

Superannuation  
Complaints  
Tribunal

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Ref. No. 15-00931



Mr Philip Laird  
Misconduct & Breach Reporting  
Australian Securities & Investments Commission  
PO Box 9827  
MELBOURNE VIC 3001

**Referral under Section 64 of the  
*Superannuation (Resolution of Complaints) Act 1993***

Dear Mr Laird

**Re: Tribunal determination 18-19/002**

I refer to the above determination of the Tribunal (copy enclosed).

The review meeting was conducted before Noel Davis (the Tribunal member).

The Tribunal member believes a breach of s1017B(1A) of the *Corporations Act 2001* may have occurred.

The particulars of the contravention are set out in the enclosed note from the Tribunal member dated 8 July 2018.

In accordance with section 64(b)(ii) of the *Superannuation (Resolution of Complaints) Act 1993* I am referring this matter to you.

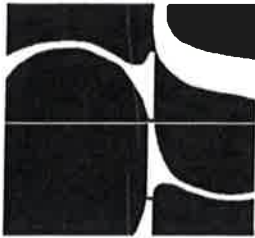
Please contact Fiona Power on 03 8635 5516 if you have any questions.

Yours sincerely

Helen Davis  
Chairperson  
11 July 2018

CC: NULIS Nominees (Australia) Limited





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Ref. No. 15-00931

NULIS Nominees (Australia) Limited  
Level 5, 700 Bourke Street  
DOCKLANDS VIC 3008

**COPY**

ATTENTION: Sam Marquard

Dear Trustee

**Re: Tribunal determination 18-19/002**

Under section 64 of the *Superannuation (Resolution of Complaints) Act 1993* I am required to report a potential contravention of any law to the relevant regulator.

Accordingly this letter is to advise that this matter has been referred to the Australian Securities & Investments Commission (ASIC) as a contravention of s1017B(1A) of the *Corporations Act 2001* may have occurred.

Enclosed is a copy of the material provided to ASIC.

Please contact Fiona Power on 03 8635 5516 if you have any questions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H. Davis'.

Helen Davis  
Chairperson  
11 July 2018

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**Section 64 Notification**

Section 64 of the Superannuation (Resolution of Complaints) Act requires that, if I become aware that a contravention of any law may have occurred, I must give particulars of the contravention to the chairperson and that the chairperson must give particulars of the contravention to ASIC if it doesn't involve a law administered by APRA.

In this complaint, the trustee advised the tribunal that a decision was made in 2008 that a contribution fee of 5% of contributions that had, until then, applied to members, would no longer apply to those members who complained in relation to the 5% fee.

The trustee advised the tribunal that this decision was not communicated to the members of the fund.

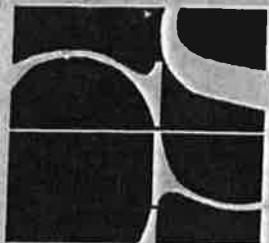
It appears to me that that was a breach of s1017B(1A) of the Corporations Act because a contribution fee is required to be disclosed in a product disclosure statement and section 1017B(1A) requires a trustee to advise members of any material change to a matter that would have been required to be disclosed in a product disclosure statement.

A variation in the application of the fee was a material change to a matter that would have been required to be disclosed in a product disclosure statement and was, therefore, a matter required to be disclosed to members.

Noel Davis

8 July 2018





DETERMINATION NUMBER : D18-19\002  
FILE NUMBER : 15-931

## **REVIEW DETERMINATION AND REASONS\***

### **PARTIES**

COMPLAINANT:



TRUSTEE:

MLC Nominees Pty Limited

### **OTHER PERSONS OR ENTITIES REFERRED TO**

FUND:

The Universal Super Scheme

PREDECESSOR FUND:

The Individuals Superannuation  
Fund

LIFE INSURER:

MLC Life Limited

PRINCIPAL COMPANY:

MLC Limited

FIRST FINANCIAL ADVISOR:

Janet Dyason

FINAL FINANCIAL ADVISOR:

Neville Williamson

### **REVIEW MEETING**

1. A review meeting of the Tribunal was conducted under the provisions of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (the Complaints Act) and held on 28 November 2017. The review meeting was adjourned to seek further submissions from the Parties and, following receipt of further submissions, the adjourned review meeting was held on 20 March 2018 before:

- Noel Davis, Member

### **DECISION UNDER REVIEW**

2. The Complainant, as a member of the Fund, complained to the Trustee that contribution fees to pay commissions to financial planners were being deducted from

her account in the Fund but that she had no contact with the financial planners and the fees that had been deducted should be reimbursed to her. The Trustee declined to refund the fees that had been deducted and it is that decision of the Trustee which is under review by the Tribunal.

