

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD1306/2021
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
ONEPATH CUSTODIANS PTY LTD ACN 008 508 496
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 14/12/2021 4:12:27 PM AEDT

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form NCF1

CONCISE STATEMENT

Federal Court of Australia
District Registry: New South Wales
Division: General

No of 2021

IN THE MATTER OF ONEPATH CUSTODIANS PTY LIMITED
ACN: 008 508 496

Australian Securities and Investments Commission
Plaintiff

OnePath Custodians Pty Ltd (ACN 008 508 496)
Defendant

A. INTRODUCTION

- 1. This claim concerns the deduction of a fee by the trustee of a superannuation fund in circumstances where the members did not receive any services and, in some cases, were not obliged to pay the fee. ASIC also claims the trustee misled the members about their rights not to pay the fee.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 2. The Defendant (Trustee) was part of the corporate group of Australia and New Zealand Banking Group Limited (ANZ) in which it acted as the trustee of superannuation funds. On 31 January 2020, ANZ sold the Trustee to IOOF Holdings Limited.
3. At all material times prior to 13 April 2019, one of the superannuation funds of which the Trustee was trustee was the OnePath MasterFund (Trust) established under a trust deed dated 1 September 1992 as amended from time to time (Trust Deed). The Trust was a regulated superannuation fund under the Superannuation Industry (Supervision) Act 1993 (SIS Act). On or about 13 April 2019, the assets and beneficiaries of the Trust were transferred to the Retirement Portfolio Service superannuation fund by way of successor fund transfer. The Trustee is also the trustee of the Retirement Portfolio Service superannuation fund.

Table with 2 columns: Field (e.g., Filed on behalf of, Prepared by, Law firm, Tel, Fax, Email, Address for service) and Value (e.g., Australian Securities and Investments Commission, Tom Jarvis, Johnson Winter & Slattery, 03 8611 1333, 03 8611 1300, tom.jarvis@jws.com.au, Level 34, 55 Collins Street, Melbourne VIC 3000)

4. Since no later than 1994, the Trustee has issued a superannuation product called the Integra Product which specialised in providing superannuation solutions for small to medium sized businesses and their employees.
5. On or about 30 June 2001, all members in the Integra Product were transferred into the Trust. Thereafter, the Trustee has been the issuer of the Integra Product as part of the Trust and subject to the provisions of the Trust Deed.
6. Under the terms of the Integra Product, the Trustee could admit, as a Principal Employer, any person who applied for the establishment of an Employer Plan within the Trust for the purpose of providing superannuation benefits to the Principal Employer's employees. The employees, as a result, became Members of the Trust linked to the particular Employer Plan.
7. The rules for each Employer Plan were set out in the relevant Employer Application form and Product Disclosure Statement of which the Employer Application form was a part.
8. Upon cessation of the Member's employment with the Principal Employer, the Trustee automatically de-linked the Member from the Principal Employer's Employer Plan and transferred the Member to the Personal Division of the Integra Product.
9. Upon the establishment of a new Employer Plan, the terms of the Integra Product permitted the Principal Employer to agree with a chosen financial adviser, a Plan Adviser, that he or she would to be assigned to the Employer Plan.
10. Since no later than 1995, the terms of the Integra Product provided that the Principal Employer could (but was not obliged to) agree with the Plan Adviser that all Members linked to the Employer Plan would pay a fee to the Plan Adviser called the "**Adviser Service Fee**".
11. At all material times, the terms of the Integra Product relevantly provided:
 - (a) when a Principal Employer agreed to the Adviser Service Fee, the Trustee was authorised to deduct the Adviser Service Fee from the accounts of Members who were linked to the Principal Employer's Employer Plan;
 - (b) the Trustee was to pay the Adviser Service Fee to the Plan Adviser who the Principal Employer had chosen to be assigned to the Employer Plan;
 - (c) the Adviser Service Fee was for advice solely about superannuation matters relating to the Employer Plan, and in exchange for which the Plan Adviser was to provide ongoing advice and servicing for the Employer Plan;
 - (d) the Principal Employer could unilaterally terminate the Adviser Service Fee at any time by notice to the Trustee;
 - (e) after cessation of employment, de-linking from the Employer Plan and transfer to the Personal Division, a Member could unilaterally terminate the Adviser Service Fee at any time by notice to the Trustee;

- (f) unless the Member terminated the Adviser Service Fee, the fee would continue to be deducted by the Trustee and paid to the Plan Adviser after the Member was transferred to the Personal Division;
- (g) there was no provision for any services to be provided to the Member by the Plan Adviser once the Member's employment had ceased, and he or she had been de-linked from the Employer Plan and transferred to the Personal Division; and
- (h) a Member linked to an Employer Plan to which no Plan Adviser was assigned did not have to pay the Adviser Service Fee and the Trustee was not authorised to deduct the Adviser Service Fee from that Member's account.

