

# FEDERAL COURT OF AUSTRALIA

## **Australian Securities and Investments Commission v OnePath Custodians Pty Ltd [2023] FCA 1485**

File number: NSD 1306 of 2021

Judgment of: **STEWART J**

Date of judgment: 29 November 2023

Catchwords: **SUPERANNUATION** – where the trustee of a superannuation fund has admitted to engaging in misleading or deceptive conduct in relation to financial services – where parties have agreed a statement of facts and the proposed form of declaratory relief, aggregate pecuniary penalty, the terms of an adverse publicity notice and payment of costs – whether the proposed penalty is within an appropriate range – whether other relief should be granted

Legislation: *Australian Securities and Investment Commission Act 2001* (Cth), ss 12DA(1), 12DB(1)(g), 12DB(1)(i)  
*Corporations Act 2001* (Cth), s 912A(1)(a)  
*Evidence Act 1995* (Cth) s 191  
*Federal Court Rules 2011* (Cth) r 2.32(2)

Cases cited: *Australian Building & Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450  
*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68  
*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157  
*Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5; 407 ALR 302; 164 ACSR 103  
*Minister for the Environment, Heritage and the Arts v PGP Developments Pty Ltd* [2010] FCA 58; 183 FCR 10

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 26

Date of hearing: 24 November 2023

Counsel for the Plaintiff: T M Faulkner SC, J Shepard and A F Garsia

Solicitor for the Plaintiff: Johnson Winter & Slattery

Counsel for the Defendant: R C A Higgins SC and K Lindeman

Solicitor for the Defendant: Gilbert + Tobin

# ORDERS

NSD 1306 of 2021

**BETWEEN:**                    **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Plaintiff

**AND:**                         **ONEPATH CUSTODIANS PTY LTD ACN 008 508 496**  
Defendant

**ORDER MADE BY:**   **STEWART J**

**DATE OF ORDER:**   **29 NOVEMBER 2023**

## **THE COURT NOTES THAT:**

- A.     In these declarations and orders, terms which are defined in the Amended Statement of Agreed Facts and Admissions dated 17 November 2023 have the same meaning as they do in that document.
- B.     The Amended Statement of Agreed Facts and Admissions may be inspected by a person pursuant to r 2.32(2)(d) of the *Federal Court Rules 2011* (Cth).

## **THE COURT DECLARES THAT:**

### ***Section 12DA***

1.     During the period from 15 December 2015 until on or around 9 May 2020, the Trustee in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that the Trustee sent a de-linking letter to each of 766 Previously Linked Members which:
  - (a)     stated “the rate at which you paid your fees and insurance premiums while you were a member of the employer plan will change to Integra Super Personal rates”;
  - (b)     did not inform the Member that the right unilaterally to terminate the Adviser Service Fee would also change, in that now the Member had that right whereas previously the Principal Employer had that right;

- (c) under the heading “What are the benefits of investing your superannuation with OnePath's Integra Super Personal?” listed a number of features of membership in the Personal Division but did not include the Member's new right unilaterally to terminate the Adviser Service Fee;
  - (d) enclosed a document described as a “Changing Jobs Kit” in which, under the heading “A job change can be an ideal time to organise your super”, listed a number of steps the Member could take to reduce fees and taxes but did not refer to the Member's new right unilaterally to terminate the Adviser Service Fee;
  - (e) did not state that the Member now had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee; and
  - (f) in the circumstances, represented that the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas he or she did.
2. During the period from 22 September 2016 to 23 December 2016, the Trustee in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that the Trustee issued to each of approximately 15,962 Previously Linked Members an annual statement for the year ending 30 June 2016 which:
- (a) as part of “Your account summary”, listed a dollar amount as “Fees paid by you”;
  - (b) under the heading “Total fees you paid”, stated “The total of the fees and rebates applied to your account from [date] to [date] is as follows” and listed the dollar amount as “Adviser Service Fee”;
  - (c) stated “Where your statement indicates that an Adviser Service Fee is applicable, it is agreed and negotiated between your employer (or former employer) and their appointed financial adviser, and cannot be cancelled until after you have left their employment”;
  - (d) did not state that the Previously Linked Member, once their employment had ceased, had been de-linked from the Employer Plan and transferred to the

Personal Division, had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee; and

- (e) in the circumstances, represented that:
  - (i) negotiation of the Adviser Service Fee, including cancellation, was still a matter between the Previously Linked Member's former employer and the Plan Adviser, whereas the Previously Linked Member now had his or her own right to cancel the fee;
  - (ii) in exchange for the Adviser Service Fee, the Plan Adviser provided services to the Previously Linked Member, whereas while in a small number of cases services may have been provided the fee had to be paid when Previously Linked Members were not entitled to receive those services; and
  - (iii) the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas the Previously Linked Member did.

