

## NOTICE OF FILING

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A handwritten signature in blue ink, reading "Sia Lagos". The signature is fluid and cursive, with the first letters of "Sia" and "Lagos" being capitalized and prominent.

Registrar

### Important Information

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 17  
Rule 8.05(1)(a)

## **FURTHER AMENDED STATEMENT OF CLAIM**

**(Filed pursuant to orders of the Honourable Justice Button dated 14 May 2024)**

VID 9 of 20219

Federal Court of Australia

District Registry: Victoria

Division: General

**IAN EDO JANSSEN** and another

Applicants

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

Respondents

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Filed on behalf of  
Prepared by  
Law firm  
Tel  
Email  
**Address for service**

Ian Edo Janssen and Dean Tobin Reeves, Applicants  
Kirsten Morrison  
Slater and Gordon Lawyers  
(03) 9602 6992  
Kirsten.Morrison@slatergordon.com.au  
Slater and Gordon Lawyers, 485 La Trobe Street, Melbourne, VIC, 3000  
Fax (03) 9600 0290

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

## **A. PARTIES**

1. The Applicants bring this proceeding as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on their own behalf and on behalf of the Group Members described in paragraphs 2 and 3.
2. The First Applicant and the persons whom he represents (~~Cash Investment~~ **Group Members**) are persons who:
  - 2.1. satisfy both of the following paragraphs:

- (a) were, as at 13 April 2019 (**Master Fund End Date**), or any time between 1 September 2011 (**Master Fund Start Date**) and the Master Fund End Date (**Master Fund Period**), members of the OnePath Master Fund (**Master Fund**); and
- (b) at any time during the Master Fund Period had units or rights in respect of investment options in the Master Fund titled (in whole or part) “Cash Advantage”, “ANZ Term Deposit” or “ANZ SmartChoice Cash”;

OR

2.2. satisfy both of the following paragraphs:

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

OR

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

OR

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

OR

2.5. satisfy both of the following paragraphs:

- (a) were the Spouse of a member of the Master Fund who satisfied paragraph 2.1; and

- (b) at any time during the Master Fund Period received a transfer from the Master Fund of all or part of the member's account in the Master Fund pursuant to an order or settlement in a *Family Law Act 1975* proceeding or a superannuation agreement within the meaning of Part VIIIB of the *Family Law Act 1975*;

OR

2.6. satisfy both of the following paragraphs:

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

AND

2.7. are not:

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

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

3.1. satisfy all of the following paragraphs:

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

OneAnswer Term Allocated Pension (including //Select)” (**ANZ OneAnswer Members**); or

(ii) “OnePath OneAnswer Personal Super (including //Select)” or “OnePath OneAnswer Allocated Pension (including //Select)” or “OnePath OneAnswer Term Allocated Pension (including //Select)” (**OnePath OneAnswer Members**); or

(iii) “ANZ Super Advantage” (**ANZ Super Advantage Members**); or

(iv) “Integra Super” or “Integra Pension” (**Integra Members**); or

(v) “OptiMix Allocated Pension” or “OptiMix Superannuation” or “OptiMix Term Allocated Pension” (**OptiMix Members**); and

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

OR

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

OR

3.3. satisfy both of the following paragraphs:

(a) were the Spouse of a member of the Master Fund or RPS Fund who satisfied paragraph 3.1; and

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

AND

3.4. are not:

- (a) a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia; or
  - (b) a legal representative of the Applicants in this proceeding.
- 4. As at the date of commencement of this proceeding, there are seven or more persons who have claims against the Respondents in respect of the matters set out in this Further Amended Statement of Claim.
- 5. The First Respondent, OnePath Custodians Pty Ltd (the **Trustee**):
  - 5.1. is and at all material times has been:
    - (a) a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);
    - (b) the holder of an RSE licence under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
  - 5.2. was at all material times:
    - (a) until 3 June 31 May 2019 (**Zurich Transfer Date**), an Associate and Related Body Corporate of OnePath Life Limited (**OPL**);
    - (b) until 31 January 2020 (**IOOF Transfer Date**), a subsidiary, a Closely-Held Subsidiary, a Related Body Corporate, and an Associate of the Third Respondent, Australia and New Zealand Banking Group Limited (**ANZ**);
  - 5.3. was at all material times in the Master Fund Period the trustee of the Master Fund; and
  - 5.4. is, and at all material times in the RPS Cash Period has been, the trustee of the RPS Fund.
- 6. The Second Respondent, Zurich Australia Limited (**ZAL**):
  - 6.1. is and at all material times has been a company incorporated under the Corporations Act;
  - 6.1A on 1 August 2022, pursuant to a scheme prepared under Part 9 of the *Life Insurance Act 1995* (Cth) (**Scheme**), and confirmed by the Federal Court of Australia on 6 July 2022, became liable for and assumed certain liabilities of

OPL as specified in the Scheme, which includes any liability that, but for the Scheme, would have been a liability of OPL arising from the allegations made against OPL in this proceeding;

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

- (a) liable for any act or omission of OPL; and
- (b) liable for the relief claimed against it in the proceeding for which a limitations defence was unavailable to OnePath Life Limited prior to 11 August 2022,

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

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

- (a) and is, a company incorporated under the Corporations Act;
- (b) an Associate and Related Body Corporate of the Trustee and ANZ; and
- (c) a subsidiary and a Closely-Held Subsidiary of ANZ.

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

7. The Third Respondent, ANZ:

7.1. is and at all material times has been:

- (a) a company incorporated under the Corporations Act;
- (b) an authorised deposit taking institution under the *Banking Act 1959* (Cth) (**ADI**); and

7.2. was at all material times:

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



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

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

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

- 8. At all material times up to 30 June 2013, by force of s 52(1) of the SIS Act, the Master Fund Trust Deed was taken to contain the covenants set out in s 52(2) (as then in force) including covenants by the Trustee:

- 8.1. to exercise, in relation to all matters affecting the Master Fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide (**Previous Care and Skill Covenant**);

- 8.2. to ensure that its duties and powers are performed and exercised in the best interests of the beneficiaries (**Previous Best Interests Covenant**);

- 8.3. to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the Master Fund including, but not limited to, the following:

- (a) the risk involved in making, holding and realising, and the likely return from, the Master Fund's investments having regard to its objectives and its expected cash flow requirements;

- (b) the composition of the Master Fund's investments as a whole including the extent to which the investments are diverse or involve the Master Fund in being exposed to risks from inadequate diversification;

- (c) the liquidity of the Master Fund's investments having regard to its expected cash flow requirements;

- (d) the ability of the Master Fund to discharge its existing and prospective liabilities,

**(Previous Investment Strategy Covenant);**

- 8.4. not to enter into any contract, or do anything else, that would prevent it from, or hinder it in, properly performing or exercising its functions and powers (**Previous Proper Performance Covenant**).
9. Since 1 July 2013, by force of s 52(1) of the SIS Act, the Master Fund Trust Deed and the RPS Trust Deed (together, the **Trust Deeds**) have each been taken to contain the covenants set out in s 52, including covenants by the Trustee:
- 9.1. to exercise, in relation to all matters affecting the relevant fund, the same degree of care, skill and diligence as a prudent person whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments (**Care and Skill Covenant**);
- 9.2. to perform its duties and exercise its power in the best interest of the beneficiaries (**Best Interests Covenant**);
- 9.3. where there is a conflict between its duties to the beneficiaries, or the interests of the beneficiaries, and its duties to any other person of the interests of it or an Associate of it:
- (a) to give priority to the duties to and the interests of the beneficiaries over the duties to and interests of other persons;
  - (b) to ensure that the duties to the beneficiaries are met despite the conflict;
  - (c) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
  - (d) to comply with the prudential standards in relation to conflicts;
- (**Conflicts Covenant**);
- 9.4. not to enter into any contract, or do anything else, that would prevent it from, or hinder it in, properly performing or exercising its functions and powers (**Proper Performance Covenant**);
- 9.5. to formulate, review regularly and give effect to an investment strategy for the whole of the fund and for each investment option offered by it in the relevant fund, having regard to:

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

**(Investment Strategy Covenant);**

9.6. to exercise due diligence in developing, offering and reviewing regularly each investment option **(Due Diligence Covenant)**.

10. From 6 April 2019, by force of s 52(1) of the SIS Act, the RPS Trust Deed has been taken to contain the covenant by the Trustee set out in s 52(12) of the SIS Act to promote the financial interests of the beneficiaries of the funds who hold a MySuper Product or a Choice Product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes) **(Financial Interests Covenants)**.
11. At all material times, pursuant to s 109(1) of the SIS Act, the Trustee has been prohibited from investing in its capacity as trustee of the Master Fund and RPS Fund unless:

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

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

- 12. Further and in the alternative, at all material times:
  - 12.1. up to 30 June 2013, each of the covenants set out in paragraph 8 above was an implied term of the Master Fund Trust Deed;
  - 12.2. from 1 July 2013 to the Master Fund End Date, each of the covenants set out in paragraph 9 above was an implied term of the Master Fund Trust Deed; and
  - 12.3. since 1 July 2013, each of the covenants set out in paragraph 9 above has been an implied term of the RPS Fund Trust Deed; and
  - 12.4. since 6 April 2019, the covenant set out in paragraph 10 above has been an implied term of the RPS Fund Trust Deed,
 (the **Implied Terms**).

### **Particulars**

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

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

### Particulars

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

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

### Particulars

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

## C. THE FUNDS

### C.1 Master Fund

15. The Master Fund was at all material times until the Master Fund End Date:

- 15.1. a trust established by a trust deed entered into by no later than the Master Fund Start Date, as amended from time to time (**Master Fund Trust Deed**), and which forms the, or part of the, Governing Rules of the Master Fund; and
- 15.2. a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registerable Superannuation Entity.

### Particulars

- (i) Master Fund Trust Deed dated 15 November 2010 ~~no later than 1 September 2011~~ as amended from time to time including by:

(aa) Amending Deed dated 26 November 2010;

(ab) Supplemental Deed dated 24 November 2011;

(a) Supplemental Deed dated 13 March 2013;

(b) Supplemental Deed dated 15 June 2017; and

(c) Supplemental Deed dated 26 March 2019.

~~Further particulars may be provided following discovery.~~

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

### Particulars

- (i) As to subparagraph 1, Master Fund Trust Deed clause 14.13, Schedule 7.
  - (ii) As to subparagraph 2, Master Fund Trust Deed clause 14.5.
  - (iii) As to subparagraph 3, Master Fund Trust Deed clause 14.14.
17. At all material times until the Master Fund End Date, the Master Fund was marketed by the Trustee as comprising a number of superannuation products under either the “ANZ” brand or the “OnePath” brand including:
- 17.1. “ANZ OneAnswer Personal Super (including //Select)”, “ANZ OneAnswer Allocated Pension (including //Select)” and “ANZ OneAnswer Term Allocated Pension (including //Select)” (**ANZ OneAnswer Products**);
  - 17.2. “OnePath OneAnswer Personal Super (including //Select)”, “OnePath OneAnswer Allocated Pension (including //Select)” and “OnePath OneAnswer Term Allocated Pension (including //Select)” (**OnePath OneAnswer Products**);
  - 17.3. “ANZ Super Advantage” (**ANZ Super Advantage Product**);
  - 17.4. “Integra Super” or “Integra Pension” (**Integra Products**);
  - 17.5. “OptiMix Allocated Pension” or “OptiMix Superannuation” or “OptiMix Term Allocated Pension” (**OptiMix Products**);
  - 17.6. “OneAnswer Frontier Personal Super” and “OneAnswer Frontier Pension” (**Frontier Products**);
  - 17.7. “ANZ Smart Choice Super”, and “ANZ Smart Choice Pension”, ~~“ANZ Smart Choice Super – Defined Benefit Division” and “ANZ Smart Choice MySuper”~~ (**ANZ Smart Choice Retail Products**);
  - 17.8. “ANZ Smart Choice Super for employers and their employees”, “ANZ Smart Choice Super – Defined Benefit Division” and “ANZ Smart Choice MySuper” (**ANZ Smart Choice Employer Products**);
- (together, the **Fund Products**).

### Particulars

(i) The products marketed under the ANZ brand were:

(A) ANZ OneAnswer Products;

(B) ANZ Super Advantage Product;

(C) ANZ Smart Choice Retail Products;

(D) ANZ Smart Choice Employer Product.;

~~(E) ANZ Legacy Products;~~

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

(A) the OnePath OneAnswer Products;

(B) Integra Products;

(C) OptiMix Products;

(D) Frontier Products;

(E) Corporate Super Product.;

~~(F) OnePath Legacy Products.~~

18. In accordance with the Governing Rules of the Master Fund, members and prospective members of the Master Fund were able to request or direct the Trustee that their account or part of their account in the Master Fund be allocated amongst various investment options offered by the Trustee within the fund (**Investment Options**).

19. On 13 April 2019, being the Master Fund End Date:

19.1. all assets of the Master Fund were transferred into the RPS Fund by way of a successor fund transfer (**Successor Fund Transfer**);

19.2. the Master Fund, upon the transfer, became the “OnePath” Part of the RPS Fund and subject to the rules specified for that Part in the RPS Trust Deed;



- 19.3. all members of the Master Fund became members of the RPS Fund ~~with equivalent rights to the rights members had under the Master Fund in respect of benefits.~~

### Particulars

- (i) Witness Statement of Victoria Weekes dated 14 August 2018 at paragraphs 18 to 22 and 41 to 43 filed on behalf of the Trustee in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**).
- (ii) Information Booklet for OnePath Superannuation and Pension Products dated January 2019;
- (iii) Information Booklet for ANZ Superannuation and Pension Products dated January 2019;
- ~~(iv) Board Paper to the Trustee Board dated 3 April 2019 [OPC.0001.0010.9555] recommending approval of the Successor Fund Transfer;~~
- ~~(v) Minutes of the Trustee Board dated 3 April 2019 [OPC.0001.0010.9477] approving the Successor Fund Transfer;~~
- ~~(vi) Redemption Deed between the Trustee and OPL dated 10 April 2019 [OPL.5013.0001.0109].~~
- ~~(iv) Further particulars may be provided following discovery.~~

## C.2 RPS Fund

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

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

### Particulars

- (i) RPS Trust Deed dated 22 October 1997 as amended from time to time including by Amending Deeds s dated 24 October 2018 and dated 27 March 2019.

~~(ii) — Further particulars may be provided following discovery.~~

21. At all material times since the RPS Start Date, the RPS Fund has been marketed by the Trustee as comprising a number of superannuation products including:

- 21.1. the ANZ OneAnswer Products;
- 21.2. the OnePath OneAnswer Products;
- 21.3. the ANZ Super Advantage Product;
- 21.4. the Integra Products;
- 21.5. the OptiMix Products;
- 21.6. the Frontier Products;
- 21.7. the ANZ SmartChoice Retail Products; and
- 21.8. the ANZ SmartChoice Employer Product;<sup>17</sup>
- ~~21.9. the ANZ Legacy Products; and~~
- ~~21.10. the OnePath Legacy Products;~~

(together, also **Fund Products**).

22. In accordance with the Governing Rules of the RPS Fund, members and prospective members of the RPS Fund were able to request or direct the Trustee that their account or part of their account in the RPS Fund be allocated amongst various investment options offered by the Trustee within the fund (also, **Investment Options**).

## D. INVESTMENT OPTIONS – CASH AND TERM DEPOSITS

### D.1 Cash Advantage Investment Option

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

#### Particulars

- (i) The Applicants refers to:
- (A) pages 2 and 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer PDS and Investment Funds Guide both dated 15 November 2010;
  - (B) page 40 of OneAnswer Investment Funds Guide dated 27 February 2012;
  - (C) page 44 of OneAnswer Investment Funds Guide dated 1 July 2014;
  - (D) page 44 of OneAnswer Investment Funds Guide dated 2 May 2016;
  - (E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

~~(ii) — Further particulars may be provided following discovery.~~

24. ~~At all times since 27 February 2012, t~~Ihe investment objective for the Cash Advantage Option has been:

24.1. at all times from the start of the Master Fund Period to around 27 February 2012, "to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts and term deposits by investing in ANZ bank deposits":

24.2. at all times from around 27 February 2012 to the end of the Cash Relevant Period, "to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts by investing in ANZ bank deposits".

**(Cash Advantage Investment Objective).****Particulars**

- (i) The investment objective is stated on:

(AA) the OneAnswer Investment Funds Guide dated 15 November 2010;

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

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

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

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

- (ii) Further particulars may be provided following discovery. Between around 15 November 2010 and around 27 February 2012, the Cash Advantage Option was called Flexible Term Deposit Plus.

25. At all times since 27 February 2012, the investment strategy for the Cash Advantage Option was stated as:

25.1. at all times from the start of the Master Fund Period to around 27 February 2012, “ANZ Flexible Term Deposit Plus aims to meet its objective by investing in a portfolio of term deposits and cash held by ANZ”; and

25.2. from around 27 February 2012 until the end of the Cash Relevant Period, “ANZ Cash Advantage aims to meet its objective by investing in a portfolio of cash held by ANZ” (Cash Advantage Investment Strategy).

**Particulars**

- (i) The investment strategy is stated on:

(AA) the OneAnswer Investment Funds Guide dated 15 November 2010

- (A) page 40 of OneAnswer Investment Funds Guide dated 27 February 2012;
- (B) page 44 of OneAnswer Investment Funds Guide dated 1 July 2014;
- (C) page 44 of OneAnswer Investment Funds Guide dated 2 May 2016;
- (D) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

- (ii) Between around 15 November 2010 and around 27 February 2012, the Cash Advantage Option was called Flexible Term Deposit Plus~~Further particulars may be provided following discovery.~~

## D.2 Term Deposit Investment Option

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

### Particulars

- (i) The Applicants refers to:
  - (A) pages 2 and 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer PDS and Investment Funds Guide both dated 15 November 2010;
  - (B) page 41 of OneAnswer Investment Funds Guide dated 27 February 2012;
  - (C) page 45 of OneAnswer Investment Funds Guide dated 27 February 2014;
  - (D) page 45 of OneAnswer Investment Funds Guide dated 2 May 2016;

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

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

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

#### Particulars

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

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

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

#### Particulars

- (i) The investment strategy is stated on:

- (A) page 12 of OneAnswer Supplementary PDS dated 1 September 2011, incorporating and amending OneAnswer Investment Funds Guide dated 15 November 2010;
- (B) page 41 of OneAnswer Investment Funds Guide dated 27 February 2012;
- (C) page 45 of OneAnswer Investment Funds Guide dated 27 February 2014;
- (D) page 45 of OneAnswer Investment Funds Guide dated 2 May 2016;
- (E) page 36 of OneAnswer Frontier Investment Funds Guide dated 14 December 2019;

~~(ii) — Further particulars may be provided following discovery.~~

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

- 29. At all times since 5 December 2011 until the end of the Cash Relevant Period, there has been an Investment Option within the ANZ Smart Choice Retail Products titled “ANZ Smart Cash” (**Smart Choice Cash Option**).
- 30. At all times since 11 November 2013 until the end of the Cash Relevant Period, there has been an Investment Option within the ANZ Smart Choice Employer Product titled “ANZ Smart Cash” (also **Smart Choice Cash Option**).
- 31. The investment objective for the Smart Choice Cash Option has been:
  - 31.1. at all times from around 5 December 2011 ~~the Master Fund Start Date~~ to around 18 February 2017, “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts and term deposits less fees, charges and taxes by investing in ANZ Bank deposits”;
  - 31.2. at all times from around 18 February 2017 to the end of the Master Fund Period, “to provide investors with a high level of capital security while achieving returns generally in line with cash management accounts and term deposits less fees, charges and taxes”;

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

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

#### **Particulars**

- (i) As to subparagraph 1, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 1 December 201~~1~~2; and
  - (B) p 21 of Smart Choice Retail Products Additional Information Guide dated 11 November 2013.
- (ii) As to subparagraph 2, the investment objective is stated on:
  - (A) p 20 of the Smart Choice Retail Products Additional Information Guide dated 18 February 2017;
  - (B) p 29 of the Smart Choice Employer Product Additional Information Guide dated 18 February 2017;
- (iii) As to subparagraph 3, the investment objective is stated on:
  - (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 13 April 2019; and
  - (B) p 31 of the Smart Choice Employer Product Additional Information Guide dated 13 April 2019;
  - (C) p 24 of the Smart Choice Retail Products Additional Information Guide dated 14 December 2019; and
  - (D) p 31 of the Smart Choice Employer Product Additional Information Guide (Employer) dated 14 December 2019;

~~(iv) — Further particulars may be provided following discovery.~~

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



- 32.1. at all times ~~from around 5 December 2011 to the end of in~~ the Master Fund Period, was stated as “this investment option aims to meet its objectives by having exposure to a portfolio of term deposits and cash held at ANZ Bank”;
- 32.2. at all times in the RPS ~~Fund~~ Cash Period, was stated as “this investment option aims to meet its objectives by having exposure to a portfolio of cash held at ANZ Bank”;

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

**Particulars**

- (i) As to subparagraph 1, the investment objective is stated on:
- (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 1 December 201~~1~~2;
  - (B) p 21 of Smart Choice Retail Products Additional Information Guide dated 11 November 2013;
  - (C) p 20 of the Smart Choice Retail Products Additional Information Guide dated 18 February 2017; and
  - (D) p 29 of the Smart Choice Employer Product Additional Information Guide dated 18 February 2017;
- (ii) As to subparagraph 2, the investment objective is stated on:
- (A) p 24 of the Smart Choice Retail Products Additional Information Guide dated 13 April 2019; and
  - (B) p 31 of the Smart Choice Employer Product Additional Information Guide dated 13 April 2019;
  - (C) p 24 of the Smart Choice Retail Products Additional Information Guide dated 14 December 2019;
  - (D) p 31 of the Smart Choice Employer Product Additional Information Guide dated 14 December 2019;

~~(iii) Further particulars may be provided following discovery.~~

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

### E.1 Cash Products Life Policies

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

#### Particulars

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

~~(ii) — Further particulars may be provided following discovery.~~

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

#### Particulars

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

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

~~(ii) — Further particulars may be provided following discovery.~~

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

#### Particulars

- (i) The Smart Choice Life Policies are the life policies issued to the Trustee by OPL from time to time as recorded in ~~referred to as the Superannuation Bond Master Policy and the Flexible Retirement Pension Master Policy, both defined as Pre-Simplification Policies, and the MIT (clause 7 of MIT);~~

~~(ii) — Further particulars may be provided following discovery.~~

37. Investments under the Cash Advantage Life Policies, Term Deposit Life Policies and ANZ Smart Choice Life Policies (together, the **Cash Products Life Policies**) were at all material times made on the basis that:
  - 37.1. all amounts invested under the policies were invested by OPL in Statutory Funds, which included investments in managed investment schemes and direct assets (**Life Policy Investment Funds**);
  - 37.2. the Trustee and members of the Master Fund (**Members**) did not have any legal or beneficial interest in any assets of the Life Policy Investment Funds (clause 15.2 of the MIT);
  - 37.3. for the Cash Advantage Life Policies and Term Deposit Life Policies (clause 10 of the MIT):

(aa) OPL may invest all or part of the assets referable to a Life Policy Investment Fund as OPL considered appropriate;

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

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

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

- (ii) the relevant Statutory Fund or other relevant pool of assets; or
- (iii) an amount received by OPL as a premium under the ~~Commission~~ Cash Products Life Policies and before allocating the balance of the amount to an Investment Option, Life Policy Investment Fund, Benefit Account or Policy Account.

