOFA Start Date, the Frontier Products were ones in respect of which OPL:

200.1. did not charge Contribution Fees; and

200.2. charged Ongoing Fees at a percentage level which was lower than that applicable to the OnePath OneAnswer Products, ANZ OneAnswer Products and OptiMix OneAnswer Products (together, **Retail Products**) for the same Investment Options.

#### **Particulars**

- (i) PDS OneAnswer Frontier dated 27 February 2012;
- (ii) Investment Funds Guide OneAnswer dated 27 February 2012;
- (iii) PDS OneAnswer Frontier dated 1 July 2013;
- (iv) Fees Guide OneAnswer Frontier dated 1 July 2013;
- (v) Investment Funds Guide OneAnswer dated 1 July 2014;
- (vi) PDS OneAnswer Frontier dated 2 May 2016;
- (vii) Investment Funds Guide OneAnswer dated 2 May 2016;
- (viii) Fees Guide OneAnswer Frontier Personal Super and Pension dated 2 May 2016;
- (ix) PDS OneAnswer Frontier dated 18 September 2017
- (x) Investment Funds Guide OneAnswer dated 18 September 2017;
- (xi) Further particulars may be provided following discovery.

201. At all material times after the FOFA Start Date to the Master Fund End Date, the Trustee had the power to:

201.1. establish a new "Section" of the Master Fund in its discretion from time to time by executing a supplemental deed under which the schedule setting out the rules governing the new section is added;

201.2. divide a Section into “Divisions” and establish a new Division by executing a supplemental deed under which the schedule setting out the rules governing the new Division is added;

201.3. transfer a member from a Section, Division or other group of members to another Section, Division or other group of members on terms the Trustee determines, and may reallocate assets between the applicable Sections and Divisions to reflect the transfer.

#### **Particulars**

- (i) As to subparagraph 1, Master Fund Trust Deed cl 2.4(a)(i);
- (ii) As to subparagraph 2, Master Fund Trust Deed cll 2.2 and 2.4(a)(ii);
- (iii) As to subparagraph 3, Master Fund Trust Deed cl 4.11;
- (iv) MIT clause 9.2 and clause 9.4.

202. Each of the Frontier Products was within a Section of the Master Fund.

#### **Particulars**

- (i) The ANZ OneAnswer Frontier Product was within the ANZ Personal Superannuation Section (MIT, page 39);
- (ii) The OnePath OneAnswer Frontier Product was within the OnePath Master Fund Section (MIT, page 37).

203. At all material times after the FOFA Start Date, the Trustee had the power to transfer Pre-FOFA OneAnswer Members and OptiMix Members to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Frontier Products) (**Transfer Power**).

#### **Particulars**

- (i) The Applicants refer to and repeat paragraphs 201 and 202.



- (ii) Pre-FOFA OneAnswer Members and OptiMix Members could have been transferred to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Fronter Personal Super or Fronter Pension Products), or another Section or Division established where there was no liability to pay such fees.
- (iii) Further particulars may be provided after discovery.

204. At all material times after the FOFA Start Date, it was in the best interests of Pre-FOFA OneAnswer Members and OptiMix Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees.

#### **Particulars**

The Applicants refer to and repeat paragraph 198.

205. Further, or in the alternative, at all material times after the FOFA Start Date, the Trustee and OPL had the ability to advise Pre-FOFA OneAnswer Members and OptiMix Members that:

205.1. there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to “delink” a former Financial Adviser; and

205.2. they had the right to request OPL or the Trustee to transfer their investment from the Retail Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Frontier Products);

205.3. they had the right to request the Trustee to cease paying commissions.

#### **Particulars**

- (i) As to subparagraph 2, Master Fund Trust Deed cl 4.11;
- (ii) Further particulars may be provided following discovery.

206. At all material times after the FOFA Start Date, it was in the best interests of the Pre-FOFA OneAnswer Members and OptiMix Members to be advised of the matters pleaded in paragraph 205 above.

