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### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
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File Title: IAN EDO JANSSEN & ANOR v ONEPATH CUSTODIANS PTY LTD & ORS  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33  
Rule 16.32

## Defence of the First Respondent

No. VID 9 of 2021

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Ian Edo Janssen** and another  
Applicants

**OnePath Custodians Pty Limited** and others  
Respondents

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Unless otherwise stated, this Defence adopts the defined terms used in the SOC (without admission as to any allegation contained in, or implied by, any defined terms used in the SOC and adopted in this Defence).

In answer to the allegations in the statement of claim filed on 23 December 2020 (**SOC**), the First Respondent (**the Trustee**) states as follows.

**A. Parties**

1. The Trustee does not plead to paragraph 1 as it contains no allegations against it.
2. As to paragraph 2, the Trustee:
  - 2.1 refers to and repeats paragraphs 223 to 226 below; and
  - 2.2 otherwise does not plead to paragraph 2 as it contains no allegations against it.
3. As to paragraph 3, the Trustee:
  - 3.1 refers to and repeats paragraphs 228 to 231 below; and
  - 3.2 otherwise does not plead to paragraph 3 as it contains no allegations against it.
4. As to paragraph 4, the Trustee:
  - 4.1 refers to and repeats paragraphs 2 and 3 above; and
  - 4.2 otherwise does not plead to paragraph 4 as it contains no allegations against it.
5. As to paragraph 5, the Trustee:
  - 5.1 says that its legal name is OnePath Custodians Pty Limited;
  - 5.2 admits paragraph 5.1;
  - 5.3 as to paragraph 5.2:
    - (a) says that the date on which the Trustee and OPL ceased to be Associates and Related Bodies Corporate was 31 May 2019, and that the defined Zurich Transfer Date should be a reference to that date, but otherwise admits paragraph 5.2(a); and
    - (b) admits paragraph 5.2(b);

5.4 admits paragraph 5.3; and

5.5 admits paragraph 5.4.

6. As to paragraph 6, the Trustee:

6.1 says that the Zurich Transfer Date was 31 May 2019; and

6.2 otherwise admits paragraph 6.

7. As to paragraph 7, the Trustee:

7.1 says that the Zurich Transfer Date was 31 May 2019; and

7.2 otherwise admits paragraph 7.

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

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

8. As to paragraph 8, the Trustee:

8.1 relies on s 52 of the SIS Act, as in force up to 30 June 2013, for its full force and effect; and

8.2 otherwise admits paragraph 8.

9. As to paragraph 9, the Trustee:

9.1 relies on s 52 of the SIS Act, as in force since 1 July 2013, for its full force and effect; and

9.2 otherwise admits paragraph 9.

10. As to paragraph 10, the Trustee:

10.1 relies on s 52 of the SIS Act for its full force and effect; and

10.2 otherwise admits paragraph 10.

11. As to paragraph 11, the Trustee:

11.1 relies on s 109 of the SIS Act for its full force and effect; and

11.2 otherwise admits paragraph 11.

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

12. As to paragraph 12, the Trustee:

- 12.1 refers to and repeats paragraphs 8 to 10 above;
  - 12.2 relies on s 52 of the SIS Act for its full force and effect; and
  - 12.3 otherwise denies paragraph 12.
13. As to paragraph 13, the Trustee:
- 13.1 refers to and repeats paragraphs 8 to 10 and 12 above; and
  - 13.2 otherwise denies paragraph 13.
14. As to paragraph 14, the Trustee:
- 14.1 refers to and repeats paragraphs 8 to 10 and 12 above;
  - 14.2 admits that it owed duties under the general law as a trustee to its members as beneficiaries;
  - 14.3 denies that its general law duties were in the form or terms alleged in paragraphs 14.1 to 14.4; and
  - 14.4 otherwise denies paragraph 14.

## **C. THE FUNDS**

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

15. The Trustee admits paragraph 15.
16. As to paragraph 16, the Trustee:
- 16.1 relies on the terms of the Master Fund Trust Deed for their full force and effect;
  - 16.2 admits paragraph 16.1;
  - 16.3 admits paragraph 16.2, and says further that the appointment was required to be in writing on terms which the Trustee considered appropriate;
  - 16.4 admits paragraph 16.3, and says further that the Master Fund Trust Deed also provided, in clause 14.14, that the Trustee acknowledged OPL may be entitled to receive or deduct fees or other remuneration in accordance with one or more investment policies (as defined).
17. As to paragraph 17, the Trustee:
- 17.1 says that the phrase “was marketed” is vague and embarrassing;

- 17.2 says that the Trustee did not market any Fund Products which were closed to new members after the dates of their respective closures;
  - 17.3 says that the Fund Products were available to ANZ customers, and some products were only offered in ANZ branches or via ANZ online platforms to ANZ customers;
  - 17.4 says that the Fund Products were offered by the Trustee;
  - 17.5 says that the ANZ Smart Choice Super – Defined Benefit Division and the ANZ Smart Choice MySuper products formed part of the ANZ Smart Choice Employer Product, and pleads to the defined terms “ANZ Smart Choice Retail Products” and “ANZ Smart Choice Employer Product” in this defence on that basis;
  - 17.6 otherwise admits that the Master Fund comprised the products alleged in paragraphs 17.1 to 17.8; and
  - 17.7 otherwise admits paragraph 17.
18. The Trustee admits paragraph 18.
19. The Trustee admits paragraph 19.

## **C.2 RPS Fund**

20. The Trustee admits paragraph 20.
21. As to paragraph 21, the Trustee:
- 21.1 says that the phrase “was marketed” is vague and embarrassing;
  - 21.2 says that the Trustee did not market any Fund Products which were closed to new members after the dates of their respective closures;
  - 21.3 says that the Fund Products were available to ANZ customers, and some products were only offered in ANZ branches or via ANZ online platforms to ANZ customers;
  - 21.4 says that the Fund Products were offered by the Trustee;
  - 21.5 admits that the RPS Fund comprised the products alleged in paragraphs 21.1 to 21.8, but says that the terms “ANZ Legacy Products” and “OnePath Legacy Products” are undefined, vague and embarrassing, and the Trustee therefore cannot plead to paragraphs 21.9 and 21.10; and
  - 21.6 otherwise admits paragraph 21.



22. The Trustee admits paragraph 22.

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

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

23. As to paragraph 23, the Trustee:

23.1 says that each of the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products had product disclosure statements which applied to them from time to time (each, a **PDS**);

#### **Particulars**

From time to time, the PDS comprised various incorporated documents, including documents titled:

- a. product disclosure statement;
- b. fees guide;
- c. funds guide;
- d. additional information guide;
- e. buy-sell spread guide; and
- f. hedge fund guide.

23.2 relies on the terms of the PDS for their full force and effect;

23.3 says that each member who applied for units in the relevant products stated that:

- (a) they had read the current PDS and consented to be bound by the terms of the PDS; and
- (b) they agreed to be bound by the provisions of the Master Fund Trust Deed;

23.4 says further that the PDS contained terms, inter alia, to the following effect:

- (a) (during the Master Fund Period) the Trustee would invest all contributions under a master life policy issued by OPL;
- (b) the Trustee and OPL were each a wholly owned subsidiary of ANZ;
- (c) the Master Fund was governed by a Trust Deed, the terms of which would prevail in the event that there was an inconsistency between the PDS and the Trust Deed;

- (d) a member was required to choose the investment option(s) they wished to invest in, the Trustee would not select one for the member, and the Trustee could not proceed with an application for units if an investment option was not selected;
- (e) the investment options included access to ANZ cash and term deposit options;
- (f) a member could switch investment options as many times as required, as their needs changed;
- (g) any fees or costs associated with the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products may be deducted from the member's account, from the returns on investment or from the assets of the Master Fund or RPS Fund, as applicable, as a whole;
- (h) initial or ongoing commissions may be paid to a member's financial adviser in respect of the ANZ OneAnswer Products and OnePath OneAnswer Products; and
- (i) in respect of the ANZ OneAnswer Products and OnePath OneAnswer Products, a member could negotiate partial or full rebates of commissions with their financial adviser, or the financial adviser may have already agreed to a partial or full rebate of commissions; and

23.5 otherwise admits paragraph 23.

### **Particulars**

The Trustee refers to Schedule A to this defence.

24. As to paragraph 24, the Trustee:

24.1 refers to and repeats paragraph 23 above;

24.2 relies on the terms of the PDS for their full force and effect; and

24.3 otherwise admits paragraph 24.

25. As to paragraph 25, the Trustee:

25.1 refers to and repeats paragraph 23 above;

25.2 relies on the terms of the PDS for their full force and effect; and

25.3 otherwise admits paragraph 25.

**D.2 Term Deposit Investment Option**

26. As to paragraph 26, the Trustee:

26.1 refers to and repeats paragraph 23 above;

26.2 relies on the terms of the PDS for their full force and effect; and

26.3 otherwise admits paragraph 26.

27. As to paragraph 27, the Trustee:

27.1 refers to and repeats paragraph 23 above;

27.2 relies on the terms of the PDS for their full force and effect; and

27.3 otherwise admits paragraph 27.

28. As to paragraph 28, the Trustee:

28.1 refers to and repeats paragraph 23 above;

28.2 relies on the terms of the PDS for their full force and effect; and

28.3 otherwise admits paragraph 28.

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

29. As to paragraph 29, the Trustee:

29.1 says that each of the ANZ SmartChoice Retail Products had product disclosure statements which applied to them from time to time (each, also a **PDS**);

**Particulars**

From time to time, the PDS comprised various incorporated documents, including documents titled:

- a. product disclosure statement;
- b. additional information guide;
- c. buy-sell spread guide; and
- d. fees guide.

- 29.2 says that each member who applied for units in the relevant products stated that:
- (a) they had read the current PDS and consented to be bound by the terms of the PDS; and
  - (b) they agreed to be bound by the provisions of the Master Fund Trust Deed;
- 29.3 relies on the terms of the PDS for their full force and effect;
- 29.4 says further that the PDS contained terms, inter alia, to the following effect:
- (a) the Trustee was a wholly owned subsidiary of ANZ;
  - (b) a member could choose to take an active role and invest some or all of their superannuation account balance in a number of diversified funds or single-sector funds, one of which was an option called "ANZ Smart Choice Cash" which invested in ANZ cash deposits;
  - (c) where a member did not select their own investment options the Trustee would invest their superannuation account balance in one of a series of Lifestage investment funds (that is, funds which did not involve ANZ Smart Choice Cash) which comprised a strategic mix of growth and defensive investments to suit a member's proximity to retirement, depending on the decade in which a member was born;
  - (d) a member could switch investment options at any time;
  - (e) any fees or costs associated with the ANZ SmartChoice Retail Products may be deducted from the member's account, from the returns on investment or from the assets of the Master Fund or RPS Fund, as applicable, as a whole;
  - (f) no commissions were payable to financial advisers;
  - (g) from 11 November 2013 until 13 April 2019, the Trustee would invest all contributions under a master life policy issued by OPL; and
  - (h) from on or around 13 April 2019, Oasis Asset Management was the Administrator of the ANZ Smart Choice Retail Product; and
- 29.5 otherwise admits paragraph 29.

### Particulars

The Trustee refers to Schedule B to this defence.

30. As to paragraph 30, the Trustee:

30.1 says that the ANZ SmartChoice Employer Product had product disclosure statements which applied to it from time to time (also a **PDS**);

### Particulars

From time to time, the PDS comprised various incorporated documents, including documents titled:

- a. product disclosure statement;
- b. additional information guide;
- c. fee guide;
- d. buy-sell spread guide; and
- e. insurance guide.