37.5. for the Smart Choice Life Policies:

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

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

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

## **E.2 Administration Agreement**

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

### Particulars

- (i) Master Life Policy – Superannuation Fund Administration Agreement between the Trustee and OPL, dated 2005.
- (ii) Master Life Policy- Superannuation Fund Administration Agreement between the Trustee and OPL, dated 2013.
- (iii) Master Investment Terms- Superannuation Fund Administration Agreement between the Trustee and OPL dated 4 February 2015;
- (iv) Master Investment Terms – Superannuation Fund Administration agreement between the Trustee and OPL dated 6 December 2017;
- (v) Deed of Amendment dated 17 July 2018.

39. The Master Fund Administration Agreement provided that:

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

39.2. In consideration for OPL providing the Administration Services:

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

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

### Particulars

- (i) As to subparagraph 1: clause 2.1(a) and Schedule 1 and Schedule 5 of the Deed of Amendment dated 17 July 2018;
- (ii) As to subparagraphs 2 and 3: clause 5 of the Deed of Amendment dated 17 July 2018;
- (iii) As to subparagraph 3: the fees as listed in the applicable PDSs;
- ~~(iv) Further particulars may be provided following discovery.~~

### E.3 Underlying investments

40. At all material times in the Master Fund Period ~~alternatively, at all material times from 5 January 2015 until the end of the Master Fund Period~~, and in accordance with the terms of the Cash Advantage Life Policies;

40.1. OPL invested the Cash Advantage Money agreed with ANZ in the form of cash deposits to invest all of the Cash Advantage Money in the form of cash deposits with ANZ (Cash Advantage Agreement); and

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

### Particulars

- ~~(i) Services Agreement dated 5 January 2015 between ANZ and OPL in respect of the Cash Advantage Money attributable to the OnePath OneAnswer Products.~~

~~(ii)(i)~~ The Applicants refer to and repeat paragraph 25 and the particulars therefore.

~~(iii)(ii)~~ The Applicants also refer to:

- (A) OneAnswer Supplementary Product Disclosure dated 1 September 2011, page 11;
- (B) OneAnswer Fees Guide dated 27 February 2012, page 19;
- (C) OneAnswer Fees Guide dated 1 July 2013, page 18;

- (D) Frontier Fees Guide dated 1 July 2013, page 11;
- (E) OneAnswer Fees Guide dated 2 May 2016, page 15;
- (F) Frontier Fees Guide dated 2 May 2016, page 12;
- (G) OneAnswer PDS dated 18 September 2017, page 4;
- (H) Frontier PDS dated 18 September 2017, page 4;

(iii) As to subparagraph 2, the Applicants refer to:

- (A) the ANZ Cash Advantage & Smart Choice Cash Investment Option Product Manual dated May 2016 [ABG.020.007.0261]
- (B) the document entitled “Intermediated Wealth Retail Deposits Pricing Change Procedure – Prime CMA & Cash Advantage” dated June 2013 [ABG.506.001.0716];
- (C) the manual entitled “AS400 (V2Plus/AU068)” [ABG.017.001.0004].

~~(iv) Further particulars may be provided following discovery.~~

41. At all material times in the Master Fund Period, alternatively at all material times from 1 December 2011:

41.1. OPL agreed with ANZ that ANZ would pay to it a share of the revenue made by ANZ on the Cash Advantage Money, calculated as 0.45% of the total Cash Advantage Money deposited with ANZ (Cash Advantage Revenue Share Payment); and

41.2. ANZ made the Cash Advantage Revenue Share Payment to OPL each month; and

41.3. OPL retained the Cash Advantage Revenue Share Payment for its own benefit, and pursuant to the Cash Advantage Agreement:

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

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



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

### Particulars

(i) The agreement to the Cash Advantage Revenue Share Payment was express and is recorded in:

(A) Email from Ron Heathcoate (ANZ) to Anthony Zeitoun (ANZ Wealth) dated 14 December 2011 [ABG.539.010.9068];

(B) Email from Anthony Zeitoun to Ron Heathcoate dated 17 April 2012 recording minutes of a meeting on 8 December 2021 [ABG.541.002.4286];

(C) Email from Aaron Lunardello (ANZ) to Anthony Zeitoun dated 27 March 2014 [ABG.509.026.5384];

(D) Invoice spreadsheets recording OPL invoicing ANZ for 45 basis points of the total Cash Advantage Money funds under management (FUM) from 1 December 2011.

(E) Clauses 2.1(a), 2.3, 2.5, Schedule 1 of the Services Agreement dated 5 January 2015 between ANZ and OPL [ABG.001.001.0168] in respect of the Cash Advantage Money attributable to the OnePath OneAnswer Products.

(ii) The monthly payments by ANZ to OPL of the Cash Advantage Revenue Share Payment were recorded in monthly invoice spreadsheets.

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

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

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

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

- (C) OneAnswer Fees Guide dated 1 July 2013, page 18;
- (D) Frontier Fees Guide dated 1 July 2013, page 11;
- (E) OneAnswer Fees Guide dated 2 May 2016, page 15;
- (F) Frontier Fees Guide dated 2 May 2016, page 12;
- (G) OneAnswer PDS dated 18 September 2017, page 4;
- (H) Frontier PDS dated 18 September 2017, page 4;

~~(iv) Further particulars may be provided following discovery.~~

42. At all times in the Master Fund Period:

- 42.1. when members of the Master Fund made a request to the Trustee, alternatively to OPL, that a specified amount from their accounts be invested in an ANZ Term Deposit of a specified term, OPL invested all of the applicable Term Deposits Money for the specified term with ANZ in term deposit accounts offered by ANZ on the day of investment;
- 42.2. ANZ set the interest rates applicable to the ANZ Term Deposits, which ~~OPL~~ OPL accepted (~~ANZ Term Deposits Master Fund Interest Rates~~);
- 42.3. the Trustee did not offer members of the Master Fund an Investment Option allowing members to invest in term deposits with an ADI other than ANZ, even when other ADIs offered higher interest rates;
- 42.4. the Trustee and OPL did not ever tell members of the Master Fund that from time to time for a given term, an ADI or ADIs other than ANZ offered term deposits with a higher interest rate than the ANZ Term Deposits Master Fund Interests Rates.
- ~~42.3. each month, ANZ paid to OPL a fee calculated as up to 0.45% of the Term Deposits Money deposited with ANZ (Term Deposits Fee).~~

#### Particulars

- (i) As to subparagraph 1, ~~The~~ Applicants refer to and repeat paragraph 28 above.

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

(A) the document entitled “Intermediated Wealth Retail Deposits Term Deposit Pricing Change Procedure – Platform & Off Platform” dated June 2013 [ABG.506.001.0714];

(B) the document entitled “Interest Rate Changes – Carded, Negotiated & At Call, Deposit & Home Loans” [ABG.017.001.0365];

(C) the document entitled “Cash Deposit Pricing change process” [ABG.017.001.0004].

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

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

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

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

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

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

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

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

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

~~(iii) — Further particulars may be provided following discovery.~~

42A. At all material times from 1 July 2014:

42A.1 OPL agreed with ANZ that ANZ would pay to it a share of the revenue made by ANZ on the Term Deposits Money, calculated as 0.05% of the total Term Deposits Money deposited with ANZ (Term Deposit Revenue Share Payment);

42A.2 ANZ paid the Term Deposit Revenue Share Payment to OPL each month; and

42A.3 OPL retained the Term Deposit Revenue Share Payment for its own benefit.

### Particulars

(i) The agreement to the Term Deposit Revenue Share Payment was express, and is recorded in:

(A) Email from Aaron Lunadello (ANZ) to Anthony Zeitoun (ANZ Wealth) dated 7 March 2014 [ABG.509.026.5384];

(B) Draft ANZ Term Deposits Services Agreement as of 26 June 2014 [ABG.531.008.8591];

(C) Email from Michael Wolke (ANZ) to Ian Page (ANZ) dated 9 July 2014 [ABG.531.017.0963];

(D) Email from Anthony Zeitoun to Peter Ornsby and Mark McShane (all ANZ Wealth) dated 7 October 2014 [ABG.530.008.1857];

(E) Invoice spreadsheets recording OPL invoicing ANZ for 5 basis points of the total Term Deposits Money funds under management from 1 July 2014.

(ii) The monthly payments by ANZ to OPL of the Term Deposit Revenue Share Payment were recorded in monthly invoice spreadsheets.

43. At all material times between the Master Fund Start Date and 6 November 2013, the Trustee ~~agreed with ANZ to invest~~ed all of the Smart Choice Money in the form of cash deposits with ~~or loans to~~ ANZ (**Master Fund Smart Choice Cash Direct Investments**).

44. ANZ set the interest rates payable on the Master Fund Smart Choice Cash Direct Investments deposited with it, which the Trustee accepted.

### **Particulars**

The Applicants infer that in accordance with:

- (i) standard banking practice (whereby ADIs set the interest rates payable on cash deposit products they offer to depositors and potential depositors), and
- (ii) the process adopted by ANZ in respect of the investment of the Cash Advantage Money during the Master Fund Period, and in respect of the investment of the Smart Choice Money on and after 6 November 2013,

ANZ set the interest rates applicable to the Master Fund Smart Choice Cash Direct Investments.

45. At all material times from around May 2012, alternatively from July 2013, to 6 November 2013: At all material times from 6 November 2013 to the end of the Master Fund Period, and in accordance with the terms of the Smart Choice Life Policies, OPL agreed with ANZ to invest the Smart Choice Money in the form of cash deposits with ANZ (Smart Choice Agreement).

45.1. the Trustee agreed with ANZ that ANZ would pay to it a share of the revenue made by ANZ on the Smart Choice Money, calculated as 0.45% of the total Smart Choice Money deposited by the Trustee with ANZ (Trustee Smart Choice Revenue Share Payment);

45.2. ANZ paid the Trustee Smart Choice Revenue Share Payment to the Trustee each month; and

45.3. the Trustee retained the Trustee Smart Choice Revenue Share Payment for its own benefit.

### Particulars

- (i) The agreement to the Trustee Smart Choice Revenue Share Payment was express, and is recorded in:

(A) Annual Product Review for Smart Choice Cash Option dated August 2013 [ABG.531.016.6638];

(B) OPL Board Paper for meeting held on 20 September 2013 [OPL.5023.0001.0039];

(C) Undated Services Agreement between ANZ and OPL in respect of Smart Choice [OPL.5005.0001.0806] which is stated to document an existing arrangement between the parties which commenced prior to 1 July 2013;

(D) Invoice spreadsheets recording the Trustee invoicing ANZ for 45 basis points of the total Smart Choice Money from May 2012.

(ii) The monthly payments by ANZ to the Trustee of the Smart Choice Revenue Share Payment were recorded in monthly invoice spreadsheets.

~~(i) Undated Services Agreement between ANZ and OPL which is stated to document an existing arrangement between the parties which commenced prior to 1 July 2013.~~

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

46. At all material times between 6 November 2013 and the end of the Master Fund Period ~~and pursuant to the Smart Choice Agreement:~~

46.1. OPL invested the Smart Choice Money with ANZ in a cash deposit account titled "ANZ V2 Plus", via the OneAnswer Cash Advantage Trust for which OnePath Funds Management Limited (**OPFM**) was the Responsible Entity;

46.2. ANZ set the interest rate payable on the Smart Choice Money deposited in the ANZ V2 Plus account, which OPL accepted (**Smart Choice Cash Master Fund Interest Rates**);

~~46.3. each month, ANZ paid to OPL a fee calculated as a proportion of up to 0.50%, alternatively up to 0.45%, per annum of the total Smart Choice Money invested in the pooled ANZ v2 Plus Account (**Smart Choice Cash Fee**).~~

#### Particulars

(i) Undated Services Agreement between ANZ and OPL in respect of Smart Choice [OPL.5005.0001.0806] which is stated to document an existing arrangement between the parties which commenced

prior to 1 July 2013. Smart Choice Agreement clauses 2.1(a), 2.3, Schedule 4

(ii) As to subparagraph 2, The Applicants refer to:

(A) the document entitled Cash Deposit Pricing Change Process [ABG.017.001.0004]; and

(B) The ANZ Cash Advantage & Smart Choice Cash Investment Option Product Manual dated May 2016 [ABG.020.007.0261].

(ii) infer that in accordance with standard banking practice, ANZ set the Smart Choice Cash Master Fund Interest Rates.

46A. At all material times from 6 November 2013 to the end of the Master Fund Period:

46A.1 OPL agreed with ANZ that ANZ would pay to it a share of the revenue made by ANZ on the Smart Choice Money, calculated as up to 0.45% of the total Smart Choice Money deposited by OPL with ANZ (OPL Smart Choice Revenue Share Payment);

46A.2 ANZ paid the OPL Smart Choice Revenue Share Payment to OPL each month; and

46A.3 OPL retained the OPL Smart Choice Revenue Share Payment for its own benefit.

#### Particulars

(i) The agreement to the OPL Smart Choice Revenue Share Payment was express, and is recorded in:

(A) OPL Board Paper for meeting held on 20 September 2013 [OPL.5023.0001.0039];

(B) Email from Michael Wolke to Brett Marshal and Tobias Hedgeland (all ANZ Wealth) dated 19 December 2014 [ABG.509.339.3616];

(C) Annual Product Review for Smart Choice Cash Option dated December 2014 [ABG.544.001.0088];

(D) Undated Services Agreement between ANZ and OPL [OPL.5005.0001.0806] which is stated to document an existing arrangement between the parties which commenced prior to 1 July 2013;

(E) Invoice spreadsheets recording OPL invoicing ANZ for 45 basis points of the total Smart Choice Money after November 2013.

~~(iii)(ii)~~ As to subparagraph 3, tThe Applicants refer to:

(A) ANZ Smart Choice Retail Products PDS dated 11 November 2013, page 9.

(B) ANZ Smart Choice Retail Products PDS dated 18 February 2017, page 9.

(C) ANZ Smart Choice Retail Products PDS dated 17 March 2018, page 8.

(D) ANZ Smart Choice Employer Product PDS dated 25 May 2015, page 7

(E) ANZ Smart Choice Employer Product PDS dated 18 February 2017, page 8.

(iii) The monthly payments by ANZ to OPL of the OPL Smart Choice Revenue Share Payment were recorded in monthly invoice spreadsheets.

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

47. At all material times in the Master Fund Period, the Cash Advantage ~~Fee~~Revenue Share Payment, the Term Deposits ~~Fee~~Revenue Share Payment and the OPL Smart Choice ~~Fee~~Revenue Share Payment (together the ~~Cash Investment Fees~~OPL Revenue Share Payments), ~~were not paid in respect of any services OPL provided as issuer of the Cash Products Life Policies and/or under the Master Fund Administration Agreement to the Trustee or members of the Master Fund who were invested in the Cash Advantage Option, ANZ Term Deposits Option or Smart Choice Cash Option (as applicable).~~ were in excess of the value of the benefits or services, if



~~any, provided by OPL in respect of the investments with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money.~~

### **Particulars**

- (i) ~~The Applicants refer to and repeat the particulars to paragraphs 41, 42A, 46A above. The benefits or services, if any, provided by OPL in connection the investment with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money with ANZ were covered by, in whole or part, its obligations as issuer of the Life Policies, and/or its obligations as provider of the Administration Services under the Master Fund Administration Agreement, and it was fully remunerated for those benefits and services by way of:~~

~~(A) the remuneration and fees it received as issuer of the Life Policies, as pleaded in paragraphs 37.4 and 37.6;~~

~~(B) the remuneration and fees it received in connection with its role as the provider of Administration Services under the Master Fund Administration Agreement, as pleaded in paragraph 39.2 and 39.3.~~

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

48. ~~[Not used] Further or alternatively to paragraph 47 above, at all material times in the Master Fund Period, OPL was already paid remuneration or fees in consideration for the benefits or services, if any, provided by OPL in respect of the investments with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money.~~

### **Particulars**

- (i) ~~OPL was sufficiently remunerated for the benefits or services, if any, it provided in connection with the investment with ANZ of the Cash Advantage Money, Term Deposits Money or Smart Choice Cash Money by way of:~~

~~(A) the remuneration and fees it received as issuer of the Life Policies, as pleaded in paragraph 37.4 and 37.6;~~

~~(B) the remuneration and fees it received in connection with its role as the provider of Administration Services under the Master Fund Administration Agreement, as pleaded in paragraph 39.2 and 39.3.~~

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

49. The payment by ANZ to OPL of the Cash Advantage ~~Fee~~ Revenue Share Payment reduced the Cash Advantage Master Fund Interest Rate which otherwise would have been offered and paid on the Cash Advantage Money in the absence of the Cash Advantage Revenue Share Payment ~~Fee~~.

#### **Particulars**

The Applicants infer from the fact of the Cash Advantage Revenue Share Payment being paid by ANZ to OPL, and that the payment was calculated as a percentage of the total Cash Advantage Money invested with ANZ, that ANZ reduced the Cash Advantage Master Fund Interest Rate which it would otherwise have offered and paid on the Cash Advantage Money.

50. The payment by ANZ to OPL of the Term Deposits Revenue Share Payment ~~Fee~~ reduced the applicable Term Deposits Master Fund Interest Rates which otherwise would have been offered and paid on the Term Deposits Money in the absence of the Term Deposits Revenue Share Payment ~~Fee~~.

#### **Particulars**

The Applicants infer from the fact of the Term Deposit Revenue Share Payment being paid by ANZ to OPL, and that the payment was calculated as a percentage of the total Term Deposits Money invested with ANZ, that ANZ reduced the Term Deposit Master Fund Interest Rate which it would otherwise have offered and paid on the Term Deposits Money.

51. The payment by ANZ to OPL of the OPL Smart Choice Revenue Share Payment ~~Fee~~ reduced the Smart Choice Cash Master Fund Interest Rate which otherwise would have been offered and paid on the Smart Choice Money in the absence of the OPL Smart Choice Cash Revenue Share Payment ~~Fee~~.

### Particulars

The Applicants infer from the fact of the OPL Smart Choice Revenue Share Payment being paid by ANZ to OPL, and that the payment was calculated as a percentage of the total Smart Choice Money invested with ANZ, that ANZ reduced the Smart Choice Master Fund Interest Rate which it would otherwise have offered and paid on the Smart Choice Money.