#### **DETERMINATION OF THE TRIBUNAL**

3. Section 37(6) of the Complaints Act requires the Tribunal to affirm the decision of the Trustee if the Tribunal is satisfied that the Trustee's decision, in its operation in relation to the Complainant, was fair and reasonable, in the circumstances.
4. For the reasons given below, the Tribunal is not satisfied that the Trustee's decision to refuse to refund any of the contribution fees, was fair and reasonable, in the circumstances, in its operation in relation to the Complainant. The Trustee's decision is not, therefore, affirmed.
5. In accordance with the provisions of the Complaints Act referred to below, the Trustee's decision not to refund any of the contribution fees debited to the Complainant's account is set aside and a decision is substituted that the Trustee compromise the Complainant's claim by paying to the Complainant, or in accordance with her directions, the amounts of [REDACTED] and [REDACTED] debited to her account in the Fund as contribution fees in [REDACTED] and [REDACTED] respectively.
6. To compensate the Complainant for lost earnings on those amounts, interest should also be paid on those two amounts, from the date on which each amount was debited to her account to the date on which the total amount of [REDACTED] is paid to her, at the investment earning rate of the investments in which her account was invested in the Fund and any successor fund.

**\*For distribution to the Parties only.**



## PROCEDURAL MATTERS

7. The Complainant requested that she be represented by her nominated legal representative before the Tribunal and her request was granted under section 23 of the Complaints Act.
8. The Tribunal, prior to the initial review meeting, in accordance with its obligations under s 32 of the Complaints Act, requested submissions from the Parties. Submissions were received and exchanged with the other Party and responses were invited and a response was received from the Trustee.
9. Following the adjournment of the initial review meeting, the Tribunal posed the following questions to the Parties, on which submissions were invited.
  - 1 Is section 1017B(1A) of the *Corporations Act 2001* relevant to the Complainant's complaint? (Section 1017B(1A) requires a trustee to, amongst other things, advise its members of any material change to a matter that would have been required to be disclosed in a product disclosure statement)
  - 2 If so, is a contribution fee of 5% of contributions a matter that would have been required to be specified in a product disclosure statement?
  - 3 Was the Complainant entitled to be told by the Trustee in 2008 that the 5% contribution fee, that had previously been advised to her, would no longer apply if she removed any financial adviser linked to her account?
10. Submissions in response to these questions were received from the Trustee and the Complainant and are summarized below.
11. The Trustee, in the evidence and submissions it provided to the Tribunal, has not advised of any change in the status of the Complainant's membership of the Fund or of the Parties to this complaint. However, it appears from other information available to the Tribunal that some or all of the members of the Fund may have been transferred to another related superannuation fund, by successor fund transfer. If that is the case, the Complainant's membership of the Fund may have been transferred to the other fund, if she was still a member of the Fund at the time of the successor fund transfer. If her membership has been transferred and if the successor trustee has assumed the responsibilities of the Trustee in relation to the Complainant's membership, the successor trustee may be required to take the actions that the Tribunal has determined should be undertaken. Nevertheless, the decision under review by the Tribunal is the decision of the Trustee to refuse to refund contribution fees to the Complainant.

## BACKGROUND

12. The Tribunal is satisfied, from the material before it, as to the occurrence of the following events:



— The Complainant's date of birth.

- [REDACTED] The Complainant signed a proposal addressed to the Life Insurer for her to be included in a master life insurance policy owned by the Trustee, in its capacity as trustee of the Predecessor Fund, for a premium of [REDACTED] per month. She selected the "balanced" investment option. The Complainant's signature was witnessed by a person identified in the proposal as an "agent".
- [REDACTED] The Complainant also signed on this date an application for membership of the Predecessor Fund in which she declared her annual income to be [REDACTED] and agreed to make an annual contribution to the Predecessor Fund of [REDACTED]. Her signature was witnessed by the person identified in the proposal as the "agent".
- [REDACTED] The Complainant signed a document called an "Application for proposal alteration", to alter her monthly contribution to [REDACTED] and declared her annual salary to be [REDACTED].
- [REDACTED] The date of a letter from the Principal Company to the Complainant advising her that she had been transferred to another superannuation arrangement, which appears to be part of the Fund. An accompanying statement showed employer contributions paid into her account for the year ended [REDACTED] of [REDACTED] from which a contribution fee of [REDACTED] had been deducted. The statement also includes, under the heading "Contribution fee", the following "We charge a fee of up to 5% on all contributions, including transfers and rollovers". There is no mention of the Trustee in these documents.
- [REDACTED] The Complainant completed a form entitled "Consolidate your super" in which she requested that her total account balance in an unrelated superannuation fund be transferred or rolled over to the Fund.
- [REDACTED] The date of a statement from the Trustee addressed to the Complainant confirmed the rollover of [REDACTED] to the Fund as a result of her request and showed that a contribution fee of [REDACTED] had been deducted from the amount rolled over.
- [REDACTED] The Complainant completed another "Consolidate your super" form in which she requested that [REDACTED] be