**Particulars**

The Applicants refer to and repeat paragraph 198.

207. At all material times:

207.1. after the FOFA Start Date until the Master Fund End Date, the Trustee did not advise the Pre-FOFA OneAnswer Members and OptiMix Members of the matters pleaded in subparagraphs 205.1 or 205.2 above;

207.2. after the FOFA Start Date until the Master Fund End Date, alternatively until March 2019, the Trustee did not advise the Pre-FOFA OneAnswer Members and OptiMix Members of the matters pleaded in subparagraph 205.3 above.

**Particulars**

- (i) As to subparagraph 2, the Applicants refer to:

(A) Information Booklets for OnePath Superannuation and Pension Products dated January 2019, page 4, provided to Master Fund Members in or about March 2019;

(B) Product Information Document entitled "Important Information about Superannuation and Pension Products" dated May 2019 issued by the Trustee.

- (ii) Further particulars may be provided following discovery.

**O.2 Alternatives to Employer Products**

208. From on or about November 2013, the ANZ Smart Choice – Employer Product was one in respect of which OPL:

208.1. did not charge Contribution Fees;

208.2. charged ongoing fees which were called “investment fees” at a percentage level which was lower than that applicable to the ANZ Super Advantage Products and Integra Products (together, **Employer Products**) for the equivalent or comparable Investment Options.

**Particulars**

- (i) Smart Choice Employer PDS dated 18 February 2017;
- (ii) Smart Choice Additional Information Guide dated 18 February 2017;
- (iii) Smart Choice Employer PDS dated 13 April 2019;
- (iv) Smart Choice Additional Information Guide dated 13 April 2019;
- (v) Smart Choice Employer PDS dated 14 December 2019;
- (vi) Further particulars may be provided following discovery.

209. The ANZ Smart Choice – Employer Product was a Division within the “ANZ Smart Choice Super and Pension” Section of the Master Fund.

**Particulars**

Master Fund Trust Deed, Schedule 7, clause 2.1

210. At all material times after the FOFA Start Date, the Trustee had the power to transfer:

210.1. ANZ Super Advantage Members to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Product);

210.2. Integra Members to a Section or Division of the Master Fund in respect of which they were not liable to pay Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Product),

(also, **Transfer Power**).

**Particulars**

- (i) The Applicants refer to and repeat paragraphs 208 and 209.
- (ii) ANZ Super Advantage Members and Integra Members could have been transferred to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Product), or another Section or Division established where there was no liability to pay such fees.
- (iii) Further particulars may be provided after discovery.

211. At all material times after the FOFA Start Date, it was in the best interests of:

211.1. ANZ Super Advantage Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees; and

211.2. Integra Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Excess Ongoing Fees.

**Particulars**

The Applicants refer to and repeat paragraph 198.

212. Further, or in the alternative, at all material times after the FOFA Start Date, the Trustee and OPL had the ability to advise ANZ Super Advantage Members and Integra Members that:

212.1. there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to “delink” a former Financial Adviser; and

212.2. they had the right to request OPL or the Trustee to transfer their investment from the Employer Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Product);

212.3. they had the right to request the Trustee to cease paying commissions.

**Particulars**

As to sub-paragraph 2, Master Fund Trust Deed cl 4.11

213. At all material times after the FOFA Start Date, it was in the best interests of the ANZ Super Advantage Members and Integra Members to be advised of the matters pleaded in paragraph 212 above.

**Particulars**

The Applicants refer to and repeat paragraph 198.

214. At all material times:

214.1. after the FOFA Start Date until the Master Fund End Date, the Trustee did not advise the ANZ Super Advantage Members and Integra Members of the matters pleaded in subparagraphs 212.1 and 212.2 above;

214.2. after the FOFA Start Date until the Master Fund End Date, alternatively until March 2019, the Trustee did not advise the ANZ Super Advantage Members and Integra Members of the matters pleaded in subparagraph 212.3 above.