- 51A. The payment by ANZ to the Trustee of the Trustee Smart Choice Revenue Share Payment reduced the Smart Choice Cash Master Fund Interest Rate which otherwise would have been offered and paid on the Smart Choice Money in the absence of the Trustee Smart Choice Cash Revenue Share Payment.

### Particulars

The Applicants infer from the fact of the Trustee Smart Choice Revenue Share Payment being paid by ANZ to the Trustee, and that the payment was calculated as a percentage of the total Smart Choice Money invested with ANZ, that ANZ reduced the interest rates paid on the Master Fund Smart Choice Cash Direct Investments, which it would otherwise have offered and paid on the Smart Choice Money.

52. By reason of the matters pleaded in paragraphs 47 to 51A above, at all material times in the Master Fund Period, the returns to members of the Master Fund invested in the Cash Advantage Option, the ANZ Term Deposits Option and the Smart Choice Cash Option were reduced by the payment by ANZ to OPL of the ~~Cash Investment Fees~~OPL Revenue Share Payments and the payment by ANZ to the Trustee of the Trustee Smart Choice Revenue Share Payment (Revenue Share Payments).
53. At all material times in the Master Fund Period, the Trustee knew:
- 53.1. that OPL was paid by ANZ the ~~Cash Investment Fees~~OPL Revenue Share Payments;
- 53.2. the amount of the OPL Revenue Share Payments~~Cash Investment Fees~~; and
- 53.3. the matters in paragraphs 47 to 52 above.

### **Particulars**

- (i) That the Trustee knew of these matters is to be inferred from:

(A) the PDSs, Fee Guides and other disclosure documents issued jointly by the Trustee and OPL in relation to the ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products which disclosed the following (and not further information) the fact and amount of the Cash Investment Fees as particularised in paragraphs 40 to 42:

- a. For the Cash Advantage Option and Term Deposit Option: "We may receive a financial payment or non financial benefit from ANZ in relation to amounts held in ANZ Cash Advantage or in relation to investing in ANZ Term Deposit options with ANZ. These payments are not an additional charge to you".
- b. For the Smart Choice Option: "OnePath Life receives payments of up to 0.50% pa from ANZ on Cash held with ANZ. These payments are not an additional charge to you and these payments do not affect the performance of those Cash investments held with ANZ".

~~(B) the fact the Trustee was a party to the Master Fund Administration Agreement and the recipient of the Administration Services provided by OPL, pursuant to which the Trustee was aware of the nature and the value of the services provided by OPL under the agreement, and the fees and remuneration OPL received under the agreement;~~

(B) the Trustee had entered into a similar arrangement with ANZ in respect of the Smart Choice Money prior to 6 November 2013. The Applicants refer to and repeat particular (i) to paragraph 46A above;

(C) at least the following persons working within the "ANZ Wealth" business unit, with responsibilities on behalf of the Trustee and OPL, were aware of the OPL Revenue Share Payments:

- a. Mark Pankhurst, Head of Superannuation & Investment Platforms, ANZ Wealth;

b. Anthony Zeitoun, Senior Manager, Retail Platforms, Pensions & Investments, ANZ Wealth;

c. Natasha Breitman, National Manager, Product, Super & Insurance, ANZ Wealth,

as recorded in the following:

d. Emails between Mark Pankhurst and Anthony Zeitoun dated March 2014 [ABG.509.027.8075];

e. Request for execution of document dated 19 December 2014, in respect of a Services Agreement – ANZ Cash Advantage fund, signed by Mark Pankhurst [OPL.5028.0001.0781];

f. Services Agreement dated 5 January 2015 between ANZ and OPL [ABG.001.001.0168] in respect of the Cash Advantage Money, listing Anthony Zeitoun as a contact person for OPL;

g. Undated Services Agreement between ANZ and OPL in respect of Smart Choice [OPL.5005.0001.0806], listing Natasha Breitman as a contact person for OPL;

h. emails between Natasha Breitman and Mark Pankhurst, among others, dated 10 May 2018 [ABG.509.344.4702];

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

(ii) Further particulars may be provided following discovery service of the Respondents' evidence.

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

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

54.1A from 1 September 2011 until around 31 December 2012, were for most of the time, 0.36% above the Reserve Bank of Australia cash rate that applied during the corresponding period (RBA Cash Rate);

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

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

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

#### Particulars

(i) The Applicants refer to:

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

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

~~(ii) Further particulars may be provided following discovery~~

55. The Cash Advantage Master Fund Interest Rates for the ANZ OneAnswer Products and OnePath OneAnswer Products were at all times from 1 January 2013 until the end of the Master Fund Period around 0.30% lower than the Cash Advantage Master Fund Interest Rates for the Frontier Product.

#### Particulars

(i) The Applicants refer to:

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

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

~~(ii) Further particulars may be provided following discovery~~

56. ~~At all material times from 1 January 2013 to the end of the Master Fund Period, t~~The Cash Advantage Master Fund Interest Rates were:

- 56.1. at all material times from 1 January 2013 to the end of the Master Fund Period, lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; and
- 56.2. at all material times from about 1 January 2012 to the end of the Master Fund Period, lower than interest rates offered by ANZ on equivalent investments, including to unrelated Regulated Superannuation Funds.

### **Particulars**

- (i) As to sub-paragraph 56.1:

(A) the National Australia Bank (NAB) paid interest rates on investments made in the MLC MasterKey Cash Fund (MLC Cash Fund Interest Rates) which were higher than the Cash Advantage Master Fund Interest Rates in the period 1 January 2013 to the end of the Master Fund Period.

(B) the MLC Cash Fund Interest Rates are published and publicly available from <http://www.mlc.com.au/personal/investments/find-a-fund/our-funds/cash-and-term-deposits/mlc-cash-fund/historical-rates>.

(C) the comparison at (A) above is made before any applicable investment fees, administration fees and taxes. The published MLC Cash Fund Interest Rates are net of an investment fee of 0.25% (applied between around 2011 to 2018) and 0.24% (applied between around 2019 and 2020).

(D) investments in the MLC MasterKey Cash Fund were offered from time to time during the Cash Relevant Period through at least the following superannuation and pension products: MasterKey Super and Pension Fundamentals; MasterKey Business Super; and MasterKey Personal Super and Pension (MasterKey Products);

(E) the MasterKey Products were available:

a. between approximately 2011 and 2016, in the Universal Super Scheme, the trustee of which was MLC Nominees Pty Ltd;

b. between approximately 2016 and 2020, in the MLC Super Fund, the trustee of which was NULIS Nominees (Australia) Ltd;

(ii) As to sub-paragraph 56.2:

(A) from about 1 January 2012 to the end of the Master Fund Period, the interest rates offered and paid by ANZ on the ANZ Prime Cash Management Account (**Prime CMA**) were higher than the Cash Advantage Master Fund Interest Rates. The Prime CMA was a cash management account available to members of ANZ OneAnswer Pension. The Applicants refer to the MasterFund Annual Report dated December 2015, listing the annual yearly returns for the Prime CMA from 2011 to 2015 [**ABG.509.262.5765**] and the RPS Annual Report, listing the annual yearly returns for the Prime CMA from 2016 to 2020 [**OPC.0010.0001.0157**];

(B) from 1 July 2013, the interest rates offered by ANZ on investments made by at least thirteen other investors, including Regulated Superannuation Funds other than the Master Fund, were higher than the Cash Advantage Master Fund Interest Rates. Further particulars can be provided on a confidential basis.

57. From 1 June 2012 to the end of the Master Fund Period, the Term Deposits Master Fund Interest Rates for **three month**, six month and twelve month term deposits were:

57.1. from 1 September 2011 to the end of the Master Fund period, on average lower than rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; **and**

57.2. from at least October 2014 to at least March 2019 lower than rates offered by ANZ on equivalent investments, including to Regulated Superannuation Funds.



### Particulars

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

(ii) As to sub-paragraph 57.1:

(A) NAB paid interest rates (**MLC Term Deposit Interest Rates**) on six month and twelve term deposits available in the Universal Super Scheme and the MLC Super Fund (**MLC Term Deposits**) which were on average higher than the Term Deposits Master Fund Interest Rates.

(B) The six month and twelve month MLC Term Deposit Interest Rates are available from <http://www.mlc.com.au/personal/investments/find-a-fund/our-funds/cash-and-term-deposits/mlc-cash-fund/historical-rates>.

(C) Investments in MLC Term Deposits were offered from time to time during the Cash Relevant Period through at least the following superannuation and pension products: MasterKey Super and Pension Fundamentals and MasterKey Personal Super and Pension.

(D) From 1 September 2011 to the end of the Master Fund Period, NAB offered three month, six month and twelve month term deposits to at least the following Regulated Superannuation Funds and trustees with interest rates that were on average higher than the applicable Term Deposits Master Fund Interest Rates:

a. IOOF Portfolio Service Superannuation Fund;

b. AustralianSuper;

c. Avanteos Superannuation Trust;

d. QSuper;

e. Aware Super;

f. Construction and Building Unions Superannuation Fund (CBUS);

g. Bond Street;

h. HUB24 Super Fund;

i. Netwealth Superannuation Master Fund;

j. DPM Retirement Service;

l. Premium Choice Retirement Service;

n. National Nominees ANF MLC Limited;

o. MLC Pooled Superannuation Trust; and

q. MLC Investments Limited.

(iii) As to sub-paragraph 57.2, between at least October 2014 and March 2019, ANZ paid higher interest rates for equivalent term deposit investments to Regulated Superannuation Funds other than the Master Fund, as recorded in deposit pricing packs prepared by ANZ.

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

58. ~~At all material times from the Master Fund Start Date until 6 November 2013, t~~The interest rate paid by ANZ on the Master Fund Smart Choice Cash Direct Investments:

58.1. was for most of the time from the Master Fund Start Date until 6 November 2013, 0.20% above RBA Cash Rate; and

58.2. was:

(a) from the Master Fund Start Date until 6 November 2013, lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; and

(b) from about 1 January 2012 until 6 November 2013, lower than interest rates offered by ANZ on equivalent investments, including to unrelated Regulated Superannuation Funds.

### Particulars

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

(ii) Further particulars may be provided following discovery. As to subparagraph 2(a), from the Master Fund Start Date until 6 November 2013, NAB paid interest rates on investments made in the MLC MasterKey Cash Fund which were for most of the period higher than the interest rates paid by ANZ on the Smart Choice Cash Direct Investments. The Applicants refer to and repeat particulars (i) to paragraph 56.

(iii) As to subparagraph 2(b):

(A) from about 1 January 2012 to 6 November 2013, the interest rates offered and paid by ANZ on the Prime CMA were higher than the Cash Advantage Master Fund Interest Rates. The Applicants refer to and repeat particulars (ii)(A) to paragraph 56 above;

(B) from 1 July 2013 until 6 November 2013, the interest rates offered by ANZ to Regulated Superannuation Funds other than the Master Fund were higher than the Cash Advantage Master Fund Interest Rates. The Applicants refer to and repeat particulars (ii)(B) to paragraph 56.

59. The Smart Choice Cash Master Fund Interest Rates:

59.1. from 6 November 2013 until 1 January 2017, were for most of the time, 0.20% above the RBA Cash Rate;

59.2. from 1 January 2017 to the end of the Master Fund Period, were for most of the time, 0.10% above the RBA Cash Rate.

59.3. at all material times from 6 November 2013 to the Master Fund End Date, were

(a) lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; and

(b) lower than interest rates offered by ANZ on equivalent investments, including to unrelated Regulated Superannuation Funds.

### Particulars

(i) The Applicants refer to:

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

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

(C) the OnePath Master Fund Annual Reports for FY2014 to FY2019.

(ii) Further particulars may be provided following discoveryAs to subparagraph 3(a), from 6 November 2013 until the end of the Master Fund Period, NAB paid interest rates on investments made in the MLC MasterKey Cash Fund which were higher than the interest rates paid by ANZ on the Smart Choice Cash Direct Investments. The Applicants refer to and repeats particulars (i) to paragraph 56.

(iii) As to subparagraph 3(b):

(A) from 6 November 2013 to the end of the Master Fund Period, the interest rates offered and paid by ANZ on the Prime CMA were higher than the Smart Choice Master Fund Master Fund Interest Rates. The Applicants refer to and repeat particulars (ii)(A) to paragraph 56 above;

(B) from 6 November 2013 until the end of the Master Fund Period, the interest rates offered by ANZ on investments made by other investors, including Regulated Superannuation Funds other than the Master Fund, were higher than the Smart Choice Master Fund Interest Rates. The Applicants refer to and repeats particulars (ii)(B) to paragraph 56.

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

### **F.1 Direct Investments**

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

#### **Particulars**

- (i) The witness statement of Victoria Weekes dated 14 August 2018, filed on behalf of the Trustee in the Banking Royal Commission, paragraph 19(a);
- (ii) Redemption Deed dated 10 April 2019 between OPL and the Trustee [OPL.5013.0001.0109].~~Further particulars may be provided following discovery.~~

61. On or before 13 April 2019, OPL ceased providing Administration Services to the Trustee in respect of ANZ OneAnswer Products, OnePath OneAnswer Products and Frontier Products.

#### **Particulars**

- (i) ANZ Retirement Portfolio Service Annual Report for period to 30 June 2019, issued December 2019, page 45
- (ii) OnePath Retirement Portfolio Service Annual Report for period to 30 June 2019, issued December 2019, page 54.
- (iii) ~~Further particulars may be provided following discovery~~Wealth Australia Product Committee Submission entitled, "Successor Fund Transfer and Change of Administrator" dated 29 October 2018 [OPC.0016.0001.0003].

62. In respect of the Cash Advantage Money, at all times in the RPS Cash Period:

62.1. the Trustee invested all of the Cash Advantage Money directly in the form of cash deposits with ~~or loans to~~ ANZ (**Cash Advantage Direct Investments**);~~;~~

62.2. ANZ set the interest rates paid on the Cash Advantage Direct Investments which the Trustee accepted (**Cash Advantage RPS Interest Rates**).

#### Particulars

(i) Frontier Product PDS dated 13 April 2019, p3;

(ii) Frontier Product PDS dated 14 December 2019, p3;

(iii) Frontier Investment Funds Guide dated 14 December 2019, p36;

(iv) As to subparagraph 2, the Applicants refer to:

(A) the ANZ Cash Advantage & Smart Choice Cash Investment Option Product Manual dated May 2016 [ABG.020.007.0261]

(B) the document entitled "Intermediated Wealth Retail Deposits Pricing Change Procedure – Prime CMA & Cash Advantage" dated June 2013 [ABG.506.001.0716];

(C) the manual entitled "AS400 (V2Plus/AU068)" [ABG.017.001.0004];

(D) the ANZ Cash Advantage & Smart Choice Cash Investment Option Product Manual dated May 2016 [ABG.020.007.0261];

(E) the manual entitled "AS400 (V2 Plus/AU068)" dated 2019 [ABG.018.001.0017].

~~(iv) As to subparagraph 2, the Applicants inter that in accordance with standard banking practice, ANZ set the Cash Advantage RPS Interest Rates;~~

~~(v) Further particulars may be provided following discovery.~~

63. In respect of the Term Deposits~~s~~ Money, at all times in the RPS Cash Period:

- 63.1. when members of the RPS Fund made a request to the Trustee that a specified amount from their accounts be invested in an ANZ Term Deposit of a specified term, The-the Trustee invested ~~all of the~~ applicable Term Deposits Money for the specified term with ANZ in term deposit accounts offered by ANZ on the day of the investment; **(Term Deposits Direct Investments)**;
- 63.2. ANZ set the interest rates applicable to the Term Deposit Direct Investments which the Trustee accepted **(Term Deposits RPS Interest Rates)**;
- 63.3. the Trustee did not offer members of the RPS Fund an Investment Option allowing members to invest in term deposits with an ADI other than ANZ, even when other ADIs offered higher interest rates;
- 63.4. the Trustee did not ever tell members of the RPS Fund that from time to time for a given term, an ADI or ADIs other than ANZ offered term deposits with a higher interest rate than the ANZ Term Deposits RPS Interests Rates.

#### Particulars

- (i) Frontier Product PDS dated 13 April 2019, p3;
- (ii) Frontier Product PDS dated 14 December 2019, p3;
- (iii) Frontier Investment Funds Guide dated 14 December 2019, p36;
- (iv) As to subparagraph 2, the Applicants refer to:
  - (A) the document entitled “Intermediated Wealth Retail Deposits Term Deposit Pricing Change Procedure – Platform & Off Platform” dated June 2013 [ABG.506.001.0714];
  - (B) the document entitled “Interest Rate Changes – Carded, Negotiated & At Call, Deposit & Home Loans” [ABG.017.001.0365];
  - (C) the document entitled “Cash Deposit Pricing change process” [ABG.017.001.0004];
  - (D) the document entitled “Cash Deposit Pricing Change Process” dated 2019 [ABG.018.001.0017].

~~(iv) As to subparagraph 2, the Applicants inter that in accordance with standard banking practice, ANZ set the Term Deposits RPS Interest Rates;~~

~~(v) Further particulars may be provided following discovery.~~

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

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

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

#### Particulars

- (i) Smart Choice Retail Products Additional Information Guide dated 13 April 2019, pages 2-3, 17 and 24;
- (ii) Smart Choice Retail Products Additional Information Guide dated 14 December 2019, pages 2-3, 18, 24
- (iii) Smart Choice Employer Product Additional Information Guide dated 13 April 2019, pages 2-3, 18, 31;
- (iv) Smart Choice Employer Product Additional Information Guide dated 14 December 2019, pages 2-3, 18, 31;

(v) As to subparagraph 2, the Applicants refer to:

(A) the manual entitled "AS400 (V2Plus/AU068)"  
[ABG.017.001.0004];

(B) the ANZ Cash Advantage & Smart Choice Cash Investment  
Option Product Manual dated May 2016 [ABG.020.007.0261];

(C) the manual entitled "AS400 (V2 Plus/AU068)" dated 2019  
[ABG.018.001.0017].



~~(v) As to subparagraph 2, the Applicants infer that in accordance with standard banking practice, ANZ set the Smart Choice Cash RPS Interest Rates;~~

~~(vi) Further particulars may be provided following discovery.~~

## F.2 Interest Rates

65. The Cash Advantage RPS Interest Rates, at all material times in the RPS Cash Period:

65.1. were 0.05% above the RBA Cash Rate

65.2. were:

(a) lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; and

(b) lower than interest rates offered by ANZ on equivalent investments, including to unrelated Regulated Superannuation Funds.

### Particulars

(i) The Applicants refer to:

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

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

~~(ii) Further particulars may be provided following discovery~~As to subparagraph 2(a), in the RPS Cash Period, NAB paid interest rates on investments made in the MLC MasterKey Cash Fund which were higher than the Cash Advantage RPS Interest Rates paid by ANZ. The Applicants refer to and repeat particulars (i) to paragraph 56.

(iii) As to subparagraph 3(b):

(A) from the RPS Start Date until at least 2020, the interest rates offered and paid by ANZ on the Prime CMA were higher than

the Cash Advantage RPS Master Fund Interest Rates. The Applicants refer to and repeat particulars (ii)(A) to paragraph 56 above.

(B) During the RPS Cash Period, the interest rates offered by ANZ on investments made by other investors, including Regulated Superannuation Funds other than the RPS Fund, were higher than the Cash Advantage RPS Interest Rates paid by ANZ. The Applicants refer to and repeat particulars (ii)(B) to paragraph 56.

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

#### **Particulars**

- (i) The Applicants refer to the Term Deposits Interest Rates published by the Trustee from time to time on the OnePath Website;
- (ii) Further particulars may be provided following discovery NAB paid interest rates on six month and twelve month MLC Term Deposits which were on average higher than the Term Deposit RPS Interest Rates. The Applicants refer to particulars (ii) to paragraph 57.2 above.
- (iii) In the RPS Cash Period, NAB offered three month, six month and twelve month term deposits to the following Regulated Superannuation Funds with interest rates that were on average higher than the applicable Term Deposits Master Fund Interest Rates:
  - (A) IOOF Portfolio Service Superannuation Fund;
  - (B) AustralianSuper;
  - (C) Avanteos Superannuation Trust;
  - (D) QSuper;

(E) Aware Super;

(F) Legalsuper;

(G) Construction and Building Unions Superannuation Fund (CBUS);

(H) Bond Street;

(I) HUB24 Super Fund;

(J) Netwealth Superannuation Master Fund;

(K) DPM Retirement Service;

(L) Premium Choice Retirement Service;

(M) National Nominees ANF MLC Limited;

(N) MLC Pooled Superannuation Trust; and

(O) MLC Investments Limited.

67. The Smart Choice Cash RPS Interest Rates:

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

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

67.3. at all material times in the RPS Cash Period, were:

(a) lower than interest rates offered by at least some ADIs other than ANZ on equivalent investments, including to Regulated Superannuation Funds; and

(b) lower than interest rates offered by ANZ on equivalent investments, including to unrelated Regulated Superannuation Funds.