transferred or rolled over from an unrelated superannuation fund to the Fund.

— The date of a statement from the Trustee addressed to the Complainant confirmed the rollover of [REDACTED] and showed that a contribution fee of [REDACTED] had been deducted from the amount rolled over.

— The Complainant telephoned the Trustee and complained that contribution fees had been deducted from the two amounts she transferred to the Fund. She was told that these fees were amounts paid to her financial adviser. The Complainant said she had not been in contact with any financial adviser and said she wanted a refund of the contribution fees that had been debited to her account. The person she spoke to said her adviser would be removed from her account.

— The Complainant again spoke to representatives of the Trustee by telephone and made a formal complaint in relation to contribution fees being deducted from her account and paid to a financial adviser who did not provide any services to her.

— The date of a letter from the Trustee to the Complainant responding to her complaint stating that, when she completed her application in [REDACTED], she had a financial adviser and that the customer information brochure disclosed that a contribution fee of 5% would apply. The Trustee also said that the fee was disclosed in her annual statements and that, until [REDACTED], details of her financial adviser were shown on her annual statements. After that, the financial advisers remained on her account until she recently requested that they be removed. The Trustee refused her request for a refund of the fees.

— The date of the Complainant's complaint to the Tribunal. She complained that, if the Trustee had advised her years ago that she could remove the name of the financial adviser from her account, she would have done so and contribution fees would not have been deducted from her contributions. She sought a refund of contribution fees paid to the financial adviser.

## GOVERNING RULES

13. The operation of the Fund is governed by a trust deed. The deed, as amended to 14 March 2013 (the Trust Deed) has a definition in clause 1.1 of the expression Member



Package which is defined as including the terms of the package (including fees) determined under clause 4.2.

14. Clause 4.2(a) states that the Trustee must administer a Member Package in accordance with its terms. Clause 4.2(b) states that the terms of a Member Package are to be determined and recorded in writing by the Trustee and made available to the Member.
15. Under clause 3.5(b)(9) of the Trust Deed, the Trustee has power to compromise proceedings in relation to the Fund or the Trustee.

## **CONTENTIONS OF THE PARTIES**

### **The Complainant**

16. In her complaint to the Tribunal, the Complainant said that she questioned the contribution fee in a telephone call to the Trustee after her contribution of [REDACTED] had been paid and [REDACTED] deducted from it and she was advised that it was for a payment to her financial adviser. She said she did not have an adviser. She was then given the name of an adviser. She then asked for that adviser to be removed from her account and she queried why she had not been advised previously in her calls to the Trustee that she could have an adviser linked to her account removed.
17. She said in her complaint to the Tribunal that if she had been aware that she could do so, she would have removed the adviser many years ago, when she became a member of the Fund, and would not have had money being paid to an adviser for services that had not been provided to her and she would have expected the Trustee to have advised her of her choice to have the adviser linked to her account removed.
18. She said she wanted reimbursement for her losses that resulted from fees being paid to advisers who had not provided services to her.
19. The Complainant's representative submitted to the Tribunal that the Complainant's adviser, when she became a member of the Fund, was apparently replaced by another adviser in [REDACTED] who had no contact with the Complainant but received commissions on her contributions, for which she should be compensated.
20. It was also submitted that a management fee was disclosed to the Complainant in the past but the details of how the fee was to be applied were not disclosed and she was not advised that it was paid as a commission to an adviser. It was submitted that no activity or service had been provided which would qualify an adviser for the receipt of a commission.
21. The representative said in his submission that a letter of [REDACTED] from the then trustee's representative referred to the agent, who introduced the Complainant as a member of the Fund, as a superannuation consultant. There was no reference to a financial adviser or advice.

