

Form 4A (version 3)

UCPR 6.2

**FURTHER AMENDED COMMERCIAL LIST STATEMENT**

**Filed pursuant to leave granted by the Court on 9 November 2021**

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity Division
List	Commercial List
Registry	Sydney
Case number	2019/193556

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Kerry Michael Quirk</b>
First Defendant	<b>Suncorp Portfolio Services Limited</b> in its capacity as trustee for the Suncorp Master Trust
Second Defendant	<b>Geoffrey Edward Summerhayes</b>
Third Defendant	<b>Sean Carroll</b>

**FILING DETAILS**

Filed for	Kerry Michael Quirk, Plaintiff
Legal representative	Bill Petrovski, William Roberts Lawyers
Legal representative reference	701900167
Contact name and telephone	Ding Pan (02) 9552 2111
Contact email	<a href="mailto:SSFclassaction@williamroberts.com.au">SSFclassaction@williamroberts.com.au</a>

## A. NATURE OF DISPUTE

- 1 The Plaintiff brings this claim on behalf of the Group Members identified in paragraph 3 in Section C below against Suncorp Portfolio Services Limited in its capacity as trustee of the Master Trust (**Suncorp**); and also against the Second Defendant, Sean Carroll (**Carroll**) and Third Defendant, Geoffrey Edward Summerhayes (**Summerhayes**), for involvement in Suncorp's contraventions.
- 2 Sections 52(2)(b), (c) and (d) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) imposed various duties on Suncorp.
- 3 From 1 July 2013 onwards, financial services licensees and authorised representatives of financial services licensees were prohibited from accepting (and issuers or sellers of financial products were prohibited from paying) Conflicted Remuneration by reason of amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) commonly called the Future of Financial Advice reforms (**FOFA Reforms**). The ban on Conflicted Remuneration did not apply to benefits given to financial services licensees or their authorised representatives under an arrangement entered into before 1 July 2013, subject to certain conditions.
- 4 The Plaintiff alleges that Suncorp's ongoing decision to pay and each act of paying Conflicted Remuneration after 1 July 2013 were contraventions of the duties Suncorp owed to the Plaintiff and the Group Members under s 52(2)(b), (c) ~~and~~, (d), (e) and (f) of the SIS Act and were breaches of trust, even if such payments were not prohibited by the FOFA Reforms.
- 5 In summary, the Plaintiff alleges that:
  - (a) it was not in his or the Group Members' best interests for Conflicted Remuneration to continue to be paid after 1 July 2013, even if such Conflicted Remuneration was not prohibited by the FOFA Reforms; and
  - (b) there was a conflict of interest between:
    - (i) on the one hand, the interests of the Plaintiff and each of the Group Members for Conflicted Remuneration not to be paid; and
    - (ii) on the other hand, Suncorp's own interests to pay Conflicted Remuneration and the interest of Financial Services Licensees to receive Conflicted Remuneration.

Suncorp should therefore have ceased charging members fees to fund the payment of Conflicted Remuneration to Financial Services Licensees and Suncorp should have ceased the payment of Conflicted Remuneration to Financial Services Licensees, from no later than 1 July 2013. Further, Suncorp should not have executed three agreements, in late June 2013, which sought to put in place arrangements providing for the payment of Conflicted Remuneration to Suncorp Financial Services Pty Ltd, Standard Pacific Consulting Ltd, Guardian Group Financial Planning Pty Ltd and GuardianFP Limited, and other Financial Services Licensees including after 1 July 2013 on all existing and new Suncorp Products **(Distribution Agreements)**.

- 6 Further or in the alternative, Conflicted Remuneration paid by Suncorp in respect of Suncorp Products that the Plaintiff and Group Members acquired an interest in after 1 July 2014 contravened the FOFA Reforms. In particular, Suncorp continued to pay Conflicted Remuneration after Suncorp transferred the interests of most of its members from existing Suncorp Products into 8 new Suncorp Products as part of Suncorp's Super Simplification Program implemented between 1 August 2016 and February 2017, in contravention of its duties under the SIS Act and in breach of trust.
- 7 Further or in the alternative, the Plaintiff alleges that Suncorp engaged in unconscionable conduct under s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), including by entering into and relying on the Distribution Agreements and relying on any such other arrangements, if any, that Suncorp asserts it had in place prior to 1 July 2013 to continue to pay Conflicted Remuneration after 1 July 2013.
- 8 The Plaintiff also alleges that Carroll and Summerhayes were involved in the contraventions summarised in paragraphs 4 to 7 above to the extent that they were directors of Suncorp at the time.

## B. ISSUES LIKELY TO ARISE

- 1 The issues likely to arise are those set out in the Summons under the heading "Questions common to claims of the Plaintiff and the Group Members".

## C. PLAINTIFF'S CONTENTIONS

<b>A PARTIES .....</b>	<b><u>45</u></b>
<b>B BACKGROUND.....</b>	<b><u>1012</u></b>
B.1 SUPERANNUATION FUNDS AND SUNCORP PRODUCTS.....	<u>1012</u>
B.2 SIS ACT.....	<u>1719</u>
B.3 EQUITABLE AND LEGAL DUTIES.....	<u>1921</u>
B.4 FOFA .....	<u>2022</u>
<b>C PAYMENT OF CONFLICTED REMUNERATION BEFORE AND AFTER 1 JULY 2013</b>	
<b>23</b>	
C.1 CONFLICTED REMUNERATION PRIOR TO 1 JULY 2013.....	<u>2325</u>
C.2 CONFLICTED REMUNERATION PROHIBITED ON ACQUISITIONS AFTER 1 JULY 2014 ....	<u>3842</u>
<b>D SUPER SIMPLIFICATION PROGRAM.....</b>	<b><u>3943</u></b>
<b>E FAILURE TO ADVISE .....</b>	<b><u>4347</u></b>
<b>F CONTRAVENTIONS.....</b>	<b><u>4449</u></b>
F.1 SIS ACT CONTRAVENTIONS AND BREACHES OF TRUST .....	<u>4449</u>
F.42 UNCONSCIONABLE CONDUCT .....	<u>6574</u>
<b>G LOSS OR DAMAGE .....</b>	<b><u>7079</u></b>
<b>H INVOLVEMENT .....</b>	<b><u>7884</u></b>
<b>I RELIEF CLAIMED .....</b>	<b><u>8288</u></b>

### A Parties

- 1 The Plaintiff brings this proceeding as representative party for and on behalf of the Group Members pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW).

#### Particulars

At the time of the filing of the Commercial List Statement there are more than seven Group Members who have claims against each of the Defendants.

- 2 The Plaintiff at all material times since at least 2008 has been a member of a superannuation fund under the Master Trust and he has had accounts with investment(s) in one or more of the Suncorp Products.

### Particulars

- (i) The best particulars that the Plaintiff can provide with his present state of knowledge is that in or about 1986 he became a member of a fund that was, between 2008 and 2011, transferred into the Asteron Life Superannuation Fund that was renamed the "Suncorp Master Trust" on 30 June 2008: RC – Witness statement of E. A. Cooley dated 25 July 2018 at [6]-[10] and [82] and Exhibit 5.320 at 0035.
- (ii) Prior to 1 July 2013, the Plaintiff had account(s) with investment(s) in the Suncorp Personal Super LifeSaver product issued by Suncorp.
- (iii) From about 5 August 2013, the Plaintiff had account(s) with investment(s) in the Suncorp WealthSmart Personal Super product issued by Suncorp.
- (iv) From about 3 December 2016, the Plaintiff had and continues to have account(s) with investment(s) in the Suncorp Brighter Super product issued by Suncorp.
- (v) The Plaintiff's account or reference numbers included No. 991013000, 909378208, 917068306 and 924439718.

3 The members of the group to whom this proceeding relates (**Group Members**) are those persons:

- (a) who are or were members of a superannuation fund under the Master Trust (this term is defined in paragraph 11 below); and
- (b) whose accounts were affected by the payment of Conflicted Remuneration (as this term is defined in paragraph 20 below) to Financial Services Licensees (as this term is defined in paragraph 9 below) in the period 1 July 2013 to 21 June 2019, inclusive (**Relevant Period**)

or:

- (c) who at any time during the Relevant Period received payment, or was entitled to receive payment, from a superannuation fund under the Master Trust of all

or part of the benefits of a deceased member who satisfied subparagraphs (a) and (b) above, by reason of the member's death;

or:

(d) who satisfy all of the following:

- (i) were the spouse, within the meaning of s 90MD or 90XD of the Family Law Act 1975 (Cth), of a member of a superannuation fund under the Master Trust who at any time during the Relevant Period had rights in or in respect of a superannuation fund under the Master Trust, and who satisfied subparagraphs (a) and (b) above; and
- (ii) at any time during the Relevant Period received a transfer from a superannuation fund under the Master Trust of all or part of the member's account(s) in a superannuation fund under the Master Trust 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:

(e) who were not during the Relevant Period, and are not, any of the following:

- (i) a director, an officer, or a close associate (as defined by s. 9 of the Corporations Act) of Suncorp; or
- (ii) a judge, judge of Appeal or the Chief Justice of the Supreme Court of NSW or a judge or the Chief Justice of the High Court of Australia.

3A The reference to Group Members in paragraphs 4, 5 and 6 of Part A above and paragraphs 18(a)-(d), 18B, 18C and 27(b)-(c), particular (iii) of 33, paragraphs 39D, 46, 49 and 51D, particulars (i) and (ii) of paragraph 53 and particulars (i) and (ii) of paragraph 55 is a reference to group members who satisfied subparagraphs 3(a) and 3(b) in Part C of this Further Amended Commercial List Statement above.

4 Suncorp at all material times was, and is:

- (a) a company duly incorporated pursuant to the Corporations Act and capable of being sued;

- (b) a trading corporation within the meaning of the ASIC Act;
- (c) the holder of an Australian Financial Services licence (licence no: 237905) (**AFSL**);
- (d) the holder of a registrable superannuation entity (**RSE**) licence (licence no: L0002059);
- (e) the trustee of the Master Trust (as defined in paragraph 11 below), which at various times offered its members the financial products pleaded in paragraphs 8, 15 and 40 below;
- (f) a body corporate:
  - (i) carrying on the business of acting as a trustee of superannuation entities and investing money in its capacity as trustee on behalf of the beneficiaries of those superannuation entities; and
  - (ii) holding itself out as having particular knowledge, skill and experience in carrying out such a business;
- (g) a wholly-owned subsidiary of Suncorp Life Holdings Limited (**Suncorp Holdings**) which in turn was at all material times a wholly owned subsidiary of Suncorp Group Limited;
- (h) part of a group of companies which are a related party (as defined by s 228 of the Corporations Act), a related body corporate (as defined by s 50 of the Corporations Act) or an associated entity (as defined by s 50AAA of the Corporations Act), of Suncorp Group Limited (**Suncorp Group**); and
- (i) a registrable superannuation entity licensee (**RSE licensee**) under s 10(1) of the SIS Act.

5 Each reference to Suncorp in this Further Amended Commercial List Statement is to be read as a reference to Suncorp in its capacity as the trustee of the Master Trust.

6 Suncorp Life and Superannuation Limited (ABN 87 073 979 530) (**Suncorp Life**) at all material times was, and is:

- (a) a company within the Suncorp Group;
- (b) one of the administrators of the Master Trust with Suncorp; and

(c) an associate of Suncorp for the purpose of the SIS Act.

7 Suncorp Financial Services Pty Ltd (ACN 010 844 621) (**Suncorp Financial**), Standard Pacific Consulting Ltd (ACN 003 315 802) (**Standard Pacific**), Guardian Group Financial Planning Pty Ltd (ACN 000 036 626) and GuardianFP Limited (ACN 003 677 334) (**Guardian**) at all material times were, and are:

(a) financial services licensees under the Corporations Act;

(b) providers of financial product advice to persons as retail clients under the Corporations Act; and

(c) associates of Suncorp for the purposes of the SIS Act,

(separately and collectively, the **Suncorp Adviser Network**).

#### Particulars

Suncorp Financial Services Guide dated 22 December 2017 at page 1.

8 At all material times:

(a) Suncorp issued financial products under the Corporations Act and the ASIC Act under the Master Trust (**Suncorp Products**);

#### Particulars

Corporations Act, s 764A(1)(g); ASIC Act, s 12BAA(7)(f); and SIS Act, s 10.

(b) Suncorp issued a product disclosure statement (**PDS**) in respect of some or all of the Suncorp Products; and

(c) the issue of each PDS by Suncorp in respect of each of the Suncorp Products was required by the provisions in Division 2 of Part 7.9 of the Corporations Act or the Trust Deed.

#### Particulars

Paragraphs 11A and 11B below.



9 At all material times, the Suncorp Products were, and are, distributed and promoted by:

- (a) the members of the Suncorp Adviser Network through their own representatives; or
  - (b) other financial services licensees or their authorised representatives,
- (separately and collectively, **Financial Services Licensees**).

### Particulars

RC – Witness statement of M. Pinto dated 5 August 2018 at [6].