### Particulars

(i) The Applicants refer to:

- (A) the Smart Choice Interest Rates published by the Trustee from time to time on the ANZ Website;
- (B) the Quarterly Reports on Smart Choice Returns published on the ANZ Website;
- (C) the OnePath Master Fund Annual Reports for FY2019 to FY2020.

(ii) As to subparagraph 3(a), in the RPS Cash Period, NAB paid interest rates on investments made in the MLC MasterKey Cash Fund which were higher than the Smart Choice RPS Interest Rates paid by ANZ. The Applicants refer to and repeats particulars (i) to paragraph 56.

(iii) As to subparagraph 3(b):

(A) from the start of the RPS Cash Period until at least 2020, the interest rates offered and paid by ANZ on the Prime CMA were higher than the Cash Advantage RPS Master Fund Interest Rates. The Applicants refer to and repeat particulars (ii)(A) to paragraph 56 above.

(B) During the RPS Cash Period, the interest rates offered by ANZ on investments made by other investors, including Regulated Superannuation Funds other than the RPS Fund, were higher than the Smart Choice RPS Interest Rates paid by ANZ. The Applicants refer to and repeats particulars (ii)(B) to paragraph 56.

~~(ii) — Further particulars may be provided following discovery~~

## **FA. MONITORING**

### **FA.1 Master Fund Period**

67A. At all material times in the Master Fund Period, the Trustee and OPL did not compare the interest rates paid by ANZ on any of the Cash Advantage Option, Term Deposits Option and (prior to 6 November 2013) the Smart Choice Cash Option, with rates of

interest offered by ANZ on comparable investments, including to unrelated Regulated Superannuation Funds.

67B. At all material times from the Master Fund Start Date to 6 November 2013, the Trustee did not compare the interest rates paid by ANZ on the Smart Choice Option, with rates of interest offered by ANZ on comparable investments, including to unrelated Regulated Superannuation Funds.

## **FA.2 RPS Cash Period**

67C. At all material times in the RPS Cash Period, the Trustee did not compare the interest rates paid by ANZ on any of the Cash Advantage Option, Term Deposits Option and Smart Choice Cash Option, with rates of interest offered by ANZ on comparable investments, including to unrelated Regulated Superannuation Funds.

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

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

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

#### **Particulars**

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

~~(ii) — Further particulars may be provided following discovery.~~

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

### Particulars

- (i) The ~~fees payable by the Trustee to OPL under the Life Policies, and the fees payments~~ which OPL was entitled to receive ~~from third parties~~ in connection with the investments made under the Cash Products Life Policies (including the OPL Revenue Share Payments), were higher than would be reasonable to expect would have applied if the Trustee were dealing with OPL at arm's length in the same circumstances.
- ~~(ii) The terms of the Cash Advantage Life Policies and Term Deposit Life Policies alleged at paragraphs 37.3(aa) and 37.4 above were more favourable to OPL than those which it is reasonable to expect would have applied if the Trustee were dealing with OPL at arm's length in the same circumstances.~~
- ~~(iii) The terms of the Smart Choice Life Policies alleged at paragraph 37.6 above were more favourable to OPL than those which it is reasonable to expect would have applied if the Trustee were dealing with OPL at arm's length in the same circumstances.~~
- ~~(ii) Further particulars may be provided following discovery and service of lay and expert evidence.~~

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

### Particulars

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

72. The rate of interest the Trustee agreed to accept from ANZ in respect of the Master Fund Smart Choice Cash Direct Investments was lower, and therefore the terms and conditions of the transactions were more favourable to ANZ, than it is reasonable to expect would apply if the Trustee were dealing with ANZ at arm's length in the same circumstances.

#### Particulars

- (i) The Applicants refer to and repeat paragraph 58 above.

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

73. By reason of the matters pleaded in paragraphs 71 and 72, in making the Master Fund Smart Choice Cash Direct Investments, at all material times from the Master Fund Start Date to 6 November 2013, the Trustee contravened s 109(1) of the SIS Act (**Smart Choice Arm's Length Contravention**).

74. At all material times in the RPS Cash Period, in respect of investment of the Cash Money, the Trustee was not dealing with ANZ at arm's length.

#### Particulars

- (i) At all material times in the RPS Cash Period, the Trustee was a Closely-Held Subsidiary of ANZ.

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

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

#### Particulars

- (i) The Applicants refer to and repeat paragraphs 65 to 67 above.

(ii) ~~Further particulars may be provided following discovery and service of lay and expert evidence.~~ Report of David Hartley filed on 1 March 2024.

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

## G.2 Care and skill contraventions

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

77.1. not have invested the Cash Advantage Money or Term Deposits Money, or retained such investments; ~~in~~

(a) in Life Policies which:

- (i) provided OPL broad discretion to invest the funds;
- (ii) entitled OPL to receive and retain Fees and the Cash Advantage Revenue Share Payments; and

(b) in the circumstances (as applicable prior to 30 June 2013) set out in paragraphs 37.3, 37.4, 40 to 42A, 47 to 50, 52 to 53, 67A and 69 above;

77.2. in respect of the Cash Advantage Money, have:

(a) invested the Cash Advantage Money directly:

- (i) in a fund, or similar investment, which adopted a strategy of investing in a rolling term deposits and interest bearing accounts mix of money market instruments issued by one or more ADIs;
- (ii) alternatively, in interest-bearing accounts with one or more ADIs;
- (iii) alternatively, with ANZ on the basis that ANZ offer market leading interest rates, alternatively, interest rates at the level it paid to other Regulated Superannuation Funds for equivalent investments,  
  
according to which option based on whichever investments the Trustee ~~would reasonably have~~ expected would maximise the net returns on investments of the Cash Money commensurate with the risk of the investment;



- (b) alternatively, continued to invest the Cash Advantage Money in life policies issued by OPL, but only the basis that OPL would:
  - (i) not otherwise be paid the ~~Cash Investment Fees~~ Cash Advantage Revenue Share Payments by ANZ, alternatively, would credit or rebate the amount of the Cash Advantage Revenue Share Payments ~~Cash Investment Fees~~ to Members' accounts;
  - (ii) not otherwise charge or be paid any other fees or other amounts in reduction of returns in respect of Cash Advantage Money; and
  - (iii) invest in underlying investments of the kind set out in subparagraph (a) above;
- (c) formulated and given effect to an investment strategy, for the purpose of complying with the Previous Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of the Cash Advantage Money; and
- (d) regularly compared the investment of the Cash Advantage Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ.

77.3. in respect of the Term Deposits Money, have:

- (a) either:
    - (i) made available to members the choice of term deposits offered by more than one ADI;
    - (ii) alternatively, invested the Term Deposits Money with one ADI which was offering market leading interest rates;
    - (iii) alternatively, invested the Term Deposits Money directly with ANZ on the basis that ANZ offer market leading interest rates,
- according to which option the Trustee expected would maximise the net returns on investments of the Term Deposits Money commensurate with the risk of the investment;

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

(iv) not otherwise be paid the Term Deposit Revenue Share Payments by ANZ, alternatively, would credit or rebate the amount of the Term Deposit Revenue Share Payments to Members' accounts;

(v) not otherwise charge or be paid any other fees or other amounts in reduction of returns in respect of Term Deposits Money; and

(vi) invest in underlying investments of the kind set out in subparagraph (a) above;

(b) formulated and given effect to an investment strategy, for the purpose of complying with the Previous Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of the Term Deposits Money;

(c) regularly compared the investment of the Term Deposits Money against the terms and rates of interest offered on comparable investments by ANZ and other ADIs.

78. The Trustee did not take any of the steps referred to in subparagraph 77.2 or 77.3 above.

79. In the premises, by:

79.1. investing the Cash Advantage Money and/or the Term Deposits Money in the Cash Products Life Policies;

79.1A investing the Cash Advantage Money in circumstances where ANZ paid to OPL the Cash Advantage Revenue Share Payment;

79.2. retaining earlier such investments; and/or

79.3. failing to take the steps set out in subparagraphs s 77.2 and 77.3 above,

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

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

80.1. not have invested the Smart Choice ~~Cash~~ Money, or retained such investments;

(a) exclusively in deposits with ANZ in the circumstances (as applicable prior to 30 June 2013) set out in paragraphs 44, 45, 58, 67B and 72 above;

(b) in circumstances where ANZ paid the Trustee Smart Choice Revenue Share Payment to the Trustee;

80.2. have:

(a) invested the Smart Choice ~~Cash~~ Money:

(i) in a fund, or similar investment, which adopted a strategy of investing in a ~~mix of money market instruments~~ rolling term deposits and interest bearing accounts issued by one or more ADIs;

(ii) alternatively, in interest-bearing accounts with one or more ADIs,

according to which option ~~based on whichever investments~~ the Trustee ~~would reasonably have~~ expected would maximise the net returns on investments of the Smart Choice ~~Cash~~ Money commensurate with the risk of the investment;

(b) alternatively, continued to invest the Smart Choice ~~Cash~~ Money in deposits with ANZ, but only the basis that:

(i) ANZ would offer market leading interest rates, alternatively, interest rates at the level it paid to other Regulated Superannuation Funds for equivalent investments; and

(ii) the Trustee would not be paid the Trustee Smart Choice Revenue Share Payment by ANZ, alternatively would credit or rebate the amount of the Trustee Smart Choice Revenue Share Payment to Members' accounts;

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

- (d) regularly compared the investment of the Smart Choice Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ.

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

82. In the premises, by:

- 82.1. investing the Smart Choice ~~Cash~~ Money ~~exclusively~~ in deposits offered by ANZ in the circumstances pleaded above;

- 82.1A investing the Smart Choice Money in circumstances where ANZ paid to the Trustee the Trustee Smart Choice Revenue Share Payment;

- 82.2. retaining earlier such investments; and/or

- 82.3. failing to take the steps set out in subparagraph 80.2 above,

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

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

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

- (a) Cash Products Life Policies which:

- (i) provided OPL broad discretion to invest the funds; and

- (ii) entitled OPL to receive and retain fees and the OPL Revenue Share Payments; and

- (b) the circumstances (as applicable after 30 June 2013) set out in paragraph 37.3, 37.4, 37.6, 40 to 42, 46 to 47, 49 to 51, 52 to 53, 59, 67A, and 69 above;

83.2. have, in respect of the Cash Advantage Money and Smart Choice Money:

- (a) invested the Cash Advantage Money and Smart Choice Money directly:
- (i) in a fund, or similar investment, which adopted a strategy of investing in rolling term deposits and interest bearing accounts a mix of money market instruments issued by one or more ADIs;
  - (ii) alternatively, in interest-bearing accounts with one or more ADIs;
  - (iii) alternatively, with ANZ on the basis that ANZ offer market leading interest rates, alternatively, interest rates at the level it paid to other Regulated Superannuation Funds for equivalent investments,
- according to which option based on whichever investments the Trustee ~~would reasonably have~~ expected would maximise the net returns on investments of the Cash Advantage Money and Smart Choice Money commensurate with the risk of the investment;
- (b) alternatively, continued to invest the Cash Advantage Money and Smart Choice Money in life policies issued by OPL, but only on the basis that OPL would:
- (i) not otherwise be paid the ~~Cash Investment Fees~~ Cash Advantage Revenue Share Payments and Smart Choice Cash Revenue Share Payments by ANZ, alternatively, credit or rebate the amount of the Cash Advantage Revenue Share Payments and Smart Choice Cash Revenue Share Payments ~~Cash Investment Fees~~ to Members' accounts;
  - (ii) not otherwise charge or be paid any other fees or amounts in reduction of returns in respect of Cash Money; and
  - (iii) invest in underlying investments of the kind set out in subparagraph (a) above;

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

(d) regularly compared the investment of the Cash Advantage Money and Smart Choice Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ;

83.3. have, in respect of the Term Deposits Money:

(a) either:

(i) made available to members the choice of term deposits offered by more than one ADI;

(ii) alternatively, invested the Term Deposits Money with an ADI which was offering market leading interest rates;

(iii) alternatively, invested the Term Deposits Money directly with ANZ on the basis that ANZ offer market leading interest rates,

according to which option the Trustee expected would maximise the net returns on investments of the Term Deposits Money commensurate with the risk of the investment;

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

(i) not otherwise be paid the Term Deposit Revenue Share Payments by ANZ, alternatively, would credit or rebate the amount of the Term Deposit Revenue Share Payments to Members' accounts;

(ii) not otherwise charge or be paid any other fees or other amounts in reduction of returns in respect of Term Deposits Money; and

(iii) invest in underlying investments of the kind set out in subparagraph (a) above;

(c) formulated and given effect to an investment strategy, for the purpose of complying with the Previous Investment Strategy Covenant, that reflected

the above approach (as applicable) to the investment of the Term Deposits Money;

(d) regularly compared the investment of the Term Deposits Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ.

84. The Trustee did not take any of the steps referred to in subparagraph 83.2 or 83.3 above.

85. In the premises, by:

85.1. investing the Cash Money in the Cash Products Life Policies;

85.1A investing the Cash Money in circumstances where ANZ paid to OPL the OPL Revenue Share Payments;

85.2. retaining earlier such investments; and/or

85.3. failing to take the steps set out in subparagraph 83.2 and 83.3 above,

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

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

86.1. not have invested the Smart Choice ~~Cash~~ Money, or retained such investments;

(a) exclusively in deposits with ANZ in the circumstances (as applicable after 30 June 2013) set out in paragraph 44, 45, 58, 67B and 72 above; and

(b) in circumstances where ANZ paid the Trustee Smart Choice Revenue Share Payment to the Trustee;-

86.2. have:

- (a) invested the Smart Choice ~~Cash~~ Money:
  - (i) in a fund, or similar investment, which adopted a strategy of investing in a mix of rolling term deposits and interest-bearing accounts ~~money market instruments~~ issued by one or more ADIs;
  - (ii) alternatively, in interest-bearing accounts with one or more ADIs, based on whichever investments the Trustee would reasonably have expected would maximise the net returns on investments of the Smart Choice ~~Cash~~ Money commensurate with the risk of the investment;
- (b) alternatively, continued to invest the Smart Choice ~~Cash~~ Money in deposits with ANZ, but only the basis that:
  - (i) ANZ would offer market leading interest rates, alternatively, interest rates at the level it paid to other Regulated Superannuation Funds for equivalent investments; and
  - (ii) the Trustee would not be paid the Trustee Smart Choice Revenue Share Payment by ANZ, alternatively would credit or rebate the amount of the Trustee Smart Choice Revenue Share Payment to Members' accounts;
- (c) formulated and given effect to an investment strategy, for the purpose of complying with the Investment Strategy Covenant, that reflected the above approach (as applicable) to the investment of Smart Choice ~~Cash~~ Money;
- (d) regularly compared the investment of the Smart Choice Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ.

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

88. In the premises, by:

- 88.1. investing the Smart Choice ~~Cash~~ Money ~~exclusively~~ in deposits offered by ANZ in the circumstances pleaded above;



88.1A investing the Smart Choice Money in circumstances where ANZ paid to the Trustee the Trustee Smart Choice Revenue Share Payment;

88.2. retaining earlier such investments; and/or

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

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

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

89.1. not have invested the Cash Money, or retained such investments ~~exclusively~~ in direct deposits with ANZ in the circumstances set out in paragraphs 65.2, 66, 67.3, 67C and ~~752~~ above;

89.2. have:

(a) invested the Cash Money:

(i) in a fund, or similar investment, which adopted a strategy of investing in a mix of rolling term deposits and interest-bearing accounts ~~money market instruments~~ issued by one or more ADIs;

(ii) alternatively, in interest-bearing accounts with one or more ADIs,

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

(aa) alternatively, continued to invest the Cash Money with ANZ but only on the basis that ANZ would offer market leading interest rates, alternatively, interest rates at the level it paid to other Regulated Superannuation Funds for equivalent investments;

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

(c) regularly compared the investment of the Cash Money against the terms and rates of interest offered on comparable investments by other ADIs and ANZ.

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

91. In the premises, by:

91.1. investing the Cash Money ~~exclusively~~ with ANZ in cash and term deposits in the circumstances pleaded above;

91.2. retaining earlier such investments; and/or

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

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

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

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

92.1. have invested the Cash Money, and have retained earlier such investments, in Cash Products Life Policies in the manner and in the circumstances set out in paragraph 77.1 above (up to 30 June 2013) and paragraph 83.1 above (from 30 June 2013 to the end of the Master Fund Period); and / or

92.2. have failed to take the steps set out in paragraphs 77.2 and 77.3 above (up to 30 June 2013) and paragraphs 83.2 and 83.3 above (from 30 June 2013 to the end of the Master Fund Period).

### **Particulars**

- (i) The best interests of the members are their best financial interests.

- (ii) The Applicants refer to and repeat paragraphs 47, 49 to 51, and 52.

93. In the premises, by:

- 93.1. investing the Cash Money in the Cash Products Life Policies;
- 93.2. retaining earlier such investments; and/or
- 93.3. failing to take the steps set out in paragraphs 77.2 and 77.3 above (up to 30 June 2013) and paragraphs 83.2 and 83.3 above (from 30 June 2013 to the end of the Master Fund Period),

the Trustee:

- 93.4. up to 30 June 2013, contravened the Previous Best Interests Covenant, and therefore contravened s 55(1) of the SIS Act (**Master Fund Previous Best Interests Contravention**);
  - 93.5. from 30 June 2013 to the end of the Master Fund Period, contravened the Best Interests Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Best Interests Contravention**).
94. At all material times in the Master Fund Period, it was not in the best interests of beneficiaries of the Master Fund for the Trustee to:
- 94.1. have invested the Smart Choice ~~Cash~~ Money, and have retained earlier such investments exclusively with ANZ in the manner and in the circumstances set out in paragraph 80.1 above (up to 30 June 2013) and paragraph 86.1 above (from 30 June 2013 to 6 November 2013); and / or
  - 94.2. have failed to take the steps set out in paragraph 80.2 above (up to 30 June 2013) and paragraph 86.2 above (from 30 June 2013 to 6 November 2013).

#### Particulars

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

95. In the premises, by:

95.1. investing the Smart Choice ~~Cash~~ Money ~~exclusively~~ with ANZ in the above circumstances;

95.2. retaining earlier such investments; and/or

95.3. failing to take the steps set out in paragraph 80.2 above (up to 30 June 2013) and paragraph 86.2 above (from 30 June 2013 to 6 November 2013),

the Trustee:

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

95.5. from 30 June 2013 to 6 November 2013 contravened the Bests Interests Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Best Interests Contravention**).

96. At all material times in the RPS ~~Fund~~ Cash Period, it was not in the best interests of beneficiaries of the RPS Fund for the Trustee to:

96.1. have invested the Cash Money, and have retained earlier such investment, with ANZ in the manner and in the circumstances set out in paragraphs 89.1 above; and or

96.2. have failed to take the steps set out in paragraphs 89.2 above.

#### Particulars

(i) The best interests of the members are their best financial interests.

(ii) The Applicants refer to and repeats paragraphs 65.2, 66 and 67.3.

97. In the premises, by:

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

97.2. retaining earlier such investments; and/or

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

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

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

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

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

98.2. have formulated and given effect to an investment strategy as set out in paragraphs 77.2 and -77.3 above;

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

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

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

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

101.2. formulated and given effect to an investment strategy as set out in paragraph 83.2 and 83.3 above;

102. At all times from 1 July 2013 to the end of the Master Fund Period, the Trustee did not take the steps set out in paragraph 101, alternatively did not take the steps set out in sub-paragraph 101.2 above.

103. In the premises, all material times from 1 July 2013 to the end of the Master Fund Period, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Investment Strategy Contravention**).

104. In relation to the Smart Choice ~~Cash~~-Money, prior to 1 July 2013, a trustee in the Trustee's position, having regard to the matters set out in paragraph 8.3(a) to 8.3(d) above, would have:

104.1. identified the matters referred to in paragraphs 58 to 59;

104.2. formulated and given effect to an investment strategy as set out in paragraph 80.2 above;

105. Prior to 1 July 2013, the Trustee did not take the steps set out in paragraph 104, alternatively did not take the steps set out in sub-paragraph 104.2 above.

106. In the premises, prior to 1 July 2013, in relation to the Smart Choice ~~Cash~~-Money, the Trustee contravened the Previous Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (**Smart Choice Previous Investment Strategy Contravention**).

107. In relation to the Smart Choice ~~Cash~~-Money, at all material times from 1 July 2013 to 6 November 2013, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 9.5(a) to 9.5(h) above, would have:

107.1. identified the matters referred to in paragraphs 58 to 59;

107.2. formulated and given effect to an investment strategy as set out in paragraph 86.2 above.

108. At all times from 1 July 2013 to 6 November 2013, in relation to the Smart Choice ~~Cash~~ Money, the Trustee did not take the steps set out in paragraph 107, alternatively did not take the steps set out in sub-paragraph 107.2 above.

109. In the premises, all material times from 1 July 2013 to 6 November 2013, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Smart Choice Investment Strategy Contravention**).

