NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	VID1360/2019
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v TAL LIFE LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 16/12/2019 3:39:20 PM AEDT Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form NCF1

CONCISE STATEMENT

No. of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

TAL LIFE LIMITED (ACN 050 109 450)
Defendant

A. Important facts giving rise to the claim

1. The defendant, TAL Life Limited (**TAL**), at all material times held an Australian Financial Services Licence (**AFSL**) No. 237848 under which it engaged in the business of providing to consumers contracts of insurance within the meaning of the *Insurance Contracts Act 1984* (**ICA**) and handling claims arising out of those contracts of insurance.

2. TAL provided an income protection policy (**Policy**) to the Second Insured (a pseudonym). The Second Insured was later diagnosed with cervical cancer and sought to make a claim under the Policy.

A1. The Policy

3. In or about September 2013, the Second Insured contacted iSelect Life Pty Ltd (**iSelect**) to take out an income protection policy.

4. By a telephone call of 26 September 2013, the Second Insured disclosed that her doctor had referred her for blood tests as a result of mid-cycle menstrual bleeding which she had not previously experienced.

5. The Second Insured was asked, amongst several quick-fire questions, whether she had "*ever had or received medical advice or treatment for … depression, anxiety, panic attacks, psychosis, schizophrenia, bipolar disorder ... chronic fatigue … or any other mental or nervous condition*". She answered, "*No*". Based on the information provided by the Second Insured during this telephone call, iSelect completed the Second Insured's application for income protection insurance and submitted it to TAL.

6. On 3 October 2013, TAL wrote to iSelect to offer the Second Insured an income protection policy subject to an exclusion for "Cervical Spine". There was no exclusion relating to her blood tests.

7. On 8 October 2013, iSelect telephoned the Second Insured and explained that her application had been accepted by TAL, subject to the cervical spine exclusion. The exclusion did not relate to the Second Insured's blood tests. Nonetheless, the Second Insured relayed the outcome of her blood test (which was no abnormalities detected).

8. On 9 October 2013, TAL sent the Second Insured a letter confirming the Policy. The letter attached a Policy Schedule. The letter also referred to an 'enclosed Policy Document'.

9. The Policy Document as then in effect was dated 31 July 2013 (**Policy Document**). The Policy Document set out the terms and conditions of the contract of life insurance between the Second Insured and TAL, including as to the parties' rights and obligations in the event of a claim upon the Policy.

Filed on behalf of	Australian Securities and Investments Commission, the Plaintiff		
Prepared by	Christine Small		
Law firm	Johnson Winter & Slattery		
Tel	(03) 8611 1333	Fax	(03) 8611 1300
Email	christine.small@jws.com.au	Ref	C3868
Address for service	Level 34, 55 Collins Street Melbourne VIC 3000		

A2. The Claims Pack Representations

10. On or about 12 December 2013, the Second Insured was diagnosed with cervical cancer.

11. On 16 December 2013, the Second Insured notified TAL that she intended to make a claim under the Policy.

12. On 17 December 2013, TAL sent the Second Insured a letter enclosing paperwork TAL required her to complete to make a claim on the Policy (**Claims Pack**).

13. ASIC contends that by the Claims Pack, TAL expressly or impliedly represented that it had a right to require the Second Insured to provide authorities enabling TAL to obtain and access:
    (a) all of the Second Insured's medical records (**First Claims Pack Representation**); and
    (b) any information required by TAL from any insurer, employer, or accountant or other relevant holder of information (**Second Claims Pack Representation**),

    (**Claims Pack Representations**).

14. ASIC further contends that the Claims Pack Representations were each false. TAL had no such right, whether arising out of the Policy Schedule, the Policy Document or otherwise.

15. On 3 January 2014, TAL received the Second Insured's completed Claims Pack. Further to the Claims Pack Representations, the Second Insured provided executed authorities enabling TAL to obtain and access all of the Second Insured's medical records, and any information required by TAL from any insurer, employer, or accountant or other relevant holder of information.

A3. TAL's Investigation

16. On 9 January 2014, TAL notified the Second Insured that it had accepted her claim and commenced paying monthly benefits.

17. In the meantime, and without notifying the Second Insured, TAL began investigating whether there were grounds to avoid the Policy by reason of non-disclosure or misrepresentation prior to entry into the contract of insurance.

18. Relying upon the executed authorities, on 8 January 2014 and 5 May 2014, TAL requested (and subsequently obtained) the Second Insured's medical records. TAL did not limit its investigation to the Second Insured's gynaecological health. Rather, TAL requested and obtained details of the Second Insured's entire medical history.

19. On or about 22 January 2014, TAL received medical notes from the Second Insured's general practitioner. The medical notes included references to the Second Insured having seen a psychologist on several occasions between 16 January 2008 and 7 August 2009, to address depressive symptoms arising, *inter alia*, out of the break-up of a long term relationship.

20. In or around June 2014, TAL sought a retrospective underwriting opinion as to whether, given this information, it would have offered the Second Insured a policy on any terms.

A4. TAL Avoids the Policy

21. On or about 30 June 2014, TAL telephoned the Second Insured to advise her that TAL would be avoiding the Policy for non-disclosure of a depressive condition.

22. On 3 July 2014, TAL formally wrote to the Second Insured avoiding the Policy (**Avoidance Letter**).

23. ASIC contends that by the Avoidance Letter, TAL also:
    (a) alleged that the Second Insured had failed to disclose and/or misrepresented her medical history and thereby breached her duty of disclosure pursuant to s 21 of the ICA;
    (b) alleged that the Second Insured had breached her duty of good faith pursuant to s 13 of the ICA; and
    (c) impliedly threatened to, or indicated it was more likely to, seek recovery of amounts paid out by TAL pursuant to the Policy, in the event the Second Insured sought to challenge the avoidance of the Policy.

