

NOTICE OF FILING

Details of Filing

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File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v AUSTRALIAN UNITY FUNDS MANAGEMENT LIMITED (ACN 071 497 115)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.

Concise Statement

No. VID of 2025

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

AUSTRALIAN UNITY FUNDS MANAGEMENT LIMITED (ACN 071 497 115)

Defendant

A. IMPORTANT FACTS GIVING RISE TO CLAIM

Introduction and overview

1. This proceeding concerns Part 7.8A of the *Corporations Act 2001* (Cth) (the **Act**), which imposes design and distribution obligations on distributors of financial products for retail clients. The Act requires distributors to make a 'target market determination' (**TMD**) by, among other things, identifying the class of retail clients that comprise the target market for their products, and to then take reasonable steps to ensure their 'retail product distribution conduct', such as issuing the product, is consistent with their TMD.
2. Between 5 October 2021 and 5 October 2023 (**Relevant Period**), the Defendant (**AUFM**) contravened its obligations in Part 7.8A of the Act because it failed to take reasonable steps to ensure that its retail product distribution conduct in relation to one of its financial products was consistent with its TMDs, in accordance with s 994E(3) of the Act.

Background

AUFM and the Australian Unity Select Income Fund

3. AUFM is an incorporated public company, and a wholly owned subsidiary of Australian Unity Limited, a mutual company with corporate bonds listed on the ASX. AUFM is a member of the Australian Unity group of companies (**Group**) providing funds management services within the Group's business platform known as 'Wealth & Capital Markets'.
4. In the financial year 2024, Australian Unity reported Group revenue and other income of \$2.17 billion, and \$75.8 million in adjusted EBITDA. The Wealth & Capital Markets business reported total segment revenue of \$232.5 million, adjusted EBITDA of \$45.5 million, with \$18.7 billion of gross funds under management, administration and advice.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission (Plaintiff)		
Prepared by (name of person/lawyer)	Nick Kelton, Lawyer		
Law firm (if applicable)			
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(include state and postcode)			

5. During the Relevant Period, AUFM:
 - a. held an Australian Financial Services licence (no. 234454) which authorised AUFM, as a responsible entity, to operate registered managed investment schemes (**MIS**) holding mortgages and incidental property; and
 - b. was the responsible entity and investment manager for, and issuer of interests in, the Australian Unity Select Income Fund (the **Fund**).
6. The Fund was (and remains):
 - a. a registered MIS (ARSN: 091 886 789); and
 - b. a contributory mortgage scheme, providing clients with an opportunity to invest in specific registered first mortgage loans procured by Australian Unity's Wealth & Capital Markets mortgage team.
7. The product disclosure statement (**PDS**) for the Fund which was available to consumers during the Relevant Period outlined the investment stages, involving:
 - a. an application process, including the investor specifying the investment amount, and deciding whether to provide a 'general investment authority' (leaving AUFM to select which first mortgage loan to apply the funds to) or a 'specific investment authority' (with the investor deciding which first mortgage loan to apply the funds to);
 - b. initial investment funds being received into a 'cash account', before being allocated to a registered first mortgage loan (known as a 'syndicate fund');
 - c. the investor receiving monthly interest payments over the term of the loan; and
 - d. at the end of the loan term, the investor's funds being returned to the cash account, with the investor then choosing whether to withdraw or to reinvest the funds.

The Fund TMDs

8. AUFM made three TMDs for the Fund during the Relevant Period, on 5 October 2021 (**First TMD**), 21 December 2022 (**Second TMD**), and 24 May 2023 (**Third TMD**) (collectively, the **Fund TMDs**).
9. The Fund TMDs defined AUFM's target market for the Fund. They did this by, firstly, identifying a potential class of consumers who may invest in the Fund, by reference to their:
 - a. investment objective (capital growth, capital preservation, capital guaranteed, or income distribution);
 - b. intended use of the financial product as a percentage of the consumer's investable assets (solution/standalone: 75-100%, core: 25-75%, or satellite/small: <25%);
 - c. investment timeframe (short ≤2 years, medium >2 years, or long >8 years);

- d. risk and return profile (low, medium, high, or very high); and
 - e. need to withdraw money (daily, weekly, monthly, quarterly, annually or longer).
10. Then, using this framework, AUFM determined the types of consumers who were within, potentially within, or outside, the Fund's target market, having regard to the nature and characteristics of the Fund itself. The results were then summarised in each Fund TMD. For example, in the First TMD, AUFM described the Fund as a product likely being appropriate for consumers: (a) seeking income distribution, (b) using the Fund as a satellite/small or a core component, (c) using the Fund within a portfolio where the consumer had a medium or long investment timeframe, (d) who had a medium or high risk return profile, and (e) who only needed annually or longer access to capital. Some changes were made by AUFM in its Second and Third TMDs to the attributes of the Fund's target market.