110. At all material times in the RPS ~~Cash~~ Period, a trustee in the Trustee's position, having regard to the matters set out in paragraphs 9.5(a) to 9.5(h) above, would:

110.1. have identified the matters referred to in paragraphs 62 to 67;

110.2. have formulated and given effect to an investment strategy as set out in paragraph 89.2 above;

- 111. At all times in the RPS Cash Period, the Trustee did not take the steps set out in paragraph 110, alternatively did not take the steps set out in sub-paragraph 110.2 above.
- 112. In the premises, all material times in the RPS Cash Period, the Trustee contravened the Investment Strategy Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Investment Strategy Contravention**).

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

- 113. At all material times from 1 July 2013 to the end of the Master Fund Period, a trustee in the Trustee's position, exercising due diligence in developing, offering and reviewing regularly the Cash Advantage Option, the Smart Choice Option and the ANZ Term Deposits Option, would have taken each of the steps set out in paragraphs 101 and 107 above.
- 114. At all material times from 1 July 2013 to the end of the Master Fund Period, the Trustee did not take the steps set out in paragraphs 101 and 107 above, alternatively did not take the steps set out in paragraph 101.2 and 107.2 above.
- 115. In the premises, the Trustee contravened the Due Diligence Covenant, and thereby contravened s 55(1) of the SIS Act (prior to 6 April 2019) and thereby contravened s 54B(1) of the SIS Act (after 6 April 2019) (**Master Fund Due Diligence Contraventions**).
- 116. At all material times in the RPS Cash Period, a trustee in the Trustee's position, exercising due diligence in developing, offering and reviewing regularly the Cash Advantage Option, the Smart Choice Option and the ANZ Term Deposits Option, would have taken each of the steps set out in paragraph 110 above.
- 117. At all material times in the RPS Cash Period, the Trustee did not take the steps set out in paragraph 110 above, alternatively did not take the steps set out in paragraph 110.2 above.
- 118. In the premises, the Trustee contravened the Due Diligence Covenant, and thereby contravened s 54B(1) of the SIS Act (**RPS Due Diligence Contravention**).

## G.6 Conflicts Contraventions

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

### Particulars

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

### Particulars

- (i) It was the Trustee's duty to take reasonable steps to seek, and it was in interests of beneficiaries to obtain, the highest obtainable net earnings on the investment of the Cash Money within an appropriate risk profile.
  - (ii) It was in ANZ's interests to minimise the interest rate payable on the Cash Money including the Smart Choice ~~Cash~~ Money.
121. By the acts and omissions set out in paragraphs 85.1 to 85.~~34~~, and 88.1 to 88.~~3-4~~ above, from 1 July 2013 to the end of the Master Fund Period, the Trustee:
- 121.1. did not prioritise its duties to and the interests of beneficiaries over the interests of OPL;
  - 121.2. did not prioritise its duties to and the interests of beneficiaries over the interests of ANZ;



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

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

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

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

#### Particulars

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

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

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

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

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

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

## G.7 Financial Interests Contraventions

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

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

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

127. In the premises, by:

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

127.2. retaining earlier such investments; and/or

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

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

## G.8 Proper Performance Contravention

128. Further or alternatively, at all material times in the Master Fund Period, the Trustee doing the things referred to in paragraphs 33, 34, 36 and 37 prevented the Trustee from, or hindered the Trustee in, properly performing or exercising the Trustee's functions and powers, including taking reasonable steps to maximise the returns to members of the Master Fund on the Cash Money.

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

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

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

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

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

131. In respect of:

131.1. the Master Fund Previous Best Interests Contravention; and

131.2. the Master Fund Best Interests Contravention,

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

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

132. In respect of:

132.1. the Smart Choice Previous Best Interests Contravention;

132.2. the Smart Choice Best Interests Contravention; and

132.3. the RPS Best Interests Contravention,

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

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

133. In respect of:

133.1. the Master Fund Previous Care and Skill Contravention;

133.2. the Master Fund Care and Skill Contravention

133.3. the Master Fund Previous Investment Strategy Contravention;

133.4. the Master Fund Investment Strategy Contravention; and

133.5. the Master Fund Due Diligence Contravention,

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

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

134. In respect of:

134.1. the Smart Choice Previous Care and Skill Contravention;

134.2. the Smart Choice Care and Skill Contravention;

134.3. the RPS Care and Skill Contravention;

134.4. the Smart Choice Previous Investment Strategy Contravention;

134.5. the Smart Choice Investment Strategy Contravention;

134.6. the RPS Investment Strategy Contravention; and

134.7. the RPS Due Diligence Contravention,

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

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

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

#### Particulars

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

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

### Particulars

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

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

### Particulars

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

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

### Particulars

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

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

### I.1 Involvement in statutory contraventions

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

139.1. knowingly concerned in; and/or

139.2. party to,

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

139.3. the Master Fund Arm's Length Contraventions;

139.4. the Master Fund Best Interests SIS Contraventions;

139.5. the Master Fund Further SIS Contraventions; and

139.6. Master Fund Conflicts Contraventions.

### **Particulars**

- (i) OPL was concerned in, or party to, each of the contraventions by reason of having accepted investments of the Cash Money by the Trustee under the Cash Products Life Policies, where the conduct of the Trustee in making such investments, and retaining such earlier investments, gave rise to the contraventions for the reasons set out in section G.
- (ii) OPL knew of or was wilfully blind to, at least the following:
  - (A) the matters in paragraphs 5.2, 6.2, 7.2 and 68 above, which knowledge is inferred, among other matters, from OPL's membership of the ANZ group and consequential knowledge of other members of that group.
  - (B) the matters set out in paragraph 5.1(b) and 5.3 above, which knowledge is inferred, among other matters, from the Trustee transacting with OPL in the stated capacity as trustee of the Master Fund;
  - (C) the matters set out in paragraphs 33, 34, 36 and 37 above, by reason of OPL being a party to the Cash Products Life Policies and having received the investments of the Cash Money under the Cash Products Life Policies;
  - (D) the matters set out in paragraphs 38 and 39 above, by reason of OPL being a party to the Master Administration Services Agreement, and having provided the Administration Services to the Trustee in respect of the Master Fund under that agreement;

(E) the matters set out in paragraphs 40, 41, 42, 42A, 45 and 46 and 46A above, which knowledge is inferred, among other matters, from one or more of the following:

- a. OPL having entered into the agreements with ANZ regarding the investments OPL Revenue Share Payments;
- b. OPL having made the investments with ANZ;
- c. OPL having been paid the Cash Investment Fees OPL Revenue Share Payments by ANZ in connection with the investments;

(F) the matters set out in paragraphs ~~s~~ 47 and 48 above, which knowledge is inferred, among other matters, from one or more of the following:

- a. OPL's knowledge of the matters set out in particulars (C) and (D) above; and
- b. OPL having entered into the agreements with ANZ regarding the OPL Revenue Share Payments;
- ~~b. OPL's provision of the Administration Services to the Trustee under the Master Fund Administration Agreement, such that OPL was aware of the nature and the value of the services it provided, and the fees and remuneration it received under the agreement;~~
- ~~c. OPL's issue of the Life Policies in respect of the Investment Options, pursuant to which it was aware of the nature and the value of the services it provided under those policies, and the fees and remuneration it received under those policies.~~

(G) the matters set out in paragraphs 49 to 51, and 52 above, which knowledge is inferred, among other matters, from OPL having made the investments of the Cash Money with ANZ

and OPL having being paid the ~~Cash Investment Fees~~OPL Revenue Share Payments;

(H) the matters set out in paragraphs 54 to 57 and 59 above, which knowledge is inferred, among other matters, from:

- a. OPL having made the investments of the Cash Money with ANZ at the interest rates offered by ANZ;
- b. OPL, and/or OPL's directors, have at all material times been subject to duties under the Life Insurance Act 1995 (Cth) and associated regulations and prudential standards, compliance with which required OPL to have a detailed understanding of the underlying investments being made of the Cash Money;
- c. OPL having been at all material times a sophisticated investor responsible for hundreds of millions of dollars in investments, from which it is inferred that OPL developed a detailed understanding of, among other matters, the underlying investments being made of the Cash Money;

(HA) The matters set out in paragraph 67A, which knowledge or wilful blindness is to be inferred from OPL not having undertaken any comparisons of the Cash Investment Options against equivalent investments together with the Trustee or on behalf of the Trustee;

(I) The matters set out in paragraph 69 above, which knowledge of or wilful blindness to is inferred, among other matters, from OPL's knowledge or wilful blindness of the matters set out in particulars (C) above, alternatively the matters set out in particulars (C) and (E) and/or (F) above.

(J) that the Trustee had not taken any of the steps in paragraphs 77.2, 77.3, -and 83.2 and 83.3 above, where it was self-evident that the Trustee had not taken those steps;



- (K) that the Trustee had not formulated and/or given effect to an investment strategy as set out in paragraphs 77.2, 77.3, ~~and 83.2 and 83.3~~, where it was self-evident that the Trustee had not formulated and/or given effect to such an investment strategy;
- (L) that the Trustee's investment of the Cash Money, and retention of such investments, in the Cash Products Life Policies was not in the best interests of beneficiaries of the Master Fund, which knowledge of or wilful blindness to is inferred from OPL's knowledge of or wilful blindness to of the matters set out in particulars (A) to (K) above and (N) below;
- (M) that the Trustee's investment of the Cash Money, and retention of such investments, in the Cash Products Life Policies was imprudent, which knowledge of or wilful blindness to is inferred from OPL's knowledge of or wilful blindness to the matters set out in the particulars (A) to (K) above and (N) below;
- (N) the matters set out in paragraphs 119 and 121 above, which knowledge of is inferred, among other matters, from the fact that the conflicts referred to therein were inherent in the manner in which OPL was paid the ~~Cash Investment Fees~~OPL Revenue Share Payments.

~~(iii) — Further particulars may be provided following discovery.~~

140. In the premises, OPL:

- 140.1. has been involved in each of the Master Fund Best Interests SIS Contraventions, ~~and Master Fund Further SIS Contraventions~~ and Master Fund Conflicts Contraventions, within the meaning of section 55 of the SIS Act;
- 140.2. has been directly or indirectly, knowingly concerned in, or party to, the Master Fund Arm's Length Contravention within the meaning of section 315 of the SIS Act.

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

141. The Applicants refer to and repeat each of the matters set out in paragraphs 139 and 140 above.
142. At all material times in the Master Fund Period, OPL received property held on trust by the Trustee, being the Cash Money invested under the Cash Products Life Policies.
143. At all material times in the Master Fund Period, OPL knew that the Cash Money invested under the Cash Products Life Policies constituted trust property.

### Particulars

- (i) The Applicants refer to and repeat the particulars subjoined at (ii)(B) to paragraph 139 above.

~~(ii) — Further particulars may be provided following discovery.~~

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

144.1. actually known;

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

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

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

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

### Particulars

- (i) The Applicants refer to and repeat the particulars subjoined at paragraph 139 above.

~~(ii) — Further particulars may be provided following discovery.~~

145. In the premises:

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

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

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

#### J. ACCESSORIAL LIABILITY OF ANZ

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

146.1. knowingly concerned in; and/or

146.2. party to,

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

146.3. the Smart Choice Arm's Length Contraventions;

146.4. the RPS Arm's Length Contraventions;

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

146.6. RPS and Smart Choice Further SIS Contraventions;<sup>1</sup>

146.7. RPS Conflicts Contravention;

146.8. Master Fund Arm's Length Contraventions;

146.9. Master Fund SIS Best Interests Contraventions;

146.10. Master Fund Further SIS Contraventions;

146.11. Master Fund Conflicts Contraventions; and

146.12. Financial Interests Contraventions.

**Particulars**

- (i) ANZ was concerned in, or party to, each of the contraventions by reason of having accepted, and set the interest rates on, the investments by the Trustee and OPL of the Cash Money, including the Smart Choice ~~Cash~~ Money by the Trustee, where the conduct of the Trustee, and where relevant OPL, in making such investments, and retaining such earlier investments, gave rise to the contraventions for the reasons set out in section G.
- (ii) ANZ knew or was wilfully blind to, at least the following:
  - (A) the matters in paragraphs 5.2(b), 7.2(b), 71 and 74 above, which knowledge or wilful blindness is inferred, among other matters, from ANZ's position as ultimate holding company of the Trustee and ANZ's consequential knowledge of the activities of its subsidiary companies.
  - (B) the matters set out in paragraphs 5.1(b), and 5.3 and 5.4 above, which knowledge is inferred, among other matters, from the Trustee transacting with ANZ in the Trustee's stated capacity as trustee of the Master Fund and the RPS Fund;
  - (BA) the matters set out in paragraphs 6.2(b), 6.2(c), 7.2(a), 68 and 69 above, which knowledge is inferred from, among other matters, ANZ's position as ultimate holding company of both OPL and the Trustee, and ANZ's consequential knowledge of the activities of its subsidiary companies;
  - (BB) the matters set out in paragraphs 33, 34, 36, 37 above, which knowledge is inferred, among other matters, from OPL transacting with ANZ in respect of the Cash Advantage Money, Smart Choice Money and Term Deposits Money in OPL's stated capacity as the issuer of the Cash Products Life Policies to the Trustee;

(BC) the matters set out in paragraphs 40, 42, 44 and 46 by reason of ANZ having received the investments of the Cash Advantage Money, Smart Choice Money and Term Deposits Money from OPL, and ANZ having paid interest at the rates set by ANZ on those investments;

(C) the matters set out in paragraphs 43, 44, 62 to 64 above, by reason of ANZ having received the investments of the Smart Choice Money, Cash Advantage Money and Term Deposits Money from the Trustee and offered and paid the interest rates on those investments;

(CA) the matters set out in paragraphs 41, 42A and 46A by reason that ANZ was a party to the agreements with OPL for the OPL Revenue Share Payments, and ANZ paid the OPL Revenue Share Payments to OPL;

(CB) the matters set out in paragraph 45 by reason that ANZ was a party to the agreement with the Trustee for payment of the Trustee Smart Choice Revenue Share Payment, and ANZ paid the Trustee Smart Choice Revenue Share Payment to the Trustee;

(CC) the matters set out in paragraph 47 by reason that ANZ was a party to the agreements for the OPL Revenue Share Payments;

(CD) the matters set out in paragraphs 49 to 51, and 52 by reason that ANZ was a party to the agreements for the OPL Revenue Share Payments and ANZ set the interest rates in respect of the Cash Advantage Money, Smart Choice Money and Term Deposits Money invested by OPL with ANZ;

(CE) the matters set out in paragraph 51A by reason that ANZ was a party to the agreement for the Trustee Smart Choice Revenue Share Payment and ANZ set the interest rates in respect of the Smart Choice Money invested by the Trustee with ANZ;

(CF) the matters set out in paragraphs 56.2, 57.2, 58.2(b), 59.3(b), 65.2(b), 66.2, 67.3(b) by reason that the “Third Party Deposits” team at ANZ set the rates offered on both the Cash Money and on equivalent investments, including equivalent investments made by unrelated Regulated Superannuation Funds;

(D) the matters set out in paragraphs 56.1, 57.1, 58.2(a), 59.3(a), 65.2(a), 66.1 to and 67.3(a), 72 and 75 by reason that as an ADI offering investments to the market including to Regulated Superannuation Funds, ANZ knew or ought to have known, ANZ knew that the rates of interest offered and paid by other ADIs on equivalent investments, which information was publicly available; the Trustee agreed to accept from it in respect of the Smart Choice Money, Cash Advantage Money and Term Deposits Money was lower and therefore the terms and conditions of the transactions were more favourable to ANZ than it is reasonable to expect would apply if the Trustee were dealing with ANZ at arm’s length in the same circumstances.

(DA) the matters set out in paragraphs 67A, 67B and 67C by reason that neither the Trustee nor OPL sought from ANZ nor was either of them given information by ANZ about the interest rates ANZ was paying on equivalent or comparable investments to other Regulated Superannuation Funds;

(DB) the matters set out in paragraphs 72 and 75 by reason of the matters set out in particulars (A), (B), (C), (CB), (CE), (CF) and (D);

(E) that the Trustee had not taken any of the steps in paragraphs 77.2, 77.3, 80.2, 83.2, 83.3, 86.2 and 89.2 above, where it was self-evident that the Trustee had not taken those steps;

- (F) that the Trustee had not formulated and/or given effect to an investment strategy as set out in paragraphs 77.2(c), 77.3(c), 80.2(c), 83.2(c), 83.3(c), 86.2(c) and 89.2(b):

a., ~~where~~ it was self-evident that the Trustee had not formulated and/or given effect to such an investment strategy; and

b. it is to be inferred that ANZ knew the Cash Advantage Investment Strategy, the Term Deposit Investment Strategy and Smart Choice Investment Strategy by reason of ANZ's publication of the PDSs containing those strategies on its website;

- (G) that the Trustee's investment of the Cash Money, and retention of such investments, with ANZ at the rates of interest paid was not in the best interests of beneficiaries of the Master Fund and the RPS Fund, which knowledge of or wilful blindness to is inferred from:

- a. ANZ's knowledge of or wilful blindness to the matters set out in particulars (A) to (CF), (CB), (CE), (CF), (D), (DA), (DB), (E) and (F) above and (I) below;
- b. ANZ's knowledge that the rate of interest it had agreed to pay the Trustee in respect of the Cash Money was below the rate that would apply if ANZ was dealing with the Trustee at arm's length in the same circumstances;
- c. ANZ's knowledge that the Trustee had not sought to invest the Cash Money with an ADI at the highest interest rate obtainable in the market commensurate with the risk associated with the investment;
- d. ANZ's knowledge that the Trustee had not sought to obtain ANZ's agreement to pay a rate of interest

in respect of the investment of the Cash Money no lower than the rate of interest obtainable in the market from another ADI with comparable risk;

e. ANZ's knowledge that it paid higher interest rates on equivalent investments, including to unrelated Regulated Superannuation Funds;

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

(HA) that the Trustee's investment of the Cash Money, and retention of such investments, with OPL in the Cash Products Life Policies in the circumstances set out in paragraphs 77, 78, 83, and 84 above, was not in the best interests of beneficiaries of the Master Fund, which knowledge of or wilful blindness to is inferred from:

a. ANZ's knowledge of or wilful blindness to the matters set out in particulars (A), (B), (BA), (BB), (BC), (CA), (CC), (CF), (D), (DA), (E) and (F) above and (I) below;

b. ANZ's knowledge that the rate of interest it had agreed to pay OPL in respect of the Cash Money was below the rate that would apply if ANZ was dealing with OPL at arm's length in the same circumstances;

c. ANZ's knowledge that OPL had not sought to invest the Cash Money with an ADI at the highest interest rate obtainable in the market commensurate with the risk associated with the investment;



d. ANZ's knowledge that OPL had not sought to obtain ANZ's agreement to pay a rate of interest in respect of the investment of the Cash Money no lower than the rate of interest obtainable in the market from another ADI with comparable risk;

e. ANZ's knowledge that it paid higher interest rates on equivalent investments, including to unrelated Regulated Superannuation Funds;

(HB) that the Trustee's investment of the Cash Money, and retention of such investments, with OPL in the Cash Products Life Policies in the circumstances pleaded above was imprudent, which knowledge of or wilful blindness to is inferred from the matters set out in the particulars (A), (B), (BA), (BB), (BC), (CA), (CC), (CF), (D), (DA), (E), (F) and (HA);

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

- a. ANZ's knowledge that there was a conflict between the Trustee's duties to and the interests of beneficiaries on the one hand, and the interests of ANZ on the other, in that it was the Trustee's duty to seek to obtain, and it was in the beneficiaries interests to obtain, the highest obtainable interest rate on the investments of the Cash Money commensurate with the risk associated with the investment, whereas it was ANZ's interest for ANZ to pay a lower rate of interest on the Cash Money;
- b. ANZ's knowledge that the Trustee did not prioritise its duties to and the interests of beneficiaries over the interests of ANZ, did not ensure that its duties to beneficiaries were met despite the conflict, and did not ensure that the interests of beneficiaries were

not adversely affected by the conflict, as it did not seek to obtain the highest obtainable interest rate on the investment of the Cash Money and in fact obtained an interest rate from ANZ below what was obtainable in the market from another ADI with comparable risk and below that which would have been paid by ANZ if it had been dealing with ANZ at arm's length.

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

147. In the premises, ANZ:

147.1. has been involved in each of:

(a) the RPS and Smart Choice SIS Best Interests Contraventions; ~~and~~

(b) the RPS and Smart Choice Further SIS Contraventions;

(c) the RPS Conflicts Contravention;

(d) the Master Fund SIS Best Interests Contraventions;

(e) the Master Fund Further SIS Contraventions;

(f) the Master Fund Conflicts Contraventions; and

(g) Financial Interests Contraventions;

within the meaning of section 55 of the SIS Act; and

147.2. has been directly or indirectly, knowingly concerned in, or party to:

(a) the Smart Choice Arm's Length Contraventions ~~and,~~

(b) the RPS Arm's Length Contraventions; and

(c) the Master Fund Arm's Length Contraventions,

(together and separately, the Arm's Length Contraventions), within the meaning of section 315 of the SIS Act.