10 At the material times set out in this paragraph:

- (a) Carroll and Summerhayes were directors of Suncorp (together, the **Directors**) respectively:
  - (i) from 17 December 2012 to 16 April 2014; and
  - (ii) from 30 June 2008 to 30 September 2015;
- (aa) Summerhayes was a senior executive of the Suncorp Group and the Chief Executive Officer of Suncorp Life from June 2008 to September 2015, with responsibilities with respect to Suncorp's superannuation business;
- (ab) Carroll had a senior executive position within the Suncorp Group, which included responsibilities with respect to Suncorp's superannuation business from January 2012 onwards;
- (b) Cathy Duncan (**Duncan**) was the Executive Manager Superannuation, Product and Portfolio Management at Suncorp from 28 February 2014 to 3 October 2015;
- (c) the conduct of Carroll, Summerhayes and Duncan is to be taken to be the conduct of Suncorp by reason of the fact that:
  - (i) Carroll and Summerhayes were directors of Suncorp, respectively, from 17 December 2012 to 16 April 2014 and from 30 June 2008 to 30 September 2015; and

- (ii) Duncan was a senior employee of Suncorp from 28 February 2014 to 3 October 2015; or
  - (iii) alternatively to (i) and (ii) above, Carroll, Summerhayes and Duncan were each an agent of Suncorp during the periods of time pleaded in respect of each of them in (i) and (ii) above;
- (d) the knowledge of Carroll, Summerhayes and Duncan is attributed to Suncorp by reason of the fact that:
- (i) Carroll, Summerhayes and Duncan were each an agent of Suncorp, holding senior positions with Suncorp and as such were under a duty to communicate to the board of Suncorp the knowledge gained by each of them in their positions; and
  - (ii) Duncan was a senior employee of Suncorp and as such was under a duty to communicate to the board of Suncorp the knowledge gained by her in that position; or
  - (iii) alternatively to (i) and (ii) above, Carroll, Summerhayes and Duncan were each the directing mind and will of Suncorp in relation to the matters alleged in this Further Amended Commercial List Statement during the time they were directors, senior employees or agents of Suncorp.

## **B Background**

### **B.1 Superannuation funds and Suncorp Products**

- 11 Suncorp, at all material times, was and is the trustee of a trust (**Master Trust**) established by a trust deed dated 22 June 1979, as amended (**Trust Deed**).

#### **Particulars**

The Trust Deed was originally dated 22 June 1979 and has been subsequently amended by various amending deeds, including on 14 December 2012, in June 2015 on 19 April 2016 and on 5 December 2017.

- 11A The Trust Deed contains “Governing Provisions” in clauses 1 to 9 of the Trust Deed.

11B The Governing Provisions included provisions to the following effect:

- (a) the “Relevant Law”, being the laws of Australia and each of its states and territories (including the Corporations Act and the SIS Act), prevails to the extent of any inconsistency with the Trust Deed (clause 2.2(i));
- (b) Suncorp had the power to change, amend or replace all or any of the provisions in the Trust Deed (clause 2.3(a)(i));
- (c) Suncorp may charge for the administration and operation of the “Fund”, a “Division”, a “Sub-Division” or a “Plan” or a class of membership of a “Plan” an amount disclosed to the “Beneficiaries” in a “Disclosure Document” provided that such amount is no greater than any maximum amount (if any) set out in the “Governing Rules” (clause 3.7(a)). Relevantly:
  - (i) “Fund” is defined to mean the Master Trust and each “Division”, “Sub-Division” or “Plan” and comprises the assets held by, and for, Suncorp in respect of that superannuation fund;
  - (ii) “Division” is defined to mean a division of the Fund established by Suncorp pursuant to clause 4.1(a) and set out in a schedule to the Trust Deed;
  - (iii) “Sub-Division” is defined to mean a sub-division of the Fund as established by Suncorp pursuant to clause 4.1(a) and set out in a schedule to the Trust Deed;
  - (iv) “Plan” is defined to mean a membership group which has been established by Suncorp or which is established by Suncorp under clause 4.1(a);
  - (v) “Beneficiaries” is defined to mean a “Member”, a dependent of a Member or any other person who is entitled to be paid a benefit from, or has an interest, in the Fund;
  - (vi) “Member” is defined to mean a person admitted as a member of the Fund and who has not ceased to be a member of the Fund;

- (vii) “Disclosure Document” is defined to mean the following document for a Plan that is issued by Suncorp:
    - (A) if new Members are still being admitted into the Plan, the document provided to a Beneficiary prior to (or, where permitted by the Relevant Law, after) the issue of an interest in the Fund to the Beneficiary; or
    - (B) if new Members are no longer being admitted into the Plan, the document provided to a Beneficiary on an annual basis;
  - (viii) “Governing Rules” is defined to mean the terms and conditions of the Division, Sub-Division or Plan that are disclosed from time to time in one or more of the following:
    - (A) the “Rules”;
    - (B) the current Disclosure Document for the Division, Sub-Division or the Plan;
    - (C) the information sent to Members of the Division, Sub-Division or Plan; or
    - (D) any other communication by whatever method is used by SPSL;
  - (ix) “Rules” is defined to mean, subject to clause 5.5 of the Trust Deed, the rules set out in each Division, Sub-Division or Plan of the Trust Deed;
- (d) clause 4 provides for the establishment and operation of Divisions, Sub-Divisions and Plans within the Master Trust, with:
- (i) clause 4.3 conferring a power on Suncorp to transfer a Member’s interests in the Master Trust or benefit between Divisions, Sub-Divisions or Plans or classes of members in a Division, Sub-Division or Plan (**Intra-Fund Transfer Power**); and

- (ii) clause 4.4 conferring a power on Suncorp to segregate the assets, liabilities and members of each Division, Sub-Division or Plan;
  - (e) clause 5.6(c) provides that Suncorp may establish a "Reserve Account" for each Division, Sub-Division or Plan and credit specified amounts (i)-(iv) of clause 5.6(c), provided that the Reserve Account can only be applied for specified purposes (v)-(viii) of clause 5.6(c) (including (vii) of clause 5.6(c) payment of "Fund Expenses"); and
  - (f) "Fund Expenses" is defined to mean the costs and expenses of and incidental to the establishment, operation, management, administration, investment and termination of the Fund, including Tax, insurance costs and any fees or charges imposed on, or paid by, Suncorp.
- 12 Suncorp at all material times was, and is, the issuer of the Suncorp Products which were interests in a:
- (a) registrable superannuation entity within the meaning of s 10(1) of the SIS Act;
  - (b) regulated superannuation fund within the meaning of s 19(1) of the SIS Act; and
  - (c) public offer superannuation fund under s 18(1) of the SIS Act.
- 13 [Intentionally left blank].
- 14 [Intentionally left blank].
- 14A In respect of each of the Suncorp Products (pleaded in paragraph 8 above and paragraphs 15 and 40 below):
- (a) Suncorp created a separate Division, Sub-Division or Plan under the Trust Deed;

#### **Particulars**

Clause 4.1 of the Trust Deed and schedules to the Trust Deed.

- (b) the Members of each such Division, Sub-Division or Plan are bound by the Governing Provisions and Governing Rules applicable to the relevant Division, Sub-Division or Plan;

### Particulars

Clause 4.2 of the Trust Deed and schedules to the Trust Deed.

- (c) Suncorp created Rules under the Trust Deed for each Division, Sub-Division or Plan established for each Suncorp Product;

### Particulars

Clause 4.2 of the Trust Deed and schedules to the Trust Deed.

- (d) when Suncorp issued a PDS, it did so in relation to a Suncorp Product of a specific Division, Sub-Division or Plan;
- (e) in the premises of (a) to (d) above, the Division, Sub-Division or Plan established for each Suncorp Product falls within the meaning of a sub-plan in reg 1.0.02 of the *Corporations Regulations 2001 (Cth)* (**Corporations Regulations**); and
- (f) when a person became a Member of a Division, Sub-Division or Plan in respect of a Suncorp Product, they were:
  - (i) issued a financial product; and
  - (ii) provided a financial service.

### Particulars

Corporations Act, s 761E(7), 764A(g), 766A(1)(a) and (b), 766B and 766C(1)(a), (b) and (d); Corporations Regulations, reg 1.0.02 and 7.9.02; ASIC Act, s 12BAA(7)(f); and SIS Act, s 10.

14B At all material times Suncorp's conduct as trustee of the Master Trust has been conduct which:

- (a) involves provision of a financial service within the meaning of s 12BAB of the ASIC Act; and
- (b) is in trade or commerce.

- 15 As at 1 July 2013, Suncorp was the issuer of various Suncorp Products (**Original Superannuation Products**), including Suncorp Products that were not offered to new members of superannuation funds under the Master Trust.

#### Particulars

- (i) The Original Superannuation Products include:
  - (A) Suncorp Everyday Super;
  - (B) Suncorp Everyday Super Pension;
  - (C) Suncorp WealthSmart Personal Super;
  - (D) Optimum Personal Super;
  - (E) Optimum Professional Superannuation Savings;
  - (F) Connelly Temple Super Savings Plan (two funds);
  - (G) Partnership Superannuation Plan (two funds);
  - (H) Connelly Temple Superannuation Plan;
  - (I) INVESCO;
  - (J) Connelly Temple Workforce – Personal;
  - (K) Connelly Temple Suncorp Master Trust Superannuation;
  - (L) Workforce Superannuation Personal;
  - (M) Suncorp Employee Superannuation Plan;
  - (N) Promina Corporate Superannuation Fund;
  - (O) Optimum Corporate Super;
  - (P) Optimum Corporate for Standard Pacific;
  - (Q) Suncorp WealthSmart Business Super;
  - (R) Connelly Temple Employer Plan;
  - (S) Connelly Temple Workforce – Employer;

- (T) Workforce Superannuation Corporate;
  - (U) Suncorp WealthSmart Pension;
  - (V) Optimum Professional Pension;
  - (W) Connelly Temple Super Savings Plan Pension (two funds);
  - (X) Connelly Temple Superannuation Allocated Pension Plan;
  - (Y) Partnership Allocated Pension Plan;
  - (Z) INVESCO Lifestyle Retirement Plan;
  - (AA) Connelly Temple Suncorp Master Trust Allocated Pension; and
  - (BB) Suncorp WealthSmart Term Allocated Pension.
- (ii) Suncorp Board Submission dated 17 March 2016 and signed by Cathy Duncan, Executive Manager Superannuation, Product and Portfolio Management, on behalf of the due diligence committee, Suncorp at pages 25 and 26.
- (iii) The PDS issued in respect of the Original Superannuation Products include:
- (A) Suncorp WealthSmart Super PDS dated 1 November 2010;
  - (B) Suncorp WealthSmart Personal Super & Suncorp WealthSmart Pension PDS dated 30 November 2010;
  - (C) Suncorp WealthSmart Business Super PDS dated 30 November 2010;
  - (D) Suncorp WealthSmart Business Super Employer PDS dated 30 November 2010;
  - (E) Suncorp Everyday Super PDS dated 1 December 2012;
  - (F) Suncorp Everyday Super Product Guide dated 1 December 2012;



- (G) Suncorp WealthSmart Personal Super and Suncorp WealthSmart Pension PDS dated 4 July 2013;
- (H) Suncorp WealthSmart Business Super PDS dated 17 February 2014;
- (I) Suncorp WealthSmart Product Guide dated 17 February 2014;
- (J) Suncorp Brighter Super Product Guide dated 3 April 2013; and
- (K) Suncorp Everyday Super Product Guide dated 13 February 2013.

(iv) Further particulars to be provided following discovery.

16 [Intentionally left blank].

## **B.2 SIS Act**

17 At all material times the Trust Deed contained the covenants set out in s 52(2) of the SIS Act.

### **Particulars**

The covenants are express terms of the Trust Deed by operation of clause 2.2 of the Trust deed and s 52(1) of the SIS Act. Alternatively, the covenants are implied terms of the Trust Deed by operation of s 52(1) of the SIS Act.

18 Suncorp covenanted:

- (aa) at all material times up to 30 June 2013, to exercise, in relation to all matters affecting the entity, 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;

### **Particulars**

SIS Act, s 52(2)(b), as in force up to 30 June 2013.

- (a) from 1 July 2013, to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee

would exercise in relation to an entity of which it is a trustee and on behalf of the Plaintiff and Group Members of which it makes investments;

**Particulars**

SIS Act, s 52(2)(b), as in force from 1 July 2013;  
*Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012 (Cth).*

- (b) at all material times up to 30 June 2013, to ensure that the trustee's duties and powers are performed and exercised in the best interests of the Plaintiff and Group Members (**Previous Best Interests Duty**);

**Particulars**

SIS Act, s 52(2)(c), as in force up to 30 June 2013.

- (c) from 1 July 2013, to perform the trustee's duties and exercise the trustee's powers in the best interests of the Plaintiff and Group Members (**Best Interests Duty**);

**Particulars**

SIS Act, s 52(2)(c), as in force from 1 July 2013;  
*Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012 (Cth).*

- (d) from 1 July 2013, where there is a conflict between the duties of the trustee to the Plaintiff and Group Members, or the interests of the Plaintiff and Group Members, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:

- (i) to give priority to the duties to and interests of the Plaintiff and Group Members over the duties to and interests of other persons; and
- (ii) to ensure that the duties to the Plaintiff and Group Members are met despite the conflict; and
- (iii) to ensure that the interests of the Plaintiff and Group Members are not adversely affected by the conflict; and

- (iv) to comply with the prudential standards in relation to conflicts-

**Particulars**

SIS Act, s 52(2)(d), as in force from 1 July 2013;  
*Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012 (Cth).*

- (e) from 1 July 2013, to act fairly in dealing with classes of beneficiaries within the entity and to act fairly in dealing with beneficiaries within a class (**Fairness Duties**).

**Particulars**

SIS Act, s 52(2)(e) and (f), as in force from 1 July 2013;  
*Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012 (Cth).*

(together, the **Statutory Covenants**).

**B.3 Equitable and legal duties**

- 18A At all material times, Suncorp owed the Plaintiff and Group Members, when they were members of a superannuation fund under the Master Trust, the duties of a trustee and fiduciary.

**Particulars**

The duties arise at law and in equity from the relationship between Suncorp as trustee and the Plaintiff and Group Members as beneficiaries of the superannuation funds under the Master Trust.

