

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/12/2019 11:28:03 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID1362/2019
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
NATIONAL AUSTRALIA BANK LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 17/12/2019 11:51:16 AM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

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.

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Concise Statement

Federal Court of Australia
District Registry: VICTORIA
Division: GENERAL

No. of 2019

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)

Defendant

A. INTRODUCTION

1. This claim relates to NAB charging fees for financial planning services pursuant to (or purportedly pursuant to) Ongoing Service Program Customer Agreements in circumstances where, between 17 December 2013 and 4 February 2019 (the **Relevant Period**):
 - 1.1. NAB failed to deliver financial planning reviews or offers of reviews to numerous clients while charging fees under Ongoing Service Agreements (“fees for no service conduct” or **FFNS Conduct**);
 - 1.2. NAB failed to give numerous clients a Fee Disclosure Statement (**FDS**) at all or containing the information required within the meaning and operation of s 962H of the *Corporations Act 2001* (Cth) (the **Act**) before the end of the period prescribed by ss 962G and 962S of the Act (**No FDS Conduct**); and
 - 1.3. NAB failed to establish and maintain compliance measures that ensured, as far as was reasonably practicable, that NAB complied with its contractual obligations to deliver the advice services and its statutory obligations to provide FDSs, and only charged ongoing fees that it was permitted to charge.
2. Consequently, as set out in detail below:
 - 2.1. NAB, in contravention of s 962P, continued charging ongoing fees to retail clients to whom it first provided personal advice after 1 July 2013 (**Post-FOFA Clients**), when it was prohibited from doing so (the **Prohibited Charging**) because the Ongoing Fee Arrangement had terminated by operation of s 962F by reason of NAB having failed to give an FDS in compliance with s 962G of the Act;
 - 2.2. NAB failed to give certain retail clients to whom it had provided personal advice prior to 1 July 2013 (**Pre-FOFA Clients**) an FDS in compliance with s 962S of the Act;
 - 2.3. NAB made false or misleading representations to clients in purportedly compliant FDSs as to the price they had paid for the services, and the services they had received in the previous year, in contravention of ss 12DB(1)(a) and (g) and 12DA of the *Australian Securities and Investments Act 2001* (Cth) (the **ASIC Act**) and s 1041H of the Act;
 - 2.4. NAB engaged in unconscionable conduct from at least 31 May 2018 by continuing to charge fees, while failing to ascertain whether it had complied with its obligations to

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provide the financial services and compliant FDSs, and when it knew that it had (or there was a real risk that it had) taken, and would continue to take payments from clients' accounts when prohibited from doing so (in contravention of s 12CB of the ASIC Act); and

2.5. NAB's systems and controls were defective and not reasonably adequate to prevent the FFNS Conduct, the No FDS Conduct or the Prohibited Charging (in contravention of ss 912A(1)(a), (b), (c), (ca), (e) and (f) of the Act).

B. THE IMPORTANT FACTS GIVING RISE TO THE CLAIMS

3. Throughout the Relevant Period, NAB provided financial advice to clients through its business unit, NAB Financial Planning (**NAB FP**), under Australian financial services licence (**AFS licence**) 230686. NAB and its representatives gave personal advice (within the meaning of s 766B(3) of the Act) to Pre-FOFA Clients and Post-FOFA Clients (collectively, **Clients**).
4. In the period:
 - 4.1. between 1 January 2009 and 30 June 2013, NAB entered into one or more Ongoing Service Program Customer Agreements with certain Pre-FOFA Clients (the **Pre-FOFA OSAs**); and
 - 4.2. from 1 July 2013, NAB entered into one or more Ongoing Service Program Customer Agreements with certain Pre-FOFA Clients and Post-FOFA Clients (the **Post-FOFA OSAs**) (collectively, the **OSAs**).
5. Under its OSAs, NAB charged fees over a period of more than 12 months (**Ongoing Fees**) in return for, among other things, reviews conducted annually or at agreed intervals to track the progress of the Client's strategy having regard to the Client's objectives, financial situation and needs, and a written report on the status of the Client's strategies (the **Review Services**).
6. The Review Services constituted financial services by NAB within the meaning of s 12BAB(1) of the ASIC Act and s 766A of the Act (by reason of it being personal advice within the meaning of s 766B(3)).