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

### K.1 Commissions Products Life Policies

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

148.1. ANZ OneAnswer Products;

148.2. OnePath OneAnswer Products;

148.3. OptiMix Products;

148.4. Integra Products; and

148.5. ANZ Super Advantage Products,

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

#### Particulars

(i) The Commission Products Life Policies are:

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

(B) on and after 6 November 2013, the Pre-Simplification Policies as amended by the MIT. ٤٦

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

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

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

- 149.2. the Trustee and Members did not have any legal or beneficial interest in any assets of the Life Policy Investment Funds (clause 15.2 of the MIT);
- 149.3. the pool of assets to which a Life Policy Investment Fund related was divided into units for the purpose of calculating the value of each Member's investments (clause 10 of the MIT);
- 149.4. OPL operated policy accounts in each Member's name for the Life Policy Investment Funds selected by the Trustee for that Member, which recorded the value of a Member's investments and transaction on the account (clause 10 of the MIT);
- 149.5. OPL would add to a Member's account by allocating units for (clause 10 of the MIT):
- (b) all amounts invested in the relevant Life Policy Investment Fund;
  - (c) switches from other Life Policy Investment Funds; and
  - (d) any applicable rebates;
- 149.6. OPL would deduct from a Member's account by cancelling units for (clause 10 of the MIT):
- (a) fees;
  - (b) payments to or on behalf of the Trustee; and
  - (c) switches to other Life Policy Investment Funds.
- 149.7. in respect to fees (clause 13 of the MIT):
- (a) OPL could charge fees in connection with the Commission Products~~s~~ Life Policies as agreed from time to time between OPL and the Trustee, which agreement may be recorded or reflected in documents or materials in the preparation or approval of which the parties had participated or acquiesced, such as product disclosure statements (also **Fees**);
  - (b) the Fees OPL could charge included fees charged by OPL to support its obligations to pay adviser service fees;

(c) OPL could deduct or accrue (or both) all Fees in connection with the Commission Products s Life Policies from:

- (i) the Member's benefit account or policy account;
- (ii) the relevant Statutory Fund or other relevant pool of assets; or
- (iii) an amount received by OPL as a premium under the Commission Products s Life Policies and before allocating the balance of the amount to an Investment Option, Life Policy Investment Fund, Benefit Account or Policy Account.

149A. On or before 13 April 2019, as a condition precedent to the Successor Fund Transfer, the Trustee redeemed the Commissions Products Life Policies it held with OPL.

#### Particulars

- (i) Redemption Deed dated 10 April 2019 between OPL and the Trustee [OPL.5013.0001.0109].

## **K.2 OneAnswer Members**

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

150.1. percentage contribution commissions calculated as:

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

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

150.2. percentage per annum trail commissions calculated as:

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

(**Trail Commissions**).

(together, **Adviser Commissions**).

#### Particulars

- (i) PDS OneAnswer Personal Super and Pension dated 15 November 2010 p 41, 51;
- (ii) Supplementary PDS OneAnswer Personal Super and Pension dated 11 September 2011, p.10;
- (iii) OneAnswer Fees Guide dated 27 February 2012 p16;
- (iv) PDS OneAnswer Personal Super and Pension dated 27 Feb 2012 p 5;
- (v) ~~Further particulars may be provided following discovery. The following template Adviser Arrangements dated prior to the FOFA Start Date:~~

(A) template Product Issuer Agreement dated about September 2003 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd, and Optimix Investment Management Ltd and a distributor [OPC.0002.0001.1842];

(B) template Product Issuer Agreement dated about May 2007 between (as Issuers) ING Life Ltd, ING Funds Management Ltd and ING Custodians Pty Ltd and a distributor [OPC.0002.0001.1859];

(C) template Product Issuer Agreement dated February 2008 between (as Issuers) ING Life, ING Funds Management Ltd and ING Custodians Pty Ltd and a distributor [OPC.0011.0001.0001];

(D) template Product Issuer Agreement dated February 2008 between (as Issuers) ING Life, ING Funds Management Ltd and ING Custodians Pty Ltd and a distributor [OPC.0002.0001.1874];

(E) template Product Issuer Agreement dated November 2010 between (as Issuers) OPL, the Trustee and OPFM and a distributor [OPC.0002.0001.1889];

(vi) The Adviser Arrangements entered into prior to the FOFA Start Date, of which the Applicants are aware:

(A) Product Issuer Agreement dated 1 October 2003 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd, and Optimix Investment Management Ltd and (as Distributor) Financial Services Partners Pty Ltd [OPC.0019.0004.9563].

(B) Product Issuer Agreement dated 5 March 2004 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd, and Optimix Investment Management Ltd and (as Distributor) Elders Securities Ltd [OPC.0019.0004.9510].

(C) Product Issuer Agreement dated 9 March 2004 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd, and Optimix Investment Management Ltd and (as Distributor) Millenium3 Financial Services Pty Ltd [ABG.002.016.3725].

(D) Product Issuer Agreement dated 28 June 2005 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd, and Optimix Investment Management Ltd and (as Distributor) RetireInvest Pty Ltd [ABG.002.016.3708].

(E) Product Issuer Agreement dated 24 February 2010 between (as Issuers) ING Life Ltd, ING Funds Management, ING Custodians Pty Ltd and (as Distributor) Elders Financial Planning Pty Ltd [ABG.002.016.3693].

(F) Product Issuer Agreement dated 27 April 2012 between (as Issuers) OPC, the Trustee and OPFM and (as Distributor) Design Financial Group Pty Ltd [OPC.0011.0002.0001].

(G) Product Issuer Agreement dated 4 April 2013 between (as Issuers) OPC, the Trustee and OPFM and (as Distributor) Catalyst Private Wealth Pty Ltd [OPC.0011.0004.0001].

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

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

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

- (a) a maximum of 1.12% of the funds invested in the OnePath Cash Investment Option for members of OnePath OneAnswer Personal Super or ANZ OneAnswer Personal Super; and



- (b) a maximum of 2.90% (where the member selected the Entry Fee Option) and equal to a maximum of 3.65% (where the member selected the Nil Entry Fee Option or Deferred Entry Fee Option), of the member's funds under management (other than Cash Investment Funds);

**(Ongoing Fees);**

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

**Particulars**

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

~~(iv) — Further particulars may be provided following discovery.~~

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

152.1. a rebate of the Contribution Commission:

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

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

### Particulars

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

~~(iv) Further particulars may be provided following discovery.~~

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

### Particulars

- (i) ANZ OneAnswer PDS dated 15 November ~~2011~~ 2010 with cover page "Special arrangements";
- (ii) ANZ OneAnswer Supplementary PDS dated 1 September 2011 with cover page "Special arrangements";
- (iii) ANZ OneAnswer PDS dated 27 Feb 2012 with cover page "Special arrangements".

~~(iv) Further particulars may be provided following discovery.~~

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

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

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

### Particulars

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

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

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

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

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

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

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

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

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

**(Transferring OneAnswer Members)**, and

156.2. otherwise became closed to new members.

### Particulars

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

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

### K.3 OptiMix Members

157. At all material times prior to the FOFA Start Date, OPL and the Trustee had Adviser Arrangements pursuant to which OPL paid commissions to Financial Advisers in

respect of persons who become OptiMix Members for whom a financial adviser was linked to their account (**OptiMix Members with Linked Advisers**), being:

157.1. percentage contribution commissions calculated as:

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

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

157.2. percentage per annum trail commissions calculated as:

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

(also **Trail Commissions**),

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

#### **Particulars**

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

- (iii) ~~Further particulars may be provided following discovery. The Applicants refer to and repeat particulars (v)(A) to (D) and (vi)(A) to (D) to paragraph 150 above.~~

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

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

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

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

#### Particulars

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

~~(iii) Further particulars may be provided following discovery.~~

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

159.1. a rebate of the Contribution Commission:

- (a) for the “Entry Fee Option”, by charging a lower Contribution Fee;

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

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

### **Particulars**

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

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

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

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

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

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

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

162.1. percentage contribution commissions calculated as a maximum of 3.3% (where the member selected the “Entry Fee Option”) of amounts contributed or transferred by or for the benefit of ANZ Super Advantage Members with Linked Advisers (also **Contribution Commissions**); and

162.2. percentage monthly trail commissions, described as “Administration Fee commissions”, calculated as a maximum of 0.78% of the total balance of each

members' account at the end of the previous month (also, **Trail Commissions**).

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

#### Particulars

- (i) ANZ Super Advantage PDS dated 27 February 2012 pp3-4;
- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18- 21.
- (iii) ~~Further particulars may be provided following discovery. The~~  
Applicants refer to and repeat particulars (v) and (vi) to paragraph  
150 above.

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

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

163.2. fees described as:

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

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

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

#### Particulars

- (i) ANZ Super Advantage PDS dated 27 February 2012 pp3-4;

- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18- 24.

~~(iii) — Further particulars may be provided following discovery.~~

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

#### Particulars

- (i) ANZ Super Advantage PDS and Member Guide dated 27 February 2012 pp3-4;
- (ii) ANZ Super Advantage Member Guide dated 27 February 2012, pp18-23.

~~(iii) — Further particulars may be provided following discovery.~~

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

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

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

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

#### K.5 Integra

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



### Particulars

- (i) Member Guide dated 27 February 2012 p20-26;
- (ii) Investment Choice Guide dated 27 February 2012, p48
- (iii) ~~Further particulars may be provided following discovery. The Applicants refer to and repeat particulars (v) and (vi) to paragraph 150 above.~~

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

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

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

### Particulars

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

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

### Particulars

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

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

171. On or about 8 November ~~By 1 July~~ 2013, Integra ~~had~~ closed to new employer plans.

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

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

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

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

#### **Particulars**

(i) The Trustee's agreement is to be inferred from:

(A) Clause 13 of the MIT;

(B) Each PDS for the relevant Fund Products issued by both OPL and the Trustee which refer to the fees.

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

#### **K.7 ANZ Aligned Financial Advisers**

172A. At all material times before the FOFA Start Date, some Financial Advisers who had Adviser Arrangements with OPL and the Trustee and received Adviser Commissions in the circumstances pleaded in paragraphs 150, 157, 162 and 167 above were companies which were Subsidiaries and/or Related Bodies Corporate of ANZ (ANZ Aligned Financial Advisers).

#### **Particulars**

(i) The ANZ Aligned Financial Advisers included:

(A) RI Advice Group Pty Ltd [AFSL 238429] and financial planners employed by, engaged by or otherwise operating as

representatives of RI Advice Group Pty Ltd within the meaning of Part 7.6 of the Corporations Act, from around 17 December 2009 and 18 October 2018.

(B) Millennium 3 Financial Services Pty Ltd [AFSL 244252] and financial planners employed by, engaged by or otherwise operating as representatives of Millenium 3 Financial Services Pty Ltd within the meaning of Part 7.6 of the Corporations Act, from around 17 October 2009 and 10 October 2018.

(C) Elders Financial Planning Pty Ltd [AFSL 224645] and financial planners employed by, engaged by or otherwise operating as representatives of Elders Financial Planning Pty Ltd within the meaning of Part 7.6 of the Corporations Act, from around 17 December 2009 and 18 October 2018.

(D) Financial Services Partners Pty Ltd [AFSL 237590] and financial planners employed by, engaged by or otherwise operating as representatives of Financial Services Partners Pty Ltd within the meaning of Part 7.6 of the Corporations Act, from around 23 December 2009 to 10 October 2018.

(E) Sentry Financial Services Pty Ltd [AFSL 286786] and financial planners employed by, engaged by or otherwise operating as representatives of Sentry Group Pty Ltd within the meaning of Part 7.6 of the Corporations Act, from around 10 March 2011 and 9 February 2015.

## **L. THE FOFA REFORMS**

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

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

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

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

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

175. The Conflicted Remuneration Provisions:

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

175.2. prohibited Conflicted Remuneration by providing that:

- (a) financial services licensees must not accept Conflicted Remuneration;
- (b) authorised representatives of financial services licensees must not accept Conflicted Remuneration;
- (c) other representatives of financial services licensees must not accept Conflicted Remuneration (unless it is in circumstances for which an employer is liable as referred to in (d) below);
- (d) employers of financial services licensees, or representatives of financial services licensees, must not give Conflicted Remuneration to the licensee or representative for work carried out, or to be carried out by the licensee or representative as an employee;
- (e) issuers or sellers of financial products must not give financial services licensees, or their representatives, Conflicted Remuneration; and

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

### Particulars

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

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

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

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

### Particulars

Corporations Act, Part 7.7A, Div 7.

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

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

177.2. certain benefits prescribed by the Corporations Regulations,

**(Grandfathered Commissions).**

### Particulars

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

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

178. At all material times from the Master Fund Start Date, the Adviser Commissions were monetary benefits given to a financial services licensee, or a representative of a financial services licensee (namely the Financial Advisers of OneAnswer Members with Linked Advisers, of OptiMix Members with Linked Advisers, or engaged by the employers or former employers of ANZ Super Advantage Members with Linked

Advisers or Integra Members with Linked Advisers) that could reasonably be expected to influence the choice of financial products recommended by that licensee or representative to retail clients, or could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

179. By reason of the matters pleaded in paragraphs 178 above, at all material times on and from 1 July 2012, Adviser Commissions were Conflicted Remuneration within the meaning of the Conflicted Remuneration Provisions.
180. By reason of the matters pleaded in paragraph 179 above, at all material times on and from the FOFA Start Date, OPL and the Trustee were each prohibited from giving financial services licensees, or their representatives, Adviser Commissions save where they were Grandfathered Commissions.

### **M.1A Post-FOFA Members**

180A. At all material times on and from about 1 July 2013, OPL and the Trustee ceased to have and/or did not enter into Adviser Arrangements pursuant to which OPL or the Trustee paid Adviser Commissions in respect of persons who became members of the Master Fund from 1 July 2013 (Post-FOFA Members).

180B. At all material times from the FOFA Start Date, in respect of Post-FOFA Members, OPL and the Trustee:

180B.1 did not charge Contribution Fees; and

180B.2 did not charge Excess Ongoing Fees.

### **Particulars**

(i) OneAnswer Personal Super and Pension PDS dated 1 July 2013 [OPC.0006.0001.3351];

(ii) OneAnswer Personal Super and Pension Fees Guide, dated 1 July 2013 [OPC.0006.0001.3331];

(iii) OneAnswer Personal Super and Pension PDS, dated 1 July 2014 [OPC.0002.0003.0001];

(iv) OneAnswer Personal Super and Pension Fees Guide, dated 1 July 2014 [OPC.0006.0001.3511];

(v) OneAnswer Personal Super and Pension Fees Guide, dated 2 May 2016 [OPC.0006.0001.3623];

(vi) OneAnswer Personal Super and Pension Fees Guide, dated 20 February 2017 [OPC.0006.0001.3649];

(vii) OneAnswer Personal Super and Pension Fees Guide, dated 18 September 2017 [OPC.0006.0001.3665];

(viii) OneAnswer Personal Super and Pension PDS, dated 18 September 2017 [OPC.0006.0001.3779].

## **M.1 OneAnswer Members**

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

181.1. OnePath OneAnswer Members before 30 June 2013;

181.2. ANZ OneAnswer Members before 30 June 2013; and

181.3. Transferred red OneAnswer Members at any time,

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

### **Particulars**

(i) In relation to Entry Fee option Pre-FOFA OneAnswer Members:

(A) ANZ OneAnswer PDS dated 27 February 2012, p1,5;

(B) OnePath OneAnswer PDS dated 27 February 2012, p5;

(C) OneAnswer Personal Super and Pension Fees Guide dated 27 February 2012, p16;

(ii) In relation to Nil or Deferred Entry Fee option Pre-FOFA OneAnswer Members:

- (A) PDS OneAnswer Personal Super and Pension dated 1 July 2013, p4
- (B) Fees Guide OneAnswer Personal Super and Pension dated 1 July 2013, pp4-16;
- (C) PDS OneAnswer Personal Super and Pension dated 2 May 2016, p4;
- (D) Fees Guide OneAnswer Personal Super and Pension dated 2 May 2016, pp4-13;
- (E) PDS OneAnswer Personal Super and Pension dated 18 September 2017, p4;
- (F) Fees Guide OneAnswer Personal Super and Pension dated 18 September 2017, pp4-16;

- (iii) The Applicants refer to and repeat particulars (vi) to paragraph 150 above~~Further particulars may be provided after discovery~~

181A. In or about March or April 2019 (and prior to 13 April 2019), the Trustee, alternatively the Trustee and OPL, altered or amended Adviser Arrangements and/or ceased to have Adviser Arrangements, such that by 13 April 2019, the Trustee and OPL no longer had Adviser Arrangements pursuant to which OPL or the Trustee paid Adviser Commissions in respect of Pre-FOFA OneAnswer Members who had a Financial Adviser linked to their account who was an ANZ Financial Adviser (Linked ANZ Financial Adviser).

### Particulars

- (i) Paper to Trustee Board entitled "Pensions and Investments Business Update" for meeting on 13 March 2019  
[OPC.0001.0010.5796] stated that the Trustee was on track to switch off/rebate commissions for members with Linked ANZ Financial Advisers in early April 2019.
- (ii) Minutes of Trustee Board Meeting dated 17 May 2019  
[OPC.0001.0011.1657] record that a decision had been made by



ANZ, following which commissions payments had been turned off for Linked ANZ Financial Advisers.

- (iii) Paper to the Trustee Board dated 12 September 2019 entitled “Pensions and Investments Business Update” [OPC.0001.0012.0182] stated that a large scale operational project was implemented and completed in April 2019 eliminating commissions on a bulk basis for members with a Linked ANZ Financial Adviser.
- (iv) Letter from Victoria Weekes, Chair of the Trustee Board, to APRA dated 30 August 2019 [OPC.0001.0011.8592] stated that as of 1 April 2019, ongoing commission payments in relation to ANZ Financial Planning members had ceased and are rebated to members in full.
- (v) Further particulars may be provided following the service of the Respondents’ evidence.

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

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

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

### Particulars

- (i) The applicants refer to and repeat the particulars to paragraph 181 and 181A.
- (ii) In relation to Pre-FOFA OneAnswer Members without a linked Financial Adviser:
  - (A) Paper to Trustee Board entitled “Pensions and Investments Business Update” for meeting on 13 March 2019 [OPC.0001.0010.5796] stated that from late March / early

April 2019, customers where no adviser relationship is registered against an account will have upfront fees paid as commission reduced to zero, and they will commence receiving an ongoing fee rebate equal to the trail commission amount built into the product fees where applicable.

(B) Trustee Board Meeting dated 17 May 2019

[OPC.0001.0011.1657] records that commissions payments had been turned off for customers without an adviser linked to their account.

(C) Paper to the Trustee board dated 12 September 2019 entitled "Pensions and Investments Business Update"

(OPC.0001.0012.0182) stated that a large scale operational project was implemented and completed in April 2019 eliminating commissions on a bulk basis for members without an adviser linked to their account.

## **M.2 OptiMix Members**

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

### **Particulars**

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

- (ii) The Applicants refer to and repeat particular (iii) to paragraph 157 above~~Further particulars may be provided following discovery.~~

184. At all material times s from the FOFA Start Date until the Master Fund End Date, in respect of OptiMix Members, OPL:

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

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

#### Particulars

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

In relation to OptiMix Members without a linked Financial Adviser, the Applicants refer to and repeat the particulars to paragraph 182 above.

### M.3 ANZ Super Advantage Members

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

#### Particulars

- (i) The Applicants refer to:
- (A) Information Booklet for ANZ Superannuation and Pension Products dated January 2019 p 4;
  - (B) Adviser Frequently Asked Questions Document dated June 2019, p 3.

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

- (ii) The Applicants refer to and repeat particular (iii) to paragraph 162 above~~Further particulars may be provided following discovery.~~

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

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

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

#### Particulars

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

#### M.4 Integra Members

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

#### Particulars

- (i) The Applicants refer to:

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

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

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

- (ii) The Applicants refer to and repeat particulars (iii) to paragraph 167 above~~Further particulars may be provided following discovery.~~

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

### Particulars

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

### M.5 Trustee's agreement to Post-FOFA Fees for Pre-FOFA Members

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

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

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

### Particulars

- (i) The Trustee's agreement is to be inferred from:

(A) Clause 13 of the MIT;

(B) Each PDS or Fees Guide for the relevant Fund Products issued by both OPL and the Trustee which refer to the fees:-

(C) Minutes of Trustee Board Meeting held on 14 March 2012 [OPC.0001.0001.2763] at which record that the Trustee noted the approach of the business to implementation of the FOFA

Reforms, as set out in a paper entitled “Future of Financial Advice (FOFA) Reforms” [OPC.0001.0001.3031].