**Particulars**

- (i) As to subparagraph 1, the Applicants refer to the Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 143;
- (ii) As to subparagraph 2, the Applicants refer to:
  - (A) Information Booklets for OnePath Superannuation and Pension Products dated January 2019, page 4, provided to Master Fund Members in or about March 2019;
  - (B) Product Information Document entitled "Important Information about Superannuation and Pension Products" dated May 2019 issued by the Trustee.
- (iii) Further particulars may be provided following discovery.

**P. CONTRAVENTION OF TRUSTEE COVENANTS AND DUTIES – COMMISSIONS**

**P.1 Contraventions of Best Interests Covenants**

215. By reason of the matters pleaded in paragraphs 190 to 199, on and from the FOFA Start Date until the end of the Master Fund Period, the Trustee's conduct in:

215.1. making and maintaining the Grandfathered Commissions Payment Decision;

215.2. agreeing with OPL that it continue to charge:

(a) Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members;

(b) Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members; and

215.3. agreeing with OPL that it continue to pay Adviser Commissions in respect of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members,

was in contravention of the Best Interest Covenant, and therefore contravened s 55(1) of the SIS Act (prior to 6 April 2019) and therefore contravened s 54B(1) of the SIS Act (after 6 April 2019) (**First Commissions Best Interest Contravention**).

216. Further, or alternatively, by reason of the matters pleaded in paragraphs 200 to 204, and 208 to 211 above, on and from the FOFA Start Date, the Trustee's conduct in:

216.1. failing to exercise its Transfer Powers so as to cause:

(a) Pre-FOFA OneAnswer Members and OptiMix Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as Frontier Products); and

(b) ANZ Super Advantage Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as ANZ Smart Choice – Employer Products)

- (c) Integra Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Excess Ongoing Fees (such as ANZ Smart Choice – Employer Products);

216.2. alternatively, exercising its discretion not to exercise its Transfer Powers so as to cause:

- (a) Pre-FOFA OneAnswer Members and OptiMix Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as Frontier Products); and
- (b) ANZ Super Advantage Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as ANZ Smart Choice – Employer Products);
- (c) Integra Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Excess Ongoing Fees (such as such as ANZ Smart Choice – Employer Products),

was in contravention of the Best Interests Covenant, and therefore contravened s 55(1) of the SIS Act (prior to 6 April 2019) and therefore contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Second Commissions Best Interests Contravention**).

217. Further, or alternatively, by reason of the matters pleaded in paragraphs 205 to 207 and 212 to 214 the Trustee's conduct in:

217.1. in respect of Pre-FOFA OneAnswer Members and OptiMix Members:

- (a) at all times from the FOFA Start Date to the Master Fund End Date, failing to advise them that:
  - (i) there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to "delink" a former Financial Adviser; and
  - (ii) they had the right to request OPL or the Trustee to transfer their investment from the Retail Products to a Section or Division in

respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Frontier Products); and

- (b) at all times from the FOFA Start Date to the Master Fund End Date, alternatively, March 2019, failing to advise them that they had the right to request the Trustee to cease paying commissions;
- (c) alternatively, at all times from the FOFA Start Date to the Master Fund End Date, exercising its discretion not to advise them that:
  - (i) there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to “delink” a former Financial Adviser; and
  - (ii) they had the right to request OPL or the Trustee to transfer their investment from the Retail Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Frontier Products); and
- (d) further or alternatively, at all times from the FOFA Start Date to the Master Fund End Date, alternatively, March 2019, exercising its discretion not to advise them that they had the right to request the Trustee to cease paying commissions;

217.2. in respect of ANZ Super Advantage Members and Integra Members:

- (a) at all times from the FOFA Start Date to the Master Fund End Date, failing to advise them that:
  - (i) there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to “delink” a former Financial Adviser; and
  - (ii) they had the right to request OPL or the Trustee to transfer their investment from the Employer Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Products); and