30.2 says that each member who applied for units in the relevant products stated that:

- (a) they had read the current PDS and consented to be bound by the terms of the PDS; and
- (b) they agreed to be bound by the provisions of the Master Fund Trust Deed;

30.3 relies on the terms of the PDS for their full force and effect;

30.4 says further that the PDS contained terms, inter alia, to the following effect:

- (a) the Trustee was a wholly owned subsidiary of ANZ;
- (b) a member could choose to take an active role and invest some or all of their superannuation account balance in a number of diversified funds or single-sector funds, one of which was an option called "ANZ Smart Choice Cash" which invested in ANZ cash deposits;
- (c) where a member did not select their own investment options the Trustee would invest their superannuation account balance in one of a series of Lifestage investment funds (that is, funds which did not involve ANZ Smart Choice Cash) which comprised a strategic

mix of growth and defensive investments to suit a member's proximity to retirement, depending on the decade in which a member was born;

- (d) a member could switch investment options at any time;
- (e) any fees or costs associated with the ANZ SmartChoice Employer Product may be deducted from the member's account, from the returns on investment or from the assets of the Master Fund or RPS Fund, as applicable, as a whole;
- (f) no commissions were payable to financial advisers;
- (g) from 11 November 2013 until 13 April 2019, the Trustee would invest all contributions under a master life policy issued by OPL; and
- (h) from on or around 13 April 2019, Oasis Asset Management was the Administrator of the ANZ Smart Choice Retail Product; and

30.5 otherwise admits paragraph 30.

### **Particulars**

The Trustee refers to Schedule C of this defence.

31. As to paragraph 31, the Trustee:

- 31.1 refers to and repeats paragraphs 29 and 30 above;
- 31.2 relies on the terms of each PDS for their full force and effect; and
- 31.3 otherwise admits paragraph 31.

32. As to paragraph 32, the Trustee:

- 32.1 refers to and repeats paragraphs 29 and 30 above;
- 32.2 relies on the terms of each PDS for their full force and effect; and
- 32.3 otherwise admits paragraph 32.

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

### **E.1 Life Policies**

33. As to paragraph 33, the Trustee:

- 33.1 says that each of the matters alleged in paragraph 33 of the SOC were disclosed in the PDS;
  - 33.2 refers to and repeats paragraph 23 above; and
  - 33.3 otherwise admits paragraph 33.
34. As to paragraph 34, the Trustee:
- 34.1 says that each of the matters alleged in paragraph 34 of the SOC were disclosed in the PDS;
  - 34.2 refers to and repeats paragraph 26 above; and
  - 34.3 on the assumption that the reference to "Term Deposits Option" is a reference to the defined term "ANZ Term Deposits Option" in paragraph 26 of the SOC, otherwise admits paragraph 34.
35. As to paragraph 35, the Trustee:
- 35.1 says that between the Master Fund Start Date and 6 November 2013 the Trustee invested the Smart Choice Money through a managed investment scheme which in turn invested the funds with ANZ;
  - 35.2 refers to and repeats paragraph 29 above; and
  - 35.3 otherwise admits paragraph 35.
36. As to paragraph 36, the Trustee:
- 36.1 refers to and repeats paragraphs 29 and 30 above; and
  - 36.2 otherwise admits paragraph 36.
37. As to paragraph 37, the Trustee:
- 37.1 relies on the terms of the MIT for their full force and effect;
  - 37.2 relies on the terms of the PDS for their full force and effect;
  - 37.3 on the assumption that the reference to Statutory Funds is a reference to statutory funds as referred to in the *Life Insurance Act 1995* (Cth), admits paragraph 37.1;
  - 37.4 admits paragraph 37.2;
  - 37.5 admits paragraph 37.3;

- 37.6 on the assumption that the reference to Commission Product Life Policies in 37.4(b) is a reference to Cash Advantage Life Policies and Term Deposit Life Policies, admits paragraph 37.4;
- 37.7 admits paragraph 37.5;
- 37.8 admits paragraph 37.6, and says further that any other fees introduced by OPL were required to be reasonable (clause 8.6 of the MIT).

## **E.2 Administration Agreement**

- 38. The Trustee admits paragraph 38.
- 39. The Trustee admits paragraph 39.

## **E.3 Underlying Investments**

- 40. As to paragraph 40, the Trustee:
  - 40.1 admits that OPL invested the Cash Advantage Money with ANZ; and
  - 40.2 otherwise does not know and therefore cannot admit paragraph 40.
- 41. As to paragraph 41, the Trustee:
  - 41.1 admits that OPL invested the Cash Advantage Money with ANZ; and
  - 41.2 otherwise does not plead to paragraph 41 as it contains no allegations against it.
- 42. As to paragraph 42, the Trustee:
  - 42.1 admits that OPL invested the Term Deposits Money with ANZ; and
  - 42.2 otherwise does not plead to paragraph 42 as it contains no allegations against it.
- 43. As to paragraph 43, the Trustee:
  - 43.1 refers to and repeats paragraph 35 above;
  - 43.2 relies on the terms of the Master Fund Trust Deed for their full force and effect; and
  - 43.3 otherwise admits paragraph 43.
- 44. As to paragraph 44, the Trustee:



- 44.1 admits that ANZ paid interest on the Master Fund Smart Choice Cash Direct Investments deposited with it at various interest rates from time to time; and
  - 44.2 otherwise denies paragraph 44.
45. As to paragraph 45, the Trustee:
- 45.1 admits that OPL invested the Smart Choice Money with ANZ; and
  - 45.2 otherwise does not know and therefore cannot admit paragraph 45.
46. As to paragraph 46, the Trustee:
- 46.1 admits paragraph 46.1; and
  - 46.2 otherwise does not plead to paragraph 46 as it contains no allegations against it.

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

47. As to paragraph 47, the Trustee:
- 47.1 refers to and repeats paragraphs 23, 26, 29, 30 and 40 to 46 above;
  - 47.2 assumes that the reference to “Smart Choice Fee” is a reference to the “Smart Choice Cash Fee” as defined in paragraph 46.3 in the SOC;
  - 47.3 says that the Cash Investment Fees were disclosed to members;

#### **Particulars**

The Cash Investment Fees were disclosed in the relevant PDS (including the documents incorporated into the PDS).

The Trustee refers to Schedule D of this Defence.

- 47.4 says that the Cash Investment Fees (to the extent that they were paid) were the only fees paid to OPL in respect of the investments of the Cash Advantage Money, Term Deposits Money and Smart Choice Cash Money;
- 47.5 says that the Trustee did not charge members any fees in respect of their investments of Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money with ANZ;
- 47.6 says that OPL did not charge the Trustee any fees in respect of the investments of Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money with ANZ; and

- 47.7 denies paragraph 47.
48. As to paragraph 48, the Trustee:
- 48.1 refers to and repeats paragraph 47 above; and
- 48.2 denies paragraph 48.
49. As to paragraph 49, the Trustee:
- 49.1 refers to and repeats paragraph 47 above; and
- 49.2 denies paragraph 49.
50. As to paragraph 50, the Trustee:
- 50.1 refers to and repeats paragraph 47 above; and
- 50.2 denies paragraph 50.
51. As to paragraph 51, the Trustee:
- 51.1 refers to and repeats paragraph 47 above; and
- 51.2 denies paragraph 51.
52. As to paragraph 52, the Trustee:
- 52.1 refers to and repeats paragraph 47 to 51 above; and
- 52.2 denies paragraph 52.
53. As to paragraph 53, the Trustee:
- 53.1 admits paragraph 53.1;
- 53.2 denies paragraph 53.2; and
- 53.3 refers to and repeats paragraph 47 to 51 above, and denies paragraph 53.3.

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

54. As to paragraph 54, the Trustee:
- 54.1 says that the Cash Advantage Master Fund Interest Rates were, from time to time, above the RBA Cash Rate by the margin alleged; and
- 54.2 otherwise denies paragraph 54.

55. As to paragraph 55, the Trustee:
- 55.1 says that the differences between the Cash Advantage Master Fund Interest Rates for the ANZ OneAnswer Products and OnePath OneAnswer Products, on the one hand, and for the Frontier Product, on the other hand, occurred in part because a commission was not payable under the Frontier Product to a member's financial adviser;
  - 55.2 says that if the member's financial adviser under the ANZ OneAnswer Products and OnePath OneAnswer Products agreed not to receive commission, the amount of the commission was rebated to the member;
  - 55.3 says that the allegation that the rates were "around" 0.30% lower is vague and embarrassing; and
  - 55.4 otherwise admits that the Cash Advantage Master Fund Interest Rates for the ANZ OneAnswer Products and OnePath OneAnswer Products were lower than the Cash Advantage Master Fund Interest Rates for the Frontier Product.
56. As to paragraph 56, the Trustee:
- 56.1 says that some of the Cash Advantage Master Fund Interest Rates were, from time to time, lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;
  - 56.2 denies that the rates referred to in paragraph 56.1 above were for equivalent investments as those investments which received the Cash Advantage Master Fund Interest Rates;

### **Particulars**

The MLC Cash Fund products for which higher interest rates were offered by the other ADI may have had a higher risk profile, lower liquidity, and different associated investment fees compared to the Cash Advantage Option.

From at least March 2012, the MLC Cash Fund deposited 80% of member funds in rolling 90-day term deposits, whereas at all times, all funds invested in the Cash Advantage Option were deposited at call.

Further, from at least September 2017, the trustee of the superannuation products invested in the MLC Cash Fund required 12 months' notice of withdrawal of member funds from the MLC Cash Fund. At all times, the termination period for the Cash Advantage Option was 30 days.

Further particulars may be provided following discovery.

- 56.3 says further that all of the Cash Advantage Master Fund Interest Rates were disclosed to members;
- 56.4 says further that members were able to compare the Cash Advantage Master Fund Interest Rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;
- 56.5 says further that once a member had chosen an Investment Option, including a Cash Advantage Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 56.6 says further that the Cash Advantage Option was designed for, and advertised to, members who wanted:
- (a) a high level of capital security;
  - (b) a steady and reliable income stream;
  - (c) to achieve returns generally in line with cash management accounts; and
  - (d) to invest in ANZ bank deposits;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products during the relevant time.

See Schedule E to this Defence.

- 56.7 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and
- 56.8 otherwise denies paragraph 56.

#### **Particulars**

The Cash Advantage Master Fund Interest Rates were, at all material times, higher than, or competitive with interest rates on similar products offered by other ADIs with an equivalent credit rating to ANZ.

Until at least 30 September 2015, the return to members who invested in the Cash Advantage Option outperformed the return

to investors in the MLC Cash Fund over 3 and 5 years after fees.

See Schedule F to this Defence.

57. As to paragraph 57, the Trustee:

- 57.1 says that some of the Term Deposits Master Fund Interest Rates for six month and twelve month term deposits were, from time to time, on average lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;
- 57.2 says further that all of the Term Deposits Master Fund Interest Rates were disclosed to members;
- 57.3 says further that members were able to compare the Term Deposits Master Fund Interest Rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;
- 57.4 says further that once a member had chosen an Investment Option, including a Term Deposits Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 57.5 says further that the Term Deposits Option was designed for, and advertised to, members who wanted:
- (a) a fixed rate of return;
  - (b) a choice of investment terms;
  - (c) a steady and reliable income stream;
  - (d) a high level of capital security; and
  - (e) to invest in term deposit products issued by ANZ;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products during the relevant time.

See Schedule G to this Defence.