(D) Minutes of Trustee Board Meeting held on 27 May 2013 [OPC.0001.0001.9976] which record that the Trustee approved the closure of ANZ OneAnswer and OnePath OneAnswer products to new members with effect from 1 July 2013 and agreed to recommendations on grandfathering existing business already invested in those products prior to 1 July 2013, and accompanying board paper entitled “OneAnswer Personal Super and Pension – closure of Entry Fee and Nil Entry Fee Products and Removal of Deferred Adviser Service Fees” [OPC.0001.0001.9319].

(E) Decision of GW Product Committee (WPC) of ANZ Wealth on or about 4 June 2013 to approve the closure of ANZ OneAnswer and OnePath OneAnswer products to new members from 1 July 2013, which would have the effect of allowing upfront and trailing commissions to be paid to advisers on those closed products after 1 July 2013 (Paper entitled “Proposed Closure of OneAnswer Entry Fee and Nil Entry Fee options and Investment Savings Bond – 1 July 2013” [ABG.502.001.1123]).

- (ii) Further particulars may be provided following discovery service for the Respondents’ evidence.

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

190. At all material times:

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

- (a) charging Contribution Fees as pleaded in paragraphs 151.1, 158.1 and 163.1 above, was to fund the payment by OPL of the Contribution Commissions pleaded in paragraphs 150.1, 157.1 and 162.1 respectively;

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

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

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

**(OPL's Purpose).**

### **Particulars**

- (i) OPL's purpose is to be inferred from:
  - (A) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraphs 140-144;
  - (B) the circumstances in which the Adviser Commissions were paid and the Fees were charged;
  - (C) PDS and Fees Guides which state that commissions are already incorporated into the Entry and Ongoing Fees (as applicable) including:
    - a. OneAnswer PDS dated 15 November 2010, p1 and p41;
    - b. OneAnswer SPDS dated 1 September 2011, p1 and p41;

- c. OneAnswer Fees Guide dated 27 February 2012, p.16;
- d. OneAnswer Fees Guide dated 1 July 2013, p16
- e. OneAnswer Fees Guide dated 2 May 2016, p13
- f. OneAnswer Fees Guide OneAnswer Fees Guide 18 September 2017, p16.

~~(ii) — Further particulars may be provided following discovery~~

191. At all material times:

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

- (a) agreeing OPL could charge Contribution Fees as pleaded in paragraph 172.1 above, was to enable OPL to fund the payment of the Contribution Commissions pleaded in paragraphs 150.1, 157.1 and 162.1 respectively;
- (b) agreeing OPL could Ongoing Fees at the level it in fact charged them as pleaded in paragraph 172.2 above, was to enable OPL to fund the payments of Trail Commissions pleaded in paragraphs 150.2, 157.2, 162.2 and 167 respectively;

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

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

**(Trustee's Purpose).**



### Particulars

- (i) The applicants refer to and repeat the particulars at paragraph 190.

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

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

### .Particulars

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

required to provide any additional or ongoing services to the member in consideration for the Contribution Commissions or Trail Commissions payable by the Issuer under the Product Issuer Agreement. The Applicants refer to the terms and conditions of the Product Issuer Agreements particularised in paragraph 150 above.

193. At all material times on and from the FOFA Start Date until the Master Fund End Date:

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

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

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

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

#### Particulars

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

194. Between about March 2012 and June 2013, At a time in or about 2013 (and no later than 30 June 2013), the Trustee decided, alternatively the Trustee and OPL agreed and decided, that OPL would continue to pay Grandfathered Commissions after the FOFA Start Date (**First Grandfathered Commission Payment Decision**).

#### Particulars

- (i) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraph 142;

- (ii) Further particulars may be provided following discovery. Minutes of Trustee Board Meeting held on 14 March 2012 [OPC.0001.0001.2763] which record that the Trustee noted the approach of the business to implementation of the FOFA Reforms, as set out in a paper entitled “Future of Financial Advice (FOFA) Reforms” (see below).
- (iii) Paper to the Trustee Board dated 14 March 2012 entitled “Future of Financial Advice (FOFA) Reforms” [OPC.0001.0001.3031] which recommended the Board note the approach the business was taking to comply with the FOFA Reforms in relation to ANZ OneAnswer products, OnePath OneAnswer products, Integra, ANZ Super Advantage and legacy and closed products (which included OptiMix). That approach had the effect of retaining existing members in products for which commissions would continue to be paid after the commencement of the FOFA Reforms.
- (iv) Decision of Wealth Leadership Team in or about March 2013 to close ANZ OneAnswer and OnePath OneAnswer products to new members from 1 July 2013, allowing upfront and trailing commissions to be paid to advisers on those closed products after 1 July 2013 (Decision referred to in email from Mark Pankhurst dated 21 March 2013 [ABG.509.022.7932] and accompanying paper entitled “FOFA Strategy – OneAnswer Commission Products and Investment Savings Bond” dated March 2013 [ABG.509.022.7934])).
- (v) Minutes of Trustee Board Meeting held on 27 May 2013 [OPC.0001.0001.9976] which record that the Trustee approved the closure of ANZ OneAnswer and OnePath OneAnswer products to new members with effect from 1 July 2013 and agreed to recommendations on grandfathering members already invested in those products prior to 1 July 2013.
- (vi) Paper to the Trustee Board dated 27 May 2013 entitled “OneAnswer Personal Super and Pension – closure of Entry Fee and Nil Entry Fee Products and Removal of Deferred Adviser

Service Fees” [OPC.0001.0001.9319] recommending the closure of ANZ OneAnswer and OnePath OneAnswer products to new members with the products grandfathered which would allow upfront and trailing commissions to be paid to advisers after 1 July 2013.

(vii) Decision of GW Product Committee (WPC) of ANZ Wealth on or about 4 June 2013 to approve the closure of ANZ OneAnswer and OnePath OneAnswer products to new members from 1 July 2013, which would have the effect of allowing upfront and trailing commissions to be paid to advisers on those closed products after 1 July 2013 (Paper entitled “Proposed Closure of OneAnswer Entry Fee and Nil Entry Fee options and Investment Savings Bond – 1 July 2013” [ABG.502.001.1123]).

(ii)(viii) Further particulars may be provided following service of the Respondents’ evidence.

195. The First Grandfathered Commission Payment Decision was made ~~based upon~~:

195.1. based upon:

- (a) the interests of Financial Advisers including ANZ Financial Advisers and ANZ Aligned Financial Advisers continuing to receive the commissions;
- (b) further or alternatively, the interests of OPL and the Trustee in not paying compensation to Financial Advisers under Adviser Arrangements for terminating or amending those arrangementsagreements;
- (c) further or alternatively, the interests of the Trustee and OPL in limiting the impact of the FOFA Reforms on the funds under management in the Master Fund and the revenue made by OPL from the Master Fund; and

195.2. without any, or any genuine, consideration by the Trustee of the best interests of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members or Integra Members.

## Particulars

(i) The applicants refer to and repeat the particulars to paragraph 194.

(ii) The Trustee, alternatively the Trustee and OPL, sought to protect their relationship and reputation with Financial Advisers, and sought to remove the incentive for Financial Advisers to recommend Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members leave the Master Fund.

196. The Trustee's decision, alternatively the Trustee and OPL's decision, to:

196.1. continue to charge Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members after the FOFA Start Date;

196.2. continue to charge Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members after the FOFA Start Date;

was made by reason of the Trustee's, alternatively the Trustee's and OPL's, First Grandfathered Payment Decision, and therefore was made: having regard to:

196.3. having regard to:

(a) the interests of Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers, in continuing to receive commission payment (by receipt from OPL of Adviser Commissions being Grandfathered Commissions);

(b) further or alternatively, the interests of OPL and the Trustee in not being obliged to pay compensation to Financial Advisers under Adviser Arrangements for terminating or amending those arrangements; agreements.

(c) further or alternatively, the interests of the Trustee and OPL in limiting the impact of the FOFA Reforms on the funds under management in the Master Fund and the revenue made by OPL from the Master Fund; and

196.4. without any, or any genuine, consideration by the Trustee of the best interests of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members or Integra Members.

196A. Further and alternatively to paragraph 194 above, at no time during the Master Fund Period did the Trustee make a decision to cause OPL to cease the payment of Grandfathered Commissions after the FOFA Start Date, but maintained the arrangement pursuant to which OPL paid Grandfathered Commissions after the FOFA Start Date (Trustee's Commissions Payment Failure).

197. At all material times on and from the FOFA Start Date until the Master Fund End Date, the deduction by OPL of Contribution Fees and Ongoing Fees and the payment by OPL of Contribution Commissions and Trail Commissions:

197.1. reduced the benefits of Members in the Master Fund;

197.2. reduced the benefits of Members in the RPS Fund from the Master Fund End Date; and

197.3. enriched and benefited OPL, ANZ and the Financial Advisers (including ANZ Financial Advisers and ANZ Aligned Financial Advisers) to whom OPL paid Contribution Commissions and Trail Commissions.

### Particulars

- (i) The particulars to paragraphs 191 ~~and to~~ 193A are repeated.
- (ii) The- OnePath OneAnswer Members' benefits, ANZ OneAnswer Members' benefits, OptiMix Members benefits and ANZ Super Advantage Members' benefits were reduced by at least the amount of the Contribution Fees and the amount of the Excess Ongoing Fee.
- (iii) The Integra Members' benefits were reduced by at least the amount of the Excess Ongoing Fees.
- (iv) Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers, were enriched and benefited to the extent OPL paid them Contribution Commissions and Trail Commissions.

(v) OPL was enriched and benefited to the extent it retained the Contribution Fees and the amount of the Excess Ongoing Fees paid by members without a linked Financial Adviser;

(vi) ANZ was enriched and benefited to the extent OPL paid the ANZ Financial Advisers and ANZ Aligned Financial Advisers the Adviser Commissions;

(vii) the Trustee and OPL benefited by limiting the impact of the FOFA Reforms on the revenue made by OPL and the Trustee from the Master Fund by protecting their relationship and reputation with Financial Advisers, and removing the incentive for Financial Advisers to recommend members leave the Master Fund.

197A. In or about March or April 2019, but prior to 13 April 2019, the Trustee, alternatively, the Trustee and OPL, decided to:

197A.1 cease to pay Adviser Commissions to ANZ Financial Advisers by 13 April 2019, as pleaded in paragraph 181A above;

197A.2 cease to charge Contribution Fees by 13 April 2019 to:

(a) Pre-FOFA OneAnswer Members with a Linked ANZ Financial Adviser;  
and

(b) Pre-FOFA OneAnswer Members and OptiMix Members without a linked Financial Adviser,

as pleaded in paragraphs 182D, 184D above; and

197A.3 cease to charge Ongoing Fees by 13 April 2019 to:

(a) Pre-FOFA OneAnswer Members with a Linked ANZ Financial Adviser;  
and

(b) Pre-FOFA OneAnswer Members and OptiMix Members without a linked Financial Adviser,

at the level at which OPL previously charged them, as pleaded in paragraphs 182D, 184D above, such that Excess Ongoing Fees were no longer charged,

**(First Cessation of Grandfathered Commissions Payment Decision).**

**Particulars**

- (i) Paper to Trustee Board entitled “Pensions and Investments Business Update” for meeting on 13 March 2019 [OPC.0001.0010.6496] which reported that from late March / early April, customers where no adviser relationship is registered against an account will have upfront fees paid as commission reduced to zero, and they will commence receiving an ongoing fee rebate equal to the trail commission amount built into the product fees where applicable, and the Trustee was on track to switch off/rebate commissions for members with Linked ANZ Financial Advisers in early April 2019.
- (ii) Minutes of Trustee Board Meeting dated 17 May 2019 [OPC.0001.0011.1657] record that:
  - (A) a decision had been made by ANZ, following which commissions payments had been turned off for ANZ Financial Advisers
  - (B) commissions payments had been turned off for customers without an adviser linked to their account.
- (iii) Paper to the Trustee Board dated 12 September 2019 entitled “Pensions and Investments Business Update” (OPC.0001.0012.0182) stated that a large scale operational project was implemented and completed in April 2019 eliminating commissions on a bulk basis for members with a Linked ANZ Financial Adviser and for members without an adviser linked to their account.
- (iv) Letter from Victoria Weekes, Chair of the Trustee Board, to APRA dated 30 August 2019 [OPC.0001.0011.8592] which stated that as of 1 April 2019, ongoing commission payments in relation to ANZ Financial Planning members had ceased and are rebated to members in full.



- (v) Further particulars may be provided following the service of the Respondents' evidence.

197B. The Trustee's First Cessation of Grandfathered Commission Payment Decision was made by the Trustee because it considered the decision to be in the best interests of the members of the Master Fund and/or the RPS Fund and/or the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members and Integra Members.

### **Particulars**

- (i) Minutes of Trustee Board Meeting dated 29 November 2018 [OPC.0001.0009.6277] which recorded that the Board had formed the commitment to phrase out commissions, without breaching contractual obligations and members' best interests was the primary driver.
- (ii) Minutes of Trustee Board Meeting dated 7 February 2019 [OPC.0001.0010.1663] which recorded a discussion that FOFA Grandfathered Commissions were considered not in best interest of members.
- (iii) Further particulars may be provided following the service of the Respondents' evidence.

198. At all material times in the period on and after the FOFA Start Date:

198.1. it was not in the best interests of members of the Master Fund, the RPS Fund and/or the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members for:

- (a) the Trustee, alternatively the Trustee and OPL, to maintain and adhere to the Trustee's, alternatively the Trustee's and OPL's, First Grandfathered Commission Payment Decision;
- (b) during the Master Fund Period, the Trustee to decide, alternatively the Trustee and OPL to agree and decide, that OPL to continue to, and for OPL to in fact continue to:

- (i) pay Adviser Commissions in respect of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members; and
- (ii) charge Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members; and
- (iii) charge Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members;

(c) alternatively to (a) and (b) above, the Trustee by failure to act to cause the Trustee's Commission Payment Failure.

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

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

- (c) during the Master Fund Period the Trustee to restructure the investment and administrative structure of the Master Fund such that it no longer agreed that OPLOPC may charge Contribution Fees and Ongoing Excess Fees to members in order to pass on the cost (in whole or in part) of the Adviser Commissions;
- (d) the Trustee to make the First Cessation of Grandfathered Commissions Payment Decision, to the extent it enabled the cessation of the charging of:
- (i) Contribution Fees to Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members; and
- (ii) Excess Ongoing Fees to Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members;
- (e) the Trustee to transfer members to a comparable product within the Master Fund (in the Master Fund Period) which did not pay Adviser Commissions and did not charge Contribution Fees or Excess Ongoing Fees.

### Particulars

- (i) The best interests of the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members were their best financial interests;
- (ii) The best financial interests of the Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members were not served by the deduction of Contribution Fees and/or Excess Ongoing Fees to fund Adviser Commissions, in circumstances where they received no benefits, as pleaded in paragraphs 193.1 and 193.2 above.
- (iii) The best financial interests of the Integra Members were not served by the deduction of Excess Ongoing Fees to fund Adviser Commissions, in circumstances where they received no benefits, as pleaded in paragraph 193.2 above.

(iv) The best financial interests of the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members were not served by OPL and the Trustee's adherence to a decision to promote the business interests of Financial Advisers and/or OPL's business interests, as pleaded in paragraphs 194 and 196 above.

(v) The Trustee's ability to restructure the Master Fund is evidenced from the fact of the restructure on and from the RPS Start Date, including the ~~revocation-redemption~~ of the Life Policies and ~~the termination of the~~ Administration Agreement.

(vi) The best financial interests of the Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, Integra Members were not served by remaining invested in superannuation products to the extent their linked Financial Adviser was influenced in the choice of the product by the receipt of Adviser Commissions,

(vii) As to transfer, the Applicants refer to Section O of the Further Amended Statement of Claim below.

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

199.1. prior to the Master Fund End Date:

(a) ~~The~~ Trustee, alternatively the Trustee and OPL were able to cease to maintain and adhere to the Trustee's, alternatively the Trustee's and OPL's, First Grandfathered Commission Payment Decision;

(b) OPL was able to cease to pay Adviser Commissions;

(c) OPL was able to absorb the cost of Adviser Commissions;

(d) OPL and the Trustee were able to agree that OPL cease to charge:

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

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

(e) OPL was able to cease to charge:

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

199.2. the Trustee was able to make and implement its First Cessation of Grandfathered Commissions Payment Decision;

### Particulars

- (i) The Trustee and/or OPL ceased to maintain and adhere to the First Grandfathered Commission Payment Decision in respect of Corporate Super Mmembers by 30 June 2017:-
  - (A) The Trustee approved the transfer of Accrued Default Account members of Corporate Super to the Smart Choice – Employer Super division in or about January or February 2015.
  - (B) Decision of Peter Mullins, as delegate of the Trustee in or about February or March 2017 (ABG.509.341.4064), to approve that it was in the best interests of 1,089 Corporate Super Members to be transferred to the Smart Choice – Employer Product.
  - (C) Decision of Alexis George, as delegate of OPL, in or about March 2017 (ABG.509.339.4086), to approve the cancellation of Corporate Super commission payments in arrears with effect from August 2017; to determine that it was reasonable not to make ongoing commission payments under the Product Issuer Agreements and to approve funding for OPL to prepay 2 years commissions to dealer support groups supporting Corporate Super employer plans.
- (ia) The Trustee and/or OPL ceased to maintain and adhere to the First Grandfathered Commission Payment Decision in respect of

ANZ Superannuation Savings Account members on or about 16 December 2016:

(A) Trustee Board Meeting Minutes held on 16 December 2016 [OPC.0001.0006.1020]:

(B) Paper to Trustee Board for meeting on 16 December 2016 [OPC.0001.0005.8916]:

(C) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraphs 215-218.

(ii) The Trustee and/or OPL could cease to maintain and adhere to the First Grandfathered Commission Payment Decision in respect of OnePath OneAnswer Products, ANZ OneAnswer Products, ANZ Super Advantage Products and Intergra Products.

(iii) The Trustee in fact made the First Cessation of Grandfathered Payment Decision on or about March or April 2019, and implemented it by 13 April 2019.

(iv) Under at least one version of the Product Issuer Agreement (Product Issuer Agreement dated 1 October 2003 [OPC.0019.0004.9563]):

(A) the Trustee and OPL (as Issuers) were entitled to terminate the agreement on 30 days' notice without cause, following which the Financial Adviser was no longer entitled to Adviser Commissions (clause 7.1, clause 7.3(3), schedule 2, paragraph 1.14);

(B) the Trustee and OPL (as Issuers) were entitled to vary Commissions and Fee rates and the bases of compensation without notice to the Financial Adviser (clause 2.7(2); schedule 2, paragraph 1.1);

(C) the agreement could be varied by the written agreement of the parties (clause 15.1);

(D) during the term of the agreement, Adviser Commissions will continue to be paid in accordance with the agreement until the client requests the Issuer in writing to cease payments to the Distributor (schedule 2, paragraph 1.8);

(E) should the product be altered or replaced by another product with consequent impact on the Adviser Commissions, the Adviser Commissions payable to the Financial Adviser shall be such amounts as the Trustee and/or (until the end of the Master Fund Period) OPL considers to be reasonable in all the circumstances (schedule 2, paragraph 1.11).

(v) Under other versions of the Product Issuer Agreements (as particularised in paragraph 150 above):

(A) the Trustee and OPL (as Issuers) were entitled to vary Commissions and Fee rates in its disclosure documents on the issuing of a new PDS and upon providing 90 days' notice of such change (schedule 2, paragraph 1.1);

(B) the agreement could be varied by the written agreement of the parties (clause 15.1);

(C) should the product be altered or replaced by another product with consequent impact on the Adviser Commissions, the Adviser Commissions payable to the Financial Adviser shall be such amounts as the Trustee and OPL considers to be reasonable in all the circumstances (schedule 2, paragraph 1.10).

(vi) As of May 2018, approximately 350 Adviser Arrangements had been terminated without Adviser Commissions continuing to be paid: Paper prepared by Caroline James and Josh Cross dated May 2018 [ABG.509.350.8392 at .8397].

(iii)(vii) Further particulars may be provided following discovery service of the Respondents' evidence.

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

**O.1 Alternatives to Retail Products**

200. At all material times after the FOFA Start Date, the Frontier Products were ones in respect of which (prior to the Master Fund End Date) OPL:

200.1. did not charge Contribution Fees; and

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

**Particulars**

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

~~(xi) Further particulars may be provided following discovery.~~

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



- 201.1. establish a new “Section” of the Master Fund in its discretion from time to time by executing a supplemental deed under which the schedule setting out the rules governing the new section is added;
- 201.2. divide a Section into “Divisions” and establish a new Division by executing a supplemental deed under which the schedule setting out the rules governing the new Division is added;
- 201.3. transfer a member from a Section, Division or other group of members to another Section, Division or other group of members on terms the Trustee determines, and may reallocate assets between the applicable Sections and Divisions to reflect the transfer.