- (b) at all times from the FOFA Start Date to the Master Fund End Date, alternatively, March 2019, failing to advise them that they had the right to request the Trustee to cease paying commissions;
- (c) alternatively, at all times from the FOFA Start Date to the Master Fund End Date, exercising its discretion not to advise them that:
  - (i) there were available products offered by the Trustee in respect of which they would not be liable to pay Contribution Fees or Excess Ongoing Fees if they did not have a Financial Adviser, or wished to “delink” a former Financial Adviser; and
  - (ii) they had the right to request OPL or the Trustee to transfer their investment from the Employer Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Products); and

further or alternatively, at all times from the FOFA Start Date to the Master Fund End Date, alternatively, March 2019, exercising its discretion not to advise them that they had the right to request the Trustee to cease paying commissions,

was in contravention of the Best Interests Covenant, and therefore contravened s 55(1) of the SIS Act (prior to 6 April 2019) and therefore contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Third Commissions Best Interests Contravention**).

#### **Q. THE TRUSTEE’S BREACHES OF TRUST – COMMISSIONS**

- 218. Further and alternatively, in respect of each contravention of a covenant in s 52 of the SIS Act set out in Section P above, by engaging in conduct giving rise to the contravention, the Trustee breached the Implied Terms of the Master Fund Trust Deed (**Trustee’s Commissions Breach of Trust**).
- 219. Further, in respect of:
  - 219.1. the First Commissions Best Interests Contravention;
  - 219.2. the Second Commissions Best Interests Contravention; and

219.3. the Third Commissions Best Interests Contravention;

(together, the **Commissions SIS Contraventions**),

by engaging in conduct giving rise to each contravention, the Trustee breached its Duty of Loyalty (**Commissions Breach of Trust**).

**R. OPL'S KNOWING INVOLVEMENT IN TRUSTEE'S STATUTORY CONTRAVENTIONS**

220. At all material times in the Master Fund Period, OPL was directly or indirectly:

220.1. knowingly concerned in; and/or

220.2. party to,

the First Commissions SIS Contravention.

**Particulars**

- (i) OPL was concerned in, or party to, the contravention by reason of:
  - (A) making the Grandfathered Commissions Payment Decision with the Trustee;
  - (B) agreeing with the Trustee that it continue to charge the Contribution Fees and Excess Ongoing Fees;
  - (C) charging the Contribution Fees and Excess Ongoing Fees;
- (ii) OPL knew or was wilfully blind in respect of, at least the following:
  - (A) the matters pleaded in paragraphs 150 to 155, 157 to 160, 162 to 165 and 167 to 170 by reason that OPL entered into the Adviser Arrangements, paid the Adviser Commissions to the Financial Advisers under those arrangements, and charged the Contribution Fees and Ongoing Fees to the members;

- (B) the matters pleaded in paragraphs 181 to 188 by reason that OPL entered into the Adviser Arrangements, paid the Adviser Commissions to the Financial Advisers under those arrangements, and charged the Contribution Fees and Ongoing Fees to the members;
- (C) the matters in paragraphs 192, 193.1(a) and 193.2(a) by reason of OPL's Purpose in charging the Contribution Fees and Ongoing Fees as pleaded in paragraph 190 above.
- (D) the matters in paragraph 197 by reason, among other matters OPL's Purpose in charging the Contribution Fees and Ongoing Fees as pleaded in paragraph 190 above.
- (E) the matters in paragraphs 198 and 199 by reason of, among other matters, each of the particulars (A) to (D) above.

(iii) Further particulars may be provided following discovery

221. In the premises, OPL (and therefore, by reason of subparagraphs 6.1A and 6.1B above, ZAL) has been involved in the -First Commissions SIS Contravention, within the meaning of section 55 of the SIS Act.