- 57.6 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered

against interest rates available from comparable ADIs to ANZ and other platforms; and

57.7 otherwise denies paragraph 57.

58. As to paragraph 58, the Trustee:

58.1 as to paragraph 58.1, says that:

(a) the interest rates paid by ANZ on the Master Fund Smart Choice Cash Direct Investments were, from time to time, above the RBA Cash Rate by the margin alleged in paragraph 58.1; and

(b) otherwise denies paragraph 58.1;

58.2 says that the interest rates paid by ANZ on the Master Fund Smart Choice Cash Direct Investments were, from time to time, lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;

58.3 denies that the rates offered by the ADI referred to in paragraph 58.2 above were for equivalent investments as the Master Fund Smart Choice Cash Direct Investments;

### **Particulars**

The MLC Cash Fund products for which higher interest rates were offered by the other ADI may have had a higher risk profile, lower liquidity, and different associated investment fees compared to the Smart Choice Cash Option.

From at least March 2012, the MLC Cash Fund deposited 80% of member funds in rolling 90-day term deposits, whereas at all times, all funds invested in the Smart Choice Cash Option were deposited at call.

Further, from at least September 2017, the trustee of the superannuation products invested in the MLC Cash Fund required 12 months' notice of withdrawal of member funds from the MLC Cash Fund. At all times, the termination period for the Smart Choice Cash was 30 days.

Further particulars may be provided following discovery.

58.4 says further that all of the interest rates payable on the Master Fund Smart Choice Cash Direct Investments were disclosed to members;

58.5 says further that members were able to review and research the interest rates payable on the Smart Choice Cash Option and compare those rates

to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;

- 58.6 says further that once a member had chosen an Investment Option, including the Smart Choice Cash Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 58.7 says further that the Smart Choice Cash Option was designed for, and advertised to, members who wanted:
- (a) a high level of capital security;
  - (b) to preserve their capital;
  - (c) to achieve returns generally in line with cash management accounts; and
  - (d) to invest in ANZ bank deposits;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ Smart Choice Retail Products and ANZ Smart Choice Employer Products during the relevant time.

See Schedule H of this Defence.

- 58.8 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and
- 58.9 otherwise denies paragraph 58.

#### **Particulars**

The interest rates paid by ANZ on the Master Fund Smart Choice Cash Direct Investments were, at all material times, higher than, or competitive with interest rates on similar products offered by other ADIs with an equivalent credit rating to ANZ outside superannuation

Until at least 30 September 2015, the return to members who invested in the Master Fund Smart Choice Cash Direct Investments outperformed the return to investors in the MLC Cash Fund over 3 and 5 years after fees.

See Schedule I to this Defence.

59. As to paragraph 59, the Trustee:

59.1 as to paragraph 59.1, says that:

- (a) the Smart Choice Cash Master Fund Interest Rates were, from time to time, above the RBA Cash Rate by the margin alleged in paragraph 59.1; and
- (b) otherwise denies paragraph 59.1;

59.2 as to paragraph 59.2, says that:

- (a) the Smart Choice Cash Master Fund Interest Rates were, from time to time, above the RBA Cash Rate by the margin alleged in paragraph 59.2; and
- (b) otherwise denies paragraph 59.2;

59.3 says that the Smart Choice Cash Master Fund Interest Rates were, from time to time, lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;

59.4 denies that the rates offered by the ADI referred to in paragraph 59.3 above were for equivalent investments as the Smart Choice Cash Option;

### **Particulars**

The MLC Cash Fund products for which higher interest rates were offered by the other ADI may have had a higher risk profile, lower liquidity, and different associated investment fees compared to the Master Fund Smart Choice Cash Direct Investments.

From at least March 2012, the MLC Cash Fund deposited 80% of member funds in rolling 90-day term deposits, whereas at all times, all funds invested in the Master Fund Smart Choice Cash Direct Investments were deposited at call.

Further, from at least September 2017, the trustee of the superannuation products invested in the MLC Cash Fund required 12 months' notice of withdrawal of member funds from the MLC Cash Fund. At all times, the termination period for the Master Fund Smart Choice Cash Direct Investments was 30 days. Further particulars may be provided following discovery.

59.5 says further that all of the Smart Choice Cash Master Fund Interest Rates were disclosed to members;



- 59.6 says further that members were able to review and research the interest rates payable on the Smart Choice Cash Option and compare those rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;
- 59.7 says further that once a member had chosen an Investment Option, including the Smart Choice Cash Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 59.8 says further that the Smart Choice Cash Option was designed for, and advertised to, members who wanted:
- (a) a high level of capital security;
  - (b) to preserve their capital;
  - (c) to achieve returns generally in line with cash management accounts; and
  - (d) to invest in ANZ bank deposits;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ Smart Choice Retail Products and ANZ Smart Choice Employer Products during the relevant time.

See Schedule H of this Defence.

- 59.9 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and
- 59.10 otherwise denies paragraph 59.

#### **Particulars**

The Smart Choice Cash Master Fund Interest Rates were, at all material times, higher than, or competitive with interest rates on similar products offered by other ADIs with an equivalent credit rating to ANZ outside superannuation.

Until at least 30 September 2015, the return to members who invested in the Smart Choice Cash Option outperformed the return to investors in the MLC Cash Fund over 3 and 5 years after fees.

See Schedule I to this Defence.

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

**F.1 Direct Investments**

60. The Trustee admits paragraph 60.

61. The Trustee admits paragraph 61.

62. As to paragraph 62, the Trustee:

62.1 admits paragraph 62.1;

62.2 refers to and repeats paragraph 23 above;

62.3 admits that ANZ paid interest on the Cash Advantage Direct Investments at various rates from time to time; and

62.4 otherwise denies paragraph 62.

63. As to paragraph 63, the Trustee:

63.1 admits paragraph 63.1;

63.2 refers to and repeats paragraph 26 above;

63.3 admits that ANZ paid interest on the Term Deposits Direct Investments at various rates from time to time; and

63.4 otherwise denies paragraph 63.

64. As to paragraph 64, the Trustee:

64.1 admits paragraph 64.1;

64.2 refers to and repeats paragraph 29 above;

64.3 admits that ANZ paid interest on the RPS Smart Choice Cash Direct Investments at various rates from time to time; and

64.4 otherwise denies paragraph 64.

**F.2 Interest Rates**

65. As to paragraph 65, the Trustee:

65.1 as to paragraph 65.1, says that:

- (a) the Cash Advantage RPS Interest Rates were, from time to time, above the RBA Cash Rate by the margin alleged in paragraph 65.1; and
  - (b) otherwise denies paragraph 65.1;
- 65.2 says that the Cash Advantage RPS Interest Rates were, from time to time, lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;
- 65.3 denies that the rates offered by the ADI referred to in paragraph 65.2 above were for equivalent investments as the Cash Advantage Direct Investments;

### **Particulars**

The MLC Cash Fund products for which higher interest rates were offered by the other ADI may have had a higher risk profile, lower liquidity, and different associated investment fees compared to the Cash Advantage Direct Investments.

From at least March 2012, the MLC Cash Fund deposited 80% of member funds in rolling 90-day term deposits, whereas at all times, all funds invested in the Cash Advantage Direct Investments were deposited at call.

Further, from at least September 2017, the trustee of the superannuation products invested in the MLC Cash Fund required 12 months' notice of withdrawal of member funds from the MLC Cash Fund. At all times, the termination period for the Cash Advantage Direct Investments was 30 days.

Further particulars may be provided following discovery.

- 65.4 says further that all of the Cash Advantage RPS Interest Rates were disclosed to members;
- 65.5 says further that members were able to review and research the Cash Advantage RPS Interest Rates and compare those rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;
- 65.6 says further that once a member had chosen an Investment Option, including the Cash Advantage Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 65.7 says further that the Cash Advantage Option was designed for, and advertised to, members who wanted:

- (a) a high level of capital security;
- (b) a steady and reliable income stream;
- (c) to achieve returns generally in line with cash management accounts; and
- (d) to invest in ANZ bank deposits;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products during the relevant time.

See Schedule E of this Defence.

65.8 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and

65.9 otherwise denies paragraph 65.

#### **Particulars**

The Cash Advantage RPS Interest Rates were, at all material times, higher than, or competitive with interest rates on similar products offered by other ADIs with an equivalent credit rating to ANZ outside superannuation.

See Schedule F to this Defence.

66. As to paragraph 66, the Trustee:

66.1 says that some of the Term Deposits RPS Interest Rates for six month and twelve month term deposits were, from time to time, on average lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;

66.2 says further that all of the Term Deposits RPS Interest Rates were disclosed to members;

66.3 says further that members were able to review and research the Term Deposits RPS Interest Rates, and compare those rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;

- 66.4 says further that once a member had chosen an Investment Option, including a Term Deposits Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 66.5 says further that the Term Deposits Option was designed for, and advertised to, members who wanted:
- (a) a fixed rate of return;
  - (b) a choice of investment terms;
  - (c) a steady and reliable income stream;
  - (d) a high level of capital security; and
  - (e) to invest in term deposit products issued by ANZ;

#### **Particulars**

The above features were identified in the PDS issued in respect of the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products during the relevant time.

See Schedule G to this Defence.

- 66.6 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and
- 66.7 otherwise denies paragraph 66.
67. As to paragraph 67, the Trustee:
- 67.1 as to paragraph 67.1, says that:
- (a) the Smart Choice Cash RPS Interest Rates were, from time to time, above the RBA Cash Rate by the margin alleged in paragraph 67.1; and
  - (b) otherwise denies paragraph 67.1;
- 67.2 denies paragraph 67.2;
- 67.3 says that the Smart Choice Cash RPS Interest Rates were, from time to time, lower than interest rates offered by the ADI referred to in the Applicants' further and better particulars provided on 12 April 2021;

- 67.4 denies that the rates offered by the ADI referred to in paragraph 67.3 above were for equivalent investments as the RPS Smart Choice Cash Direct Investments;

#### **Particulars**

The MLC Cash Fund products for which higher interest rates were offered by the other ADI may have had a higher risk profile, lower liquidity, and different associated investment fees compared to the RPS Smart Choice Cash Direct Investments.

From at least March 2012, the MLC Cash Fund deposited 80% of member funds in rolling 90-day term deposits, whereas at all times, all funds invested in the RPS Smart Choice Cash Direct Investments were deposited at call.

Further, from at least September 2017, the trustee of the superannuation products invested in the MLC Cash Fund required 12 months' notice of withdrawal of member funds from the MLC Cash Fund. At all times, the termination period for the RPS Smart Choice Cash Direct Investments was 30 days.

Further particulars may be provided following discovery.

- 67.5 says further that all of the Smart Choice Cash RPS Interest Rates were disclosed to members;
- 67.6 says further that members were able to review and research the Smart Choice Cash RPS Interest Rates and compare those rates to other publicly available rates in respect of other cash investments, and also compare those rates to other Investment Options;
- 67.7 says further that once a member had chosen an Investment Option, including the Smart Choice Cash Option, the Trustee was obliged to invest the funds in that Investment Option and had no ability to change a member's Investment Option without the member's consent;
- 67.8 says further that the Smart Choice Cash Option was designed for, and advertised to, members who wanted:
- (a) a high level of capital security;
  - (b) to preserve their capital;
  - (c) to achieve returns generally in line with cash management accounts; and
  - (d) to invest in ANZ bank deposits;

### Particulars

The above features were identified in the PDS issued in respect of the ANZ Smart Choice Retail Products and ANZ Smart Choice Employer Products during the relevant time.