3. During the period 11 October 2017 to 30 November 2021, the Trustee in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that the Trustee issued to each of approximately 2,451 Previously Linked Members an annual statement for at least one of the years ending 30 June 2017 to 30 June 2021 which:

- (a) as part of “Your account summary”, listed a dollar amount as “Fees paid by you”;
- (b) under the heading “Total fees you paid”, stated “This approximate amount includes all the fees and costs which affected your investment during the period” and listed the dollar amount including the “Adviser Service Fee”;
- (c) stated “Where your statement indicates that an Adviser Service Fee is applicable, it is agreed and negotiated between your employer (or former employer) and their appointed financial adviser, and cannot be cancelled until after you have left their employment”;
- (d) specified a total amount for the “Adviser Service Fee” and then stated “Total of any adviser service fees (if applicable) you have agreed with your financial

adviser to be deducted from your account and paid to them for the service and advice they provide”;

- (e) at no place stated that the Previously Linked Member, once their employment had ceased, had been de-linked from the Employer Plan and transferred to the Personal Division, had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee; and
- (f) in the circumstances, represented that:
  - (i) negotiation of the Adviser Service Fee, including cancellation, was still a matter between the Previously Linked Member's former employer and the Plan Adviser, whereas the Previously Linked Member now had his or her own right to cancel the fee;
  - (ii) the Previously Linked Member had agreed to the Adviser Service Fee, whereas the Adviser Service Fee was agreed between the Plan Adviser and the Previously Linked Member's former employer, and was applicable to that Member as a result of them becoming Members via the relevant Employer Plan; and
  - (iii) in exchange for the Adviser Service Fee, the Plan Adviser provided services to the Previously Linked Member, whereas while in a small number of cases services may have been provided the fee had to be paid when Previously Linked Members were not entitled to receive those services; and
  - (iv) the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas the Previously Linked Member did.

### ***Section 12DB***

- 4. By reason of the matters referred to in the three preceding paragraphs, the Trustee in connection with the supply of financial services:
  - (a) made a false or misleading representation to each of approximately 15,962 Previously Linked Members in respect of the fees to be paid by the Previously Linked Member, and by each such representation contravened section 12DB(1)(g); and

- (b) made a false or misleading representation to each of approximately 15,962 Previously Linked Members concerning the existence of a right, namely the Member's right to terminate the Adviser Service Fee, and by each such representation contravened section 12DB(1)(i).

***Section 912A(1)(a)***

- 5. During the period from 15 December 2015 until on or around 30 November 2021, the Trustee failed to do all things necessary to ensure that the financial services covered by its AFSL Number 238346 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a), in that:
  - (a) the Trustee did not inform Previously Linked Members, including when they ceased employment with the Principal Employer, were de-linked from the Employer Plan and transferred to the Personal Division, that they now had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee;
  - (b) on the occasion of each Previously Linked Member being transferred to the Personal Division, the Trustee issued to that Member a de-linking letter which was misleading and deceptive and contained the false or misleading representations referred to above;
  - (c) the Trustee issued to each Previously Linked Member annual statements which were misleading and deceptive and contained the false or misleading representations referred to above;
  - (d) the Trustee allowed its appointed administrator of the Trust to make deductions of Adviser Service Fees in a total amount of approximately \$3,787,966.21 from the accounts of approximately 16,210 Previously Linked Members; and
  - (e) the Trustee allowed its appointed administrator of the Trust to pay those deductions to the Plan Adviser assigned to the Employer Plan from which the Member had been de-linked.

**THE COURT ORDERS THAT:**

- 6. The Trustee pay to the Commonwealth a pecuniary penalty of \$5 million in respect of the contraventions of sections 12DB(1)(g) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.

7. Pursuant to section 12GLB of the *Australian Securities and Investments Commission Act 2001* and section 1101B(1) of the *Corporations Act 2001* the Trustee publish a written adverse publicity notice (Written Notice) within 14 days of this order, in the terms set out in the Schedule, by:
  - (a) for a period of no less than 90 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the following web address: <https://onepathsuperinvest.com.au/> (the Webpage);
  - (b) for a period of no less than 365 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the webpage to appear after a person uses credentials to log into OnePath's "Super & Investment Customers" or "Super & Investment Advisers" sections of the Webpage.
8. The Trustee pay a contribution to ASIC's costs of and incidental to this proceeding fixed in the amount of \$400,000.

**AND THE COURT DIRECTS THAT:**

9. The Registry provide an electronic copy of the parties' submissions upon request to any person.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.