## **S. HARM TO THE APPLICANTS AND GROUP MEMBERS**

### **S.1 First Applicant and Cash Group Members**

222. The First Applicant:

222.1. became a member of the Master Fund on 20 September 2012, and remained a member until the end of the Master Fund Period;

222.2. by reason of the Successor Fund Transfer, became a member of the RPS Fund at the RPS Start Date and remains a member of the RPS Fund;

222.3. at all material times in the Cash Relevant Period was a member of ANZ Smart Choice Personal Super;

222.4. at all material times in the Cash Relevant Period had units or rights in respect of the Smart Choice Cash Investment Option.

223. Each of the:

223.1. Master Fund SIS Best Interests Contraventions;

223.2. RPS and Smart Choice SIS Best Interests Contraventions;

223.3. Master Fund Further SIS Contraventions;

223.4. RPS and Smart Choice Further SIS Contraventions;

223.5. Master Fund Conflicts Contraventions; and

223.6. RPS Conflicts Contraventions,

**(Cash SIS Contraventions)**

separately or in any combination have caused the First Applicant and the Cash Group Members to suffer loss or damage within the meaning of s 55 of the SIS Act.

**Particulars**

- (i) The Cash SIS Contraventions have caused the Master Fund and the RPS Fund to earn less interest on the investment of the Cash Money.
- (ii) By reason of (i), the Cash SIS Contraventions have caused the balance of the First Applicant's and Cash Group Members' accounts in the Master Fund and RPS Fund to be reduced.
- (iii) By reason of (i), the Cash SIS Contraventions have caused, and continue to cause, a reduction in the amount which the First Applicant and some or all of the Cash Group Members can expect to receive from the RPS Fund on reaching a condition of release of benefits.

- (iv) By reason of (i), the Cash SIS Contraventions have caused, and continue to cause, a reduction in the amount which some or all of the Cash Group Members have received on payment from their account in the Master Fund or the RPS Fund on having reached a condition of release of benefits.

224. Further or in the alternative, each of the Cash SIS Contraventions have been and continue to be, injurious to the interests of the First Applicant and the Cash Group Members.

#### **Particulars**

- (i) The particulars to paragraph 223 are repeated.

225. Further or in the alternative, each of the:

225.1. Trustee's Cash Investments Breach of Trust;

225.2. Master Fund Loyalty Breach of Trust;

225.3. RPS and Smart Choice Loyalty Breach of Trust;

225.4. Master Fund Prudent Investment Breach of Trust;

225.5. RPS and Smart Choice Prudent Investment Breach of Trust;

225.6. Master Fund Conflicts Breach of Trust;

225.7. Smart Choice Conflicts Breach of Trust;

225.8. RPS Conflicts Breach of Trust; and

225.9. Master Fund Profits Breach of Trust,

(the **Cash Breaches of Trust**),

separately or in any combination have caused loss to the Master Fund and RPS Fund, the First Applicant and the Cash Group Members.

#### **Particulars**

- (i) The particulars to paragraph 223 are repeated.

226. Further or in the alternative, each of the Cash Breaches of Trust have been, and continue to be, injurious to the interests of the First Applicant and the Cash Group Members.

#### **Particulars**

- (i) The particulars to paragraph 223 are repeated.

### **S.2 Second Applicant and Commissions Group Members**

227. The Second Applicant:

227.1. was a member of the Master Fund from 29 October 1998 to the end of the Master Fund Period;

227.2. by reason of the successor fund transfer, became a member of the RPS Fund at the RPS Start Date and remains a member of the RPS Fund;

227.3. at all material times has been and is a member of ANZ OneAnswer Personal Super.

228. Each of the Commissions SIS Contraventions separately or in any combination have caused the Second Applicant and the Commissions Group Members to suffer loss or damage within the meaning of s 55 of the SIS Act.