#### Particulars

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

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

#### Particulars

- (i) The ANZ OneAnswer Frontier Product was within the ANZ Personal Superannuation Section (MIT, page 3936);
- (ii) The OnePath OneAnswer Frontier Product was within the OnePath Master Fund Section (MIT, page 3735).

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

### Particulars

- (i) The Applicants refer to and repeat paragraphs 201 and 202.
- (ii) Pre-FOFA OneAnswer Members and OptiMix Members could have been transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Fronter Personal Super or Fronter Pension Products), or another Section or Division of the Master Fund established where there was no liability to pay such fees.

~~(iii) Further particulars may be provided after discovery.~~

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

### Particulars

The Applicants refer to and repeat paragraph 198.

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

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

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

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

### Particulars

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

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

### Particulars

The Applicants refer to and repeat paragraph 198.

207. At all material times:

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

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

### Particulars

- (i) As to subparagraph 2, the Applicants refer to:
  - (A) Information Booklets for OnePath Superannuation and Pension Products dated January 2019, page 4, provided to Master Fund Members in or about March 2019;
  - (B) Product Information Document entitled "Important Information about Superannuation and Pension Products" dated May 2019 issued by the Trustee<sub>1</sub>:-
  - (C) Significant Event Notices (SEN) regarding the Successor Fund Transfer:
    - a. Sample SEN for OneAnswer Pension [OPC.0020.0001.0441];

b. Sample SEN for OneAnswer Personal  
[OPC.0020.0001.0444];

(D) As a condition of the relief provided to enable the Successor Fund Transfer, ASIC required the Trustee to send a communication to impacted members of products that pay grandfathered commissions within two months of the Successor Fund Transfer, stating that they are currently paying commissions in relation to their account and that the member could give direction to immediately stop the payment of commissions without any need for the member to contain the recipient adviser. The Trustee sent 58,000 letters in June and July 2019:

a. Paper for Trustee Board entitled “Member Engagement – Commissions Communication” dated 17 May 2019  
[OPC.0001.0011.1601];

b. Letter from Victoria Weekes, Chair of the Trustee, to APRA dated 30 August 2019 [OPC.0001.0011.8592];

c. Sample letter from the Trustee to members  
[OPC.0020.0001.1539].

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

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

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

208.1. did not charge Contribution Fees;

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

### **Particulars**

(i) Smart Choice Employer PDS dated 18 February 2017;

- (ii) Smart Choice Additional Information Guide dated 18 February 2017;
- (iii) Smart Choice Employer PDS dated 13 April 2019;
- (iv) Smart Choice Additional Information Guide dated 13 April 2019;
- (v) Smart Choice Employer PDS dated 14 December 2019;

~~(vi) Further particulars may be provided following discovery.~~

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

#### Particulars

- (i) Master Fund Trust Deed, Schedule 7, clause 2.1

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

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

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

(also, **Transfer Power**).

#### Particulars

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

~~(iii) Further particulars may be provided after discovery.~~

210A. Between 11 November 2016 and 25 November 2016, Accrued Default Amounts (ADA) members of Integra and ANZ Super Advantage were transferred to the ANZ Smart Choice – Employer Product.

### **Particulars**

- (i) Paper for Trustee Board meeting held on 21 July 2016 [OPC.0001.0005.2147] recommending the Board approve that it is in the best interests of ADA members in the ANZ Super Advantage and Integra products to transfer their ADAs to the MySuper Division of the ANZ Smart Choice Super and Pension Section of the Fund.
- (ii) Minutes of meeting of Trustee Board held on 21 July 2016 resolving to approve the transfer [OPC.0001.0005.2575];
- (iii) Joint Trustee and OPL Board Meeting Minutes dated 16 December 2016 [OPC.0001.0006.1020] recorded that the transfer had been completed.
- (iv) Witness statement of Mark James Pankhurst dated 1 August 2018 provided on behalf of the Trustee to the Banking Royal Commission, paragraphs 105, 120.

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

- 211.1. ANZ Super Advantage Members (both members with ADA accounts and Choice Members) to be transferred to a Section or Division of the Master Fund (prior to the Master Fund End Date) in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees; and
- 211.2. Integra Members (both members with ADA accounts and Choice Members) to be transferred to a Section or Division of the Master Fund (prior to the Master Fund End Date) in respect of which they were not liable to pay Excess Ongoing Fees.

### **Particulars**

The Applicants refer to and repeat paragraph 198.

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

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

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

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

#### **Particulars**

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

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

#### **Particulars**

The Applicants refer to and repeat paragraph 198.

214. At all material times:

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

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

#### **Particulars**

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

(C) SENs regarding the Successor Fund Transfer:

a. Sample SEN for Integra Super [OPC.0020.0001.1534];

b. Sample SEN for Integra Super [OPC.0020.0001.0451];

(D) As a condition of the relief provided to enable the Successor Fund Transfer, ASIC required the Trustee to send a communication to impacted members of products that pay grandfathered commissions within two months of the Successor Fund Transfer, stating that they are currently paying commissions in relation to their account and that the member could give direction to immediately stop the payment of commissions without any need for the member to contain the recipient adviser. The Trustee sent 58,000 letters in June and July 2019:

a. Paper for Trustee Board entitled “Member Engagement – Commissions Communication” dated 17 May 2019 [OPC.0001.0011.1601];

b. Letter from Victoria Weekes, Chair of the Trustee, to APRA dated 30 August 2019 [OPC.0001.0011.8592];



c. Sample letter from the Trustee to members  
[OPC.0020.0001.1539].

~~(iii) Further particulars may be provided following discovery.~~

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

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

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

215.1. making and maintaining the First Grandfathered Commissions Payment Decision;

215.2. agreeing with OPL that it continue to charge:

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

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

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

215.4. alternatively to paragraphs 215.1, 215.2 and 215.3 above, the Trustee's Commission Payment Failure;

215.5. not deciding to make the First Cessation of Grandfathered Commissions Payments Decision prior to 13 April 2019;

215.6. prior to the end of the Master Fund Period, failing to cause OPL to cease to charge:

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

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

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

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

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

- (a) Pre-FOFA OneAnswer Members and OptiMix Members to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as Frontier Products); and
- (b) ANZ Super Advantage Members (save for those members transferred as pleaded in paragraph 210A (ADA Members)) to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as ANZ Smart Choice – Employer Products);
- (c) Integra Members (save for those members transferred as pleaded in paragraph 210A (also ADA Members)) to be transferred to a Section or Division of the Master Fund in respect of which they were not liable to pay Excess Ongoing Fees (such as ANZ Smart Choice – Employer Products);

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

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

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

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

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

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

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

- (ii) they had the right to request OPL or the Trustee to transfer their investment from the Retail Products to a Section or Division in respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the Frontier Products); and
- (d) further or alternatively, at all times from the FOFA Start Date to the Master Fund End Date, alternatively, March 2019, exercising its discretion not to advise them that they had the right to request the Trustee to cease paying commissions;

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

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

respect of which they were not liable to pay Contribution Fees or Excess Ongoing Fees (such as the ANZ Smart Choice – Employer Products); and

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

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

### **P.1A Contraventions of Conflicts Covenants**

217A. At all material times from the FOFA Start Date until the Master Fund End Date, there was a conflict between:

217A.1 the Trustee's duty to and the interests of Pre-FOFA OneAnswer Members, OptiMix Members, ANZ Super Advantage Members, and Integra Members, on the one hand; and

217A.2 the interests of Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers, the Trustee, OPL and ANZ on the other, in respect of (prior to the Master Fund End Date) OPL charging:

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

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

### **Particulars**

- (i) it was not in the interests of Pre-FOFA OneAnswer Members, OptiMix Members and ANZ Super Advantage Members for Contribution Fees and Excess Ongoing Fees to be deducted by OPL (prior to the Master Fund End Date), to fund Adviser Commissions, in circumstances where the members received no benefit, as pleaded in paragraphs 192 to 193 and 198 above;

- (ii) it was not in the interests of Integra Members for Excess Ongoing Fees to be deducted by OPL (prior to the Master Fund End Date), to fund Adviser Commissions, in circumstances where the members received no benefit, as pleaded in paragraphs 192 to 193 and 198 above;
- (iii) it was in the Financial Advisers' interests (including ANZ Financial Advisers and ANZ Aligned Financial Advisers) to be paid Adviser Commissions by OPL (prior to the Master Fund End Date), funded by Contribution Fees and Excess Ongoing Fees;
- (iv) it was in the interests of ANZ for the ANZ Financial Advisers and ANZ Aligned Financial Advisers to be paid Adviser Commissions by OPL (prior to the Master Fund End Date) funded by Contribution Fees and Excess Ongoing Fees;
- (v) it was in the interests of OPL (until the Master Fund End Date) to retain for its benefit Adviser Commissions funded by Contribution Fees and Excess Ongoing Fees paid by a Pre-FOFA OneAnswer Member or OptiMix Member without a Linked Adviser;
- (vi) it was in the interests of OPL (until the Master Fund End Date) and the Trustee to limit the impact of the FOFA Reforms on the revenue made by OPL from the Master Fund, and made by the Trustee from the Master Fund by continuing to pay Financial Advisers the Adviser Commissions funded by Contribution Fees and Excess Ongoing Fees for the purpose of protecting their relationship and reputation with Financial Advisers and removing the incentive for Financial Advisers to recommend members leave the Master Fund (during the Master Fund Period).

217B. By the acts and omissions pleaded in paragraphs 190 to 199, from the FOFA Start Date to the Master Fund End Date, the Trustee:

217B.1 did not prioritise its duties to and interests of beneficiaries over the interests of Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers;

217B.2 did not prioritise its duties to and interests of beneficiaries over the interests of ANZ and OPL;

217B.3 did not prioritise its duties to and interests of beneficiaries over its own interests

217B.4 did not ensure that its duties to beneficiaries were met despite the above conflicts;

217B.5 did not ensure that the interests of beneficiaries were not adversely affected by the above conflicts.

217C. In the premises, the Trustee was in contravention of the Conflicts Covenant, and thereby in contravention of s 55(1) of the SIS Act, or from 6 April 2019, s 54B of the SIS Act (**First Commissions Conflicts Contravention**).

217D. By the acts and omissions pleaded in 200 to 204, 208 to 211 above, from the FOFA Start Date to the Master Fund End Date, the Trustee:

217D.1 did not prioritise its duties to and interests of beneficiaries over the interests of Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers;

217D.2 did not prioritise its duties to and interests of beneficiaries over the interests of ANZ and OPL;

217D.3 did not prioritise its duties to and interests of beneficiaries over its own interests;

217D.4 did not ensure that its duties to beneficiaries were met despite the above conflicts;

217D.5 did not ensure that the interests of beneficiaries were not adversely affected by the above conflicts.

217E. In the premises, the Trustee was in contravention of the Conflicts Covenant, and thereby in contravention of s 55(1) of the SIS Act, or from 6 April 2019, s 54B of the SIS Act (**Second Commissions Conflicts Contravention**).

217F. By the acts and omissions pleaded in paragraphs 205 to 207 and 212 to 214, from the FOFA Start Date to the Master Fund end date, the Trustee:

217F.1 did not prioritise its duties to and interests of beneficiaries over the interests of Financial Advisers, including ANZ Financial Advisers and ANZ Aligned Financial Advisers;

217F.2 did not prioritise its duties to and interests of beneficiaries over the interests of ANZ and OPL;

217F.3 did not prioritise its duties to and interests of beneficiaries over its own interests;

217F.4 did not ensure that its duties to beneficiaries were met despite the above conflicts;

217F.5 did not ensure that the interests of beneficiaries were not adversely affected by the above conflicts.

217G. In the premises, the Trustee was in contravention of the Conflicts Covenant, and thereby in contravention of s 55(1) of the SIS Act, or from 6 April 2019, s 54B of the SIS Act (Third Commissions Conflicts Contravention).

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

218. Further and alternatively, in respect of each contravention of a covenant in s 52 of the SIS Act during the Master Fund Period set out in Section P above, by engaging in conduct giving rise to the contravention, the Trustee breached the Implied Terms of the Master Fund Trust Deed (~~Trustee's Commissions~~ Master Fund Breach of Trust).

219. Further, in respect of:

219.1. the First Commissions Best Interests Contravention;

219.2. the Second Commissions Best Interests Contravention; and

219.3. the Third Commissions Best Interests Contravention;

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

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



219A. Further, in respect of:

219A.1 the First Commissions Conflicts Contravention;

219A.2 the Second Commissions Conflicts Contravention; and

219A.3 the Third Commissions Conflicts Contravention;

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

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

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

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

220.1. knowingly concerned in; and/or

220.2. party to,

each of:

220.3. the First Commissions Best Interests ~~SIS~~ Contravention;

220.4. the Second Commissions Best Interests Contravention;

220.5. the Third Commissions Best Interests Contravention;

220.6. the First Commissions Conflicts Contravention;

220.7. the Second Commissions Conflicts Contravention;

220.8. the Third Commissions Conflicts Contravention;

### **Particulars**

(i) OPL was concerned in, or party to, the contravention by reason of:

(A) making the First Grandfathered Commissions Payment Decision with the Trustee;

(B) agreeing with the Trustee that it continue to charge the Contribution Fees and Excess Ongoing Fees;

(C) charging the Contribution Fees and Excess Ongoing Fees;

(D) entering into the Adviser Arrangements with the Trustee;

(ii) OPL knew or was wilfully blind in respect of, at least the following:

(A) the matters pleaded in paragraphs 150 to 155, 157 to 160, 162 to 165 and 167 to 170 and 196A by reason that OPL entered into the Adviser Arrangements, paid the Adviser Commissions to the Financial Advisers under those arrangements, and charged the Contribution Fees and Ongoing Fees to the members;

(B) the matters pleaded in paragraphs 180A to 181 to 188 by reason that OPL entered into the Adviser Arrangements, paid the Adviser Commissions to the Financial Advisers under those arrangements, and charged the Contribution Fees and Ongoing Fees to the members;

(C) the matters in paragraphs 192, 193.1(a) and 193.2(a) by reason of OPL's Purpose in charging the Contribution Fees and Ongoing Fees as pleaded in paragraph 190 above.

(D) the matters in paragraph 197 by reason, among other matters OPL's Purpose in charging the Contribution Fees and Ongoing Fees as pleaded in paragraph 190 above.

(E) the matters in paragraphs 198 and 199 by reason of, among other matters, each of the particulars (A) to (D) above.

~~(iii) — Further particulars may be provided following discovery~~

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

221.1. the First Commissions SIS Best Interests Contravention, ~~within the meaning of section 55 of the SIS Act;~~

221.2. the Second Commissions Best Interests Contravention;

221.3. the Third Commissions Best Interests Contravention;

221.4. the First Commissions Conflicts Contravention;

221.5. the Second Commissions Conflicts Contravention; and

221.6. the Third Commissions Conflicts Contravention.

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

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

222. The First Applicant:

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

222.2. by reason of the Successor Fund Transfer, became a member of the RPS Fund at the RPS Start Date and remained ~~eds~~ a member of the RPS Fund until 10 January 2022;

222.3. ~~at all material times in the Cash Relevant Period~~ was a member of ANZ Smart Choice Personal Super from 20 September 2012 until 10 January 2022;

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

(a) 2 November 2012 and 25 August 2015;

(b) 25 September 2015 until 10 January 2022.

223. Each of the:

223.1. Master Fund SIS Best Interests Contraventions;

223.2. RPS and Smart Choice SIS Best Interests Contraventions;

223.3. Master Fund Further SIS Contraventions;

223.4. RPS and Smart Choice Further SIS Contraventions;

223.5. Master Fund Conflicts Contraventions; and

## 223.6. RPS Conflicts Contraventions,

**(Cash SIS Contraventions)**

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

**Particulars**

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

(v) the Applicants refers to the expert report of Anh Nguyen dated 15 March 2024 in respect of the loss and damage suffered by the First Applicant.

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

**Particulars**

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

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

225.1. Trustee's Cash Investments Breach of Trust;

225.2. Master Fund Loyalty Breach of Trust;

225.3. RPS and Smart Choice Loyalty Breach of Trust;

225.4. Master Fund Prudent Investment Breach of Trust;

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

225.6. Master Fund Conflicts Breach of Trust;

225.7. Smart Choice Conflicts Breach of Trust;

225.8. RPS Conflicts Breach of Trust; and

225.9. Master Fund Profits Breach of Trust,

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

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

#### **Particulars**

(i) The particulars to paragraph 223 are repeated.

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

#### **Particulars**

(i) The particulars to paragraph 223 are repeated.

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

227. The Second Applicant:

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

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

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

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

### Particulars

(i) The deduction of Contribution Fees and Excess Ongoing Fees by OPL (during the Master Fund Period) on and after 1 July 2013 for the purpose of paying Adviser Commissions under Adviser Agreements has caused a reduction in the accounts of some Commissions Group Members held in the Master Fund and RPS Fund.

(i)(ii) The deduction of Contribution Fees and Excess Ongoing Fees by OPL (during the Master Fund Period) caused a reduction in the accounts of the Second Applicant and the Commissions Group Members held in the Master Fund and RPS Fund.

(ii)(iii) By reason of (i) and (ii), the Commissions SIS Contraventions have caused the balance of the Second Applicant's and the Commissions Group Members accounts in the Master Fund and RPS Fund to be reduced.

(iii)(iv) By reason of (i) and (ii), the Commissions SIS Contraventions have caused, and continue to cause a reduction in the amount which the Second Applicant and some or all of the Commissions Group Members can expect to receive from the RPS Fund on reaching a condition of release of benefits.

(iv)(v) By reason of (i) and (ii), the Commissions SIS Contraventions have caused, and continue to cause, a reduction in the amount which some or all of the Commissions Group Members have

received on payment from their account in the Master Fund or the RPS Fund on having reached a condition of release of benefits.

(vi) The Applicants refer to the expert report of Anh Nguyen dated 15 March 2024 in respect of the loss and damage suffered by the Second Applicant.

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

#### **Particulars**

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

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

#### **Particulars**

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

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

#### **Particulars**

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

### **T. EXTENSION OF TIME**

232. At no time since the Master Fund Start Date were the First Applicant, the Second Applicant or any Group Members aware of the conduct of OPL (any liability for which has been transferred to and will be borne by the Second Respondent by reason of the matters pleaded at subparagraphs 6.1A and 6.1B) or the First and Third Respondents pleaded in this Further Amended Statement of Claim.





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

DATED: ~~23 December 2020~~ ~~28 March 2024~~ 16 May 2024

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

This pleading was prepared by Alexandra Folie and Kristine Hanscombe QC of Counsel and amended by James Page and Fleur Shand of counsel in September 2022 and further amended by Alexandra Folie and Kristine Hanscombe KC of Counsel in May 2024.

## SCHEDULE A – DEFINED TERMS

### Part 1

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Administration Services	39.1
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ANZ OneAnswer Products	17.1
ANZ Smart Choice Employer Products	17.8
ANZ Smart Choice Retail Products	17.7
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Care and Skill Covenant	9.1
<del>Cash Advantage Agreement</del>	<del>40</del>
Cash Advantage Direct Investments	62.1
<del>Cash Advantage Fee</del>	<del>41.3</del>
Cash Advantage Investment Objective	24
Cash Advantage Investment Strategy	25.2
Cash Advantage Life Policies	33
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Duty of Loyalty	14.1
Duty of Prudent Investment	14.2
Early FOFA Start Date	176.1
Employer Products	208. <u>2</u>
Excess Ongoing Fees	182. <u>2</u> , 184. <u>2</u> , 186. <u>2</u> , <u>186C</u> , 188, <u>188C</u> , <u>188D</u>
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Master Fund Best Interests Contravention	93.5
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OnePath OneAnswer Members	3.1
OnePath OneAnswer Members with Linked Advisers	150
OnePath OneAnswer Products	17.2
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<a href="#"><u>OPL Smart Choice Revenue Share Payment</u></a>	<a href="#"><u>46A.1</u></a>
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Smart Choice Investment Strategy Contravention	109
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**Part 2**

A term in Column 1 used in this Further Amended Statement of Claim means the term within the meaning of the section stated in Column 2 of the Act stated in Column 3

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Financial Benefit	229	Corporations Act
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Superannuation Fund	10	SIS Act

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

Federal Court of Australia

District Registry: VIC

Division: General

**Applicants**

Second Applicant DEAN TOBIN REEVES

**Respondents**

Second Respondent: ZURICH AUSTRALIA LIMITED (ABN 92 000 010 195)

Third Respondent: AUSTRALIA AND NEW ZEALAND BANKING GROUP  
LIMITED (ACN 005 357 522)Date: 23-December-2020 ~~28-March-2024~~ 16-May-2024

**Certificate of lawyer**

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

Date: ~~23 December 2020~~ ~~28 March 2024~~ 16 May 2024

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