See Schedule H to this Defence.

- 67.9 says further that the Trustee regularly compared and benchmarked the interest rates being paid by ANZ on the various cash options it offered against interest rates available from comparable ADIs to ANZ and other platforms; and
- 67.10 otherwise denies paragraph 67.

### Particulars

The Smart Choice Cash RPS Interest Rates were, at all material times, higher than, or competitive with interest rates on similar products offered by other ADIs with an equivalent credit rating to ANZ outside superannuation.

See Schedule I to this Defence.

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

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

68. As to paragraph 68, the Trustee:
- 68.1 admits that the Trustee and OPL were Associates and Related Bodies Corporate;
- 68.2 says that the fact that the Trustee and OPL were Associates and Related Bodies Corporate was disclosed to members;
- 68.3 says that each of the Trustee, OPL and ANZ had boards independent of each other, and which held separate meetings;
- 68.4 says that its Board considered whether any conflict of interest existed during its deliberations, and if a conflict existed, took steps to ensure that the conflict was appropriately addressed;
- 68.5 was an RSE Licensee, and accordingly was bound to, and did, comply with "Prudential Standard SPS 521 – Conflicts of Interest" to manage conflicts of interest;
- 68.6 refers to and repeats paragraphs 23, 26, 29 and 30 above;

68.7 refers to and repeats paragraphs 43, 44, 63 and 64 above; and

68.8 otherwise denies paragraph 68.

69. As to paragraph 69, the Trustee:

69.1 refers to and repeats paragraphs 47 and 68 above;

69.2 says further that the Trustee regularly benchmarked the performance levels of OPL to ensure that they were market competitive and in line with the service levels stipulated in the Administration Agreement; and

### **Particulars**

From at least June 2014, the OPC Board of Directors received quarterly reports which measured OPL's performance against agreed service levels.

From at least June 2014, the Trustee undertook an annual internal review of OPL's performance against agreed service levels.

The Trustee engaged SuperRatings Pty Ltd to undertake triennial independent reviews to benchmark OPL's performance against market competitors. The reports were completed and provided to the Trustee in September 2014 and October 2017.

Further particulars may be provided after discovery.

69.3 denies paragraph 69.

70. As to paragraph 70, the Trustee:

70.1 refers to and repeats paragraph 68 and 69 above; and

70.2 denies paragraph 70.

71. As to paragraph 71, the Trustee:

71.1 admits that the Trustee and ANZ were Associates and Related Bodies Corporate;

71.2 refers to and repeats paragraph 68 above; and

71.3 denies paragraph 71.

72. As to paragraph 72, the Trustee:

72.1 refers to and repeats paragraphs 58, 68 and 71 above; and



72.2 denies paragraph 72.

73. As to paragraph 73, the Trustee:

73.1 refers to and repeats paragraph 71 and 72 above; and

73.2 denies paragraph 73.

74. As to paragraph 74, the Trustee:

74.1 admits that the Trustee and ANZ were Associates and Related Bodies Corporate;

74.2 refers to and repeats paragraph 68 above; and

74.3 denies paragraph 74.

75. As to paragraph 75, the Trustee:

75.1 refers to and repeats paragraphs 65 to 67 above; and

75.2 denies paragraph 75.

76. As to paragraph 76, the Trustee:

76.1 refers to and repeats paragraph 74 and 75 above; and

76.2 denies paragraph 76.

## **G.2 Care and skill contraventions**

77. As to paragraph 77, the Trustee:

77.1 refers to and repeats paragraphs 23 to 32, 37, 47 to 59 and 68 to 69 above; and

77.2 denies paragraph 77.

78. As to paragraph 78, the Trustee:

78.1 refers to and repeats paragraph 77 above; and

78.2 admits paragraph 78.

79. As to paragraph 79, the Trustee:

79.1 refers to and repeats paragraph 77 above; and

79.2 denies paragraph 79.

80. As to paragraph 80, the Trustee:
- 80.1 refers to and repeats paragraphs 58 and 72 above; and
  - 80.2 denies paragraph 80.
81. As to paragraph 81, the Trustee:
- 81.1 refers to and repeats paragraph 80 above; and
  - 81.2 admits paragraph 81.
82. As to paragraph 82, the Trustee:
- 82.1 refers to and repeats paragraph 80 above; and
  - 82.2 denies paragraph 82.
83. As to paragraph 83, the Trustee:
- 83.1 refers to and repeats paragraphs 23 to 32, 37, 47 to 59 and 68 to 69 above;  
and
  - 83.2 denies paragraph 83.
84. As to paragraph 84, the Trustee:
- 84.1 refers to and repeats paragraph 83 above; and
  - 84.2 admits paragraph 84.
85. As to paragraph 85, the Trustee:
- 85.1 refers to and repeats paragraph 83 above; and
  - 85.2 denies paragraph 85.
86. As to paragraph 86, the Trustee:
- 86.1 refers to and repeats paragraphs 58 and 72 above; and
  - 86.2 denies paragraph 86.
87. As to paragraph 87, the Trustee:
- 87.1 refers to and repeats paragraph 86 above; and
  - 87.2 admits paragraph 87.

88. As to paragraph 88, the Trustee:
- 88.1 refers to and repeats paragraph 86 above; and
  - 88.2 denies paragraph 88.
89. As to paragraph 89, the Trustee:
- 89.1 refers to and repeats paragraphs 65 to 67 and 72 above; and
  - 89.2 denies paragraph 89.
90. As to paragraph 90, the Trustee:
- 90.1 refers to and repeats paragraph 89 above; and
  - 90.2 otherwise admits paragraph 90.
91. As to paragraph 91, the Trustee:
- 91.1 refers to and repeats paragraph 89 above; and
  - 91.2 denies paragraph 91.
- G.3 Best Interests Contraventions**
92. As to paragraph 92, the Trustee:
- 92.1 refers to and repeats paragraph 77 and 83 above; and
  - 92.2 denies paragraph 92.
93. As to paragraph 93, the Trustee:
- 93.1 refers to and repeats paragraph 77 and 83 above; and
  - 93.2 denies paragraph 93.
94. As to paragraph 94, the Trustee:
- 94.1 refers to and repeats paragraph 80 and 86 above; and
  - 94.2 denies paragraph 94.
95. As to paragraph 95, the Trustee:
- 95.1 refers to and repeats paragraph 80 and 86 above; and
  - 95.2 denies paragraph 95.

96. As to paragraph 96, the Trustee:

96.1 refers to and repeats paragraph 89 above; and

96.2 denies paragraph 96.

97. As to paragraph 97, the Trustee:

97.1 refers to and repeats paragraph 89 above; and

97.2 denies paragraph 97.

#### **G.4 Investment Strategy Contraventions**

98. As to paragraph 98, the Trustee:

98.1 to and repeats paragraph 77 above; and

98.2 otherwise denies paragraph 98.

99. As to paragraph 99, the Trustee:

99.1 refers to and repeats paragraph 98 above; and

99.2 admits paragraph 99.

100. As to paragraph 100, the Trustee:

100.1 refers to and repeats paragraph 98 above; and

100.2 denies paragraph 100.

101. As to paragraph 101, the Trustee:

101.1 refers to and repeats paragraph 83 above; and

101.2 denies paragraph 101.

102. As to paragraph 102, the Trustee:

102.1 refers to and repeats paragraph 101 above; and

102.2 otherwise admits paragraph 102.

103. As to paragraph 103, the Trustee:

103.1 refers to and repeats paragraph 101 above; and

103.2 denies paragraph 103.

104. As to paragraph 104, the Trustee:
- 104.1 refers to and repeats paragraph 80 above; and
  - 104.2 denies paragraph 104.
105. As to paragraph 105, the Trustee:
- 105.1 refers to and repeats paragraph 104 above; and
  - 105.2 otherwise admits paragraph 105.
106. As to paragraph 106, the Trustee:
- 106.1 refers to and repeats paragraph 104 above; and
  - 106.2 denies paragraph 106.
107. As to paragraph 107, the Trustee:
- 107.1 refers to and repeats paragraph 86 above; and
  - 107.2 denies paragraph 107.
108. As to paragraph 108, the Trustee:
- 108.1 refers to and repeats paragraph 107 above; and
  - 108.2 otherwise admits paragraph 108.
109. As to paragraph 109, the Trustee:
- 109.1 refers to and repeats paragraph 107 above; and
  - 109.2 denies paragraph 109.
110. As to paragraph 110, the Trustee:
- 110.1 refers to and repeats paragraph 89 above; and
  - 110.2 denies paragraph 110.
111. As to paragraph 111, the Trustee:
- 111.1 refers to and repeats paragraph 110 above; and
  - 111.2 otherwise admits paragraph 111.
112. As to paragraph 112, the Trustee:

112.1 refers to and repeats paragraph 110 above; and

112.2 otherwise denies paragraph 112.

**G.5 Due Diligence Contraventions**

113. As to paragraph 113, the Trustee:

113.1 refers to and repeats paragraphs 101 and 107 above; and

113.2 denies paragraph 113.

114. As to paragraph 114, the Trustee:

114.1 refers to and repeats paragraph 113 above; and

114.2 otherwise admits paragraph 114.

115. As to paragraph 115, the Trustee:

115.1 refers to and repeats paragraph 113 above; and

115.2 denies paragraph 115.

116. As to paragraph 116, the Trustee:

116.1 refers to and repeats paragraphs 110 above; and

116.2 denies paragraph 116.

117. As to paragraph 117, the Trustee:

117.1 refers to and repeats paragraph 116 above; and

117.2 otherwise admits paragraph 117.

118. As to paragraph 118, the Trustee:

118.1 refers to and repeats paragraph 116 above; and

118.2 denies paragraph 118.

**G.6 Conflicts Contraventions**

119. As to paragraph 119, the Trustee:

119.1 refers to and repeats paragraphs 68 and 69 above; and

119.2 denies paragraph 119.

120. As to paragraph 120, the Trustee:
- 120.1 refers to and repeats paragraphs 71 and 72 above; and
  - 120.2 denies paragraph 120.
121. As to paragraph 121, the Trustee:
- 121.1 refers to and repeats paragraphs 85 and 88 above; and
  - 121.2 denies paragraph 121.
122. As to paragraph 122, the Trustee:
- 122.1 refers to and repeats paragraph 121 above; and
  - 122.2 denies paragraph 122.
123. As to paragraph 123, the Trustee:
- 123.1 refers to and repeats paragraphs 74 and 75 above; and
  - 123.2 denies paragraph 123.
124. As to paragraph 124, the Trustee:
- 124.1 refers to and repeats paragraph 91 above; and
  - 124.2 denies paragraph 124.
125. As to paragraph 125, the Trustee:
- 125.1 refers to and repeats paragraph 124 above; and
  - 125.2 denies paragraph 125.

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

126. As to paragraph 126, the Trustee:
- 126.1 refers to and repeats paragraph 89 above; and
  - 126.2 denies paragraph 126.
127. As to paragraph 127, the Trustee:
- 127.1 refers to and repeats paragraph 126 above; and
  - 127.2 denies paragraph 127.

**G.8 Proper Performance Contravention**

128. As to paragraph 128, the Trustee:

128.1 refers to and repeats paragraphs 23 to 32, 37, 47 to 59 and 68 to 69 above;  
and

128.2 denies paragraph 128.

129. As to paragraph 129, the Trustee:

129.1 refers to and repeats paragraph 128 above; and

129.2 denies paragraph 129.

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

130. As to paragraph 130, the Trustee:

130.1 refers to and repeats paragraphs 12 to 14 and 68 to 129 above; and

130.2 denies paragraph 130.