#### **Particulars**

- (i) The deduction of Contribution Fees and Excess Ongoing Fees by OPL caused a reduction in the accounts of the Second Applicant and the Commissions Group Members held in the Master Fund and RPS Fund.
- (ii) By reason of (i), the Commissions SIS Contraventions have caused the balance of the Second Applicant's and the Commissions Group Members accounts in the Master Fund and RPS Fund to be reduced.
- (iii) By reason of (i), the Commissions SIS Contraventions have caused, and continue to cause a reduction in the amount which

the Second Applicant and some or all of the Commissions Group Members can expect to receive from the RPS Fund on reaching a condition of release of benefits.

- (iv) By reason of (i), the Commissions SIS Contraventions have caused, and continue to cause, a reduction in the amount which some or all of the Commissions Group Members have received on payment from their account in the Master Fund or the RPS Fund on having reached a condition of release of benefits.

229. Further or in the alternative, each of the Commissions SIS Contraventions have been and continue to be, injurious to the interests of the Second Applicant and the Commissions Group Members.

**Particulars**

- (i) The particulars to paragraph 228 are repeated.

230. Further or in the alternative, each of the Commissions Breaches of Trust separately or in any combination have caused loss to the Master Fund and RPS Fund, the Second Applicant and the Commissions Group Members.

**Particulars**

- (i) The particulars to paragraph 228 are repeated.

231. Further or in the alternative, each of the Commissions Breaches of Trust have been, and continue to be, injurious to the interests of the Second Applicant and the Commissions Group Members.

**Particulars**

- (i) The particulars to paragraph 228 are repeated.

**T. EXTENSION OF TIME**

232. At no time since the Master Fund Start Date were the First Applicant, the Second Applicant or any Group Members aware of the conduct of OPL (any liability for which has been transferred to and will be borne by the Second Respondent by reason of the

matters pleaded at subparagraphs 6.1A and 6.1B) or the First, ~~Second~~ and Third Respondents pleaded in this Amended Statement of Claim.

AND THE APPLICANTS CLAIM for themselves and on behalf of the Group Members the relief set out in the Amended Originating Application.

DATED: ~~23 December 2020~~ 14 September 2022



.....  
Signed by Kirsten Marie Morrison  
Lawyer for the Applicants

This pleading was prepared by Alexandra Folie and Kristine Hanscombe QC of Counsel and amended by James Page and Fleur Shand of counsel.



**SCHEDULE A – DEFINED TERMS**

## Part 1

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## Part 2

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Financial Benefit	229	Corporations Act
Holding Company	9	Corporations Act
Ultimate Holding Company	9	Corporations Act
Public Offer Superannuation Fund	18	SIS Act
Registered Scheme	9	Corporations Act
Registrable Superannuation Entity	10	SIS Act
Regulated Superannuation Fund	19	SIS Act
Related Body Corporate	50	Corporations Act
Responsible Entity	9	Corporations Act
Scheme Property	9	Corporations Act
Spouse	90MD	Family Law Act 1975
Subsidiary	46	Corporations Act
Superannuation Entity	10	SIS Act
Superannuation Fund	10	SIS Act

**SCHEDULE OF PARTIES**No. VID9 of 20210

Federal Court of Australia

District Registry: VIC

Division: General

**Applicants**

Second Applicant DEAN TOBIN REEVES

**Respondents**Second Respondent: ZURICH AUSTRALIA LIMITED (ABN 92 000 010 195)  
ONEPATH LIFE LIMITED (ACN 009 657 176)Third Respondent: AUSTRALIA AND NEW ZEALAND BANKING GROUP  
LIMITED (ACN 005 357 522)Date: ~~23 December 2020~~ 14 September 2022



**Certificate of lawyer**

I Kirsten Marie Morrison certify to the Court that, in relation to the statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~23 December 2020~~ 14 September 2022

A handwritten signature in cursive script, appearing to read "Kirsten Marie Morrison".

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Signed by Kirsten Marie Morrison  
Lawyer for the Applicants