- 18B At all material times, Suncorp owed and owes to the Plaintiff and Group Members a duty to comply with the terms of the Trust Deed.

**Particulars**

The duty is one in equity arising from the relationship of trustee and beneficiary.

- 18C At all material times, including prior to 1 July 2013, where there was a conflict between on the one hand, the duties of Suncorp to the Plaintiff and Group Members,

or the interests of the Plaintiff and Group Members, and on the other hand, the duties of Suncorp to any other person or the interests of Suncorp or an associate of Suncorp, Suncorp had a fiduciary duty:

- (i) to give priority to the duties to and interests of the Plaintiff and Group Members over the duties to and interests of other persons;
- (ii) to ensure that the duties to the Plaintiff and Group Members are met despite the conflict; and
- (iii) to ensure that the interests of the Plaintiff and Group Members are not adversely affected by the conflict,

**(General Law Conflict Duty).**

#### **B.4 FOFA**

19 The Future of Financial Advice (**FOFA**) amendments to the Corporations Act commenced on 1 July 2012.

#### **Particulars**

- (i) *Corporations Amendment (Future of Financial Advice) Act 2012 (Cth), s 3 and Sch1;*
- (ii) *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth), s 3 and Sch 1.*

20 For the purposes of this Further Amended Commercial List Statement, “**Conflicted Remuneration**” means:

- (a) any commission paid to Financial Services Licensees in relation to Suncorp Products (**Commissions**), including:
  - (i) commissions on contributions;
  - (ii) ongoing commissions paid on account of balances of member accounts;
  - (iii) commissions on insurance premiums; and

- (iv) amounts paid on the total amount of funds that Financial Services Licensees introduced to Suncorp;
- (b) any benefit given to a Financial Services Licensee who provided financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it was given (**FOFA Conflicted Remuneration**):
  - (i) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
  - (ii) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

except any Commissions or FOFA Conflicted Remuneration in respect of a Risk-Only Product.

In this paragraph, a Risk-Only Product is a life risk insurance product within the meaning of s 963B(1)(b)(i) of the Corporations Act which has no investment component or balance and is not either a group life policy for members of a superannuation entity or a life policy for a member of a default superannuation fund within the meaning of s 963B(1)(b)(ii) of the Corporations Act.

- 20A At all material times, Commissions were and are FOFA Conflicted Remuneration.
- 21 From 1 July 2013 onwards, subject to the qualification in paragraph 24 below, Financial Services Licensees were prohibited from accepting FOFA Conflicted Remuneration.

#### **Particulars**

Corporations Act, s 963E(1) and s 963G(1).

- 22 [intentionally left blank].
- 23 From 1 July 2013 onwards, subject to the qualification in paragraph 24 below, issuers of Suncorp Products were prohibited from giving a Financial Services Licensee, FOFA Conflicted Remuneration.

#### **Particulars**

Corporations Act, s 963K.

- 24 Subject to the matters set out in paragraphs 24A below, the ban on FOFA Conflicted Remuneration did not apply to benefits (**Grandfathered Benefits**) given to Financial Services Licensees, if the benefit was given under an arrangement entered into before 1 July 2013 and not given by a platform operator (the **Exception**).

#### Particulars

Corporations Act, s 1528(1).

- 24A The Corporations Regulations restricted the operation of the Exception such that it did not apply to a benefit given by a person *not* acting in the capacity as a platform operator, if the client did not have an interest in the financial product before 1 July 2014 and the benefit:
- (a) was given in relation to the acquisition, on or after 1 July 2014, of a financial product for the benefit of a retail client; or
  - (b) did not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client.

#### Particulars

Corporations Act, s 1528(2); Corporations Regulations 7.7A.16B.

- 24B The Corporations Regulations also provided that the ban on FOFA Conflicted Remuneration did not apply to benefits (also Grandfathered Benefits) if the benefit was given by a person acting in the capacity as a platform operator, if the benefit was in relation to:
- (a) an acquisition of a financial product on the instructions of a person who had given an instruction to the person acting in the capacity of a platform operator to open an account on the platform before 1 July 2014; or
  - (b) a person who had opened an account on the platform before 1 July 2014.
- 24C At all material times, Suncorp was obliged to ensure that the Master Trust was maintained *solely* for the provision of benefits for each member in the circumstances set out in s 62 of the SIS Act (**Sole Purpose Requirement**).

#### **B.4 Unconscionable conduct**

24D At all material times Suncorp has been prohibited by s 12CB of the ASIC Act from engaging in conduct that is, in all the circumstances, unconscionable in connection with the supply or possible supply of its services as trustee of the Master Trust and issuer of Suncorp Products.

### **C Payment of Conflicted Remuneration before and after 1 July 2013**

#### **C.1 Conflicted Remuneration prior to 1 July 2013**

24E Prior to 1 July 2013, Suncorp had an agreement with Suncorp Financial (**Superseded Distribution Agreement**) pursuant to which:

- (a) Suncorp authorised Suncorp Financial to include in agreements with Suncorp Financial's distributors (including authorised representatives of Suncorp Financial) provision for payment to distributors of commission;

#### **Particulars**

Superseded Distribution Agreement, clause 7.1(a).

- (b) Suncorp would notify Suncorp Financial from time to time of the commission rates applicable to each of the Suncorp Products;

#### **Particulars**

Superseded Distribution Agreement, clause 7.1(b).

- (c) Suncorp Financial was required to ensure its agreements with distributors provided for commission in accordance with the commission rates applicable at the time the agreement was entered into and that Suncorp Financial could vary the commission rates in a manner consistent with Suncorp's procedures for the variation of commission rates;

#### **Particulars**

Superseded Distribution Agreement, clause 7.1(c).

- (d) as between Suncorp and Suncorp Financial, Suncorp would be solely responsible for payment of commission to the distributors, however, Suncorp

Financial was required to provide all details to Suncorp in respect of each distributor each month to:

- (i) calculate the commission due to distributors;
- (ii) generate the recipient created tax invoice in respect of the commission (where applicable); and
- (iii) pay the commission in accordance with the distributor's instructions;

**Particulars**

Superseded Distribution Agreement, clause 7.1(d).

- (e) Suncorp Financial was not entitled to any remuneration under the Superseded Distribution Agreement, however, Suncorp and Suncorp Financial could from time to time enter into arrangements whereby Suncorp paid Suncorp Financial amounts to cover the costs of distributing and promoting the Suncorp Products; and

**Particulars**

Superseded Distribution Agreement, clause 7.2(a).

- (f) Suncorp or Suncorp Financial could terminate the Superseded Distribution Agreement by giving the other party 4 weeks' (or such other period as the parties may agree) notice in writing.

**Particulars**

Superseded Distribution Agreement, clause 8.1(a).

The Superseded Distribution Agreement is in writing and comprised of:

- (i) Product Issue and Distribution Agreement between Suncorp Financial, Suncorp Metway Investment Management Limited, Suncorp Superannuation Pty Ltd and Suncorp Life dated 7 July 2004; and
- (ii) Deed of Assignment and Variation of Product Issue and Distribution Agreement between Suncorp Financial Services



and the Issuers (Suncorp Metway Investment Management Limited, Suncorp Life & Superannuation Limited, Suncorp Superannuation Pty Ltd and Suncorp Portfolio Services Limited) dated 26 May 2009.

- 25 Conflicted Remuneration was paid to Financial Services Licensees (**Conflicted Remuneration Payments**) in relation to the Suncorp Products, on and prior to 30 June 2013.

#### Particulars

- (i) RC – Witness statement of E. A. Cooley dated 25 July 2018 at [121]-[126].
- (ii) RC – Witness statement of M. Pinto dated 5 August 2018 at [33] including question 12 immediately above [33] but below [32];
- (iii) Suncorp, Document Approval Process form dated 26 June 2013 for Distribution Agreements at page .0041;
- (iv) Conflicted Remuneration Payments included:
  - (A) commissions on contributions;
  - (B) ongoing commissions paid on account of balances of members accounts;
  - (C) commissions on insurance premiums; and
  - (D) amounts paid on the total amount of funds that advisers or their financial services licensee introduced to Suncorp.
- (v) Further particulars will be provided following discovery or the service of evidence.

- (a) made each of the Conflicted Remuneration Payments referred to in paragraph 25 above; or
- (b) reimbursed members of the Suncorp Adviser Network or Suncorp Life for each of the Conflicted Remuneration Payments that they made referred to in paragraph 25 above,

by:

- (c) directly deducting the payments from members' funds; or
- (d) alternatively, drawing on Suncorp's general revenue.

#### **Particulars**

- (i) RC – Witness statement of E. A. Cooley dated 25 July 2018 at [91] and [125].
- (ii) RC – Witness statement of M. Pinto dated 5 August 2018 at [33] including question 12 immediately above [33] but below [32];
- (iii) Suncorp, Document Approval Process form dated 26 June 2013 for Distribution Agreements at page .0041.

26A Suncorp set administration costs, fees and charges for Members (**Fees**) at the level they were set to enable part or all of those Fees (**Excess Fees**) to be used to fund the Conflicted Remuneration Payments referred to in paragraph 25 above (**Suncorp Fee Purpose**).

#### **Particulars**

- (i) Fees include:
  - (A) contribution fees;
  - (B) administration fees;
  - (C) insurance premiums;
  - (D) ongoing service fees as part of the administration fees.

- (ii) Further particulars will be provided following discovery or evidence.

27 As at 20 June 2013, the payments referred to in paragraphs 25 and 26 above were:

- (a) not given pursuant to an arrangement within the meaning of s 1528(1) of the Corporations Act;
- (b) alternatively to (a) above, not given pursuant to an arrangement between the Plaintiff, the Group Members, Suncorp, Suncorp Financial, Suncorp Life or any other member of the Suncorp Adviser Network or any Financial Services Licensee; or

#### **Particulars**

- (i) As at 20 June 2013:
  - (A) Suncorp was unable to identify which Suncorp Products were the subject of payments of Conflicted Remuneration; and
  - (B) Suncorp was unable to identify the amount of Conflicted Remuneration payable to Financial Services Licensees in relation to the Suncorp Products.
- (ii) Email from Lucy Lowing, Senior Lawyer – Life, Legal and Secretariat, Suncorp sent on 24 June 2013 at 10.15 a.m. to various staff members of the Suncorp Group.

- (c) alternatively to (a) and (b) above, not given pursuant to any contractual obligation between the Plaintiff, the Group Members or Suncorp to Suncorp Financial, Suncorp Life, other members of the Suncorp Adviser Network or any other Financial Services Licensee.

#### **Particulars**

The particulars to sub-paragraph (b) above are repeated.

28 [intentionally left blank].

29 At all material times, Suncorp knew or ought to have known that, if there was any arrangement or arrangements to make the payments referred to in paragraphs 25

and 26 above (contrary to the Plaintiff's primary contention), Suncorp was capable of ceasing such arrangements on or by 1 July 2013 (and at any time thereafter) (a **Cessation of Arrangement Act**).

#### Particulars

If there was any arrangement or arrangements to make the payments referred to in paragraphs 25 and 26 above (contrary to the Plaintiff's primary contention), without limitation, Suncorp could have:

- (A) terminated the Superseded Distribution Agreement;
- (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products, or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
- (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments.

29A Further or in the alternative to paragraph 29 above, regardless of whether there was any arrangement or arrangements to make the payments referred to in paragraphs 25 and 26 above (contrary to the Plaintiff's primary contention) or not, at all material times Suncorp knew or ought to have known that it could have ceased paying Conflicted Remuneration on or by 1 July 2013 (and at any time thereafter) (a **Cessation of Payment Act**).

#### Particulars

- (i) The particulars to paragraph 29 are repeated.

- (ii) There was no physical impediment preventing Suncorp from ceasing paying Conflicted Remuneration on or by 1 July 2013 (and at any time thereafter).

29B Further or in the alternative to paragraphs 29 and 29A above, regardless of whether there was any arrangement or arrangements to make the payments referred to in paragraphs 25 and 26 above (contrary to the Plaintiff's primary contention) or not, at all material times, Suncorp knew or ought to have known that it could have ceased applying the Suncorp Fee Purpose on or by 1 July 2013 (and at any time thereafter) (a **Cessation of Member Charging Act**).

#### **Particulars**

- (i) The particulars to paragraph 29 are repeated.
- (ii) There was no physical impediment preventing Suncorp from ceasing to apply the Suncorp Fee Purpose on or by 1 July 2013 (and at any time thereafter).
- (iii) Suncorp had a discretion to reduce its fees such that Excess Fees were not charged on or by 1 July 2013 (and at any time thereafter).

30 At some point prior to 13 June 2013, Suncorp, Suncorp Life or Suncorp Holdings established the FOFA project.

#### **Particulars**

Suncorp Document Approval Process form dated 26 June 2013 for Distribution Agreements at page 0057.

31 On 13 June 2013, Suncorp provided draft Product Issue and Distribution Agreements with Suncorp Financial, Guardian and Standard Pacific to various staff members at Suncorp.

**Particulars**

Email from Paul Girot Project Manager - Business Improvement, Product and Service, Suncorp sent on 13 June 2013 at 5.31 p.m. to various staff members of the Suncorp Group.

- 32 On or about 23 or 24 June 2013, Suncorp prepared a document titled "Document Approval Process" for the approval of the Distribution Agreements.

**Particulars**

Suncorp, Document Approval Process form dated 26 June 2013 for Distribution Agreements at page 0057.