22. The Complainant's representative said that there were no contributions to the Fund by the Complainant from [REDACTED] to [REDACTED] so the issue of contributions fees did not arise during that period.
23. It was also submitted that the Complainant was not aware and had not been advised that the fee represented as a management fee was also a commission, which gave rise to a right to service. There was never any communication or documentation that expressly explained the fee or stated the scope of service that was being paid for by the fee or that there was an option to terminate the adviser.
24. It was submitted that the Complainant never engaged the adviser linked to her account in [REDACTED] and it appeared that that adviser had acquired her account in [REDACTED] but had never made contact with her. Neither the Trustee nor the adviser had advised her of the existence of that adviser or what services she was entitled to from that adviser. She terminated that adviser's connection to her account as soon as she became aware of it in [REDACTED].
25. In a timeline of events provided to the Tribunal by the Complainant she said that she spoke to a representative of the Trustee on [REDACTED], the day after she received a statement in relation to her [REDACTED] contribution showing a [REDACTED] contribution fee, and was told that the Final Financial Adviser was her adviser. She said she had never heard of him or spoken to him and requested his removal.
26. The Complainant's representative made a further submission in response to the three questions posed to the Parties by the Tribunal. He submitted that section 1017B(1A) of the *Corporations Act* is relevant to the Complainant's complaint and she was entitled to be told in 2008 of the decision to discontinue deducting the contribution fee if there was not an adviser linked to a member's account.
27. It was also submitted that neither the contribution fee nor the availability of access to a financial adviser as a result of the payment of commission to an adviser was ever adequately disclosed to the Complainant.
28. It was submitted that the Complainant should be put in the position she would have been in had the Trustee fully disclosed the fees and commissions from the outset when she became a member of the Fund. It was said she has not had the use of the money that was deducted from her account and has lost the earnings that she would otherwise have had on those amounts. It was also submitted that she should be compensated for her lost time, grief and legal expenses incurred in relation to her complaint.

#### **The Trustee**

29. The Trustee submitted to the Tribunal that the Complainant appointed the First Financial Adviser as her adviser at the time of her application to become a member of the Fund and the adviser had been referred to in each annual statement to the Complainant and the 5% contribution fee had been disclosed to her in the customer information brochure provided to her when she became a member.

30. The Trustee said that the full contribution fee is paid to the adviser unless some other arrangement is reached.
31. The Trustee also submitted that the *Corporations Act* does not require it to disclose details of financial advisers linked to members' accounts in annual statements provided to members. However, a decision was made in 2007 to include adviser details in annual member statements.
32. The Trustee submitted that it is not unusual for an adviser to be changed when financial planning businesses are sold. The Trustee said that, in the Complainant's case, she was transferred from the First Financial Adviser to another in [REDACTED], then to another in [REDACTED], then to another in [REDACTED] and, in [REDACTED], there was a transfer to the Final Financial Adviser.
33. The Trustee said that, in 2008, there was a business decision to remove the contribution fee if there was no adviser on the member's account. However, as the Complainant had an adviser, that decision did not apply to her. The Trustee said that no documentation was issued to the Complainant or any other member about the decision to remove the contribution fee if there was no adviser because the Trustee did not want to encourage clients to not seek financial advice.
34. The Trustee referred to annual statements provided with its submission and said that each of those documents clearly disclosed the contribution fees, which had applied since the Complainant became a member of the Fund.
35. The Trustee submitted that it had administered the Complainant's account and had charged her fees in accordance with its disclosure to her and in accordance with the terms and conditions of its contract with her and, accordingly, maintained its position to decline her request to refund any contribution fees.
36. In relation to the 3 questions posed by the Tribunal to the Parties set out above, a submission was provided to the Tribunal. That submission is not on any particular company's letterhead but it appears to have been intended to be provided on behalf of the Trustee, as a Party to this complaint.
37. In response to question 1, it is said in the submission that section 1017B(1A) of the *Corporations Act* is not relevant to the Complainant's complaint.
38. It is also said in the submission that the Complainant was notified of the 5% administration charge when she initially purchased the product and the amounts deducted were set out in the Complainant's annual statements.
39. It was also submitted that, in 2008, the Principal Company (not the Trustee) implemented a procedural change in the way in which it managed complaints from members of the Fund who had terminated their relationship with their adviser. The Principal Company decided to rebate the full amount of contribution fees that would otherwise be charged to a member of the Fund where the member had approached the Principal Company expressing dissatisfaction with their adviser and requesting to have the adviser's name removed from the member's account.