NAB's failure to provide an FDS and/or Prohibited Charging of Ongoing Fees in contravention of ss 962S or 962P

7. From 1 July 2013, Pt 7.7A of Div 3 of the Act (introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth)) applied to NAB's OSAs.
8. NAB's Post-FOFA OSAs with Post-FOFA Clients were ongoing fee arrangements within the meaning of s 962A of the Act (**OFAs**), to which the termination and disclosure obligations in Subdivision B of Pt 7.7A applied.
9. NAB's OSAs with Pre-FOFA Clients were OFAs to which Subdivision C of Pt 7.7A applied.
10. Subdivisions B and C of Pt 7.7A obliged NAB to provide Clients with an FDS (the **Disclosure Obligation**), being a written statement that included, in respect of the previous year, the required information of the amount of each ongoing fee paid under the OFA, the services the client was entitled to receive, and the services which the client did receive, before the end of a period, being 30 days (prior to 19 March 2016) or 60 days (from 19 March 2016) following:
 - 10.1. the anniversary of the day on which the OFA was entered, where no FDS had been given since the arrangement was entered into; or
 - 10.2. the anniversary of the day immediately after the last FDS was given to the Client, where an FDS in relation to the OFA had been given since the arrangement was entered into.

11. It was a condition of each Post-FOFA Client's OFA that the arrangement terminated if NAB failed to comply with the Disclosure Obligation in relation to the arrangement: s 962F of the Act.
12. Charging Ongoing Fees after termination of a Post-FOFA Client's OFA was prohibited: s 962P of the Act.
13. On occasions between 28 August 2014 and 23 October 2018, NAB failed to comply with the Disclosure Obligation (and thereby engaged in No FDS Conduct) by:
 - 13.1. not giving Clients any written statement; or
 - 13.2. giving Clients a written statement that failed to include:
 - a) the amount of fees paid under the OFA by the client in the previous year; and/or
 - b) the services that the client received under the OFA during the previous year (including no Review Services, by reason of FFNS Conduct).
14. By reason of No FDS Conduct, Post-FOFA Clients' OFAs were terminated.
15. On each of the dates alleged in Annexure A (column 4), NAB engaged in Prohibited Charging in respect of the Post-FOFA Clients there alleged, following termination of the Post-FOFA OFAs of those Clients consequent upon NAB having engaged in No FDS Conduct with respect to those Clients (being 8700 occasions of Prohibited Charging, in respect of more than \$1.3 million in Ongoing Fees to 446 Post-FOFA Clients), in contravention of s 962P of the Act.
16. By the end of each of the dates alleged in Annexure B (column 3), NAB had engaged in No FDS Conduct in respect of the Pre-FOFA Clients there alleged (being 227 occasions of No FDS Conduct in respect of 204 Pre-FOFA Clients), in contravention of s 962S of the Act.

NAB's false or misleading representations and misleading or deceptive conduct

17. NAB represented in written statements issued for the purpose of meeting the Disclosure Obligation to the Clients alleged in Annexure C (**Annexure C Clients**) that, in the statement period, they had:
 - 17.1. paid Ongoing Fees in the amount referred to in column 3 (a **Price Representation**); and/or
 - 17.2. received the services (including the Review Services) referred to in column 5 (a **Service Representation**).
18. The Price Representations were false and/or misleading by reason that the Annexure C Clients had paid Ongoing Fees in the statement period in the amount referred to in column 4 of that Annexure.
19. The Service Representations were false and/or misleading by reason that, including in circumstances of FFNS Conduct, the Annexure C Clients did not receive the Review Services specified in column 5 of that Annexure.
20. By making each Price Representation and/or Service Representation, NAB, in trade or commerce, in connection with the supply or possible supply of financial services, made false or misleading representations with respect to the price of services contrary to s 12DB(1)(g) of the ASIC Act, and that the services were of a particular standard or quality contrary to s 12DB(1)(a) of the ASIC Act. NAB also engaged in conduct, in relation to a financial service, that was misleading or deceptive, or was likely to mislead or deceive, contrary to s 12DA of the ASIC Act and s 1041H of the Act.