24. TAL did not, prior to the Avoidance Letter:
    (a) give notice to the Second Insured of its retrospective investigation into her medical history;
    (b) afford the Second Insured with an opportunity to address concerns as to non-disclosure; and/or
    (c) have regard to the circumstances and manner in which the questions had been asked, and the Second Insured had responded, on 26 September 2013.

B. Summary of relief sought from the Court

25. ASIC contends that TAL contravened ss 12DB(1) and 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), s 1041H(1) of the *Corporations Act 2001* (**Corporations Act**) and s 13(2) of the ICA when it made the First Claims Pack Representation and/or the Second Claims Pack Representation, which representations were false

26. ASIC further contends that TAL contravened s 13(2) of the ICA by the manner in which, on 3 July 2014, it avoided the Policy.

27. ASIC seeks declarations, pecuniary penalties, compliance orders and ancillary orders as set out in the Originating Process.

C. Primary legal grounds for the relief sought

C1. The Claims Pack Representations

28. By the First Claims Pack Representation, TAL expressly or impliedly represented:
    (a) in trade or commerce:
        (i) in connection with the supply or possible supply of a financial service; and/or
        (ii) in relation to financial services; and/or
    (b) in relation to a financial product,

    that it had a contractual entitlement to require the Second Insured to provide a written authority enabling TAL to obtain and access all of the Second Insured's medical records, when TAL did not have such a contractual entitlement.

29. Further to paragraph 28(a), TAL:
    (a) made a false and/or misleading representation in connection with the supply of financial services concerning the existence or effect of a condition, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act;
    (b) engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act.

30. Further to paragraph 28(b), TAL engaged in conduct, in relation to a financial product, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act.

31. Further to paragraph 28, TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

32. By the Second Claims Pack Representation, TAL expressly or impliedly represented:
    (a) in trade or commerce:
        (i) in connection with the supply or possible supply of a financial service; and/or
        (ii) in relation to financial services; and/or
    (b) in relation to a financial product,

    that it had a contractual entitlement to require the Second Insured to provide a written authority enabling TAL to obtain and access any information required by TAL from any insurer, employer, or accountant or other relevant holder of information, when TAL did not have such a contractual entitlement.

33. Further to paragraph 32(a), TAL:
    (a) made a false and/or misleading representation in connection with the supply of financial services concerning the existence or effect of a condition, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act;
    (b) engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act.

34. Further to paragraph 32(b), TAL engaged in conduct, in relation to a financial product, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act.

35. Further to paragraph 32, TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision implied in a contract of insurance requiring each party to such a contract to act towards the other party, in respect of each matter arising under or in relation to it, with the utmost good faith.

C2. Seeking and Acquiring Information

36. In requesting the Second Insured's medical records as referred to in paragraphs 17 to 19 above, with reliance upon executed authorities obtained further to the contraventions referred to in paragraphs 29 to 31 above, TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

C3. The Avoidance Letter

37. In avoiding the Policy in the Avoidance Letter on the basis of purported non-disclosure or misrepresentation:
    (a) with reliance upon the medical history of the Second Insured, as acquired by TAL further to the contraventions referred to in paragraphs 29 to 31 and 36 above; and/or
    (b) without first:
        (i) giving notice to the Second Insured of its retrospective investigation into her medical history; and/or
        (ii) affording the Second Insured any or any reasonable opportunity to address concerns as to non-disclosure,

    TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

38. In alleging, in the Avoidance Letter, that the Second Insured had failed to disclose and/or misrepresented her medical history and thereby breached her duty of disclosure pursuant to s 21 of the ICA:
    (a) with reliance upon the medical history of the Second Insured, as acquired by TAL further to the contraventions referred to in paragraphs 29 to 31 and 36 above; and/or
    (b) without first:
        (i) giving notice to the Second Insured of its retrospective investigation into her medical history; and/or
        (ii) affording the Second Insured any or any reasonable opportunity to address concerns as to non-disclosure,

    TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

39. In alleging, in the Avoidance Letter, that the Second Insured had breached her "duty of good faith" pursuant to s 13 of the ICA:
    (a) with reliance upon the medical history of the Second Insured, as acquired by TAL further to the contraventions referred to in paragraphs 29 to 31 and 36 above; and/or
    (b) without first:
        (i) giving notice to the Second Insured of its retrospective investigation into her medical history; and/or
        (ii) affording the Second Insured any or any reasonable opportunity to address concerns as to non-disclosure,

    TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

40. In impliedly threatening to, or indicating it was more likely to, seek recovery of amounts paid out by TAL pursuant to the policy, in the event the Second Insured sought to challenge the avoidance of the policy, TAL breached the requirements of the ICA pursuant to s 13(2) of the ICA, in that it failed to comply with the provision requiring each party to the contract of insurance to act towards the other party, in respect of each matter arising under or in relation to the contract of insurance, with the utmost good faith.

D. Harm suffered

41. TAL obtained access to the Second Insured's medical records in the circumstances alleged in C1 and C2 above and TAL avoided the Policy in the circumstances alleged in C3 above.

This Concise Statement has been prepared by D R Luxton and A L Ounapuu, of counsel.

Certificate of lawyer

I, Christine Sheree Small, 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: 13 December 2019

Signed by Christine Sheree Small
Lawyer for the plaintiff, Australian Securities and Investments Commission