131. As to paragraph 131, the Trustee:

131.1 refers to and repeats paragraphs 12 to 14 and 93 above; and

131.2 denies paragraph 131.

132. As to paragraph 132, the Trustee:

132.1 refers to and repeats paragraphs 12 to 14, 95 and 97 above; and

132.2 denies paragraph 132.

133. As to paragraph 133, the Trustee:

133.1 refers to and repeats paragraphs 12 to 14, 79, 85, 100, 103 and 115 above;  
and

133.2 denies paragraph 133.

134. As to paragraph 134, the Trustee:

134.1 refers to and repeats paragraphs 12 to 14, 82, 88, 91 and 106 above; and

134.2 denies paragraph 134.

135. As to paragraph 135, the Trustee:



135.1 refers to and repeats paragraphs 12 to 14 and 119 to 122 above; and

135.2 denies paragraph 135.

136. As to paragraph 136, the Trustee:

136.1 refers to and repeats paragraphs 12 to 14 and 120 to 122 above; and

136.2 denies paragraph 136.

137. As to paragraph 137, the Trustee:

137.1 refers to and repeats paragraphs 123 to 125 above; and

137.2 denies paragraph 137.

138. As to paragraph 138, the Trustee:

138.1 refers to and repeats paragraphs 12 to 14 and 119 to 122 above; and

138.2 denies paragraph 138.

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

### **I.1 Involvement in statutory contraventions**

139. The Trustee does not plead to paragraph 139 as it contains no allegation against it.

140. The Trustee does not plead to paragraph 140 as it contains no allegation against it.

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

141. The Trustee does not plead to paragraph 141 as it contains no allegation against it.

142. The Trustee does not plead to paragraph 142 as it contains no allegation against it.

143. The Trustee does not plead to paragraph 143 as it contains no allegation against it.

144. The Trustee does not plead to paragraph 144 as it contains no allegation against it.

145. The Trustee does not plead to paragraph 145 as it contains no allegation against it.

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

146. The Trustee does not plead to paragraph 146 as it contains no allegation against it.

147. The Trustee does not plead to paragraph 147 as it contains no allegation against it.

**K. THE PRE-FOFA REFORM COMMISSIONS PAID AND FEES CHARGED****K.1 Life Policies**

148. As to paragraph 148, the Trustee:

148.1 says that each of the ANZ OneAnswer Products, OnePath OneAnswer Products, OptiMix Products, Integra Products and ANZ Super Advantage Products had product disclosure statements which applied to them (each, also a **PDS**);

148.2 relies on the terms of the PDS for their full force and effect;

148.3 says further that the PDS contained terms, inter alia, to the following effect:

- (a) the Trustee would invest all contributions in a master life policy issued by OPL;
- (b) fees and costs would be deducted from investment returns, or paid direct from a member's account, including contribution fees, ongoing fees, and withdrawal fees;
- (c) the Trustee or OPL may pay initial or ongoing commissions to a member's financial adviser;
- (d) a member could negotiate partial or full rebates of commissions with their financial adviser, or the financial adviser may have already agreed to a partial or full rebate of commissions; and

148.4 otherwise admits paragraph 148.

**Particulars**

The Trustee refers to Schedules A and J to this Defence.

149. As to paragraph 149, the Trustee:

149.1 refers to and repeats paragraph 148 above;

149.2 relies on the terms of the MIT for their full force and effect;

149.3 relies on the terms of the Commission Products Life Policies for their full force and effect; and

149.4 otherwise admits paragraph 149.

**K.2 OneAnswer Members**

150. As to paragraph 150, the Trustee:

150.1 refers to and repeats paragraph 148 above; and

150.2 otherwise admits paragraph 150.

151. As to paragraph 151, the Trustee:

151.1 refers to and repeats paragraph 148 above; and

151.2 otherwise admits paragraph 151.

152. As to paragraph 152, the Trustee:

152.1 refers to and repeats paragraph 148 above; and

152.2 otherwise admits paragraph 152.

153. As to paragraph 153, the Trustee:

153.1 refers to and repeats paragraph 148 above;

153.2 admits that the Adviser Arrangements in relation to ANZ OneAnswer Members with Linked Advisers were with ANZ Financial Advisers;

153.3 says further that ANZ OneAnswer Members were able to change to Financial Advisers who were not ANZ Financial Advisers; and

153.4 otherwise denies paragraph 153.

154. As to paragraph 154, the Trustee:

154.1 refers to and repeats paragraph 148 above; and

154.2 otherwise admits paragraph 154.

155. As to paragraph 155, the Trustee:

155.1 refers to and repeats paragraph 148 above; and

155.2 otherwise admits paragraph 155.

156. The Trustee admits paragraph 156.

**K.3 OptiMix Members**

157. As to paragraph 157, the Trustee:

- 157.1 refers to and repeats paragraph 148 above; and
  - 157.2 otherwise admits paragraph 157.
158. As to paragraph 158, the Trustee:
- 158.1 refers to and repeats paragraph 148 above; and
  - 158.2 otherwise admits paragraph 158.
159. As to paragraph 159, the Trustee:
- 159.1 refers to and repeats paragraph 148 above; and
  - 159.2 otherwise admits paragraph 159.
160. As to paragraph 160, the Trustee:
- 160.1 refers to and repeats paragraph 148 above and paragraph 192 below; and
  - 160.2 otherwise denies paragraph 160.
161. The Trustee admits paragraph 161 and says that the OptiMix Products were closed to new members from in or around July 2007.
- K.4 ANZ Super Advantage**
162. As to paragraph 162, the Trustee:
- 162.1 refers to and repeats paragraph 148 above; and
  - 162.2 otherwise admits paragraph 162.
163. As to paragraph 163, the Trustee:
- 163.1 refers to and repeats paragraph 148 above; and
  - 163.2 otherwise admits paragraph 163.
164. As to paragraph 164, the Trustee:
- 164.1 refers to and repeats paragraph 148 above; and
  - 164.2 otherwise admits paragraph 164.
165. As to paragraph 165, the Trustee:
- 165.1 refers to and repeats paragraph 148 above and paragraph 192 below; and

165.2 otherwise denies paragraph 165.

166. The Trustee admits paragraph 166.

#### **K.5 Integra**

167. As to paragraph 167, the Trustee:

167.1 refers to and repeats paragraph 148 above; and

167.2 otherwise admits paragraph 167.

168. As to paragraph 168, the Trustee:

168.1 refers to and repeats paragraph 148 above; and

168.2 otherwise admits paragraph 168.

169. As to paragraph 169, the Trustee:

169.1 refers to and repeats paragraph 148 above; and

169.2 otherwise admits paragraph 169.

170. As to paragraph 170, the Trustee:

170.1 refers to and repeats paragraph 148 above and paragraph 192 below; and

170.2 otherwise denies paragraph 170.

171. The Trustee denies paragraph 171 and says that Integra closed to new employer plans on or about 8 November 2013.

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

172. As to paragraph 172, the Trustee:

172.1 refers to and repeats paragraphs 151, 154, 158, 163 and 168 above; and

172.2 otherwise admits paragraph 172.

#### **L. THE FOFA REFORMS**

173. The Trustee admits paragraph 173.

174. The Trustee admits paragraph 174.

175. The Trustee admits paragraph 175.

176. The Trustee admits paragraph 176.

177. The Trustee admits paragraph 177.

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

178. The Trustee admits paragraph 178.

179. As to paragraph 179, the Trustee:

179.1 admits that, at all material times on and from 1 July 2013, Adviser Commissions were Conflicted Remuneration within the meaning of the Conflicted Remuneration Provisions; and

179.2 otherwise denies paragraph 179.

180. The Trustee admits paragraph 180.

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

181. As to paragraph 181, the Trustee:

181.1 refers to and repeats paragraph 148 above; and

181.2 otherwise admits paragraph 181.

182. As to paragraph 182, the Trustee:

182.1 refers to and repeats paragraphs 148, 151 and 154 above; and

182.2 admits that OPL continued to charge Contribution Fees and Ongoing Fees in respect of Pre-FOFA One Answer members;

182.3 otherwise admits paragraph 182.

### **M.2 OptiMix Members**

183. As to paragraph 183, the Trustee:

183.1 refers to and repeats paragraph 148 above; and

183.2 otherwise admits paragraph 183.

184. As to paragraph 184, the Trustee:

184.1 refers to and repeats paragraphs 148 and 158 above; and

184.2 admits that OPL continued to charge Contribution Fees and Ongoing Fees in respect of Pre-FOFA OptiMix Members; and

184.3 otherwise admits paragraph 184.

**M.3 ANZ Super Advantage Members**

185. As to paragraph 185, the Trustee:

185.1 refers to and repeats paragraph 148 above; and

185.2 otherwise admits paragraph 185.

186. As to paragraph 186, the Trustee:

186.1 refers to and repeats paragraphs 148 and 163 above;

186.2 admits that OPL continued to charge Contribution Fees and Ongoing Fees in respect of Pre-FOFA ANZ Super Advantage members; and

186.3 otherwise admits paragraph 186.

**M.4 Integra Members**

187. As to paragraph 187, the Trustee:

187.1 refers to and repeats paragraph 148 above; and

187.2 otherwise admits paragraph 187.

188. As to paragraph 188, the Trustee:

188.1 refers to and repeats paragraphs 148 and 168 above;

188.2 says further that to the extent that the defined term “Excess Ongoing Fees” is an allegation that the Ongoing Fees were excessive, it denies that allegation; and

188.3 otherwise admits paragraph 188.

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

189. As to paragraph 189, the Trustee:

189.1 refers to and repeats paragraphs 182, 184, 186 and 188 above, and paragraph 192 below; and

189.2 otherwise admits paragraph 189.

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

190. The Trustee does not plead to paragraph 190 as it contains no allegations against it.

191. As to paragraph 191, the Trustee:

191.1 says that a purpose of agreeing that OPL could charge Contribution Fees and Ongoing Fees was to enable OPL to pay for its costs in providing services to the Trustee, which included costs incurred by OPL in respect of distribution;

191.2 refers to and repeats paragraph 192 below; and

191.3 otherwise denies paragraph 191.

192. As to paragraph 192, the Trustee:

192.1 refers to and repeats paragraph 148 above;

192.2 says that the payment of commissions to financial advisers was, at all times, permitted under the SIS Act;

**Particulars**

*SIS Act s 154 and Superannuation Industry (Supervision) Regulations 1994 (Cth) r 3.10.*

192.3 says that the continued payment of Grandfathered Commissions after the FOFA Start Date was expressly permitted under the FOFA Reforms;

**Particulars**

*Corporations Act 2001 (Cth), s 1528 and Corporations Regulations 2001 (Cth), Part 7.7A.*

192.4 says that:

(a) the Trustee and/or OPL were obliged to pay Grandfathered Commissions to financial advisers under the terms of their contracts with those financial advisers; and

(b) in the event that the Trustee and/or OPL did not pay Grandfathered Commissions in accordance with the terms of their contracts, the Trustee and/or OPL would have been liable to pay damages to financial advisers, and the Trustee would have been entitled to be



indemnified in respect of that legal liability from the assets of the Master Fund;

- 192.5 says that if Grandfathered Commissions had ceased to be paid, members may have (on advice from their financial advisers) left the fund, and thereby incurred transactional costs in doing so and reduced the size and scale of the Master Fund (which would have adversely impacted the Master Fund and therefore the remaining members);
- 192.6 says that the members otherwise derived a benefit from the payment of the Contribution Fees and Ongoing Fees; and

#### **Particulars**

- (i) Members were able to obtain financial advice, and access to financial advisers, for free or at a lower cost than would have been payable if the Grandfathered Commissions were not paid.
- (ii) By reason of obtaining such financial advice, members were able to structure their affairs in a way which was most financially advantageous to them.
- (iii) The Master Fund was not diminished by the need for the Trustee, or OPL at the Trustee's expense, to fund administrative services which were otherwise carried out by financial advisers who were paid the Grandfathered Commissions.