NAB's unconscionable charging of Ongoing Fees

21. As at 31 May 2018, NAB had more than 7,300 Post-FOFA Clients in respect of which it was charging Ongoing Fees in purported reliance on OFAs entered into prior to 31 December 2017 (the **Affected Clients**).

22. From at least May 2013, NAB was aware that FFNS Conduct may be a systemic issue within NAB and other entities within the NAB Group.
23. In June 2015, ASIC wrote to NAB asking it to scrutinise the operations of all its licence-holders and provide a comprehensive statement setting out any instances of FFNS Conduct.
24. In April 2016, NAB's Internal Audit team identified deficiencies in the systems and controls in NAB Wealth (which included NAB FP). Those deficiencies included a lack of clarity about the responsibilities to ensure that Ongoing Fees were appropriately charged to Clients, a lack of controls to ensure that Ongoing Fees were established, maintained and terminated appropriately, and a lack of monitoring over the Ongoing Fees charged.
25. In September 2016, a NAB internal report identified defects in the controls relating to the Disclosure Obligation, and the risk of Prohibited Charging.
26. Between December 2014 and July 2017, NAB, and other AFS licence entities within the NAB Group, lodged five breach reports with ASIC under s 912D of the Act relating to the charging of fees in circumstances where agreed services had not been provided.
27. As at 2 June 2017, having mandated electronic record keeping since 2013, NAB identified that:
 - 27.1. it had no digital record evidencing service delivery in respect of approximately \$54 million in Ongoing Fees which it had received between 1 January 2009 and 31 December 2015 from 47,487 Clients (the **No Digital Evidence Clients**); and
 - 27.2. for a subset of the No Digital Evidence Clients (from whom NAB had received approximately \$28 million in Ongoing Fees), NAB had no digital record evidencing any service having been provided to those clients in any of the annual service periods between 1 January 2009 and 31 December 2015.
28. On or around 7 March 2018, Andrew Hagger, then Chief Customer Officer, Consumer Banking and Wealth Management, received a memorandum seeking his acceptance of a 'residual risk' relating to 'failure to provide contractual service to clients' and to failures relating to 'annual Fee Disclosure Statements'. NAB categorised the severity of the risk as 'critical' and its likelihood as being 'almost certain' within 12 months and therefore designated the risk as being 'excessive' within NAB's policies.
29. On 29 March 2018, NAB received a draft report (and by 25 May 2018, a final report) from PwC highlighting a range of defects in systems and controls which related to the risks of FFNS Conduct, No FDS Conduct and Prohibited Charging.
30. On 31 May 2018, NAB notified ASIC of further significant breaches of its AFS licence obligations in three breach reports lodged under s 912D of the Act. Those breaches related to system failures highlighting a risk of FFNS Conduct, No FDS Conduct and Prohibited Charging and failures of NAB's compliance systems.
31. On or around 2 July 2018, a further memorandum was prepared for provision to Mr Hagger seeking his approval of another 'excessive risk'. The memorandum stated that the control environment for compliance obligations within NAB Advice was 'largely ineffective', including with respect to FFNS Conduct and No FDS Conduct, and was not expected to be brought back within appetite until 30 September 2019.
32. Since at least 31 May 2018, NAB knew that its systems and controls did not provide adequate assurance that they would detect and prevent FFNS Conduct, No FDS Conduct and Prohibited Charging.
33. Throughout the period from 31 May 2018 to 4 February 2019 (or alternatively, on each of the dates on and after 31 May 2018 referred to in column 4 of Annexure A), NAB, in trade or commerce, in connection with the supply or possible supply of financial services, engaged in conduct which was unconscionable in all the circumstances (the **Unconscionable Conduct**), by charging the Affected Clients Ongoing Fees when it:
 - 33.1. knew, or ought reasonably to have known, that (or there was a real risk that):

- a) it had failed to comply with the Disclosure Obligation by providing an FDS to Affected Clients as required by s 962G of the Act, by reason of which:
 - i) those clients' OFAs had terminated; and
 - ii) NAB was no longer entitled, and was prohibited from continuing, to charge those clients Ongoing Fees;
 - b) it had failed, and / or would fail, to provide Affected Clients the Review Services; and / or
 - c) it had already engaged (and would continue to engage) in Prohibited Charging by deducting (or causing to be deducted) Ongoing Fees from Affected Clients' accounts;
- 33.2. had failed to disclose to Affected Clients the matters referred to in 33.1 above; and
- 33.3. did not know, and had not ascertained, whether it was permitted to charge each Affected Client Ongoing Fees.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