- 33 Prior to executing the Distribution Agreements:
- (a) Suncorp was unable to finalise a list of the Suncorp Products covered by the Distribution Agreements;
  - (b) the existence of an 'arrangement' in relation to Conflicted Remuneration was stated by Suncorp to be based on records of what fees had been received for what Suncorp Products from which issuer;

**Particulars**

Email from Lucy Lowing, Senior Lawyer – Life, Legal and Secretariat, Suncorp sent on 24 June 2013 at 10.15 a.m. to various staff members of the Suncorp Group.

- (c) it was in the interests of Financial Services Licensees to receive Conflicted Remuneration Payments from Suncorp (directly by Suncorp or through the Suncorp Advisor Network) and it was in the interests of Suncorp for Financial Services Licensees to receive Conflicted Remuneration Payments;

**Particulars**

- (i) It was in the interests of Suncorp to maintain good relations with Financial Services Licensees in relation to the promotion and distribution of Suncorp Products; and
- (ii) The Conflicted Remuneration Payments would enrich Suncorp and Financial Services Licensees.

- (d) the best interests of the Plaintiff and each of the Group Members was for Conflicted Remuneration Payments not to be made from 1 July 2013; and

**Particulars**

- (i) the best interests of the Plaintiff and Group Members were their best financial interests;
  - (ii) no additional benefits or services would be received by the Plaintiff and each of the Group Members, nor would they have an entitlement to receive additional benefits or services, in return for the payment or continuation of the Conflicted Remuneration Payments;
  - (iii) the Conflicted Remuneration Payments would reduce the benefits of the Plaintiff and each of the Group Members in the Suncorp Product(s) they held interests in and enrich Suncorp and Financial Services Licensees;
  - (iv) new Members of each of the Divisions, Sub-Divisions and Plans for each of the Suncorp Products after 1 July 2014 would not and could not be charged fees to pay for the Conflicted Remuneration Payments such that they would be in a better financial position than Members of such Divisions, Sub-Divisions and Plans who were charged fees to pay for the Conflicted Remuneration Payments; and
  - (v) further particulars will be provided after discovery.
- (e) the best interests of the Plaintiff and each of the Group Members was for the Suncorp Fee Purpose to cease.

**Particulars**

The particulars of sub-paragraph (d) are repeated.

34 Suncorp:

- (a) decided to execute the Distribution Agreements on or prior to 27 June 2013;

- (b) on or about 27 June 2013, entered into a “Product Issue and Distribution Agreement” with Suncorp Financial (**Suncorp Financial Distribution Agreement**);

#### Particulars

The Suncorp Financial Distribution Agreement was executed by Carroll and Summerhayes as directors of Suncorp.

- (c) decided, on or about 27 June 2013, to continue making Conflicted Remuneration Payments or to reimburse Financial Services Licensees for any Conflicted Remuneration Payments that they made; and
- (d) decided:
- (i) on or about 27 June 2013 or alternatively prior to 1 July 2013, to continue to charge existing members of superannuation funds under the Master Trust as at 30 June 2013; and
  - (ii) on or about 27 June 2013, to charge persons who became members of superannuation funds under the Master Trust between 1 July 2013 and 30 June 2014,

Excess Fees to fund Conflicted Remuneration Payments (whether pursuant to the Distribution Agreements or otherwise),

(each of which, separately and collectively, constitute a **Continuation of Conflicted Remuneration Decision**).

35 [intentionally left blank].

36 The Suncorp Financial Distribution Agreement provided that:

- (a) Suncorp would pay commissions to Suncorp Financial on any Suncorp Product that had or would be issued by Suncorp in accordance with the commission rates applicable for each of the Suncorp Products;

#### Particulars

Suncorp Financial Distribution Agreement, cl 7.1 (a).

- (b) Suncorp authorised Suncorp Financial to include in any agreement pursuant to which Suncorp Financial distributed Suncorp Products for Suncorp (a **CAR**



**Agreement**) a provision for the payment to ‘Distributors’ (defined in the Suncorp Financial Distribution Agreement as being persons who distribute and promote Suncorp Products, and includes employees of the Suncorp Group and authorised representatives of Suncorp Financial) of commission or other remuneration;

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (b).

- (c) Suncorp would notify Suncorp Financial from time to time of the commission in the commission schedule for each of the Suncorp Products;

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (c).

- (d) Suncorp Financial would ensure that:
- (i) the commission payable under each CAR Agreement was in accordance with the commission schedule applicable at the time the CAR Agreement was entered into; and
  - (ii) each CAR Agreement authorised Suncorp Financial to vary commission rates in a manner consistent with the relevant issuer’s procedures for variation of commission rates;

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (d).

- (e) Suncorp was solely responsible for payment of commission to Suncorp Financial for Distributors. Suncorp Financial would however provide all details that Suncorp needed, in respect of each Distributor each month, to:
- (i) calculate the commission due to the Distributor;
  - (ii) generate the recipient created tax invoice in respect of the commission; and
  - (iii) pay the commission in accordance with the Distributor’s instructions;

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (e).

- (f) Suncorp could from time to time enter into arrangements by which Suncorp pays Suncorp Financial amounts to cover costs of distributing and promoting Suncorp Products;

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.2 (a).

- (g) in consideration of Suncorp Financial agreeing to distribute the Suncorp Products, Suncorp would pay Suncorp Financial fees as agreed in writing between Suncorp and Suncorp Financial from time to time; and

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.3.

- (h) Suncorp or Suncorp Financial could terminate the Suncorp Financial Distribution Agreement by giving the other party 4 weeks' (or such other period as the parties may agree) notice in writing.

**Particulars**

Suncorp Financial Distribution Agreement, cl 9.1.

37 On or about 27 June 2013, Suncorp decided to execute and executed agreements:

- (a) with Guardian that contained substantially the same terms as pleaded in paragraph 36 above in respect of the Suncorp Financial Distribution Agreement (**Guardian Distribution Agreement**); and
- (b) with Standard Pacific that contained substantially the same terms as pleaded in paragraph 36 above in respect of the Suncorp Financial Distribution Agreement, except for the terms pleaded in subparagraphs 36(b) and (d) above (**Standard Pacific Distribution Agreement**),

(each of which, separately, also constitute a Continuation of Conflicted Remuneration Decision).

**Particulars**

Email from Lucy Lowing, Senior Lawyer – Life, Legal and Secretariat, Suncorp sent on 24 June 2013 at 10.15 a.m. to various staff members of the Suncorp Group.

- 37A The Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement were materially different to the Superseded Distribution Agreement in that:
- (a) they required Suncorp to pay amounts described as ‘commission’ to the Suncorp Adviser Network, being a requirement that was not in the Superseded Distribution Agreement; and
  - (b) they provided for the payment of fees to the Suncorp Adviser Network, being a requirement that was not in the Superseded Distribution Agreement.

**Particulars**

Clauses 7.1(a) and 7.3 of the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

- 37B In entering into the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement, Suncorp sought to ensure that:
- (a) Conflicted Remuneration Payments could, after 1 July 2013, be paid in respect of:
    - (i) persons who were existing members of superannuation funds under the Master Trust as at 30 June 2013;
    - (ii) persons who became members of superannuation funds under the Master Trust between 1 July 2013 and 30 June 2014; and
  - (b) Suncorp could charge persons referred to in (a) above Excess Fees to fund Conflicted Remuneration Payments,

to the extent that Suncorp considered it was not prohibited to do so under the FOFA Reforms (**Suncorp's Continuation of Fees Purpose**).

37C Prior to the entry into the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement, Suncorp did not give, or alternatively did not give any proper, adequate or reasonable consideration, as to whether:

- (a) it was in the interests of persons who were existing members of superannuation funds under the Master Trust:
  - (i) for Conflicted Remuneration Payments to be continued; or
  - (ii) that they continue to be charged Excess Fees to fund Conflicted Remuneration Payments;
- (b) it was in the interests of persons who became members of superannuation funds under the Master Trust between 1 July 2013 and 30 June 2014:
  - (i) for Conflicted Remuneration Payments to be made; or
  - (ii) that they be charged Excess Fees to fund Conflicted Remuneration Payments.

38 On and after 1 July 2013, Conflicted Remuneration Payments were continued to be made in relation to the Suncorp Products.

#### **Particulars**

- (i) The best particulars that the Plaintiff can provide with his present state of knowledge is that the total amounts paid during the Relevant Period from 1 July 2013 to 30 June 2018 are set out in the response to question 12(a) in the table at [33] of RC –Witness statement of M. Pinto dated 5 August 2018.
- (ii) Conflicted Remuneration Payments included:
  - (A) commissions on contributions;
  - (B) ongoing commissions paid on account of balances of members accounts;

- (C) commissions on insurance premiums;
  - (D) amounts paid on the total amount of funds that advisers or their financial services licensee introduced to Suncorp.
- (iii) Further particulars will be provided following discovery or the service of evidence.

39 On and after 1 July 2013, Suncorp:

- (a) made each of the Conflicted Remuneration Payments referred to in paragraph 38 above; or
- (b) reimbursed members of the Suncorp Adviser Network or Suncorp Life for each of the Conflicted Remuneration Payments they made referred to in paragraph 38 above,

by:

- (c) directly deducting the payments from members' funds; or
- (d) alternatively, drawing on Suncorp's general revenue,

(each act of which, separately, constitutes an act in **Implementing the Continuation of Conflicted Remuneration Decision**).

#### **Particulars**

- (i) RC – Witness statement of E.A. Cooley dated 25 July 2018 at [91] and [125]; and
- (ii) RC –Witness statement of M. Pinto dated 5 August 2018 at [33] and [34];
- (iii) Suncorp Financial Distribution Agreement, cl 7.1 (a).

39A From 1 July 2013, Suncorp set and charged members Fees, which included Excess Fees, to fund the Conflicted Remuneration Payments referred to in paragraph 39 above (also a Suncorp Fee Purpose and each an act in Implementing the Continuation of Conflicted Remuneration Decisions).

### Particulars

- (i) Fees include:
  - (A) contribution fees;
  - (B) administration fees;
  - (C) insurance premiums;
  - (D) ongoing service fees as part of the administration fees.
- (ii) Further particulars will be provided following discovery or evidence.

39B At the time of making each of the Continuation of Conflicted Remuneration Decisions and engaging in each of the acts of Implementing the Continuation of Conflicted Remuneration Decisions, Suncorp knew or ought to have known each of the facts in paragraphs 24D to 39A above.

39C At all material times, Suncorp has not engaged in a:

- (a) Cessation of Arrangement Act, to the extent arrangements existed prior to 1 July 2013 within the meaning of s 1528 of the Corporations Act (contrary to the Plaintiff's primary contention);
- (b) Cessation of Payment Act; or
- (c) Cessation of Member Charging Act,

other than in relation to members of superannuation funds under the Master Trust who had accrued default amounts (**ADAs**) and who were transferred by Suncorp to a MySuper Suncorp Product pursuant to legislative requirements.

### **C.2 Conflicted Remuneration prohibited on acquisitions after 1 July 2014**

39D At all material times:

- (a) Suncorp was not acting in the capacity as a platform operator when issuing the Suncorp Products and providing financial services to the Plaintiff and Group Members in respect of the Suncorp Products; and

- (b) any Conflicted Remuneration Payments in respect of any Suncorp Product that a Member acquired an interest in after 1 July 2014 was prohibited by the FOFA Reforms.

### Particulars

The Plaintiff repeats paragraphs 14A and 19 to 24A above.

#### D Super Simplification program

40 On or about 17 March 2016, the Due Diligence Committee of Suncorp recommended to the board of Suncorp that:

- (a) the Trust Deed be amended to insert a new Division, being “Division 13”, and called the “Suncorp Superannuation Division”; and
- (b) members of Original Superannuation Products be transferred to at least the following 8 new Suncorp Products to be issued from the new Division 13 (**New Superannuation Products**):
- (i) Suncorp Everyday Super;
  - (ii) Suncorp Everyday Super Pension;
  - (iii) Suncorp Brighter Super;
  - (iv) Suncorp Brighter Super – Personal Super;
  - (v) Suncorp Employee Superannuation Plan;
  - (vi) Suncorp Brighter Super – Employer Super;
  - (vii) Suncorp Brighter Super – Pension; and
  - (viii) Suncorp Brighter Super – Term Allocated Pension,

**(Super Simplification Proposal).**

### Particulars

Suncorp Board Submission dated 17 March 2016 and signed by Duncan, Executive Manager Superannuation, Product and Portfolio

Management, on behalf of the due diligence committee, Suncorp.  
Further particulars to be provided following discovery.

- 41 On or about 24 March 2016, Suncorp decided:
- (a) to approve the Super Simplification Proposal;
  - (b) not to cease making Conflicted Remuneration Payments;
  - (c) not to cease reimbursing members of the Suncorp Adviser Network for Conflicted Remuneration Payments that they made; and
  - (d) not to cease charging its members Excess Fees to fund Conflicted Remuneration Payments,
- (each, separately and collectively, constitute the **Super Simplification Decision**).

#### **Particulars**

RC – Witness statement of E. A. Cooley dated 25 July 2018 at [87].

- 41A The PDS that Suncorp issued in respect of each of the New Superannuation Products:
- (a) stated that Suncorp would pay to a member's nominated Financial Services Licensee adviser any advice fee that the member agrees to pay their nominated Financial Services Licensee adviser; and
  - (b) should have disclosed, but did not disclose, that in relation to members who had acquired an interest in the Original Superannuation Products prior to 1 July 2014:
    - (i) Suncorp would (directly or through members of the Suncorp Adviser Network) make payments to such member's nominated Financial Services Licensee adviser that would be Conflicted Remuneration; and
    - (ii) Suncorp would charge such members Excess Fees to fund the Conflicted Remuneration Payments referred to in (i) above.

