

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 14/12/2021 4:05:24 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating process (Rule 2.2): Federal Court (Corporations) Rules 2000 form 2
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
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Dated: 14/12/2021 4:12:20 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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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.



ORIGINATING PROCESS

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. DETAILS OF APPLICATION

This application is made under sections 12GBA and s 12GLB of the Australian Securities and Investments Commission Act 2001, section 1101B(1) of the Corporations Act 2001, sections 21 and 43 of the Federal Court of Australia Act 1976 and the inherent or implied jurisdiction of the Court for civil penalties and declarations of contravention by the Defendants of sections 912A(1)(a) of the Corporations Act 2001 and sections 12DA and 12DB of the Australian Securities and Investments Commission Act 2001.

On the facts stated in the Concise Statement filed in these proceedings and served with this Originating Process, and using the same terms which are defined in the Concise Statement, the Plaintiff claims:

No-Adviser Members

Section 12DA

- 1. A declaration that, during the period from December 2015 to October 2019, the Defendant (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

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, the Plaintiff
Prepared by (name of person/lawyer) Tom Jarvis
Law firm (if applicable) Johnson Winter & Slattery
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(include state and postcode)



thereby contravened section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that the Trustee sent one or more annual statements to each existing No-Adviser Member of the Integra Product 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) did not state 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; and
- (f) in the circumstances, represented that:
 - i. the Adviser Service Fee was applicable to the Member, whereas the fee was not applicable;
 - ii. the Trustee was entitled to deduct the Adviser Service Fee, whereas the Trustee had no such entitlement; and
 - iii. the No-Adviser Member was obliged to pay it, whereas the Member had no such obligation.

Section 12DB

2. A declaration that, by reason of the matters referred to in the preceding paragraph, the Trustee in connection with the supply of financial services:



- (a) made a false or misleading representation to each of no fewer than 2,508 No-Adviser Members in respect of the fees to be paid by the No-Adviser Member, and by each such representation contravened section 12DB(1)(g); and
- (b) made a false or misleading representation to each of no fewer than 2,508 No-Adviser Members concerning the existence of a right of the Trustee, namely the right to deduct the Adviser Service Fee and, further, a condition imposed on No-Adviser Members, namely the obligation to pay the Adviser Service Fee, and by each such representation contravened section 12DB(1)(i).

Section 912A(1)(a)

- 3. A declaration that, during the period from December 2015 until October 2019, the Trustee failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services License (**AFSL**) 238346 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a), in that:
 - (a) the Trustee, either directly or by its appointed administrator of the Trust, deducted Adviser Service Fees in a total amount of approximately \$502,667.18 from the accounts of approximately 2,508 Members in circumstances where the Members were, or had been, linked to an Employer Plan to which no Plan Adviser was assigned at the time of the deductions;
 - (b) the making of those deductions was unauthorised and contrary to the terms of the Integra Product;
 - (c) the Trustee, either directly or by its appointed administrator of the Trust, paid the deducted amounts to ANZ;
 - (d) the making of those payments was unauthorised and contrary to the terms of the Integra Product; and
 - (e) the Trustee did not inform the Members from whose accounts the deductions were made that the Trustee was not entitled to make the deductions and that the Member was not obliged to pay the Adviser Service Fee.
- 4. An order pursuant to section 12GBA(1) of the *Australian Securities and Investments Commission Act 2001* that the Trustee pay to the Commonwealth a pecuniary penalty in respect of the contraventions of sections 12DB(1)(g) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* in such amount as the Court determines to be appropriate.



Previously Linked Members

Section 12DA

5. A declaration that, 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.

6. A declaration that, 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) 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) did not state that the Previously Linked 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:
 - 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 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 he or she had not;
 - iii. 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



- iv. the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas the Linked Member did.
7. A declaration that, during the period after 11 October 2017, 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 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”;
 - (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; 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 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 he or she had not;



- iii. 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
- iv. the Previously Linked Member did not have the right unilaterally to terminate the Adviser Service Fee, whereas the Linked Member did.

Section 12DB

8. A declaration that, 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 16,210 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 16,210 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)

9. A declaration that, during the period from 15 December 2015 until on or around 9 May 2020, 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 at any time, 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) issued to each Previously Linked Member annual statements which were misleading and deceptive and contained the false or misleading representations referred to above;
 - (d) made, either directly or by its appointed administrator of the Trust, deductions of Adviser Service Fees in a total amount of approximately \$3,654,468 from the accounts of approximately 16,190 Previously Linked Members; and
 - (e) paid those deductions to the Plan Adviser assigned to the Employer Plan from which the Member had been de-linked.
10. An order pursuant to section 12GBA(1) of the *Australian Securities and Investments Commission Act 2001* that the Trustee pay to the Commonwealth a pecuniary penalty in respect of the contraventions of sections 12DB(1)(g) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* in such amount as the Court determines to be appropriate.

Other orders

- 11. Orders under section 12GLB of the *Australian Securities and Investments Commission Act 2001* and/or section 1101B(1) of the *Corporations Act 2001* that the Defendant publish a written adverse publicity notice in terms to be determined by the Court.
- 12. Costs.
- 13. Such further or other orders and as the Court sees fit.

Date: 14 December 2021

Johnson Winter + Slaty

Signed by Tom Jarvis, lawyer for the Plaintiff

This application will be heard by
Law Courts, Queens Square, Sydney, NSW 2000 at

at Commonwealth
am/pm on



B. NOTICE TO DEFENDANTS

TO: OnePath Custodians Pty Limited

Level 6, 161 Collins St
Melbourne VIC 3000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

Note: Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

Date of filing:

Registrar

This originating process is filed by the plaintiff.

D. SERVICE

The plaintiff's address for service is:

Johnson Winter & Slattery
Level 34
55 Collins Street
Melbourne VIC 3000
Email: tom.jarvis@jws.com.au

Johnson Winter & Slattery's telephone, facsimile, and document exchange numbers are:

Tel: (03) 8611 1336
Fax: (03) 8611 1300

The Plaintiff's address is:

Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

It is intended to serve a copy of this originating process on the defendant.