192.7 otherwise denies paragraph 192.

193. As to paragraph 193, the Trustee:

193.1 refers to and repeats paragraph 192 above; and

193.2 denies paragraph 193.

194. As to paragraph 194, the Trustee:

194.1 admits that OPL continued to pay Grandfathered Commissions after the FOFA Start Date;

194.2 admits that the Trustee knew that OPL continued to pay Grandfathered Commissions after the FOFA Start Date; and

194.3 otherwise denies paragraph 194.

195. As to paragraph 195, the Trustee:

- 195.1 refers to and repeats paragraph 192 above; and
- 195.2 denies paragraph 195.
- 196. As to paragraph 196, the Trustee:
  - 196.1 refers to and repeats paragraph 192 above; and
  - 196.2 denies paragraph 196.
- 197. As to paragraph 197, the Trustee:
  - 197.1 refers to and repeats paragraph 192 above;
  - 197.2 admits that OPL deducted Contribution Fees and Ongoing Fees;
  - 197.3 admits that the Financial Advisers were paid Contribution Commissions and Trail Commissions; and
  - 197.4 otherwise denies paragraph 197.
- 198. As to paragraph 198, the Trustee:
  - 198.1 refers to and repeats paragraph 192 above; and
  - 198.2 denies paragraph 198.
- 199. As to paragraph 199, the Trustee:
  - 199.1 as to paragraph 199.1:
    - (a) refers to and repeats paragraphs 192 and 194 above;
    - (b) says that the cessation of payments of Grandfathered Commissions would have had the consequences alleged in paragraph 192 above;
    - (c) says that the phrase “were able to” is vague and embarrassing; and
    - (d) denies paragraph 199.1;
  - 199.2 as to paragraph 199.2:
    - (a) refers to and repeats paragraphs 192 above;

- (b) says that the cessation of payments of Grandfathered Commissions would have had the consequences alleged in paragraph 192 above;
- (c) says that the phrase “was able to” is vague and embarrassing; and
- (d) otherwise does not plead to paragraph 199.2 as it contains no allegations against it;

199.3 as to paragraph 199.3:

- (a) refers to and repeats paragraph 192 above;
- (b) says that the phrase “able to absorb the cost” is vague and embarrassing; and
- (c) otherwise does not plead to paragraph 199.3 as it contains no allegations against it;

199.4 as to paragraph 199.4:

- (a) refers to and repeats paragraph 192 above;
- (b) says that the phrase “were able to” is vague and embarrassing; and
- (c) otherwise denies paragraph 199.4; and

199.5 as to paragraph 199.5:

- (a) refers to and repeats paragraph 192 above;
- (b) says that the phrase “was able to” is vague and embarrassing; and
- (c) otherwise does not plead to paragraph 199.5 as it contains no allegations against it.

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

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

200. On the assumption that the reference in paragraph 200.2 to “Optimix OneAnswer Products” is a reference to “Optimix Products”, the Trustee admits paragraph 200.

201. As to paragraph 201, the Trustee:

201.1 admits that it had the powers alleged in paragraph 201; and

- 201.2 says further that the powers were required to be exercised in accordance with the terms of the Master Fund Trust Deed, and in accordance with the Trustee's obligations under the SIS Act.
202. The Trustee admits paragraph 202.
203. As to paragraph 203, the Trustee:
- 203.1 admits that it had the powers alleged in paragraph 203; and
- 203.2 says further that the powers were required to be exercised in accordance with the terms of the Master Fund Trust Deed, and in accordance with the Trustee's obligations under the SIS Act.
204. As to paragraph 204, the Trustee:
- 204.1 refers to and repeats paragraph 192 above;
- 204.2 says further that the transfer of members to a different Section or Division of the Master Fund:
- (a) may have incurred tax consequences for the Master Fund which would have diminished the Master Fund, and thereby have had negative consequences for members;
  - (b) may have incurred other costs for members, including the costs associated with the sale and purchase of units in the relevant Section or Division of the Master Fund, such as a buy-sell spread, and thereby diminished the Master Fund;
  - (c) may have adversely affected members' pension entitlements, including by making the relevant member subject to deeming rules which may have affected their eligibility to receive the Age Pension;
  - (d) may have adversely affected members' insurance arrangements, including by requiring members to be re-assessed for insurance eligibility;
  - (e) may have adversely affected members' rebate arrangements; and
  - (f) may have altered or limited the range of investment options available to members, including the availability of capital guaranteed and capital stable investment options; and
- 204.3 otherwise denies paragraph 204.

205. As to paragraph 205, the Trustee:

205.1 refers to and repeats paragraph 148 above;

205.2 says further that at all material times, products offered by the Trustee which did not involve the payment of Contribution Fees or Excess Ongoing Fees were promoted and advertised; and

205.3 otherwise denies paragraph 205 insofar as the allegations in it are made against the Trustee.

206. As to paragraph 206, the Trustee:

206.1 refers to and repeats paragraphs 192 and 205 above; and

206.2 denies paragraph 206.

207. As to paragraph 207, the Trustee:

207.1 refers to and repeats paragraph 205 above; and

207.2 denies paragraph 207.

## **O.2 Alternatives to Employer Products**

208. The Trustee admits paragraph 208.

209. The Trustee admits paragraph 209.

210. As to paragraph 210, the Trustee:

210.1 admits that it had the powers alleged in paragraph 210; and

210.2 says further that the powers were required to be exercised in accordance with the terms of the Master Fund Trust Deed, and in accordance with the Trustee's obligations under the SIS Act.

211. As to paragraph 211, the Trustee:

211.1 refers to and repeats paragraphs 192 and 204 above; and

211.2 otherwise denies paragraph 211.

212. As to paragraph 212, the Trustee:

212.1 refers to and repeats paragraph 148 above;

212.2 says further that at all material times, products offered by the Trustee which did not involve the payment of Contribution Fees or Excess Ongoing Fees were promoted and advertised; and

212.3 otherwise denies paragraph 212 insofar as the allegations in it are made against the Trustee.

213. As to paragraph 213, the Trustee:

213.1 refers to and repeats paragraphs 192 and 212 above; and

213.2 denies paragraph 213.

214. As to paragraph 214, the Trustee:

214.1 refers to and repeats paragraphs 192 and 212 above; and

214.2 denies paragraph 214.

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

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

215. As to paragraph 215, the Trustee:

215.1 refers to and repeats paragraph 192 above; and

215.2 denies paragraph 215.

216. As to paragraph 216, the Trustee:

216.1 refers to and repeats paragraphs 192, 200 to 204 and 208 to 211 above; and

216.2 denies paragraph 216.

217. As to paragraph 217, the Trustee:

217.1 refers to and repeats paragraphs 192, 205 to 207 and 212 to 214 above; and

217.2 denies paragraph 217.

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

218. As to paragraph 218, the Trustee:

218.1 refers to and repeats paragraphs 12 to 14 and 215 to 216 above; and

218.2 otherwise denies paragraph 219.

219. As to paragraph 219, the Trustee:

219.1 refers to and repeats paragraphs 12 to 14 and 215 to 216 above; and

219.2 otherwise denies paragraph 219.

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

220. The Trustee does not plead to paragraph 220 as it contains no allegations against it.

221. The Trustee does not plead to paragraph 221 as it contains no allegations against it.

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

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

222. The Trustee admits paragraph 222.

223. As to paragraph 223, the Trustee:

223.1 refers to and repeats paragraphs 122, 125, 131, 132, 133 and 134 above;

223.2 says further that, insofar as a Cash Group Member remains a member of the Master Fund or the RPS Fund, they have not suffered loss within the meaning of section 55 of the SIS Act; and

### **Particulars**

- (i) If, which is denied, any assets of the Master Fund or the RPS Fund have been misapplied, then the Trustee is obliged to (and will) make good the assets of the Master Fund or the RPS Fund, and the appropriate relief is an order that it do so. Upon the assets of the Master Fund or the RPS Fund being made good, no loss or damage will have been suffered by a Cash Group Member who remains a member of the Master Fund or the RPS Fund and there is no loss or damage to be recovered under s 55 of the SIS Act.
- (ii) Further, if, which is denied, the Trustee is liable under s 55 of the SIS Act to compensate the First Applicant or any of the Cash Group Members for any loss or damage, any such compensation must be effected by payment into the

relevant person's superannuation balance. No payment can or should be ordered which would effect a de facto release of preserved benefits inconsistent with the scheme established by the *Superannuation Industry (Supervision) Regulations 1994* (Cth) including by the payment of sums to any third party.

223.3 denies paragraph 223.

224. As to paragraph 224, the Trustee:

224.1 refers to and repeats paragraph 223 above; and

224.2 denies paragraph 224.

225. As to paragraph 225, the Trustee:

225.1 refers to and repeats paragraphs 130 to 138, and paragraph 223.2 above; and

225.2 denies paragraph 225.

226. As to paragraph 226, the Trustee:

226.1 refers to and repeats paragraph 225 above; and

226.2 denies paragraph 226.

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

227. The Trustee admits paragraph 227.

228. As to paragraph 228, the Trustee:

228.1 refers to and repeats paragraph 219 above;

228.2 says further that, insofar as a Commissions Group Member remains a member of the Master Fund or the RPS Fund, they have not suffered loss within the meaning of section 55 of the SIS Act; and

### **Particulars**

- (i) If, which is denied, any assets of the Master Fund have been misapplied, then the Trustee is obliged to (and will) make good the assets of the Master Fund or the RPS Fund, and the appropriate relief is an order that it do so. Upon the assets of the Master Fund or the RPS Fund being made good, no loss or damage will have been suffered by a Commissions Group Member who remains a member of the



Master Fund or the RPS Fund and there is no loss or damage to be recovered under s 55 of the SIS Act.

- (ii) Further, if, which is denied, the Trustee is liable under s 55 of the SIS Act to compensate the Second Applicant or any of the Commissions Group Members for any loss or damaged, any such compensation must be effected by payment into the relevant persons superannuation balance. No payment can or should be ordered which would effect a de facto release of preserved benefits inconsistent with the scheme established by the *Superannuation Industry (Supervision) Regulations 1994* (Cth) including by the payment of sums to any third party.

228.3 denies paragraph 228.

229. As to paragraph 229, the Trustee:

229.1 refers to and repeats paragraph 228 above; and

229.2 denies paragraph 229.

230. As paragraph 230, the Trustee:

230.1 refers to and repeats paragraph 219 and 228.2 above; and

230.2 denies paragraph 230.

231. As to paragraph 231, the Trustee:

231.1 refers to and repeats paragraph 230 above; and

231.2 denies paragraph 231.

## **T. EXTENSION OF TIME**

232. As to paragraph 232, the Trustee:

232.1 refers to and repeats paragraph 233 and 234 below; and

232.2 otherwise does not know and therefore cannot admit paragraph 232.