#### **Particulars**



- (i) Suncorp Brighter Super Personal Super and Pension PDS issued 30 May 2016; page 11, in respect of “Advice fees”.
- (ii) Suncorp Brighter Super for business PDS issued 30 May 2016, page 11 in respect of Advice fees.
- (iii) Suncorp Everyday Super PDS issued 27 May 2017, page 11, in respect of “Personal Advice fees”.
- (iv) Suncorp Everyday Super PDS issued 13 February 2018, page 10 in respect of “Personal Advice fees”.
- (v) Suncorp Brighter Super Personal Super and Pension PDS issued 3 April 2018, page 10 in respect of “Advice fees”.
- (vi) Suncorp Brighter Super for business PDS issued 3 April 2018, page 10 in respect of “Advice fees”.
- (vii) Suncorp Employee Superannuation Plan PDS, issued 3 April 2018, page 10 in respect of “Advice fees”.
- (viii) The Plaintiff repeats paragraphs 11B and 14A above.

42 If it is found that there was an arrangement prior to 1 July 2013 (within the meaning of s 1528(1)(a) of the Corporations Act) to make the Conflicted Remuneration Payments referred to in paragraphs 25 and 38 above (contrary to the Plaintiff’s primary contention):

- (a) that arrangement ceased to have the effect of causing Conflicted Remuneration Payments to be Grandfathered Benefits once members had been transferred from the Original Superannuation Products to the New Superannuation Products; and
- (b) further, the payment of Conflicted Remuneration to Financial Services Licensees in respect of any members whose interests were transferred from Original Superannuation Products to the New Superannuation Products was and is prohibited by the FOFA Reforms once the interests of those members were transferred from the Original Superannuation Products to the New Superannuation Products.

### **Particulars**

The Plaintiff repeats paragraphs 14A and 19 to 24A above.

- 43 Between 1 August 2016 and February 2017, Suncorp transferred members from Original Superannuation Products to the New Superannuation Products.

**Particulars**

- (i) Suncorp Board Submission dated 17 March 2016 and signed by Duncan, Executive Manager Superannuation, Product and Portfolio Management, on behalf of the Due Diligence Committee, Suncorp.
- (ii) RC – Witness statement of E.A. Cooley dated 25 July 2018 at [87].

- 44 On and after 1 August 2016, Conflicted Remuneration Payments were continued to be made in relation to Suncorp Products, including the New Superannuation Products.

**Particulars**

The total amounts paid during the period from 1 August 2016 to 30 June 2018 are set out in the response to question 12(a) in the table at [33] of RC – Witness statement of M. Pinto dated 5 August 2018

- 45 On and after 1 August 2016, Suncorp:
- (a) made each of the Conflicted Remuneration Payments referred to in paragraph 44 above; or
  - (b) reimbursed members of the Suncorp Adviser Network or Suncorp Life for each of the Conflicted Remuneration Payments referred to in paragraph 44 above,
- by:
- (c) directly deducting the payments from members' funds; or
  - (d) alternatively, drawing on Suncorp's general revenue,
- (each act of which, separately, constitutes an act in **Implementing the Super Simplification Decision**).

### **Particulars**

The particulars to paragraph 44 above are repeated.

- 45A From 1 August 2016, Suncorp set and charged members Excess Fees to fund the Conflicted Remuneration Payments referred to in paragraph 45 above (also a Suncorp Fee Purpose and each an act in Implementing the Super Simplification Decision).
- 45B At the times of making the Super Simplification Decision and engaging in each of the acts Implementing the Super Simplification Decision, Suncorp knew or ought to have known each of the facts in paragraphs 39D to 45A above.

### **E Failure to advise**

- 45C At all material times, Suncorp failed to advise members of superannuation funds under the Master Trust that they had the right to request Suncorp to transfer their investment to a product in respect of which:
- (a) members would not be charged Excess Fees; or
  - (b) Suncorp would not (directly or through members of the Suncorp Adviser Network) pay Financial Services Licensees any Conflicted Remuneration.

### **Particulars**

- (i) From 1 July 2014, Suncorp offered a MySuper product known as the Suncorp Lifestage Fund in respect of which:
  - (A) members were not charged Excess Fees;
  - (B) no Conflicted Remuneration Payments would be made.
- (ii) As pleaded in paragraph 11B above, Suncorp could:
  - (A) amend the Trust Deed; create new Divisions, Sub-Divisions and Plans; create new Suncorp Products (to be issued from Divisions, Subdivisions or Plans); amend the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products); amend the Suncorp Products, or amend the PDS issued in respect of each of the Suncorp Products,

to remove: (1) Conflicted Remuneration Payments; or  
 (2) the charging of Excess Fees to members to fund  
 Conflicted Remuneration Payments; or

- (B) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the charging of Excess Fees to members to fund Conflicted Remuneration Payments.

(iii) Further particulars will be provided after discovery or evidence.

45D Further or in the alternative to paragraph 45C above, Suncorp exercised its discretion not to advise members of superannuation funds under the Master Trust of the matters pleaded in paragraph 45C.

## **F Contraventions**

### **F.1 SIS Act Contraventions and breaches of trust**

46 At all material times, there was an actual conflict between the interests of the Plaintiff and each of the Group Members, on the one hand, and Suncorp's own interests and the interests of Financial Services Licensees, on the other hand.

#### **Particulars**

- (i) It was in the interests of the Plaintiff and each of the Group Members not to be charged Excess Fees to fund the Conflicted Remuneration Payments.
- (ii) No additional benefits or services would be received by the Plaintiff and each of the Group Members, nor would they have an entitlement to receive additional benefits or services, in return for: (A) the Excess Fees charged to them in order to fund the making or continuation of making of the Conflicted Remuneration Payments; (B) the payment or continuation of the Conflicted Remuneration Payments.
- (iii) It was in the interests of Suncorp to: (A) continue the making of Conflicted Remuneration Payments; (B) charge the

Plaintiff and each of the Group Members Excess Fees to fund the Conflicted Remuneration Payments.

- (iv) The charging of Excess Fees or the making of Conflicted Remuneration Payments would reduce the benefits that the Plaintiff and each of the Group Members were entitled to under the Master Trust with respect to the Suncorp Product(s) they held interests in and would enrich Suncorp and Financial Services Licensees.
- (v) It was in the interests of Suncorp to maintain good relations with Financial Services Licensees in relation to the promotion and distribution of the Suncorp Products.
- (vi) Summerhayes, the executive director of Suncorp, was a member of the boards of entities within the Suncorp Adviser Network.

47 At all material times, Suncorp knew or, alternatively, recklessly shut its eyes to the actual conflict pleaded in paragraph 46 above.

#### **Particulars**

- (i) Each of the Directors received, read and signed the Distribution Agreements, and was aware of the contents and, in particular, the terms of clause 7.1.
- (ii) The matters pleaded in this paragraph are matters that should have been known to Suncorp, Carroll and Summerhayes unless they recklessly shut their eyes to them.
- (iii) The knowledge of the Directors is to be attributed to Suncorp by reason of the matters pleaded in paragraph 10(d) above.

48 Alternatively to paragraph 47 above, at all material times, Suncorp ought to have known each of the matters pleaded in paragraph 46 above.

### Particulars

The Plaintiff repeats the particulars (i) to (iii) to paragraph 47 above. Further, the matters pleaded in paragraph 46 above are matters that a prudent trustee would have known.

- 49 Suncorp contravened the covenant in s 52(2)(b) of the SIS Act to exercise the degree of care, skill and diligence that a prudent superannuation trustee would have exercised if they were the trustee of the superannuation funds under the Master Trust **(Due Care and Skill Contraventions)** and the covenants in ss 52(e) and (f) of the SIS Act to act fairly in dealing with classes of beneficiaries within the entity and to act fairly in dealing with beneficiaries within a class (Fairness Contraventions):

- (a) in:
- (i) making each of the Continuation of Conflicted Remuneration Decisions;
  - (ii) engaging in each act of Implementing the Continuation of Conflicted Remuneration Decision; and

### Particulars

- (ia) For the purpose of the covenants in ss 52(e) and (f), the following persons are classes of beneficiaries or persons within a class of beneficiaries:
- (A) persons who became members of a superannuation fund under the Master Trust before 1 July 2014 and who were charged Excess Fees after 1 July 2014; and
  - (B) persons who became members of a superannuation fund under the Master Trust after 1 July 2014 and who were not charged Excess Fees after 1 July 2014;
- (i) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have identified the following considerations as relevant:

- (AA) whether Suncorp could cease making the Conflicted Remuneration Payments;
- (A) what were the amounts that the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
- (B) what were the benefits or services, if any, that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;
- (C) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees, what was their estimated value;
- (D) whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments and the charging of Excess Fees were continued;
- (E) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of Financial Services Licensees on the other;
- (F) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict;
- (G) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp or Financial Services Licensees;
- (H) whether the decision was only made for proper purposes and, in particular, whether it satisfied the Sole Purpose Requirement.

- (ii) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have taken all reasonable steps to obtain relevant information and advice so as to:
- (AA) ascertain whether Suncorp could cease making the Conflicted Remuneration Payments;
  - (A) ascertain the amounts that the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
  - (B) ascertain whether there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;
  - (C) ascertain the value of those benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;
  - (D) ascertain whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments and the charging of Excess Fees were continued;
  - (E) ascertain whether, and to what extent, there was any conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of Financial Services Licensees on the other hand;
  - (F) ensure that the financial interests of the Plaintiff and each of the Group Members would not be adversely affected by any such conflict;
  - (G) ensure that priority was given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp and Financial Services Licensees;



- (H) ensure that the decision was only made for proper purposes and, in particular, ensure that it satisfied the Sole Purpose Requirement.
- (iii) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have taken into account the following relevant considerations:
  - (AA) Suncorp could cease making the Conflicted Remuneration Payments at any time;
  - (AB) the fact that persons who became a new member of the superannuation funds under the Master Trust after 1 July 2014 would not and could not be charged Excess Fees to make Conflicted Remuneration Payments such that they would be in a better financial position than members who were charged Excess Fees to pay for Conflicted Remuneration Payments, including members within the same Division, Sub-Division, Plan or holding the same Product;
  - (A) the amounts the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
  - (B) the fact that no additional benefits or services would be received by the Plaintiff and each of the Group Members in return for the continuation of the Conflicted Remuneration Payments or the charging of Excess Fees;
  - (C) the fact that it was in the financial interests of the Plaintiff and each of the Group Members for: (1) the charging of Excess Fees to them to fund the payment of Conflicted Remuneration to cease; and (2) the Conflicted Remuneration Payments to cease;
  - (D) the fact that there was a significant conflict between the financial interests of the Plaintiff and each of the Group Members, on the one hand, and its own interests and the interests of Financial Services Licensees, on the other;

- (E) the fact that the financial interests of the Plaintiff and each of the Group Members were adversely affected by that conflict in a significant way;
  - (F) the fact that priority had not been given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp or Financial Services Licensees;
  - (G) the fact that Continuation of Conflicted Remuneration Payment Decisions were made to ensure that the Conflicted Remuneration Payments continued from 1 July 2013 onwards and the financial interests of the Plaintiff and each of the Group Members were adversely affected in a significant way by the conflict that existed between those interests on the one hand and the interests of Suncorp and Financial Services Licensees on the other (the **Improper Purpose**);
  - (H) the fact that Suncorp had adopted the Suncorp Fee Purpose and Suncorp's Continuation of Fees Purpose;
  - (I) the fact that the making of Conflicted Remuneration Payments did not meet the Sole Purpose Requirement as they were not payments made in the maintenance of the superannuation funds under the Master Trust for the sole purposes set out in s 62 of the SIS Act; rather, they were payments benefitting Suncorp and Financial Services Licensees.
- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would not have:
- (A) charged members Excess Fees to fund the making of Conflicted Remuneration Payments after 1 July 2013; or
  - (B) made any of the Conflicted Remuneration Payments after 1 July 2013.
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would not have:

- (A) made any of the Continuation of Conflicted Remuneration Decisions; or
  - (B) engaged in any of the acts in Implementing the Continuation of Conflicted Remuneration Decisions.
- (vi) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have from no later than 1 July 2013:
  - (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and
  - (B) ceased making the Conflicted Remuneration Payments.
- (vii) Further or in the alternative to sub-paragraphs (i) to (vi) above, without limitation, Suncorp could have:
  - (A) terminated the Superseded Distribution Agreement;
  - (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products, or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments;
  - (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
  - (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

- (b) in:
- (i) making the Super Simplification Decision;
  - (ii) engaging in each act in Implementing the Super Simplification Decision.

