

**CONCISE STATEMENT**

Federal Court of Australia  
District Registry: Victoria  
Division: General

**IN THE MATTER OF DOVER FINANCIAL ADVISERS PTY LTD**

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**DOVER FINANCIAL ADVISERS PTY LTD and another named in the Schedule**

Defendants

**A. Nature of proceeding**

1. Between around 25 September 2015 and around 30 March 2018 (**relevant period**):
  - (a) the first defendant, Dover Financial Advisers Pty Ltd (**Dover**), operated a financial services advice business pursuant to Australian Financial Services Licence (**AFSL**) number 307248;
  - (b) a substantial number of individuals and corporate entities operated as authorised representatives (**ARs**) of Dover to provide financial services to clients (namely, around 200 ARs in September 2015, around 300 ARs in 2016 and between around 350 and 400 ARs in 2017);
  - (c) the second defendant, Terrence Paul McMaster (**McMaster**), was the sole director and shareholder of Dover, and a responsible manager and key person on the AFSL;
  - (d) Dover, acting through McMaster, required Dover's ARs to incorporate into, or provide with, Statements of Advice (**SOAs**) provided to clients, a document entitled "Client Protection Policy" (as varied from time to time) (**CPP**); and
  - (e) over 11,000 clients of Dover's ARs were provided with the CPP incorporated into, or provided with, a SOA.
2. By this proceeding, the Australian Securities and Investments Commission (**ASIC**) seeks declarations and civil pecuniary penalties against Dover and McMaster in respect of misleading or deceptive conduct by reason of the content of the CPP as particularised below.

**B. Important facts giving rise to the claim**

3. During the relevant period, Dover had the following versions of the CPP:
  - (a) a CPP dated 25 September 2015 (the **25 September 2015 CPP**);
  - (b) a CPP dated 28 September 2015 (the **28 September 2015 CPP**);
  - (c) a CPP dated 3 May 2016 (the **3 May 2016 CPP**);
  - (d) a CPP dated 4 August 2016 (the **4 August 2016 CPP**);
  - (e) a CPP dated 9 January 2017 (the **9 January 2017 CPP**);
  - (f) a CPP dated 16 January 2017 (the **16 January 2017 CPP**); and
  - (g) a CPP dated 13 November 2017 (the **13 November 2017 CPP**).

4. The 25 September 2015 CPP relevantly contained the following clauses:
- (a) an introductory clause: “*Dover’s Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client gets the best possible advice and the maximum protection available under the law...*” (**Introductory Clause**);
  - (b) a clause dealing with the purported limits on an adviser’s authority from Dover which relevantly:
    - (i) stated: “*Under the Corporations Act Dover is not responsible for anything done by your adviser which is not within the authority provided by Dover in these circumstances*”;
    - (ii) stated: “*Your advisor is only authorised to provide advice that complies with the Corporations Act and the related regulatory guidelines. Your advisor cannot provide advice or do anything else which breaches a law or an ASIC regulation, is outside of Dover’s AFSL or which is not in your best interests or appropriate to your circumstances*”; and
    - (iii) listed specific instances of conduct outside the ‘authority’ of an adviser, including, among others, “*any act that breaches a law of Australia of a state of Australia including the law of negligence, the criminal law and the corporations law or any ASIC regulation or regulatory guideline*”(**Authority Liability Exclusion**);
  - (c) a clause which purported to obtain the client’s agreement that, if the client acts on Dover’s advice, the client “*will not subsequently claim to have not understood the general intent of this SOA or any word, phrase or sentence used in it*” (**SOA Liability Exclusion**);
  - (d) a clause which purportedly operated as an ‘acknowledgment’ by the client, that the “*risk insurance recommendations... do not comprise churning, are in your best interests, are appropriate to you and are not motivated by any other criteria*” (**Insurance Liability Exclusion**);
  - (e) a clause which stated: “*We will use our best efforts to ensure our advice is in your best interests and appropriate to you*” (**Best Efforts Clause**);
  - (f) a clause which purported to exclude Dover’s liability for losses incurred by the client, relevantly, “*for any reason after six months from the date of our most recent statement of advice*”, “*if you do not instruct us to implement our advice to you*”, and “*if you cease to engage us as your adviser or if you engage another financial planner*” (**Losses Liability Exclusion**);
  - (g) a clause which stated: “*You must contact us every six months to request that we review our advice to you and up-date our advice for identified changes in your circumstances and the investment environment. You agree that six monthly reviews are an essential aspect of our relationship*” (**Continued Retainer Clause**);
  - (h) a clause which stated: “*All investments recommended in your SOA should be held for a minimum holding period of at least ten years. This is notwithstanding any statement made by the product issuer or any other person in a product disclosure statement or similar document or else where [sic] in this statement of advice*”, and “*You agree that the performance of the investment will not be known and will not be able to be measured until the end of the minimum holding period and that no claim or complaint will be made regarding investment performance until the end of the minimum holding period*” (**Investments Minimum Holding Clause**).
5. The 28 September 2015 CPP contained the clauses set out at subparagraphs 4(a)-(h) above, among others.