## SCHEDULE

*The Federal Court of Australia has ordered OnePath Custodians Pty Ltd (OnePath Custodians) to publish this notice.*

On 29 November 2023 Justice Stewart of the Federal Court of Australia ordered OPC to pay a penalty of \$5 million for contravening Australia’s financial services laws.

The Court found that between December 2015 and November 2021 OPC made false or misleading representations in communications to members of the superannuation product ‘Integra Super’ about Adviser Service Fees. OPC told members that they had to pay the Adviser Service Fee for superannuation advice from a ‘Plan Adviser’ even after the member had been transferred from the “Employer” division to the “Personal” division of Integra Super where they were not entitled to receive advice services.

OPC also misled members by representing that:

- the member had agreed to the Adviser Service Fee, whereas that fee was agreed between the Plan Adviser and the member’s former employer; and
- the negotiation of the Adviser Service Fee was a matter for the member’s former employer and the Plan Adviser, whereas the member had their own right to cancel the fee.

During this period OPC issued “de-linking letters” to approximately 766 members and annual statements to approximately 15,962 members containing the false or misleading representations, and charged \$3.8m in Adviser Service Fees to relevant members.

This conduct contravened the following financial services laws:

- sections 12DA, 12DB(1)(g) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- section 912A(1)(a) of the *Corporations Act 2001* (Cth).

All affected members have been remediated as part of a remediation program that has put them back in the position they would have been if they had not been charged the Adviser Service Fees.

OPC is a wholly owned subsidiary of Insignia Financial Ltd. Prior to February 2020, OPC was wholly owned by Australia and New Zealand Banking Group Limited.

For further information about the conduct, see:

- Justice Stewart’s judgment [[hyperlink](#)];
- ASIC media release [[hyperlink](#)]; and
- Statement of facts agreed between the parties to the proceeding [[hyperlink](#)].

## REASONS FOR JUDGMENT

### STEWART J:

1 This case arises from misleading communications sent by the trustee of a superannuation fund to its members. The communications concerned the deduction of a fee known as an “Adviser Service Fee” from members’ accounts for services which certain members were not entitled to receive. Those members were also entitled to terminate liability for the fee, but they were not advised of that.

2 The defendant, OnePath Custodians Pty Ltd, has admitted to contraventions of ss 12DA(1), 12DB(1)(g) and 12DB(1)(i) of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**) and s 912A(1)(a) of the *Corporations Act 2001* (Cth) in relation to that conduct.

3 The defendant is the **trustee** of the relevant superannuation fund (the **trust**), first the OnePath MasterFund and then, from 13 April 2019, the Retirement Portfolio Service (**RPS**).

4 Section 12DA(1) of the ASIC Act prohibits a person, in trade or commerce, from engaging in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. The relevant paragraphs of s 12DB(1) of the ASIC Act prohibit a person, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion of the supply or use of financial services, from making a false or misleading representation with respect to the price of services or concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

5 Section 912A(1)(a) of the Corporations Act provides that a financial services licensee, of which the trustee was one, must do all things necessary to ensure that the financial services covered by the licence are provided “efficiently, honestly and fairly”.

6 ASIC and the trustee have agreed on the proposed form of declaratory relief, the amount of an aggregate pecuniary penalty, the terms of an adverse publicity notice and payment of costs. The parties now jointly apply for declarations and orders reflecting their agreement.

7 ASIC and the trustee jointly submit that an aggregate pecuniary penalty of \$5 million is an appropriate penalty for the contraventions of the provisions which are civil penalty provisions. That represents \$2.5 million in respect of each of two courses of conduct discussed further below.

8 Pursuant to s 191 of the *Evidence Act 1995* (Cth), ASIC and the trustee filed an amended statement of agreed facts and admissions (SAFA). It is a comprehensive document which sets out facts and admissions sufficient to support the declarations that the parties seek. The SAFA has the effect under s 191 of admitting the agreed facts into evidence, but it remains for the Court to determine whether those facts are to be accepted as true and to determine what weight to attribute to that evidence: *Minister for the Environment, Heritage and the Arts v PGP Developments Pty Ltd* [2010] FCA 58; 183 FCR 10 at [35] (Stone J).

9 I have no hesitation in accepting the agreed facts as proved – they form part of a coherent narrative that is inherently probable and credible, and there is nothing to throw doubt on them. I also accept that the admissions are properly made. There is also no doubt that the facts necessary to support declarations to be made by the Court may be established by agreed facts and admissions: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 (*ABCC v CFMEU*) at [91] (Dowsett, Greenwood and Wigney JJ).

10 The relevant background can be dealt with briefly.

11 The trustee issued a superannuation product named the Integra Product.

12 In the relevant period, being from 15 December 2015 to 30 November 2021, the trustee engaged in two courses of conduct in relation to that product that give rise to the contraventions.