**Particulars**

(ia) particulars (ia) to subparagraph 49(a) above are repeated in respect of the covenants in ss 52(e) and (f) of the SIS Act:

- (i) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have identified the following considerations as relevant:
  - (AA) whether Suncorp could cease making Conflicted Remuneration Payments;
  - (A) whether it was lawful under the FOFA Reforms for the Conflicted Remuneration Payments to be continued;
  - (B) what were the amounts that the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
  - (C) what were the benefits or services, if any, that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;
  - (D) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees, what was their estimated value;
  - (E) whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments and the charging of Excess Fees were continued;

- (F) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of Financial Services Licensees on the other;
  - (G) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict;
  - (H) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp and Financial Services Licensees;
  - (I) whether the decision was only made for proper purposes and, in particular, whether it satisfied the Sole Purpose Requirement.
- (ii) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have taken all reasonable steps to obtain relevant information and advice so as to:
- (AA) ascertain whether Suncorp could cease making Conflicted Remuneration Payments;
  - (A) ascertain whether it was lawful under the FOFA Reforms for the Conflicted Remuneration Payments to be continued;
  - (B) ascertain the amounts that the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
  - (C) ascertain the benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;
  - (D) ascertain the value of those benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments and the charging of Excess Fees;

- (E) ascertain whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued or the charging of Excess Fees;
  - (F) ascertain whether, and to what extent, there was any conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of Financial Services Licensees on the other hand;
  - (G) ensure that the financial interests of the Plaintiff and each of the Group Members would not be adversely affected by any such conflict;
  - (H) ensure that priority was given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp and Financial Services Licensees;
  - (I) ensure that the decision was only made for proper purposes and, in particular, ensure that it satisfied the Sole Purpose Requirement.
- (iii) A prudent superannuation trustee in a position of trustee of the superannuation funds under the Master Trust acting fairly would have taken into account the following relevant considerations:
- (AA) Suncorp could cease making Conflicted Remuneration Payments at any time;
  - (AB) the fact that new members of the superannuation funds under the Master Trust after 1 July 2014 would not and could not be charged fees to pay for Conflicted Remuneration such that they would be in a better financial position than members who were charged fees to pay for Conflicted Remuneration;
  - (A) it would have been unlawful under the FOFA amendments to the Corporations Act for the Conflicted Remuneration Payments to be continued upon the Plaintiff and Group Members obtaining their interests in the New Superannuation Products;

- (B) the amounts the Plaintiff and each of the Group Members would pay in Fees if the Conflicted Remuneration Payments were continued;
- (C) the fact that no additional benefits or services would be received by the Plaintiff and each of the Group Members in return for the continuation of the Conflicted Remuneration Payments or the charging of Excess Fees;
- (D) the fact that it was in the financial interests of the Plaintiff and each of the Group Members for: (1) the charging of Excess Fees to them to fund the payment of Conflicted Remuneration to cease; and (2) the Conflicted Remuneration Payments to cease;
- (E) the fact that there was a significant actual conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of Financial Services Licensees on the other;
- (F) the fact that the financial interests of the Plaintiff and each of the Group Members were adversely affected by that conflict in a significant way;
- (G) the fact that priority had not been given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp and Financial Services Licensees;
- (H) the fact that the decision was made for an Improper Purpose;
- (I) the fact that Suncorp had adopted the Suncorp Fee Purpose and Suncorp's Continuation of Fees Purpose;
- (J) the fact that the making of Conflicted Remuneration Payments did not meet the Sole Purpose Requirement as they were not payments made in the maintenance of the superannuation funds under the Master Trust for the sole purposes set out in s 62 of the SIS Act; rather, they were payments benefitting Suncorp and Financial Services Licensees.

- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would not have:
  - (A) continued to charge members Excess Fees to fund the making of Conflicted Remuneration Payments; or
  - (B) continued to make the Conflicted Remuneration Payments.
  
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would not have:
  - (A) made the Super Simplification Decision; or
  - (B) engaged in any of the acts in Implementing the Super Simplification Decision.
  
- (vi) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust acting fairly would have:
  - (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and
  - (B) ceased making the Conflicted Remuneration Payments.
  
- (vii) Further or in the alternative to sub-paragraphs (i) to (vi) above, without limitation, Suncorp could have:
  - (A) terminated the Superseded Distribution Agreement;
  - (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments;



- (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
- (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

50 Suncorp contravened the ~~Former~~Previous Best Interests Duty and the Best Interests Duty, namely the covenant in s 52(2)(c) of the SIS Act (**Best Interests Contraventions**):

- (a) in:
  - (i) making each of the Continuation of Conflicted Remuneration Decisions;
  - (ii) engaging in each act of Implementing the Continuation of Conflicted Remuneration Decisions; and

#### **Particulars**

- (i) Paragraph 33(c)-(e) above and the particulars thereto are repeated.
- (ii) Particulars to paragraph 46 above are repeated.
- (iii) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:
  - (A) identified the considerations set out in particular (i) to subparagraph 49(a) above and particular (i)(A) to subparagraph 51(a) below;
  - (B) taken all reasonable steps to obtain the information and advice set out in particular (ii) to subparagraph 49(a) above and particular (i)(B) to subparagraph 51(a) below; and

- (C) taken into account the considerations set out in particular (iii) to subparagraph 49(a) above and particular (i)(C) to subparagraph 51(a) below.
- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
  - (A) charged members Excess Fees to fund the making of Conflicted Remuneration Payments after 1 July 2013; or
  - ~~(A)~~ (B) made any of the Conflicted Remuneration Payments after 1 July 2013.
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
  - (A) made any of the Continuation of Conflicted Remuneration Decisions; or
  - (B) engaged in any of the acts in Implementing the Continuation of Conflicted Remuneration Decisions.
- (vi) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have from no later than 1 July 2013:
  - (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and
  - (B) ceased making the Conflicted Remuneration Payments.
- (vii) Further or in the alternative to sub-paragraphs (i) to (vi) above, without limitation, Suncorp could have:
  - (A) terminated the Superseded Distribution Agreement;
  - (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued

Suncorp Products), the Suncorp Products or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the charging of Excess Fees on members to fund Conflicted Remuneration Payments;

- (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the charging of Excess Fees on members to fund Conflicted Remuneration Payments; or
- (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

(b) in:

- (i) making the Super Simplification Decision;
- (ii) engaging in each act of Implementing the Super Simplification Decision.

#### **Particulars**

- (i) Paragraph 33(c)-(e) above and the particulars thereto are repeated.
- (ii) Particulars to paragraph 46 above are repeated.
- (iii) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:
  - (A) identified the considerations set out in particular (i) to subparagraph 49(b) above and particular (i)(A) to subparagraph 51(b) below;
  - (B) taken all reasonable steps to obtain the information and advice set out in particular (ii) to subparagraph 49(b) above and particular (i)(B) to subparagraph 51(b) below; and

- (C) taken into account the considerations set out in particular (iii) to subparagraph 49(b) above and particular (i)(C) to subparagraph 51(b) below.
- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
  - (A) continued to charge members Excess Fees to fund the making of Conflicted Remuneration Payments; or
  - (B) continued to make the Conflicted Remuneration Payments.
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
  - (A) made the Super Simplification Decision; or
  - (B) engaged in any of the acts in Implementing the Super Simplification Decision.
- (vi) Further or in the alternative to sub-paragraphs (i) to (v) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:
  - (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and
  - (B) ceased making the Conflicted Remuneration Payments.
- (vii) Further or in the alternative to sub-paragraphs (i) to (vi) above, without limitation, Suncorp could have:
  - (A) terminated the Superseded Distribution Agreement;
  - (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the levying of

Excess Fees on members to fund Conflicted Remuneration Payments;

- (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
- (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

51 Suncorp contravened:

- (a) the covenant in s 52(2)(d) of the SIS Act (**SIS Act Conflict of Interest Contraventions**);
- (b) the General Law Conflict Duty (**General Law Conflict of Interest Contraventions**),

to give priority to the interests of its members over the interests of itself and Financial Services Licensees in circumstances where there was a conflict between the interests of its members on the one hand and the interests of Suncorp or Financial Services Licensees on the other hand:

- (c) in:
  - (i) making each of the Continuation of Conflicted Remuneration Decisions;
  - (ii) engaging in each of the acts of Implementing the Continuation of Conflicted Remuneration Decisions;

#### **Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:

- (A) identified: (1) the considerations set out in particular (i) to subparagraph 49(a) above; (2) the financial interests of the Plaintiff and each of the Group Members in the particulars to paragraph 46 above; (3) its financial interests set out in the particulars to paragraph 46 above; and (4) its interests set out in the particulars to paragraph 46 above;
  - (B) taken all reasonable steps to obtain the information and advice set out in particular (ii) to subparagraph 49(a) above; and
  - (C) taken into account the considerations set out in particular (iii) to subparagraph 49(a) above.
- (ii) By reason of the matters particularised in (i) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
- (A) charged members Excess Fees to fund the making of Conflicted Remuneration Payments after 1 July 2013; or
  - (B) made any of the Conflicted Remuneration Payments after 1 July 2013.
- (iii) Further or in the alternative to sub-paragraphs (i) to (ii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
- (A) made any of the Continuation of Conflicted Remuneration Decisions; or
  - (B) engaged in any of the acts in Implementing the Continuation of Conflicted Remuneration Decisions.
- (iv) Further or in the alternative to sub-paragraphs (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have from no later than 1 July 2013:
- (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and

- (B) ceased making the Conflicted Remuneration Payments.
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, without limitation, Suncorp could have:
  - (A) terminated the Superseded Distribution Agreement;
  - (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products, or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments;
  - (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
  - (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.
- (d) in:
  - (i) making the Super Simplification Decision;
  - (ii) engaging in each of the acts of Implementing the Super Simplification Decision.

#### **Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:
  - (A) identified: (1) the considerations set out in particular (i) to subparagraph 49(b) above; (2) the financial interests of the Plaintiff and each of the Group Members set out in the

- particulars to paragraph 46 above; (3) its financial interests set out in the particulars to paragraph 46 above; and (4) its interests set out in the particulars to paragraph 46 above;
- (B) taken all reasonable steps to obtain the information and advice set out in particular (ii) to subparagraph 49(b) above; and
  - (C) taken into account the considerations set out in particular (iii) to subparagraph 49(b) above.
- (ii) By reason of the matters particularised in (i) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
- (A) continued to charge members Excess Fees to fund the making of Conflicted Remuneration Payments; or
  - (B) continued to make the Conflicted Remuneration Payments.
- (iii) Further or in the alternative to sub-paragraphs (i) to (ii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would not have:
- (A) made the Super Simplification Decision; or
  - (B) engaged in any of the acts in Implementing the Super Simplification Decision.
- (iv) Further or in the alternative to sub-paragraphs (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the superannuation funds under the Master Trust would have:
- (A) ceased charging Excess Fees to members to fund the making of Conflicted Remuneration Payments; and
  - (B) ceased making the Conflicted Remuneration Payments.
- (v) Further or in the alternative to sub-paragraphs (i) to (iv) above, without limitation, Suncorp could have:
- (A) terminated the Superseded Distribution Agreement;



- (B) amended the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products or the PDS issued in respect of each of the Suncorp Products, to remove: (1) Conflicted Remuneration Payments; and (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments;
- (C) used the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve: (1) the payment of Conflicted Remuneration; or (2) the levying of Excess Fees on members to fund Conflicted Remuneration Payments; or
- (D) not entered into or terminated the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement.

51A In failing to advise or alternatively not advising the Plaintiff and Group Members of the matters pleaded in paragraphs 45C or 45D above, Suncorp contravened:

- (a) the ~~SIS Act~~Statutory Covenants (**SIS Act Failure to Advise Contravention**);
- (b) the General Law Conflict Duty (**General Law Failure to Advise Contravention**).

51B The contraventions by Suncorp pleaded in paragraphs 49, 50, 51 and 51A above also constituted:

- (a) contraventions by it of s 55(1) of the SIS Act (prior to 6 April 2019);
- (b) contraventions by it of s 54B(1) of the SIS Act (after 6 April 2019),  
**(Other SIS Act Contraventions)**.

51C Further or alternatively, the contraventions by Suncorp pleaded in paragraphs 49, 50, 51, 51A, 51B were breaches of the Trust Deed and thereby breaches of trust (**Breaches of Trust**).

#### **F.42 Unconscionable Conduct**

51D At all material times, the Plaintiff and the Group Members:

- (a) had no ability, by reason of inequality of bargaining power, to negotiate with Suncorp in relation to whether Suncorp would:
- (i) make any of the Continuation of Conflicted Remuneration Decisions or engage in any of the acts of Implementing the Conflicted Remuneration Decisions;
  - (ii) make the Super Simplification Decision or engage in any of the acts of Implementing the Super Simplification Decision;
  - (iii) perform any Cessation of Arrangement Act, Cessation of Payment Act or Cessation of Member Charging Act;
  - (iv) adopt and implement the Suncorp Fee Purpose;
  - (v) adopt and implement Suncorp's Continuation of Fees Purpose;
  - (vi) adopt and implement the Improper Purpose;
  - (vii) continue to charge Excess Fees to fund Conflicted Remuneration Payments after 1 July 2013; or
  - (viii) continue to make Conflicted Remuneration Payments after 1 July 2013; and
- (b) were in a position of vulnerability as against Suncorp in respect of its performance of its role as trustee of the superannuation funds under the Master Trust, and Suncorp owed them trustee and fiduciary duties in that capacity.

#### **Particulars**

- (i) Suncorp issued PDS in respect of the Suncorp Products that invited persons to apply to become members on terms of adhesion; and
- (ii) Suncorp had the power to unilaterally amend the Governing Rules applying to Divisions, Sub-Divisions and Plans under the Trust Deed, and the terms on which Suncorp Products were issued pursuant to PDS's.

51E At all material times to date, Suncorp has engaged in a course of conduct or pattern of behaviour designed to ensure that:

- (a) Conflicted Remuneration Payments were continued to be paid; and
- (b) members continued to be charged Excess Fess to fund Conflicted Remuneration payments,

to the extent that Suncorp considered it was not prohibited to do so under the FOFA Reforms (**Suncorp's Unconscionable Course of Conduct**).