40. It was also submitted that:

The issuer of the product was (the Trustee) and not (the Principal Company). At the relevant time, interests in the Product were invested by the Trustee wholly in policies of life insurance issued by (the Principal Company). (The Principal Company) was also the administrator of the Product and was responsible for managing complaints on behalf of the Trustee. At no point did the Trustee determine to change the features of the Product that a contribution fee was not payable where a member terminated their relationship with their adviser. Rather, where (the Principal Company) elected not to charge the Trustee a contribution fee in respect of a member, the Trustee elected to pass that cost saving on to the member.

(The Tribunal notes that the effect of this submission is that the life insurance policies referred to in the submission were contracts between the Trustee and the Principal Company, and it appears, therefore, these were replacements for the policy that was a contract between the Trustee, as trustee of the Predecessor Fund, and the Life Insurer that existed when the Complainant became a member of the Predecessor Fund.)

41. It was also submitted on behalf of the Trustee that it was important to note a financial adviser's right to receive commissions arose as a consequence of the adviser selling the product and was not dependent on the adviser providing ongoing advice to the member of the Fund.
42. Question 2 posed by the Tribunal was not answered in the submission, other than to say that the contribution fee was specified in the customer information brochure provided to the Complainant.
43. In response to the Tribunal's question 3, it was said that the Complainant did not need to be told in 2008 of the change in relation to contribution fees being charged as that change was implemented as a complaints management tool only and did not represent a waiver of the Trustee's entitlement to charge the fees that had been disclosed to the Complainant.
44. It was also submitted that, if the Trustee had sought to implement a change to the fees payable under the product, that would have needed to be notified to members of the Fund under section 1017B of the *Corporations Act*. However, it was argued that the Trustee did not implement a change to the fees and, if it had done so, there would have been the potential for claims against it by advisers if commission payments had ceased. However, in the same submission, it was also said that commissions ceased to be paid when a member of the Fund expressed dissatisfaction with their adviser.

#### **TRIBUNAL'S DELIBERATIONS AND FINDINGS**

45. Section 37(6) of the Complaints Act requires that the Tribunal must affirm the Trustee's decision if the Tribunal is satisfied that the decision, in its operation in relation to the Complainant, was fair and reasonable, in the circumstances. The function of the Tribunal is, therefore, initially, to determine whether the decision of the Trustee was fair and reasonable within the meaning of s 37(6). It is not, therefore, a question of what decision the Tribunal would have made on the evidence

that was before the Trustee but whether the Trustee's decision was fair and reasonable.

46. In making its determination, the Tribunal took into account the whole of the evidence and the submissions of the Parties.
47. The Complainant's complaint is that the Trustee should refund to her the contribution fees deducted from her account in the Fund because the fees were paid to financial advisers who had not provided her with any advice or service and the Trustee had not told her that she could remove the advisers and not pay contribution fees. She submitted to the Tribunal that she was not aware and had not been advised that the fee represented as a management fee was also a commission that gave rise to a right to a service.
48. Her final submission sought a refund of all the contribution fees that had been deducted from her account because she had not been adequately or clearly advised of the contribution fee and the payment of commissions by the Trustee to financial advisers who did not provide her with any advice or communicate with her. She also sought compensation for the expenses she has incurred and for lost earnings on the contribution fees that had been deducted.
49. The application completed by the Complainant on [REDACTED] to become a non-employer sponsored member of the Predecessor Fund was completed, in part, by the First Financial Adviser as an "agent". It was submitted by the Trustee that the Complainant appointed the agent as her financial adviser at the time of her application to become a member of that fund. The finding of the Tribunal in relation to that submission is that there is no mention in either the application for membership of the Predecessor Fund or the proposal completed by the Complainant of the Complainant appointing a financial adviser. It is not suggested by the Trustee that the Complainant appointed an adviser in any other way and there is no evidence of an appointment having been made in any other way. The finding of the Tribunal is, therefore, that the Complainant did not appoint a financial adviser as part of her membership of the Predecessor Fund.
50. It was submitted by the Trustee that a customer information brochure that has been provided to the Tribunal was given to the Complainant at the time of her application and that that brochure states that "administration charges" are 5% of net contributions. There is no evidence before the Tribunal, other than the Trustee's assertion, that a customer information brochure was given to the Complainant at the time she became a member of the Predecessor Fund.
51. To call a fee that is charged an administration charge when the whole of the fee is paid as a commission to a financial adviser could be regarded as misleading.
52. The Trustee also submitted that the contribution fee, as it is now called, was disclosed in all annual statements provided to the Complainant.
53. The Complainant acknowledges that she was told about a management fee in the past but her contention is that she was never advised that a commission was paid to a