Members with no Plan Adviser

12. Many of the Plan Advisers were employees of ANZ Financial Planning which was a business division of ANZ.
13. On 11 August 2014, ANZ established a customer call centre. Along with other customers of ANZ Financial Planning, all Members of the Integra Product whose Plan Adviser was employed by ANZ Financial Planning could get free general advice services from the call centre whether or not the Member was liable to pay the Adviser Service Fee to a Plan Adviser.
14. From August 2014 to around February 2015, ANZ:
 - (a) informed the Members of the Integra Product linked to the Employer Plans for which its employees were the assigned Plan Advisers about the new customer call centre;
 - (b) removed its employees as the assigned Plan Advisers for those Employer Plans; and
 - (c) informed the Trustee of the Members from whom the assigned Plan Adviser had been removed.
15. Upon the Plan Adviser ceasing to be assigned to each of those Employer Plans:
 - (a) the Members linked to the Employer Plan were no longer entitled to any services from the Plan Adviser chosen by the Principal Employer;
 - (b) there was no Plan Adviser linked to the Employer Plan;
 - (c) the Members linked to the Employer Plan were no longer liable to pay the Adviser Service Fee; and
 - (d) the Trustee was no longer authorised to deduct the Adviser Service Fee from the accounts of the Members linked to the Employer Plan.
16. Nonetheless, up until about January 2019, the Trustee, either directly or by its appointed administrator of the Trust, continued to deduct Adviser Service Fees from the accounts of these Members (**No-Adviser Members**). A total of \$791,492.56 was deducted from the accounts of approximately 3,494 No-Adviser Members. Of those deductions, a total

of \$502,667.18 was deducted from the accounts of approximately 2,508 No-Adviser Members after 15 December 2015. By monthly payments, the Trustee paid these deducted amounts to ANZ.

17. Further, during the period from December 2015 until about October 2019, the Trustee issued to each No-Adviser Member one or more annual statements which represented that the Trustee was entitled to deduct the Adviser Service Fee and that the No-Adviser Member was obliged to pay it. The making of these representations was conduct which was false or misleading. **Schedule A** sets out the conduct relied upon by the Plaintiff in relation to misleading No-Adviser Members.

Members de-linked from the Employer Plan

18. In addition, many Members who had previously been linked to an Employer Plan to which a Plan Adviser was assigned, ceased their employment with the Principal Employer, were de-linked from the Employer Plan and transferred to the Personal Division (**Previously Linked Members**).
19. The Trustee continued to deduct Adviser Service Fees from the accounts of the Previously Linked Members. The deductions were paid by the Trustee to the Plan Adviser assigned to the Employer Plan from which the Member had been de-linked.
20. In the period from July 2004, the Trustee continued to deduct Adviser Service Fees totalling approximately \$19 million from the accounts of approximately 40,000 Previously Linked Members. Of those deductions, the Trustee deducted Adviser Service Fees totalling \$3,787,966.21 from the accounts of approximately 16,210 Previously Linked Members after 15 December 2015.
21. During the period from July 2004 the Trustee issued delinking letters and annual statements to the Previously Linked Members which did not inform them that, from the time they ceased their employment and were transferred to the Personal Division, they had the right unilaterally to terminate the Adviser Service Fee. On the contrary, these documents included statements which misrepresented the Previously Linked Members' rights with respect to the Adviser Service Fee.
22. Schedule **B** sets out the conduct relied upon by the Plaintiff in relation to making false and misleading representations to Previously Linked Members.

C. RELIEF SOUGHT FROM THE COURT

23. ASIC seeks:
 - (a) declarations of contravention of ss 912A(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and ss 12DA(1), 12DB(1)(g) and 12DB(1)(i) of the *Australian Investments and Securities Commission Act 2001* (Cth) (**ASIC Act**);
 - (b) pecuniary penalties pursuant to s12GBA(1) of the ASIC Act in respect of the contraventions of ss 12DB(1)(g) and 12DB(1)(i) of the ASIC Act;

- (c) orders pursuant to s 12GLB of the ASIC Act and/or s 1101B(1) of the Corporations Act requiring the defendant to publish an adverse publicity notice in terms to be determined by the Court; and
- (d) costs.

D. PRIMARY GROUNDS FOR THE RELIEF SOUGHT

- 24. **Misleading, deceptive and false conduct:** The Trustee engaged in misleading or deceptive conduct within the meaning of s 12DA(1) of the ASIC Act, and made representations which were false or misleading within the meaning of s 12DB(1)(g) and (i) of the ASIC Act to both No-Adviser Members and Previously Linked Members.
- 25. **Failures to provide financial services efficiently, honestly and fairly:** The Trustee failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence (No. 238346) were provided efficiently, honestly and fairly, in breach of s 912A(1)(a) of the Corporations Act by:
 - (a) deducting Adviser Service Fees from No-Adviser Members and paying those amounts to ANZ where those deductions and payments were unauthorised, contrary to the terms of the Integra Product and a breach of trust;
 - (b) not informing No-Adviser Members that the Trustee was not entitled to make the deductions and the Members were not obliged to pay the Adviser Service Fees;
 - (c) not informing Previously Linked Members that they had the right unilaterally to terminate the Adviser Service Fee;
 - (d) issuing annual statements and delinking letters which contained false and misleading representations; and
 - (e) deducting Adviser Service Fees from the accounts of Previously Linked Members and paying those deductions to the Plan Adviser assigned to the Employer Plan from which the Member had been de-linked.