### **Particulars**

The course of conduct or pattern of behaviour includes:

- (i) making the Continuation of Conflicted Remuneration Decisions;
- (ii) engaging in acts Implementing the Conflicted Remuneration Decisions;
- (iii) making the Super Simplification Decision;
- (iv) engaging in acts Implementing the Super Simplification Decision;
- (v) not performing any Cessation of Arrangement Act, Cessation of Payment Act or Cessation of Member Charging Act;
- (vi) adopting and implementing the Suncorp Fee Purpose;
- (vii) adopting and implementing Suncorp's Continuation of Fees Purpose;
- (viii) adopting and implementing the Improper Purpose;
- (ix) continuing to charge Excess Fees to fund the payment of commissions that were Conflicted Remuneration after 1 July 2013;
- (x) continuing to pay commissions that were Conflicted Remuneration after 1 July 2013;
- (xi) Prior to 6 March 2017, Suncorp:
  - (A) knew it was required to transfer ADAs for all members of superannuation funds under the Master Trust to a MySuper default option by 1 July 2017;

- (B) was granted an authority to offer a MySuper product known as the Suncorp Lifestage Fund;
  - (C) emailed Financial Services Licensees lists of their clients who were members of the superannuation funds under the Master Trust with accrued default amounts (**ADA Lists**);
  - (D) provided the ADA Lists to an intermediaries team that was set up by Suncorp to assist Financial Services Licensees and build relationships with Financial Services Licensees;
  - (E) communicated to Financial Services Licensees that Conflicted Remuneration would be payable on Suncorp Products that contained ADAs until 2017;
  - (F) communicated to Financial Services Licensees that, for members who had made an investment decision opting out of the transfer to the Suncorp Lifestyle Fund, Conflicted Remuneration would still be paid;
  - (G) communicated to Financial Services Licensees that Suncorp recommended that Financial Services Licensees call or write to their clients who were members of superannuation funds under the Master Trust with ADAs and encourage them to make an investment decision;
  - (H) In doing so, Suncorp knew that it was encouraging advisors to recommend to clients that they take a step which would result in: (i) the client continuing to be charged Excess Fees; and (ii) Conflicted Remuneration Payments continuing to be made in relation to that client;
- (xii) On or about 6 March 2017, Suncorp notified members of superannuation funds under the Master Trust with ADAs:
- (A) of Suncorp's intention to transfer their ADAs into the Suncorp Lifestyle Fund, if they did not make an investment direction opting out of the transfer; and

- (B) the period in which members could give an investment direction and thereby opt out of the transfer.

51F The Plaintiff repeats paragraphs 29, 29A, 29B, 39B, 45B, 47 and 48 above.

51G Each of Suncorp's conduct in:

- (a) making each of the Continuation of Conflicted Remuneration Decisions;
- (b) engaging in each act of Implementing the Continuation of Conflicted Remuneration Decisions;
- (c) making the Super Simplification Decision;
- (d) engaging in each act of Implementing the Super Simplification Decision;
- (e) not performing any Cessation of Arrangement Act, Cessation of Payment Act or Cessation of Member Charging Act;
- (f) adopting and engaging in each act of implementing the Suncorp Fee Purpose;
- (g) adopting and engaging in each act of implementing Suncorp's Continuation of Fees Purpose;
- (h) adopting and engaging in each act of implementing the Improper Purpose;
- (i) deciding not to, prior to 1 July 2013:
  - (i) terminate the Superseded Distribution Agreement;
  - (ii) amend the Trust Deed, the Governing Rules (applicable to each of the Divisions, Sub-Divisions and Plans that issued Suncorp Products), the Suncorp Products or the PDS issued in respect of each of the Suncorp Products, to remove Conflicted Remuneration Payments and to remove the levying of Excess Fees on members for the Conflicted Remuneration Payments;
  - (iii) use the Intra-Fund Transfer Power under the Trust Deed to transfer the interests of members to a Division, Sub-Division or Plan that issued a Suncorp Product that did not involve the payment of Conflicted Remuneration or the levying of Excess Fees on members for the Conflicted Remuneration Payments; or

- (iv) not enter into or terminate the Suncorp Financial Distribution Agreement, Guardian Distribution Agreement and Standard Pacific Distribution Agreement;
- (j) continuing to make Conflicted Remuneration Payments and charge members Excess Fees to fund the making of Conflicted Remuneration Payments in relation to the Suncorp Products:
  - (i) after 1 July 2013; and
  - (ii) after 1 August 2016; and
- (k) not ceasing on and from 1 July 2013 the making of Conflicted Remuneration Payments or the charging of Excess Fees;
- (l) engaging in Suncorp's Unconscionable Course of Conduct,

was (and is), in all the circumstances, unconscionable within the meaning of s 12CB of the ASIC Act.

51H By reason of the matters pleaded in paragraphs 24D, 51D to 51G above, Suncorp contravened s 12CB of the ASIC Act (**Unconscionable Conduct Contravention**).

## **G Loss or Damage**

52 Had Suncorp complied with its Statutory Covenants, the General Law Conflict Duty or not engaged in each of the Due Care and Skill Contraventions, Fairness Contraventions, Best Interest Contraventions, SIS Act Conflict of Interest Contraventions, SIS Act Failure to Advise Contravention, Other SIS Act Contraventions (collectively **SIS Act Contraventions**), General Law Conflict of Interest Contraventions, General Law Failure to Advise Contravention, Breaches of Trust or the Unconscionable Conduct Contravention, Suncorp would not have:

- (a) made any of the Continuation of Conflicted Remuneration Decisions; or
- (b) engaged in any of the acts of Implementing the Continuation of Conflicted Remuneration Decisions,

including:

- (c) charged members Excess Fees to make the Conflicted Remuneration Payments referred to in paragraph 39 above from 1 July 2013 onwards; or

- (d) made any of the Conflicted Remuneration Payments referred to in paragraph 39 above in relation to the Suncorp Products from 1 July 2013 onwards.

52A By reason of the matters pleaded in paragraphs 2 and 3 above, the Plaintiff, each Group Member referred to in subparagraphs 3(a) and (b) above and the persons who are referred to in subparagraphs 3(a) and (b) above as being members of a superannuation fund under the Master Trust, each had an equitable proprietary interest in the Master Trust during the period each of them was a member of the Master Trust.

### **Particulars**

- (i) The particulars of paragraph 2 above are repeated in respect of the Plaintiff. Further, the benefits in the Plaintiff's accounts in the Master Trust were "unrestricted and non-preserved" from 11 January 2020 onwards (when the Plaintiff turned 65);
- (ii) SIS Regulations 1994 (Cth) reg 6.20;
- (iii) Particulars of the period in which each of the Group Members was a Member of the Master Trust and the benefits in their accounts shall be provided following discovery, the service of evidence or other such time that it is necessary to particularise Group Members' claims.

53 By reason of the matters pleaded in paragraphs 46, 47, 48, 49(a), 50(a), 51(a), 51A, 51B, 51C, 51H and 52 above, the Plaintiff and each Group Member has suffered loss or damage.

### **Particulars**

- (i) The deduction of Excess Fees from the Plaintiff and Group Members' accounts to fund the Conflicted Remuneration Payments referred to in paragraph 39 above from 1 July 2013 onwards and the making of those payments has caused a reduction in the accounts of the Plaintiff and Group Members and a corresponding reduction in the amounts they have either received, or can expect to receive, in respect of their investment(s) in Suncorp Products.
- (ii) Further or in the alternative to (i) above, the deduction of Excess Fees from the Plaintiff and Group Members' accounts to fund the Conflicted

Remuneration Payments referred to in paragraph 39 above from 1 July 2013 onwards and the making of those payments has caused, and continues to cause, a reduction in the assets of the superannuation funds under the Master Trust, thereby causing a reduction in:

(A) the amounts that the Plaintiff and Group Members have received, or can expect to receive, in respect of their investment(s) in Suncorp Products;

(B) the value of the equitable proprietary interest that the Plaintiff and each Group Member has or had in the superannuation funds under the Master Trust of which they are members as referred to in paragraph 52A above.

- (iii) Further or alternatively to (i) and (ii) above, the SIS Act Failure to Advise Contravention or the General Law Failure to Advise Contravention caused a loss of a valuable opportunity to manage affairs in relation to superannuation with the benefit of relevant advice.
- (iv) With respect to Group Members referred to in subparagraphs 3(c) and 3(d) of Part C of this Further Amended Commercial List Statement, those Group Members have received, or were entitled to receive, less than they otherwise would receive or were entitled to receive, by reason of: (a) a reduction in the accounts of the relevant member referred to in particular (i) of this paragraph; (b) further or alternatively, the reduction in the assets of the superannuation funds under the Master Trust referred to in particular (ii) of this paragraph; (c) further or alternatively, the loss of the valuable opportunity referred to in particular (iii) of this paragraph.
- (v) Particulars of the amount of Excess Fees and Conflicted Remuneration Payments from 1 July 2013 onwards is not presently known and will be provided following discovery and the service of evidence.
- (vi) Further particulars of the loss and damage suffered by the Plaintiff will be served after discovery or following the Plaintiff's evidence in chief.



- (vii) Further particulars of the loss and damage suffered by Group Members will be provided following discovery, the service of evidence or other such time that it is necessary to particularise Group Members' claims.

54 Further or in the alternative to the allegations in paragraph 52 and 53 above, had Suncorp complied with its Statutory Covenants, the General Law Conflict Duty or not engaged in each of the SIS Act Contraventions, General Law Conflict of Interest Contraventions, General Law Failure to Advise Contravention, Breaches of Trust or the Unconscionable Conduct Contravention, Suncorp would not have:

- (a) made the Super Simplification Decision; or
- (b) engaged in the acts of Implementing the Super Simplification Decision,

including:

- (c) charged members Excess Fees to make the Conflicted Remuneration Payments referred to in paragraph 45 above; or
- (d) made the Conflicted Remuneration Payments referred to in paragraph 45 above,

in relation to the Suncorp Products from 1 August 2016 onwards.

55 By reason of the matters pleaded in paragraphs 46, 47, 48, 49(b), 50(b), 51(b), 51A, 51B, 51C, 51H and 54 above, the Plaintiff and each Group Member has suffered loss or damage.

### **Particulars**

- (i) The deduction of Excess Fees from the Plaintiff and Group Members' accounts to fund the Conflicted Remuneration Payments referred to in paragraph 45 above from 1 August 2016 onwards and the making of those payments has caused a reduction in the accounts of the Plaintiff and Group Members and a corresponding reduction in the amounts they have either received, or can expect to receive, in respect of their investment(s) in Suncorp Products.
- (ii) Further or in the alternative to (i) above, the deduction of Excess Fees from the Plaintiff and Group Members' accounts to make the Conflicted Remuneration Payments referred to in paragraph 45 above from 1

August 2016 onwards and the making of those payments has caused, and continues to cause, a reduction in the assets of the superannuation funds under the Master Trust, thereby causing a reduction in-;

(A) the amounts that the Plaintiff and Group Members have received, or can expect to receive, in respect of their investment(s) in Suncorp Products-;

(B) the value of the equitable proprietary interest that the Plaintiff and each Group Member has or had in the superannuation funds under the Master Trust of which they are members as referred to in paragraph 52A above.

- (iii) Further or alternatively to (i) and (ii) above, the SIS Act Failure to Advise Contravention or the General Law Failure to Advise Contravention caused a loss of a valuable opportunity to manage affairs in relation to superannuation with the benefit of relevant advice.
- (iv) With respect to Group Members referred to in subparagraphs 3(c) and 3(d) of Part C of this Further Amended Commercial List Statement, those Group Members have received, or were entitled to receive, less than they otherwise would receive or were entitled to receive, by reason of: (a) a reduction in the accounts of the relevant member referred to in particular (i) of this paragraph; (b) further or alternatively, the reduction in the assets of the superannuation funds under the Master Trust referred to in particular (ii) of this paragraph; or (c) further or alternatively, the loss of the valuable opportunity referred to in particular (iii) of this paragraph.
- (v) Particulars of the amount of Excess Fees and Conflicted Remuneration Payments referred to in paragraph 45 above from 1 August 2016 onwards is not presently known and will be provided following discovery.
- (vi) Further particulars of the loss and damage suffered by the Plaintiff will be served after discovery or following the Plaintiff's evidence in chief.
- (vii) Further particulars of the loss and damage suffered by Group Members will be provided following discovery, the service of evidence or other such time that it is necessary to particularise Group Members' claims.

55A Further or in the alternative to paragraphs 53 and 55 above, by reason of the matters pleaded in paragraphs 46, 47, 48, 49, 50, 51, 51A, 51B, 51C, 51H, 52, 52A and 54 above, the Plaintiff and each Group Member who:

- (a) ceased to be a Member of the Master Trust on or after 1 July 2012; or
- (b) had “unrestricted non-preserved” benefits in the Master Trust on or after 1 July 2012,

have suffered loss or damage.

### **Particulars**

- (i) In the case of the Plaintiff, the particulars (i) & (ii) paragraphs 52A and particulars (i) and (ii) to paragraphs 53 and 55 above are repeated.
- (ii) Further particulars of the loss and damage suffered by the Plaintiff will be served after discovery or following the Plaintiff’s evidence in chief.
- (iii) Further particulars of the loss and damage suffered by Group Members will be provided following discovery, the service of evidence or other such time that it is necessary to particularise Group Members’ claims.

56 By reason of the matters pleaded in paragraphs 52 to 55 above, Suncorp is liable to:

- (a) pay equitable compensation or pay damages to the Plaintiff and each of the Group Members; or
- (b) in the alternative, by restoring the accounts of the Plaintiff and Group Members in the superannuation funds under the Master Trust (or, if any such Group Member had but no longer has an account in the superannuation funds under the Master Trust but they are members of or have an account in a superannuation fund not under the Master Trust, then payment into such a superannuation account or fund),

for the loss or damage referred to in paragraphs 53 and 55 above.

### **Particulars**

SIS Act, s 55(3) and s 315(11); ASIC Act, s 12GF(1) or 12GM(1) or (2); the equitable jurisdiction of the Court; and *Civil Procedure Act 2005* (NSW), s 177(1)(f) and (2).