6. The 3 May 2016 CPP:
  - (a) contained the clauses set out at subparagraphs 4(a)-(h) above, among others, save that the Introductory Clause referred to “client” rather than “consumer” protections (**Revised Introductory Clause**);
  - (b) also relevantly contained:
    - (i) a clause which stated: “*We will not be responsible for any losses connected to our advice if it is not implemented by us, if you do not engage us as your adviser or if you cease to engage us as your adviser*” (**Ceased Engagement Exclusion**); and
    - (ii) a clause which stated: “*You agree to not complain or seek any form of compensation for any loss suffered as a result of being under-insured should an insured event occur*” (**Underinsurance Exclusion**).
7. The 4 August 2016 CPP:
  - (a) contained the Revised Introductory Clause and the clauses set out at subparagraphs 4(b)-(h) and 6(a)-(b) above, among others;
  - (b) also relevantly contained a clause which stated: “*You agree to maintain all risk insurance policies for at least two years and you agree to compensate the adviser for commissions or other income that have to be re-paid to an insurer or other person if you fail to do this*” (**Insurance Minimum Holding Clause**).
8. The 9 January 2017 CPP contained the Revised Introductory Clause, the clauses set out at subparagraphs 4(b)-(h) and 6(a)-(b) above, and the Insurance Minimum Holding Clause, among others.
9. The 16 January 2017 CPP contained the Revised Introductory Clause, the clauses set out at subparagraphs 4(b)-(h) and 6(a)-(b) above, and the Insurance Minimum Holding Clause, among others.
10. The 13 November 2017 CPP:
  - (a) contained the Revised Introductory Clause, the clauses set out at subparagraphs 4(b)-(h) and 6(a)-(b) above, and the Insurance Minimum Holding Clause, among others;
  - (b) also relevantly contained a clause which stated: “*You are responsible for ensuring our advice to you is implemented on a timely basis notwithstanding you may have engaged us to implement it for you. You indemnify and release us from any claim for costs or losses connected to any delays in implementing the advice no matter what caused the delay or who is responsible for the delay*” (**Delayed Advice Indemnity**).
11. During the relevant period, Dover required ARs to incorporate the current version of the CPP into SOAs provided to clients or to provide the CPP with SOAs.
12. During the relevant period, McMaster, in his capacity as Dover’s sole director and the responsible manager and key person on the AFSL, was responsible for:
  - (a) determining and/or approving the content of the CPP; and/or
  - (b) requiring Dover’s ARs to incorporate the current version of the CPP into, or provide the current version of the CPP with, the SOAs provided to clients.

**C. Primary legal grounds for relief sought**

13. By reason of the Introductory Clause or the Revised Introductory Clause, during the relevant period Dover represented to clients who received SOAs incorporating the CPP, or with which the CPP was provided, that the purported exclusions, limitations, restrictions and/or dilutions of their rights pursuant to one or more of the:

- (a) Authority Liability Exclusion;
- (b) SOA Liability Exclusion;
- (c) Insurance Liability Exclusion;
- (d) Best Efforts Clause;
- (e) Losses Liability Exclusion;
- (f) Continued Retainer Clause;
- (g) Investments Minimum Holding Clause;
- (h) Ceased Engagement Exclusion;
- (i) Underinsurance Exclusion;
- (j) Insurance Minimum Holding Clause; and/or
- (k) Delayed Advice Indemnity,

(collectively, the **Offending Clauses**) constituted the maximum protection available under the law.