Target Market Questionnaires

11. During the Relevant Period the PDSs for the Fund included an investor application form. Potential investors were able to apply online or by submitting a paper application:
- a. with those applying online asked to complete a series of questions titled 'Target Market Criteria' (**Online Questionnaire**);
 - b. with those applying by way of a paper application:
 - i. prior to 30 September 2022, not provided with a questionnaire;
 - ii. between 30 September 2022 to 5 October 2023, asked to complete a page titled 'Target Market Determination Questions' (**Paper Questionnaire**).
12. A purpose of the Online and Paper Questionnaires was to assist AUFM to determine whether a potential 'non-advised' investor was within the Fund's target market, and that the investment was therefore appropriate to their objectives, financial situation and needs.¹
13. However, in the Relevant Period, AUFM issued interests in the Fund to 87 investors without the investors completing an Online or Paper Questionnaire.
14. Further, from 5 October 2021 until August 2023, AUFM did not review the answers to the Online Questionnaire or the Paper Questionnaire which were submitted by potential investors. In the Relevant Period, at least 307 non-advised retail investors had submitted application forms to acquire interests in the Fund. Of them, at least 220 had completed an

¹ The obligation pursuant to s 994E of the Act for someone who makes a TMD to take reasonable steps to ensure that its retail product distribution conduct in relation a financial product is consistent with the TMD does not apply to 'excluded conduct'. 'Excluded conduct' includes an 'excluded dealing', where a person or their associate arranges for a retail client to apply for or acquire the product for the purpose of implementing personal advice the person has given to the retail client.

Online or Paper Questionnaire, and up to 144 had provided at least one response which indicated they were not in the target market for the Fund.

B. RELIEF SOUGHT FROM THE COURT

15. ASIC seeks the relief set out in the accompanying Originating Process.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Retail product distribution conduct by AUFM

16. Pursuant to s 1012B(3)(a)(i) of the Act, AUFM was required to give a PDS when offering to issue interests in the Fund to retail clients. By operation of section 1011B of the Act, AUFM was a regulated person within the definition in s 994A(1) as in force in the Relevant Period and was required by s 994B to make a TMD for the Fund, and to comply with s 994E(3).
17. Pursuant to s 994A(1) of the Act as in force in the Relevant Period, 'retail product distribution conduct' (**RPD Conduct**) included dealing in the product in relation to a retail client. Pursuant to s 766C(1)(b) of the Act, 'dealing' includes issuing a financial product. An interest in the Fund is a financial product specified in s 764A(b)(i) of the Act. Those who acquired Fund interests were retail clients within the meaning of s 761A of the Act. Thus on each occasion AUFM issued interests in the Fund to retail clients, it engaged in RPD Conduct.

Contravention of Section 994E of the Act

18. A regulated person contravenes s 994E(3) if, relevantly, a TMD for a financial product has been made; the product is on offer for acquisition by issue; a regulated person engaged in RPD Conduct in relation to the product; and the regulated person failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the RPD Conduct being consistent with the determination.
19. Section 994E(5) of the Act relevantly provided that, without limiting s 994E(3), reasonable steps are steps that, in the circumstances, the regulated person is reasonably able to take that will, or are reasonably likely to, result in RPD Conduct in relation to the financial product being consistent with the TMD for the product, taking into account all relevant matters including those set out in ss 994E(5)(a) to (d).
20. By reason of the matters referred to in paragraphs 11 to 14, and 16 to 17 above, on each of the occasions AUFM issued interests in the Fund to a retail client, it failed to take reasonable steps that would have, or would have been reasonably likely to have, resulted in the RPD Conduct being consistent with the TMD. That is because:
 - a. applications were submitted without a completed Online or Paper Questionnaire; or
 - b. where applications were submitted with a completed Online or Paper Questionnaire, the Online or Paper Questionnaires were not reviewed by AUFM to assess whether

the applicant was within the target market for the Fund.

21. Accordingly, AUFM contravened s 994E(3) of the Act.

D. RISK OF LOSS AND LOSS SUFFERED

22. AUFM's failure to comply with s 994E(3) of the Act exposed persons who invested in the Fund to the risk that they might have obtained a financial product that was not appropriate to their objectives, financial situation or needs, and to a risk of financial loss.

23. During the Relevant Period, AUFM accepted initial investments of up to \$9,564,300.00 into the Fund from investors who had returned responses to the Online or Paper Questionnaire indicating they may have been, or were, outside the Fund's target market. Further amounts were invested by new investors who did not return a Questionnaire.

24. The risk of financial loss to such investors is illustrated by the following examples:

- a. 1 Studley Park Road Pty Ltd Syndicate-Fund, in which at least 23 new retail investors (some of whom may have been or were outside the target market) invested a total of at least \$1,748,090.38 during the Relevant Period. The fund ceased making distributions on 1 July 2023 before the maturity date of the underlying loan. Following a final payment of capital in February 2025, investors lost approximately 34.70% of their initial capital contribution.
- b. Cheng and Lok Company Pty Ltd Syndicate-Fund, in which at least 76 new retail investors (some of whom may have been or were outside the target market) invested a total of at least \$8,668,716.98 in the Relevant Period. The fund ceased making distributions on 1 April 2024, before the maturity date of the underlying loan. Investors are estimated to have lost 3.28% of their initial capital contribution (subject to enforcement action which is being taken by AUFM against the borrower, developer and guarantor entities).
- c. 626 Glen Iris – WPG 221 Bourke Road Glen Iris Pty Ltd Syndicate-Fund, in which at least 33 new retail investors (some of whom may have been or were outside the target market) invested a total of at least \$1,248,908.66 in the Relevant Period. The fund ceased making distributions from 1 December 2024. No capital has been returned to members, who may suffer a future capital loss.

Dated: 10 June 2025



Signed by Nick Kelton
Lawyer for the Plaintiff

This concise statement was prepared by Michael Rush KC and Monique Hardinge of counsel.

Certificate of lawyer

I Nick Kelton certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 10 June 2025

Signed by Nick Kelton

Lawyer for the Plaintiff