56A Further to paragraph 56 above, by reason of the matters pleaded in paragraphs 52 to 55 above, Suncorp should be restrained from:

- (a) continuing to charge Excess Fees to fund the payment of Conflicted Remuneration; and
- (b) continuing to pay Conflicted Remuneration.

#### **Particulars**

SIS Act, s 315(1) and (2); ASIC Act, s 12GD(1) or s 12GM(1) or (2); and the equitable jurisdiction of the Court.

56B Further or in the alternative to paragraphs 56 and 56A above, by reason of the matters pleaded in paragraphs 52 to 55 above:

- (a) As pleaded in paragraphs 49, 50, 51, 51A, 51B above, Suncorp has contravened s 52(2)(b), (c), (d), (e) and (f) of the SIS Act (which were at all material times contained in the Trust Deed), its General Law Conflict Duty, s 55(1) of the SIS Act (prior to 6 April 2019) and s 54B(1) of the SIS Act (after 6 April 2019);
- (b) As pleaded in paragraph 51C above, the contraventions by Suncorp pleaded in paragraphs 49, 50, 51, 51A, 51B were breaches of the Trust Deed and thereby breaches of trust;
- (c) a condition of Suncorp's RSE licence was that Suncorp was required to properly perform the duties of trustee in respect of the Master Trust;

#### **Particulars**

SIS Act, s 29E(1)(b).

- (d) Suncorp as trustee of the Master Trust was under a duty to:
  - (i) pay equitable compensation to the Plaintiff and each Group Member for breach of trust; or
  - (ii) alternatively, restore or pay equitable compensation into the accounts of the Plaintiff and each Group Member in the Master Trust (or, if any such Group Member had but no longer has an account in the superannuation funds under the Master Trust but they are members of

or have an account in a superannuation fund not under the Master Trust, then payment into such a superannuation account or fund);

(e) Suncorp has failed to:

- (i) pay equitable compensation to the Plaintiff and each Group Member for breach of trust as required by the condition of Suncorp's RSE licence; or
- (ii) alternatively, restore or pay equitable compensation into the accounts of the Plaintiff and each Group Member in the Master Trust (or, if any such Group Member had but no longer has an account in the superannuation funds under the Master Trust but they are members of or have an account in a superannuation fund not under the Master Trust, then payment into such a superannuation account or fund);

(f) the Plaintiff and each Group Member are persons whose interests have been, are, or would be, affected by the conduct of Suncorp as pleaded in subparagraph (d) and (e) above.

#### **Particulars**

The Plaintiff refers to and repeats paragraph 52A and particulars (i) and (ii) to paragraphs 53 and 55 above.

56C In the premise of paragraph 56A, the Plaintiff and Group Members are entitled to an injunction requiring Suncorp to:

- (a) pay compensation to the Plaintiff and each Group Member; or
- (b) restore the accounts, or pay compensation into the accounts, of the Plaintiff and each Group Member in the Master Trust (or, if any such Group Member had but no longer has an account in the superannuation funds under the Master Trust but they are members of or have an account in a superannuation fund not under the Master Trust, then payment into such a superannuation account or fund),

in an amount equal to :

- (i) the Excess Fees deducted from their accounts (or the accounts of the deceased or spouse in the case of Group Members falling within paragraph 3(c) or (d) above) to fund the payment of Conflicted Remuneration;

- (ii) the amount that they would have received, or could expect to receive in respect of their investments (or the investments of the deceased or spouse in the case of Group Members falling within paragraph 3(c) or (d) above) in Suncorp Products but for the SIS Act Contraventions, General Law Conflict contraventions, or Breaches of Trust.

**Particulars**

SIS Act, s 315(1), (2)(b) and (3); the equitable jurisdiction of the Court; ASIC Act, s12GD or s12GM; and Civil Procedure Act 2005 (NSW), s 177(1)(d).

**H Involvement**

57 Each of the Directors knew, at the time of making each of the Continuation of Conflicted Remuneration Decisions:

- (a) the matters pleaded in paragraphs 11 to 15 and 24E to 30 above;

**Particulars**

The knowledge of each of the Directors can be inferred from:

- (i) their positions as Directors of Suncorp;
- (ii) their roles as senior employees or senior executives of the Suncorp Group, Suncorp or Suncorp Life;
- (iii) the significant quantum of Conflicted Remuneration Payments;
- (iv) the significant quantum of the Excess Fees;
- (v) each Director receiving, reading and signing the Distribution Agreements and being aware of their contents;
- (vi) the purpose referred to in paragraph 37B;

Further particulars will be provided following discovery or evidence.

- (b) the matters pleaded in paragraphs 34 to 39C above and, in respect of paragraph 46 above, each of the Directors knew or alternatively recklessly shut their eyes to the matters pleaded in paragraph 46 above.

### Particulars

- (i) Each of the Directors received, read and signed the Distribution Agreements, and was aware of their contents and in particular the terms of cl 7.1.
- (ii) Each of the Directors knew the FOFA amendments to the Corporations Act which commenced on 1 July 2012 and became mandatory on and after 1 July 2013.
- (iii) Further to particulars (i) and (ii) above, the knowledge of each of the Directors can be inferred from:
  - (A) their positions as Directors of Suncorp;
  - (B) their roles as senior employees or senior executives of the Suncorp Group, Suncorp or Suncorp Life;
  - (C) the significant quantum of Conflicted Remuneration Payments;
  - (D) the significant quantum of the Excess Fees;
  - (E) the purpose referred to in paragraph 37B;
- (iv) Further particulars will be provided following discovery or evidence.

58 [Intentionally left blank]

59 Each of the Directors:

- (a) authorised, or participated in authorising, or alternatively approved or participated in the approving of, the making of each of the Continuation of Conflicted Remuneration Decisions;
- (b) authorised, or participated in authorising the execution of, the Distribution Agreements;
- (c) executed the Distribution Agreements;
- (d) authorised, or participated in authorising, or alternatively approved or participated in the approving of, the making of the Conflicted Remuneration Payments from 1 July 2013 onwards; and

- (e) authorised, or participated in authorising, or alternatively approved or participated in the approving of, the charging of Excess Fees to fund the Conflicted Remuneration Payments from 1 July 2013.

### **Particulars**

- (i) Each of the Directors executed the Distribution Agreements.
- (ii) Further or alternatively, in executing the Distribution Agreements the Directors were authorising, or participating in authorising, or alternatively approving or participating in the approval of:
- (A) the making of Conflicted Remuneration Payments from 1 July 2013;
  - (B) the charging of Excess Fees to fund those payments;
- (iii) At no time after the execution of the Distribution Agreements, did either Director take any step to:
- (A) withdraw his authorisation or approval, or his participation in the authorisation or approval referred to in (ii) above;
  - (B) further, or alternatively, indicate to the Board of Suncorp or otherwise, dissension to the continued making of Conflicted Remuneration Payments from 1 July 2013 and the charging of Excess Fees to fund those payments;
  - (C) further, or alternatively, cause or alternatively encourage, Suncorp to cease making any Conflicted Remuneration Payments from 1 July 2013 nor to cease the charging of Excess Fees to fund those payments;
  - (D) further, or alternatively, cause or alternatively encourage, Suncorp to engage in a Cessation of Arrangement Act (if arrangements existed contrary to the Plaintiff's primary position), Cessation of Payment Act, or Cessation of Charging Act;



- (iv) Further, or alternatively, the quantum of Conflicted Remuneration Payments referred to in paragraph 39 above was of such magnitude that it can be inferred that the Directors authorised, or participated in authorising, or alternatively approved or participated in the approval of, the making of those Conflicted Remuneration Payments.
- (v) Further, or alternatively, the quantum of Excess Fees to fund the Conflicted Remuneration Payments referred to in paragraph 39 was of such magnitude that it can be inferred that the Directors authorised, or participated in authorising, or alternatively approved or participated in the approval of, the charging of those Excess Fees.
- (vi) Further particulars will be provided following discovery or evidence.

60 The Plaintiff repeats paragraph 52 above.

61 By reason of the matters pleaded in 57 to 60 above, each of the Directors was:

- (a) involved within the meaning of s 55(3) of the SIS Act in the SIS Act Contraventions; or
- (b) involved within the meaning of s 12G(F) or s 12GM(1) or (2) of the ASIC Act in the Unconscionable Conduct Contravention.

62 By reason of the matters pleaded in paragraphs 57 to 61(b) above, each of the Directors is liable to compensate the Plaintiff and each of the Group Members for the loss or damage that has been suffered by the Plaintiff and each of the Group Members by reason of SIS Act Contraventions or the Unconscionable Conduct Contravention.

### Particulars

- (i) The particulars of paragraph 53 are repeated.
- (ii) SIS Act, s 55(3).
- (iii) ASIC Act, s 12GF(1) and s 12GM(1) or (2).

62A Further and alternatively to paragraph 62 above, by reason of the matters pleaded in paragraphs 57 to 61(a) above, the Plaintiff and Group Members are entitled to an injunction requiring the Directors to:

- (a) pay compensation to the Plaintiff and each Group Member; or
- (b) alternatively, restore the accounts, or pay compensation into the accounts, of the Plaintiff and each Group Member in the Master Trust (or, if any such Group Member had but no longer has an account in the superannuation funds under the Master Trust but they are members of or have an account in a superannuation fund not under the Master Trust, then payment into such a superannuation account or fund),

in an amount equal to:

- (i) the Excess Fees deducted from their accounts (or the accounts of the deceased or spouse in the case of Group Members falling within paragraph 3(c) or (d) above) to fund the payment of Conflicted Remuneration;
- (ii) the amount that they would have received, or could expect to receive in respect of their investments (or the investments of the deceased or spouse in the case of Group Members falling within paragraph 3(c) or (d) above) in Suncorp Products but for the SIS Act Contravention and Unconscionable Conduct Contravention.

### **Particulars**

SIS Act, s 315(1) and (2)(b); ASIC Act, s12GD or s12GM; and *Civil Procedure Act 2005* (NSW), s 177(1)(d)

#### **I Relief claimed**

- 63 The Plaintiff claims for himself and on behalf of each of the Group Members the relief set out in the accompanying Summons.

## Glossary of Defined Terms

### A

ADA Lists .....	67
ADAs .....	38
AFSL .....	7
ASIC Act .....	3

### B

Best Interests Contraventions .....	56
Best Interests Duty .....	18
Breaches of Trust .....	65

### C

CAR Agreement .....	32
Carroll .....	2
Cessation of Arrangement Act .....	27
Cessation of Member Charging Act .....	29
Cessation of Payment Act .....	28
Commissions .....	20
Conflicted Remuneration .....	20
Conflicted Remuneration Payments .....	25
Continuation of Conflicted Remuneration Decision .....	32
Corporations Act .....	2
Corporations Regulations .....	14

### D

Directors .....	9
<u>Distribution Agreements</u> .....	3
Due Care and Skill Contraventions .....	46
Duncan .....	9

### E

Exception .....	21
Excess Fees .....	26

### F

Fees .....	26
Financial Services Licensees .....	9
FOFA .....	20
FOFA Conflicted Remuneration .....	20
FOFA Reforms .....	2

### G

General Law Conflict Duty .....	20
General Law Conflict of Interest Contraventions .....	61
General Law Failure to Advise Contravention .....	65
Grandfathered Benefits .....	21

<b>Group Members</b> .....	5
<b>Guardian</b> .....	8
<b>Guardian Distribution Agreement</b> .....	34
<b>I</b>	
<b>Implementing the Continuation of Conflicted Remuneration Decision</b> .....	37
<b>Implementing the Super Simplification Decision</b> .....	42
<b>Improper Purpose</b> .....	49
<b>Intra-Fund Transfer Power</b> .....	13
<b>M</b>	
<b>Master Trust</b> .....	10
<b>N</b>	
<b>New Superannuation Products</b> .....	39
<b>O</b>	
<b>Original Superannuation Products</b> .....	15
<b>Other SIS Act Contraventions</b> .....	65
<b>P</b>	
<b>PDS</b> .....	8
<b>Previous Best Interests Duty</b> .....	18
<b>R</b>	
<b>Relevant Period</b> .....	5
<b>RSE</b> .....	7
<b>RSE licensee</b> .....	7
<b>S</b>	
<b>SIS Act</b> .....	2
<b>SIS Act Conflict of Interest Contraventions</b> .....	60
<b>SIS Act Contraventions</b> .....	70
<b>SIS Act Failure to Advise Contravention</b> .....	65
<b>Sole Purpose Requirement</b> .....	22
<b>Standard Pacific</b> .....	8
<b>Standard Pacific Distribution Agreement</b> .....	34
<b>Statutory Covenants</b> .....	19
<b>Summerhayes</b> .....	2
<b>Suncorp</b> .....	2
<b>Suncorp Adviser Network</b> .....	8
<b>Suncorp Fee Purpose</b> .....	26
<b>Suncorp Financial</b> .....	8
<b>Suncorp Financial Distribution Agreement</b> .....	31
<b>Suncorp Group</b> .....	7
<b>Suncorp Holdings</b> .....	7
<b>Suncorp Life</b> .....	7
<b>Suncorp Products</b> .....	8
<b>Suncorp's Continuation of Fees Purpose</b> .....	35
<b>Suncorp's Unconscionable Course of Conduct</b> .....	66

<b>Super Simplification Decision</b> .....	40
<b>Super Simplification Proposal</b> .....	39
<b>Superseded Distribution Agreement</b> .....	23
<b><i>T</i></b>	
<b>Trust Deed</b> .....	10
<b><i>U</i></b>	
<b>Unconscionable Conduct Contravention</b> .....	70

**D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

Nil

**E. STATEMENT AS TO MEDIATION**

The Plaintiff is willing to participate in a mediation at an appropriate time.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor

Date of signature

~~20 December 2019~~ 9 November 2021