financial adviser, that she has not received any advice and that the payment of commission gave rise to a right to service. She submitted that it was never clearly communicated to her how the fee was to be applied. She said she was unaware that an adviser was linked to her account or who that adviser was and she was never told by the Trustee that she could remove the financial adviser linked to her account and not be subjected to a contribution fee on her contributions. The Trustee does not dispute that she was never told that and has now removed from her account any mention of an adviser linked to her account.

54. The Tribunal finds that, since at least [REDACTED] and, quite possibly, earlier than that, the Complainant did not have a financial adviser providing her with any advice or services in relation to her membership of the Predecessor Fund or the Fund.
55. Nevertheless, the issue is whether the Trustee was entitled to charge her a contribution fee, despite her not receiving advice from a financial adviser linked to her account, over a long period.
56. The finding of the Tribunal is that the fee charged to the Complainant's account was disclosed to the Complainant in documents provided to her, including annual statements, albeit that it was described in the early years of her membership of the Predecessor Fund as an administration charge. The fact that the contribution fee was misdescribed as an administration fee is not of itself sufficient reason to require the Trustee to refund fees debited to the Complainant's account prior to [REDACTED].
57. The fee was a condition attaching to membership of the Predecessor Fund and the Fund that applied to the Complainant as a member. The payment of the fee was not stated in the disclosure documents to be conditional on whether the Complainant received any advice from a financial adviser.
58. As it was a condition of membership that was disclosed in the annual statements given to the Complainant that a 5% fee applied to contributions, the Tribunal's view is that the Trustee did not have a legal obligation to refund the fees paid before [REDACTED]. The Complainant's claim for compensation for contribution fees debited to her account prior to [REDACTED] cannot, therefore, be sustained.
59. The Complainant has said that no contributions were made by her between [REDACTED] and [REDACTED].
60. When the Complainant subsequently made contributions of [REDACTED] on [REDACTED] [REDACTED] and [REDACTED] on [REDACTED] in the form of rollovers from another superannuation fund, she was provided with statements, after the contributions had been made, showing that contribution fees of [REDACTED] and [REDACTED] had been deducted from the amounts rolled over. When she saw the statement showing that the [REDACTED] had been deducted, she immediately contacted the Trustee about it and learned, for the first time, that the contribution fees were applied to pay commissions to financial advisers even though no adviser had played any part in those rollovers being made. As she correctly contended, the Final Financial Adviser was being paid, at her considerable expense, for doing nothing.

61. The Trustee has submitted that, in [REDACTED] there had been a business decision to remove contribution fees if there was no longer an adviser linked to a member's account but the members were not told about it. Given the substantial contribution fees that were levied on the Complainant's [REDACTED] and [REDACTED] contributions, which she could have avoided if she had been made aware she could have removed the adviser who was not giving her any advice and who played no part in the rollover contributions she made, the [REDACTED] decision was important information for members of the Fund to be made aware of.
62. Section 1017B(1A) of the *Corporations Act*, as it applied in 2008, required the Trustee to advise its members of any material change to a matter that would have been required to be specified in a product disclosure statement. A product disclosure statement provided to a prospective member of a superannuation fund is required to contain information in relation to the fund, including in relation to fees-section 1013D of the *Corporations Act*. In the view of the Tribunal, a contribution fee of 5% of contributions is clearly a matter required to be specified in a product disclosure statement and a decision that the fee would no longer apply if the member requested the removal of a financial adviser linked to the member's account is a material change to such a matter.
63. Furthermore, in the view of the Tribunal, the Complainant, as a beneficiary of a trust and as a person in whose best interests the Trustee had an obligation to act, as required by section 52(2) of the *Superannuation Industry (Supervision) Act 1993*, was entitled to be told by the Trustee that the 5% fee, that had previously been advised to her, would no longer apply if she removed any financial adviser linked to her account. The failure to tell her that took away from her the opportunity to advise the Trustee that she did not want a 5% contribution fee to be deducted from any contribution she made and was not in her best interests. The need for that disclosure was particularly relevant to her because of her not having had a financial adviser advising her for some time.
64. The Trustee's submission that it was the Principal Company rather than the Trustee who made the 2008 decision reads as though the Trustee had no involvement in it. However, the decision appears to have been made as a variation of the terms of the life insurance policy to which the Trustee was a party. If so, such a variation to the contract required the Trustee's consent and the Trustee cannot absolve itself from the decision by saying it had no involvement in it. The Trustee had an obligation in relation to the life insurance contract it entered into to administer the contract, and its participation in it, in a manner that was in the best interests of all its members, including looking after the members' financial interests.
65. In any event the Trustee, not the Principal Company, was supposed to be in control of the Fund and was responsible for what happened in the Fund in relation to its members and their financial interests, including decisions by the Principal Company under an arrangement made between that company and the Trustee.
66. The Trustee also submitted that the Principal Company made the decision not to charge the contribution fee to some members as part of its administration of the Fund on behalf of the Trustee. If that is the case, it appears to the Tribunal that the