## **U. LIMITATIONS**

### **U.1 First Applicant and Cash Investment Group Members**

233. In further answer to the claims by the First Applicant and the Cash Investment Group Members, the Trustee says that if (which is denied) any of the First Applicant or the Cash Investment Group Members have suffered any loss or damage alleged, they are not entitled to recover any loss or damage:

- 233.1 suffered prior to 23 December 2014 as their claims before that date are time-barred;
- 233.2 further or alternatively, insofar as their claims concern conduct prior to 23 December 2014 because those claims are time-barred.

#### **Particulars**

- a. Section 55(4) of the *SIS Act*
- b. Sections 14 and 48 of the *Limitations Act 1969* (NSW)
- c. Section 21 of the *Limitation of Actions Act 1958* (Vic)
- d. Section 11 of the *Limitations Act 1969* (ACT)
- e. Section 13 of the *Limitations Act 1969* (WA)
- f. Section 33 of the *Limitations Act 1981* (NT)
- g. Section 27 of the *Limitations of Actions Act 1974* (Qld)
- h. Section 32 of the *Limitation of Actions Act 1936* (SA)
- i. Section 24 of the *Limitation Act 1974* (Tas)

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

234. In further answer to the claims by the Second Applicant and the Commissions Group Members, the Trustee says that if (which is denied) any of the Second Applicant or the Commissions Group Members have suffered any loss or damage alleged, they are not entitled to recover any loss or damage:

- 234.1 suffered prior to 23 December 2014 as their claims before that date are time-barred;
- 234.2 further or alternatively, insofar as their claims concern conduct prior to 23 December 2014 because those claims are time-barred.

#### **Particulars**

- a. Section 55(4) of the *SIS Act*
- b. Sections 14 and 48 of the *Limitations Act 1969* (NSW)
- c. Section 21 of the *Limitation of Actions Act 1958* (Vic)
- d. Section 11 of the *Limitations Act 1969* (ACT)
- e. Section 13 of the *Limitations Act 1969* (WA)
- f. Section 33 of the *Limitations Act 1981* (NT)

- g. Section 27 of the Limitations of Actions Act 1974 (Qld)
- h. Section 32 of the Limitation of Actions Act 1936 (SA)
- i. Section 24 of the *Limitation Act 1974* (Tas)

## V. OTHER DEFENCES

235. Further, and in answer to all of the allegations in the Statement of Claim, if (which is denied) the Trustee would be liable for loss or damage caused by any of the causes of action, the Trustee:

235.1 says that none of the alleged acts or omissions by the Trustee were dishonest, or constituted an intentional or reckless failure to exercise the degree of care and diligence required of it; and

235.2 as a result, any liability which the Trustee would otherwise have is excluded under the terms of the Master Fund Trust Deed and the RPS Trust Deed.

### Particulars

Master Fund Trust Deed, clause 14.7.

RPS Trust Deed, clause 14.7.

236. Further, and in answer to all of the allegations of contravention of sections 54B and 109(1) of the SIS Act, if (which is denied) the Trustee is found to be liable for any loss or damage in respect of any of those alleged contraventions, the Trustee states that:

236.1 it acted honestly at all material times;

236.2 in the circumstances, it ought fairly to be excused for any such contraventions;

236.3 in consequence of subparagraphs 235.1 and 235.2, the Court should relieve the Trustee wholly, or alternatively partly, from any such liability under s 221(2) of the SIS Act.

Date: 18 June 2021

A handwritten signature in blue ink, consisting of a stylized 'M' followed by a cursive 'G'.

.....  
Signed by Domenic Mathew Gatto  
Lawyer for the First Respondent

This pleading was prepared by Philip Crutchfield QC, Nicholas De Young QC and Myles Tehan of counsel, and King and Wood Malesons.

**Certificate of lawyer**

I Domenic Mathew Gatto certify to the Court that, in relation to the defence filed on behalf of the First Respondent, the factual and legal material available to me at present provides a proper basis for:

- a. each allegation in the pleading; and
- b. each denial in the pleading; and
- c. each non admission in the pleading.

Date: 18 June 2021



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Signed by Domenic Mathew Gatto  
Lawyer for the First Respondent

**SCHEDULE A: TABLE OF PARTICULARS TO  
PARAGRAPHS 23 and 148**

**PDS REFERENCES FOR ONEPATH AND FRONTIER PRODUCTS**

<b>Key:</b>
<b>PDS:</b> Product Disclosure Statement <b>IFG:</b> Investment Funds Guide <b>FG:</b> Fees Guide

*OnePath OneAnswer Products*

<b>Term</b>	<b>November 2010</b>	<b>February 2012</b>	<b>July 2013</b>	<b>July 2014</b>	<b>May 2016</b>	<b>September 2017</b>
The Trustee would invest all contributions in a master life policy issued by OPL	PDS, preface	PDS, p2 FG, p2	FG, p2	FG, p2	FG, p2	FG, p2
The Trustee and OPL were wholly owned subsidiaries of ANZ	PDS, preface; p2	PDS, p2 FG, p2	PDS, p2 FG, p2	FG, p2	FG, p2	FG, p2
The Master Fund was governed by a Trust Deed, the terms of which would prevail in the event that there was an inconsistency between the PDS and the Trust Deed	PDS, preface	FG, p2	FG, p2	FG, p2	FG, p2	FG, p2
A member was required to choose the investment option(s) they wished to invest in, the Trustee would not select one for the member, and the Trustee could not proceed with an application for units if an investment option was not selected	N/A	PDS, p3	PDS, p3	PDS, p3	PDS, p3	PDS, p3
The investment options included access to a range of ANZ cash and term deposit options	IFG, p20	IFG, p12; pp82-83	IFG, p12; pp78-80	IFG, p16; pp82-84	IFG, p16; pp82-84	IFG, p16; pp78-80

<b>Term</b>	<b>November 2010</b>	<b>February 2012</b>	<b>July 2013</b>	<b>July 2014</b>	<b>May 2016</b>	<b>September 2017</b>
A member could switch investment options as many times as required, as their needs changed	PDS, p7; p13	PDS, p3	PDS, p3	PDS, p3	PDS, p3	PDS, p3
Fees and costs would be deducted from investment returns, or paid direct from a member's account, including contribution fees, ongoing fees, and withdrawal fees	PDS, p34; p35	PDS, p4 FG, p3	PDS, p4 FG, p3	PDS, p4 FG, p3	PDS, p4 FG, p3	PDS, p4 FG, p3
Initial or ongoing commissions may be paid to a member's financial adviser	PDS, p41	PDS, p5 FG, p16	PDS, p5 FG, p16	PDS, p6 FG, p13	PDS, p6 FG, p13	PDS, p6 FG, p16
A member could negotiate partial or full rebates of commissions with their financial adviser, or the financial adviser may have already agreed to a partial or full rebate of commissions	PDS, p41	PDS, p5 FG, p16	PDS, p5 FG, p16	PDS, p6 FG, p13	PDS, p6 FG, p13	PDS, p6 FG, p16







**SCHEDULE B: TABLE OF PARTICULARS TO PARAGRAPH 29****PDS REFERENCES FOR ANZ SMART CHOICE RETAIL PRODUCTS**

<b>Key:</b>									
<b>PDS:</b> Product Disclosure Statement			<b>AIG:</b> Additional Information Guide			<b>FG:</b> Fees Guide			
<b>Term</b>	<b>December 2011</b>	<b>August 2012</b>	<b>December 2012</b>	<b>November 2013</b>	<b>February 2017</b>	<b>September 2017</b>	<b>March 2018</b>	<b>April 2019</b>	<b>December 2019</b>
The Trustee was a wholly owned subsidiary of ANZ.	PDS, p3 AIG, p3	PDS, p2 AIG, p2	PDS, p2 AIG, p2	PDS, p2 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2
A member could choose to take an active role and invest some or all of their superannuation account balance in a number of diversified funds or single-sector funds, one of which was an option called "ANZ Smart Choice Cash.	PDS, p6 AIG, p26	PDS, p5 AIG, p17	PDS, p5 AIG, p17	PDS, p3 AIG, p16	PDS, p4 AIG, p15	PDS, p4 AIG, p14	PDS, p4; p7 AIG, p17	PDS, p7 AIG, p19	PDS, p6 AIG, p19
Where a member did not select their own investment options the Trustee would invest their superannuation account balance in one of a series of Lifestage investment funds which comprised a strategic mix of growth and defensive investments to suit a member's proximity to retirement, depending on the decade in which a member was born.	PDS, p5 AIG, p 19; p23	PDS, p5 AIG, p17	PDS, p5 AIG, p17	PDS, p3 AIG, p16	PDS, p4 AIG, p14	PDS, p4 AIG, p14	PDS, p4; p5 AIG, p16	PDS, p6 AIG, p17	PDS, p7 AIG, p18
A member could switch investment options at any time.	PDS, p4 AIG, p19	PDS, p5	PDS, p5 AIG, p17	PDS, p7	PDS, p8 AIG, p11	PDS, p7 AIG, p11	PDS, p7	PDS, p7	PDS, p7

Term	December 2011	August 2012	December 2012	November 2013	February 2017	September 2017	March 2018	April 2019	December 2019
		AIG, p17							
Fees and costs would be deducted from assets of each investment option, or paid from a member's account, including investment fees, administration fees and a buy-sell spread.	PDS, p9 AIG, p30	PDS, p8 AIG, p27	PDS, p8 AIG, p28	PDS, p8 AIG, p.26	PDS, p9 AIG, p26	PDS, p9 AIG, p26	PDS, p8 AIG, p28	PDS, p9 FG, p4	PDS, p9 FG, p4
No commissions were payable to financial advisers.	PDS, p4 AIG, p30	PDS, p2; p3, p8 AIG, p12	PDS, p2; p3, p8 AIG, p12	PDS, p4; p8 AIG, p12	PDS, p4 AIG, p11	PDS, p4, AIG, p11	PDS, p4 AIG, p12	PDS, p4 AIG, p14	PDS, p4 AIG, p15
From 11 November 2013 until 13 April 2019, the Trustee would invest all contributions under a master life policy issued by OPL.	N/A	N/A	N/A	AIG, p1	PDS, p3 AIG, p2; p26	PDS, p3 AIG, p2	PDS, p3 AIG, p2	N/A	N/A
From 13 April 2019, Oasis Asset Management was the Administrator of the ANZ Smart Choice Retail Product.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	PDS, p2 AIG, p2	PDS, 2 AIG, p2

**SCHEDULE C: TABLE OF PARTICULARS TO PARAGRAPH 30**  
**PDS REFERENCES FOR ANZ SMART CHOICE EMPLOYER PRODUCTS**

<b>Key:</b>	<b>PDS:</b> Product Disclosure Statement	<b>AIG:</b> Additional Information Guide	<b>FG:</b> Fees Guide
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<b>Term</b>	<b>November 2013</b>	<b>May 2015</b>	<b>February 2017</b>	<b>September 2017</b>	<b>March 2018</b>	<b>April 2019</b>	<b>December 2019</b>
The Trustee was a wholly owned subsidiary of ANZ.	PDS, p2 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p2 AIG, p2 FG, p2
A member could choose to take an active role and invest some or all of their superannuation account balance in a number of diversified funds or single-sector funds, one of which was an option called “ANZ Smart Choice Cash”.	PDS, p8 AIG, p15	PDS, p7 AIG, p14	PDS, p7 AIG, p17	PDS, p7 AIG, p17	PDS, p6 AIG, p18	PDS, p6 AIG, p18	PDS, p5 AIG, p18
Where a member did not select their own investment options the Trustee would invest their superannuation account balance in one of a series of Lifestage investment funds which comprised a strategic mix of growth and defensive investments to suit a member’s proximity to retirement, depending on the decade in which a member was born.	PDS, p6 AIG, p14	PDS, p5 AIG, p14	PDS, p5 AIG, p16	PDS, p5 AIG, p16	PDS, p5 AIG, p17	PDS, p5 AIG, p17	PDS, p5 AIG, p18
A member could switch investment options at any time.	PDS, p8 AIG, p15	PDS, p7 AIG, p14	PDS, p7 AIG, p11	PDS, p7 AIG, p11	PDS, p7 AIG, p19	PDS, p6 AIG, p19	PDS, p7 AIG, p19
Fees and costs would be deducted from assets of each investment option, or paid from a member’s account, including	PDS, p9 AIG, p24	PDS, p8 AIG, p54	PDS, p8 AIG, p57	PDS, p8 AIG, p52	PDS, p8 FG, p4	PDS, p8 FG, p4	PDS, p7 FG, p4