14. Those representations were false and/or misleading because, in fact, the purported exclusions, limitations, restrictions and/or dilutions of clients' rights pursuant to one or more of the Offending Clauses did not, during the relevant period, constitute the maximum protection available under the general law and/or statute, including as follows:

- (a) ss 917B and 917C of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the law of agency operated in a less restrictive manner to the Authority Liability Exclusion in relation to Dover's liability for the conduct of its ARs;
- (b) contrary to the SOA Liability Exclusion, a client was not prevented by the operation of the general law or statute from claiming, subsequently to acting on Dover's advice, that the client had not understood the general intent of a SOA or any word, phrase or sentence used in it;
- (c) contrary to the Insurance Liability Exclusion, the general law and statute did not operate to extinguish, by way of an 'acknowledgement', a client's right to allege that an AR contravened ss 961B and/or 961G of the Corporations Act in providing insurance recommendations to the client;
- (d) contrary to the Best Efforts Clause, the obligations in ss 961B, 961G and 961L of the Corporations Act were not satisfied by the "best efforts" of Dover or its ARs;
- (e) the general law and statute did not exclude Dover's liability for losses incurred by a client on the bases set out in the Losses Liability Exclusion Clause;
- (f) contrary to the Continued Retainer Clause, the general law and statute did not impose on a client an obligation to contact Dover every six months to request a review of Dover's advice;
- (g) contrary to the Investments Minimum Holding Clause, the general law and statute did not exclude a client's right to make a claim or complaint regarding investment performance until the end of a 10-year minimum holding period with respect to investments recommended in a client's SOA;
- (h) the general law and statute did not exclude Dover's liability for losses connected to Dover's advice on the bases set out in the Ceased Engagement Exclusion;
- (i) contrary to the Underinsurance Exclusion, the general law and statute did not exclude a client's right to complain or seek compensation for loss suffered as a result of being under-insured following the occurrence of an insured event;

- (j) contrary to the Insurance Minimum Holding Clause, the general law and statute did not require a client to agree to maintain all insurance risk policies for at least two years or otherwise to agree to compensate the adviser for any commissions or other income that had to be repaid to an insurer or another third party; and
  - (k) contrary to the Delayed Advice Indemnity, the general law and statute did not require a client to indemnify and release Dover from any claim for costs or losses connected to any delays in implementing the advice no matter what caused the delay or who was responsible for the delay.
15. By reason of the matters set out at paragraphs 13 and 14 above, during the relevant period Dover engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive and thereby contravened:
- (a) s 1041H of the Corporations Act; and/or
  - (b) s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
16. Further, by reason of the matters set out at paragraphs 13 and 14 above, during the relevant period Dover made false or misleading representations concerning the existence, exclusion and/or effect of clients' rights under the general law and/or statute in relation to financial services provided by Dover and/or its ARs, and thereby contravened s 12DB(1)(i) of the ASIC Act.
17. Further, by reason of the matters set out at paragraphs 1(c) and 12 above, during the relevant period McMaster was knowingly concerned in Dover's misleading or deceptive conduct in contravention of s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and/or s 12DB(1)(i) of the ASIC Act.

**D. Relief sought from the Court**

Relief against Dover

- 18. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) or s 1101B(1)(a) of the Corporations Act, ASIC seeks declarations that Dover has contravened s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and s 12DB(1)(i) of the ASIC Act.
- 19. Pursuant to s 12GBA(1)(a) of the ASIC Act, ASIC seeks orders that Dover pay pecuniary penalties in respect of its contraventions of s 12DB(1)(i) of the ASIC Act.

Relief against McMaster

- 20. Pursuant to s 21 of the Federal Court Act, ASIC seeks declarations that McMaster was knowingly concerned in Dover's contraventions of s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and s 12DB(1)(i) of the ASIC Act.
- 21. Pursuant to s 12GBA(1)(e) of the ASIC Act, ASIC seeks orders that McMaster pay pecuniary penalties in respect of being knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act.

**Dated: 12 September 2018**



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Signed by Georgina Thomas  
Solicitor for the Australian Securities and Investments Commission

## **SCHEDULE OF PARTIES**

**Australian Securities and Investments Commission**

Plaintiff

**Dover Financial Advisers Pty Ltd (ACN 112 139 321)**

First Defendant

**Terrence Paul McMaster**

Second Defendant