Principal Company made the decision on behalf of the Trustee, in which case, the Trustee and its delegate had an obligation, in performing the administration agreement, to do so in a way that was in the best interests of all of the members of the Fund.

67. One of the obligations of a trustee and its delegates is to ensure fairness between the beneficiaries. That is an obligation both under section 52(2) of the *Superannuation Industry (Supervision) Act 1993* and under principles of trust law (see *Re Tempest* [1866] WN 230 and the many cases decided since then on this point including *Stannard v Fisons Pensions Trust Ltd* [1991] PLR 225 and *Re Alan Bond; Ex parte Ramsay* (1992) 92 ATC 4807). In *Jacobs' Law of Trusts in Australia* 7<sup>th</sup> edition, it is said at [1901] that "trustees have a duty to act impartially between the beneficiaries in order to avoid benefiting one set of beneficiaries at the expense of another set."
68. The Trustee, in the arrangements it entered into with other companies in the same group of companies in relation to members of the Fund, therefore, had an obligation to ensure that all members of the Fund were treated fairly so that one group of members were not advantaged over another group in the fees they paid, where there wasn't justification for it. The removal of the contribution fee for members who complained and not for those who didn't complain was not justifiable, because of the unfairness of it.
69. The effect of the decision was that members who complained and had the financial adviser linked to their account removed were no longer required to pay a contribution fee but those members who did not complain or who did not know that they could complain about the fee continued to have a 5% fee deducted from each contribution they and their employers made to the Fund.
70. Where the Tribunal decides that it was not fair and reasonable for the Trustee to refuse to compensate the Complainant for some or all of the amount that she claims, it is open to the Tribunal to determine that the Trustee should have compromised her claim - *Retail Employees Superannuation Pty Ltd v Croker* [2001] FCA 1330 at [126] to [136] and *Commonwealth Superannuation Scheme Board v Dexter* [2004] FCA 1434 at [58] to [65]. For the reasons stated below, it is the Tribunal's view that the Trustee's decision to refuse to refund any of the contribution fees was not fair and reasonable and that it should, in the circumstances, have compromised the Complainant's claim.
71. It is also the Tribunal's view that the decision made in 2008 should have been disclosed to the Complainant and was not fair in its application to her because the result of it was that some other members of the Fund in her position no longer paid a contribution fee but it continued to apply to her.
72. Because the Trustee did not tell the Complainant that the contribution fee would no longer apply if there was not an adviser linked to her account, she lost an opportunity, from 2008 onwards, to avoid payment of the contribution fee.
73. As the Complainant did not have an adviser providing her with any advice or services in [REDACTED] it is the Tribunal's view that the Trustee, when it was told in



██████ that there had not been an adviser from before ██████ should have decided, in order to ensure fairness between members, to apply the compromise power in the Trust Deed and in section 49 of the New South Wales *Trustee Act 1925*. It should have agreed to compromise the Complainant's claim for a refund of the contribution fees by agreeing to refund to her the contribution fees of ██████ and ██████ levied on her ██████ and ██████ contributions, which were the only contributions made after ██████.