E. ALLEGED HARM

- 26. The Trustee deducted a total of approximately \$791,492.56 from the account balances of approximately 3,494 No-Adviser Members in respect of Adviser Service Fees. Of those deductions, a total of \$502,667.18 was deducted from the accounts of approximately 2,508 No-Adviser Members after 15 December 2015.
- 27. In the period from July 2004, the Trustee deducted Adviser Service Fees totalling approximately \$19 million from the accounts of approximately 40,000 Previously Linked Members. Of those deductions, the Trustee deducted Adviser Service Fees totalling \$3,787,966.21 from the accounts of approximately 16,210 Previously Linked Members after 15 December 2015.
- 28. The Trustee has remediated or agreed to remediate members in respect of these breaches.

29. By 2 December 2021, No-Adviser Members received compensation in the order of \$989,051. Total remediation to No-Adviser Members is anticipated to be \$1,103,236 (including interest of approximately \$318,236).
30. By 6 December 2021, Previously Linked Members received compensation in the order of \$31,833,922. Total remediation to Previously Linked Members is anticipated to be \$31,919,479 (including total net Adviser Service Fees of \$17,506,574 and interest of \$14,425,187 and less tax of \$12,282).
31. Irrespective of the remediation, the conduct of the Trustees did not promote confident and informed decision making by retail clients. Further, it promoted inefficiencies in the operation of Australia's regulated and taxpayer supported superannuation arrangements, thereby exposing the wider Australian public to financial detriment as well as eroding consumer trust and confidence in the efficient administration of superannuation funds to the detriment of the wider industry.

Dated: 14 December 2021

Certificate of lawyer

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

Date: 14 December 2021



Signed by Tom Jarvis

Schedule A

REPRESENTATIONS BY THE TRUSTEE TO NO-ADVISER MEMBERS

Annual statements

1. During the period from December 2015 until about October 2019, the Trustee issued to each No-Adviser Member one or more annual statements 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 same dollar amount as “Adviser Service Fee”;
 - (c) from 2016, 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) from 2017, 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”; and
 - (e) at no place stated that the Trustee was not entitled to deduct the Adviser Service Fee from the No-Adviser Member’s account or that the No-Adviser Member was not obliged to pay the Adviser Service Fee.
2. Each annual statement referred to in the preceding paragraph represented that:
 - (a) the Adviser Service Fee was applicable to the Member, whereas the fee was not applicable;
 - (b) the Trustee was entitled to deduct the Adviser Service Fee, whereas the Trustee had no such entitlement; and
 - (c) the No-Adviser Member was obliged to pay it, whereas the Member had no such obligation.
3. The Trustee issued one or more annual statements during the period December 2015 until about October 2019 to no fewer than 2,508 No-Adviser Members.

Schedule B

REPRESENTATIONS BY THE TRUSTEE TO PREVIOUSLY LINKED MEMBERS

De-linking letters

1. During the period from 15 December 2015 until on or around 9 May 2020, 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:
 - (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 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; and
 - (e) at no place stated that the Member now had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee.
2. Each of the de-linking letters referred to in the preceding paragraph represented that the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee whereas he or she did.
3. During the period from December 2015 to on or around 9 May 2020, the Trustee issued a de-linking letter to no fewer than 766 Previously Linked Members.

2015-2016 annual statements

4. Further, during the period from 22 September 2016 to 23 December 2016, the Trustee issued to 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”; and

- (d) at no place stated that the Previously Linked Member now had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee.
5. Each of the 2015-2016 annual statements represented that:
- (a) 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; and
 - (b) the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas he or she did.
6. The Trustee issued the 2015-2016 annual statement to no fewer than 15,962 Previously Linked Members.

Post 2015-2016 annual statements

7. Further, after 11 October 2017 the Trustee issued to Previously Linked Members an annual statement for at least one of the years ending 30 June for 2017 and following 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) 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”; and
 - (e) at no place stated that the Previously Linked Member now had a right unilaterally to terminate the Adviser Service Fee by written notice to the Trustee.
8. Each of the post 2015-2016 annual statements represented that:
- (a) 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 Linked Member now had his or her own right to cancel the fee;
 - (b) the Previously Linked Member had agreed to the Adviser Service Fee, whereas he or she had not;

- (c) in exchange for the Adviser Service Fee, the Plan Adviser provided services to the Previously Linked Member, whereas the fee was for advice solely about superannuation matters relating to the Employer Plan from which the Previously Linked Member had been de-linked and there was no provision for any services to be provided by the Plan Adviser to Previously Linked Members once their employment had ceased, they had been de-linked from the Employer Plan and transferred to the Personal Division; and
 - (d) the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas the Linked Member did.
9. The Trustee issued one or more of the post 2015-2016 annual statement to no fewer than 2,451 Previously Linked Members.