<b>Term</b>	<b>November 2013</b>	<b>May 2015</b>	<b>February 2017</b>	<b>September 2017</b>	<b>March 2018</b>	<b>April 2019</b>	<b>December 2019</b>
investment fees, administration fees and a buy-sell spread.							
No commissions were payable to financial advisers.	N/A	N/A	N/A	N/A	N/A	PDS, p4	PDS, p4
From 11 November 2013 until 13 April 2019, the Trustee would invest all contributions under a master life policy issued by OPL.	PDS, p3 AIG, p2; p24	PDS, p3 AIG, p2, p54	PDS, p3 AIG, p2	PDS, p3 AIG, p2	PDS, p3 AIG, p2	N/A	N/A
From 13 April 2019, Oasis Asset Management was the Administrator of the ANZ Smart Choice Retail Product.	N/A	N/A	N/A	N/A	N/A	PDS, p3 AIG, p2	PDS, p2 AIG, p2

**SCHEDULE D: TABLE OF PARTICULARS TO PARAGRAPH 47**  
**DISCLOSURE OF CASH INVESTMENT FEE**

<b>Key:</b>	<b>PDS:</b> Product Disclosure Statement	<b>AIG:</b> Additional Information Guide	<b>FG:</b> Fees Guide	<b>N/A:</b> No new PDS issued
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<b>Product</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019*</b>
ANZ OnePath OneAnswer	PDS, p43	PDS, p43	FG, p19	FG, p18	FG, p16	N/A	FG, p15	FG, p4	N/A	N/A
OnePath OneAnswer	PDS, p43	PDS, p43	FG, p19	FG, p18	FG, p16	N/A	FG, p15	FG, p4	N/A	N/A
OnePath OneAnswer Frontier	PDS, p41	PDS, p41	FG, p11	FG, p11	FG, p12	N/A	FG, p12	PDS, p4	N/A	PDS, p4
ANZ Smart Choice Retail	N/A	PDS, p10	PDS, p10	PDS, p9	N/A	N/A	N/A	PDS, p9	PDS, p8	PDS, p8
ANZ Smart Choice Employer	N/A	N/A	N/A	PDS, p10	N/A	PDS, p8	N/A	PDS, p8	PDS, p7	PDS, p8

\*2020 is omitted as none of the relevant products issued new PDSs during the first month of the year.

**SCHEDULE E: TABLE OF PARTICULARS TO PARAGRAPHS 56.6 & 65.7**

**PDS REFERENCES TO CASH ADVANTAGE**

<b>Key:</b> <b>IFG:</b> Investment Funds Guide
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*ANZ OneAnswer Products, OnePath OneAnswer Products and OneAnswer Frontier Products*

<b>Term</b>	<b>February 2012</b>	<b>July 2013</b>	<b>July 2014</b>	<b>May 2016</b>	<b>September 2017</b>	<b>April 2019</b>	<b>December 2019</b>
A high level of capital security	IFG, p40	IFG, p40	IFG, p44	IFG, p44	IFG, p41	IFG, p36	IFG, p36
A steady and reliable income stream	IFG, p40	IFG, p40	IFG, p44	IFG, p44	IFG, p41	IFG, p36	IFG, p36
To achieve returns generally in line with cash management accounts	IFG, p40	IFG, p40	IFG, p44	IFG, p44	IFG, p41	IFG, p36	IFG, p36
To invest in ANZ bank deposits	IFG, p40	IFG, p40	IFG, p44	IFG, p44	IFG, p41	IFG, p36	IFG, p36

**SCHEDULE F: TABLE OF PARTICULARS TO PARAGRAPHS 56.8 & 65.9**

**CASH ADVANTAGE INTEREST RATE COMPARISON**

<b>Date</b>	<b>Cash Advantage</b>	<b>FirstRate Saver – deposit with CBA (Note 1)</b>	<b>RBA Cash Rate</b>
31 December 2019	0.80%	0.75%	0.75%
31 December 2018	1.55%	1.50%	1.50%
31 December 2017	1.55%	1.50%	1.50%
31 December 2016	1.65%	1.50%	1.50%
31 December 2015	2.15%	2.00%	2.00%
31 December 2014	2.65%	2.65%	2.50%
31 December 2013	2.70%	2.65%	2.50%
31 December 2012	3.45%	3.15%	3.00%
31 December 2011	4.70%	4.40%	4.25%

Note 1 – rates for FirstRate Saver within the FirstChoice Wholesale Personal Super product offered by Colonial First State Investments Limited, a subsidiary of Commonwealth Bank of Australia, published at [https://www.colonialfirststate.com.au/Price\\_performance/HistoricalSaverRates.aspx?ProductID=11&Public=1&Public=1](https://www.colonialfirststate.com.au/Price_performance/HistoricalSaverRates.aspx?ProductID=11&Public=1&Public=1)



**SCHEDULE G: TABLE OF PARTICULARS TO PARAGRAPHS 57.5 & 66.5****PDS REFERENCES TO ANZ TERM DEPOSITS**

<b>Key:</b> <b>IFG:</b> Investment Funds Guide
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*ANZ OneAnswer Products, OnePath OneAnswer Products and OneAnswer Frontier Products*

<b>Term</b>	<b>February 2012</b>	<b>July 2013</b>	<b>July 2014</b>	<b>May 2016</b>	<b>September 2017</b>	<b>April 2019</b>	<b>December 2019</b>
A fixed rate of return	IFG, p41	IFG, p41	IFG, p45	IFG, p45	IFG, p42	IFG, p36	IFG, p36
A choice of investment terms	IFG, p41	IFG, p41	IFG, p45	IFG, p45	IFG, p42	IFG, p36	IFG, p36
A steady and reliable income stream	IFG, p41	IFG, p41	IFG, p45	IFG, p45	IFG, p42	IFG, p36	IFG, p36
A high level of capital security	IFG, p41	IFG, p41	IFG, p45	IFG, p45	IFG, p42	IFG, p36	IFG, p36
To invest in term deposit products issued by ANZ	IFG, p41	IFG, p41	IFG, p45	IFG, p45	IFG, p42	IFG, p36	IFG, p36

**SCHEDULE H: TABLE OF PARTICULARS TO PARAGRAPHS 58.7, 59.8 & 67.8**

**PDS REFERENCES TO SMART CHOICE CASH**

<b>Key:</b> <b>AIG:</b> Additional Information Guide
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*ANZ Smart Choice Retail Products*

<b>Term</b>	<b>December 2011</b>	<b>August 2012</b>	<b>December 2012</b>	<b>November 2013</b>	<b>February 2017</b>	<b>September 2017</b>	<b>March 2018</b>	<b>April 2019</b>	<b>December 2019</b>
A high level of capital security	AIG, p26	AIG, p24	AIG, p24	AIG, p22	AIG, p20	AIG, p20	AIG, p22	AIG, p24	AIG, p24
To preserve their capital	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
To achieve returns generally in line with cash management accounts	AIG, p26	AIG, p24	AIG, p24	AIG, p22	AIG, p20	AIG, p20	AIG, p22	AIG, p24	AIG, p24
To invest in ANZ bank deposits	AIG, p26	AIG, p24	AIG, p24	AIG, p22	AIG, p20	AIG, p20	AIG, p22	AIG, p24	AIG, p24

*ANZ Smart Choice Employer Products*

<b>Term</b>	<b>November 2013</b>	<b>May 2015</b>	<b>February 2017</b>	<b>September 2017</b>	<b>March 2018</b>	<b>April 2019</b>	<b>December 2019</b>
A high level of capital security	AIG, p20	AIG, p27	AIG, p29	AIG, p29	AIG, p30	AIG, p31	AIG, p31
To preserve their capital	N/A	N/A	N/A	N/A	N/A	N/A	N/A
To achieve returns generally in line with cash management accounts	AIG, p20	AIG, p27	AIG, p29	AIG, p29	AIG, p30	AIG, p31	AIG, p31
To invest in ANZ bank deposits	AIG, p20	AIG, p27	AIG, p29	AIG, p29	AIG, p30	AIG, p31	AIG, p31

**SCHEDULE I: TABLE OF PARTICULARS TO PARAGRAPHS 58.9, 59.10 & 67.10**

**SMART CHOICE CASH INTEREST RATE COMPARISON**

<b>Date</b>	<b>Smart Choice Cash</b>	<b>FirstRate Saver – deposit with CBA (Note 1)</b>	<b>RBA Cash Rate</b>
31 December 2019	0.85%	0.75%	0.75%
31 December 2018	1.60%	1.50%	1.50%
31 December 2017	1.60%	1.50%	1.50%
31 December 2016	1.70%	1.50%	1.50%
31 December 2015	2.20%	2.00%	2.00%
31 December 2014	2.70%	2.65%	2.50%
31 December 2013	2.70%	2.65%	2.50%
31 December 2012	3.45%	3.15%	3.00%
31 December 2011	N/A	4.40%	4.25%

Note 1 – rates for FirstRate Saver within the FirstChoice Wholesale Personal Super product offered by Colonial First State Investments Limited, a subsidiary of Commonwealth Bank of Australia, published at [https://www.colonialfirststate.com.au/Price\\_performance/HistoricalSaverRates.aspx?ProductID=11&Public=1&Public=1](https://www.colonialfirststate.com.au/Price_performance/HistoricalSaverRates.aspx?ProductID=11&Public=1&Public=1)

**SCHEDULE J: TABLE OF PARTICULARS TO PARAGRAPH 148.3**

**PDS REFERENCES FOR ANZ SUPER ADVANTAGE, INTEGRA & OPTIMIX PRODUCTS**

<b>Key:</b>
<b>PDS:</b> Product Disclosure Statement <b>MG:</b> Member Guide

<b>Term</b>	<b>ANZ Super Advantage 2012</b>	<b>Integra 2012</b>	<b>Optimix Super 2006</b>	<b>Optimix Pension 2006</b>
The Trustee would invest all contributions in a master life policy issued by OPL	PDS, p1	PDS, p1	PDS, p1	PDS, p1
OnePath was a wholly owned subsidiary of ANZ	PDS, p1	PDS, p1	N/A	N/A
Fees and costs would be deducted from investment returns, or paid direct from a member's account, including contribution fees, ongoing fees, and withdrawal fees	PDS, p4	PDS, p4	PDS, p8	PDS, p8
The Trustee may pay initial or ongoing commissions to a member's financial adviser	MG, p22	MG, p22	PDS, p8	PDS, p9; p14
A member could negotiate partial or full rebates of commissions with their financial adviser, or the financial adviser may have already agreed to a partial or full rebate of commissions	MG, p22	MG, p20; p22	PDS, p8; p13	PDS, p9; p14