13 First, in letters sent to certain members (being members whose membership had previously been linked to their employer but on account of that employment having ended their continued membership was de-linked and they were transferred to the Personal Division of the Integra Product) it impliedly represented that they did not have the right unilaterally to terminate the Adviser Service Fee when in fact they did. That right of termination arose on the de-linking of their membership from their employer. During the period from 15 December 2015 to 9 May 2020, letters were issued to 766 relevant members. After 9 May 2020, the letters were amended to cure the defect.

14 Secondly, in annual statements sent to previously linked members the trustee impliedly made the same representation and further representations that the Adviser Service Fee had been agreed to by those members when in fact it had been agreed to by their former employer, and that in exchange for the Adviser Service Fee those members were receiving services when in fact they were not entitled to receive those services after having been de-linked.

15 The 2015-2016 annual statements were issued to 15,962 previously linked members during the  
period 22 September 2016 to 23 December 2016. The post-FY2016 annual statements were  
issued to approximately 7,250 previously linked members during the period 11 October 2017  
to 30 November 2021.

16 After July 2004, the total of deductions of Adviser Service Fees from the accounts of relevant  
members was approximately \$19 million. Of the \$19 million deducted, deductions of  
approximately \$3,787,966 were made between 15 December 2015 and January 2021.

17 Full details of the conduct and an analysis of why that conduct contravened the relevant  
statutory provisions is set out in the parties' joint submissions. The submissions also set out the  
principles to be applied in a civil penalty consent hearing such as this, in respect of which there  
is not only no controversy between the parties but the position is also well-settled in the general  
law. I have carefully considered the submissions, as well as the oral submissions presented by  
senior counsel for both ASIC and the trustee, and I am satisfied that those submissions are  
correct and well-founded. I adopt them as my own reasoning – no legitimate purpose would be  
served in rehashing them into independent reasons for judgment.

18 I have carefully considered the proposed penalty, and for the reasons given in the submissions  
I am satisfied that it is within an appropriate range. That is to say, it is an appropriate amount,  
even if I may have come to a different amount approaching the matter on my own without the  
benefit of the parties' agreement.

19 The matters that I have considered in reaching that state of satisfaction include the following.

20 Civil penalties are imposed primarily, if not solely, for the purpose of deterrence: *Australian  
Building & Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 at [15]. A  
penalty must have the necessary “sting or burden” to secure “the specific and general deterrent  
effects that are the *raison d'être* of its imposition”: *Australian Building and Construction  
Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR  
157 at [116].

21 Depending on exactly when in the relevant period they occurred, each contravening act or  
omission gives rise to a maximum penalty ranging from \$1.8 million to \$11.1 million.  
However, since there is a very large number of individual contraventions which in aggregate  
would result in no meaningful overall maximum penalty, the maximum penalty should not be

applied mechanically and should instead be treated as one of a number of relevant factors: *ABCC v CFMEU* at [143]-[146].

- 22 Also, I consider that this is an appropriate case to analyse the contravening conduct as constituting two courses of conduct, one in respect of the de-linking letters and one in respect of the annual statements. That is because the myriad separate contraventions within each of those two courses of conduct share the same legal and factual elements; to treat each as a separate contravention for the purposes of penalty would likely lead to double punishment and in any event be somewhat meaningless because of the large number of individual contraventions. See *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5; 407 ALR 302; 164 ACSR 103 at [51]) (Rares, Stewart and Abraham JJ).
- 23 I am satisfied that the trustee's admitted contraventions were not the result of conduct which was deliberate or reckless, or in respect of which the trustee itself served to gain financially by the retention of the fees that were continued to be charged. In that regard, once the Adviser Service Fees were deducted from the members' accounts, they were paid over to the relevant advisers who were not employed by the trustee.
- 24 It is significant that the trustee modified and improved its practices and systems in respect of the Adviser Service Fees during the relevant period, which ultimately resulted in no previously linked members paying any Adviser Service Fees from around January 2021. Also, the trustee demonstrated contrition and remorse by fully compensating the relevant members from whom the Adviser Service Fees had been deducted by repaying those fees plus interest. Letters of apology were also sent.
- 25 The trustee's conduct that amounts to the contraventions was voluntarily reported to ASIC. That led to ongoing discussions between the parties which ultimately concluded in the joint position presented to the Court.
- 26 So that the reasons for my satisfaction as to the contraventions and the relief, including the declarations and penalty, are readily accessible, I will direct that the written submissions be made available to any person requesting access to them, notwithstanding that they are not otherwise covered by r 2.32(2) of the *Federal Court Rules 2011* (Cth). I acknowledge the care and industry of counsel and their instructing solicitors in the preparation of the submissions.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a series of loops and a long horizontal stroke extending to the right.

Dated: 29 November 2023