74. Its decision to refuse to refund contribution fees debited to the Complainant's account after the 2008 decision was not, therefore, fair and reasonable, in its operation in relation to the Complainant.
75. The contribution fees levied before 2008 were imposed before any decision was made that those fees would no longer apply if there was not an adviser and, as they were a condition of membership disclosed to the Complainant in documentation provided to her, they are not refundable to the Complainant.
76. The Complaints Act does not permit the Tribunal to award costs for legal fees incurred and for time expended by the Complainant in dealing with this complaint. The Complainant is, however, entitled to be compensated by the Trustee for lost earnings on the contribution fees to be refunded, in the form of interest. Interest should, therefore, be paid to the Complainant on the amount be refunded to her, at the investment earning rate of the investments in which her account was invested in the Fund and any successor fund, from the dates on which the amounts of ██████ and ██████ were deducted from her account to the date on which those amounts are refunded to her.

#### **The effect of the determination on other members**

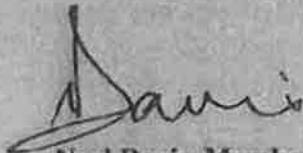
77. In relation to members of the Fund other than the Complainant, section 44(2) of the Complaints Act states that if a determination of the Tribunal was made as a result of a section 14 complaint, the Tribunal may direct the Trustee to inform all or any of the other members or all or any of the former members of the relevant fund of the Tribunal's determination. The Complainant's complaint was made under s14 of the Complaints Act. The Tribunal can, therefore, require the Trustee to inform the other members or former members of the Tribunal's determination. Because of the expense and administrative difficulty of it, such a requirement should only be imposed where it is an issue of such significance that the members and former members should be made aware of the Tribunal's determination.
78. It is the Tribunal's view that the Trustee's decision not to inform the then members of the 2008 decision that the contribution fee that was previously advised to the members would no longer apply, if they did not want a financial adviser linked to their account, may have had a significant financial effect on some members who, if they had been aware of the decision, could have notified the Trustee that they no longer wanted a financial adviser linked to their account in the Fund and would not, therefore, have had contribution fees deducted from their accounts.

79. It is the Tribunal's view that the possible financial effect on some members and former members of the Tribunal's determination in this matter warrants the power granted by section 44 being invoked in this instance. The Tribunal, therefore, directs the Trustee to inform the members of the Fund, who were members at the date of the 2008 decision, and former members of the Fund, who were members at the date of the 2008 decision, of the Tribunal's determination in this complaint, unless the Australian Securities and Investments Commission, as the regulator, decides otherwise. If the Trustee decides that it is inappropriate to provide them with a copy of the determination, a fair summary of the Tribunal's determination should be provided to those members and former members so that they are properly informed of the Tribunal's determination. It would be appropriate for the form of the summary to be approved by the Australian Securities and Investments Commission.

## CONCLUSION

80. Section 37(6) of the Complaints Act requires the Tribunal to affirm the decision of the Trustee if the Tribunal is satisfied that the Trustee's decision, in its operation in relation to the Complainant, was fair and reasonable, in the circumstances.
81. For the reasons given above, the Tribunal is not satisfied that the Trustee's decision to refuse to refund any of the contribution fees was fair and reasonable, in the circumstances, in its operation in relation to the Complainant. The Trustee's decision is not, therefore, affirmed.
82. The effect of s 37(3) of the Complaints Act is that, where a trustee's decision is not affirmed by the Tribunal, the Tribunal can vary or set aside the trustee's decision and substitute another.
83. Under s 37(1) of the Complaints Act, the Tribunal, in reviewing the Trustee's decision, has all the powers, obligations and discretions of the Trustee.
84. Section 37(4) of the Complaints Act requires that the Tribunal may only exercise its determination-making power for the purpose of placing the Complainant, as nearly as practicable, in the position she would have been in but for the unfairness or unreasonableness that the Tribunal has determined exists.
85. Section 37(5) of the Complaints Act restricts the Tribunal from doing anything in making its determination that would be contrary to law or the governing rules of the Fund. It is the Tribunal's view that its determination is not contrary to law or the governing rules of the Fund.
86. In accordance with these provisions of the Complaints Act, the Trustee's decision not to refund any of the contribution fees debited to the Complainant's account is set aside and a decision is substituted that the Trustee compromise the Complainant's claim by paying to the Complainant, or in accordance with her directions, the amounts of [REDACTED] and [REDACTED] debited to her account in the Fund as contribution fees in [REDACTED] and [REDACTED] respectively.

87. To compensate the Complainant for lost earnings on those amounts, interest should also be paid on those two amounts, from the date on which each amount was debited to her account to the date on which the total amount of [REDACTED] is paid to her, at the investment earning rate of the investments in which her account was invested in the Fund and any successor fund.



Noel Davis, Member  
3 July 2018