34. ASIC seeks declarations to the effect that:
- 34.1. NAB contravened s 962P of the Act on each of the dates in Annexure A (column 4), by charging Ongoing Fees after the termination of the OFAs;
 - 34.2. NAB contravened s 962S of the Act on each of the dates in Annexure B (column 3), by failing to provide a fee disclosure statement within the meaning of s 962H(1) in accordance with the Disclosure Obligation;
 - 34.3. by making the Price Representations and Service Representations to the Annexure C Clients, NAB, in trade or commerce, in connection with the supply or possible supply of financial services, made false or misleading representations with respect to:
 - a) the price of services in contravention of ss 12DA and 12DB(1)(g) of the ASIC Act and s 1041H of the Act; and
 - b) the standard or quality of services in contravention ss 12DA and 12DB(1)(a) of the ASIC Act and s 1041H of the Act;
 - 34.4. NAB contravened s 12CB of the ASIC Act by reason of paragraph 33 above; and
 - 34.5. in the circumstances alleged, NAB contravened ss 912A(1)(a), (b), (c), (ca), (e) and (f) of the Act by:
 - a) failing to do all things necessary to ensure that the financial services covered by its AFS licence were provided efficiently, honestly and fairly;
 - b) failing to comply with the conditions on the licence;
 - c) failing to comply with the financial services laws;
 - d) failing to take reasonable steps to ensure that its representatives complied with the financial services laws;
 - e) failing to maintain the competence to provide financial services; and
 - f) failing to do all things necessary to ensure that its representatives were adequately trained, and were competent, to provide financial services.
35. ASIC also seeks:
- 35.1. pecuniary penalties in respect of the contraventions of s 962P and s 962S of the Act and ss 12CB and 12DB of the ASIC Act;
 - 35.2. orders requiring NAB to implement a comprehensive compliance program; and
 - 35.3. costs.

D. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

36. **Prohibited Charging:** On each of the dates in Annexure A (column 4), NAB continued to charge the Annexure A Post-FOFA Clients Ongoing Fees after the termination of their OFAs, in contravention of s 962P of the Act.
37. **No FDS Conduct:** By the end of each of the dates in Annexure B (column 3), NAB had failed to provide Pre-FOFA Clients with a compliant FDS in respect of their OFA, in contravention of s 962S of the Act.
38. **False or Misleading Representations:** By making the Price Representations and Service Representations, NAB made false or misleading representations with respect to the price of services and the standard or quality of services, and engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in breach of ss 12DB(1)(a) and (g) and 12DA of the ASIC Act and s 1041H of the Act.
39. **Unconscionable Conduct:** By engaging in the Unconscionable Conduct referred to in paragraph 33 above, NAB contravened s 12CB of the ASIC Act.
40. **Breach of Financial Service Licence Obligations:** By failing to take adequate action to detect and prevent the risks of FFNS Conduct, No FDS Conduct and Prohibited Charging, NAB contravened its obligations under ss 912A(1)(a), (b), (c), (ca), (e) and (f) of the Act.

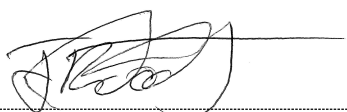
E. THE ALLEGED HARM SUFFERED FROM THE CONDUCT

41. The Prohibited Charging and Unconscionable Conduct caused harm to the Clients listed in Annexure A by depriving them of the value of the fees charged (during such period until they were remediated) which they were not obliged to pay.
42. The No FDS Conduct, Price Representations and Service Representations and Unconscionable Conduct caused harm to the Clients by impairing their ability to make decisions accurately in their own best interests regarding obtaining financial advice.

Certificate of lawyer

I, James Rutherford Docherty, 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 pleading.

Date: 17 December 2019



Signed by James Docherty

Lawyer for the Plaintiff

This concise statement was prepared by Peter Collinson QC, Christopher Archibald QC, Christina Klemis and Alex James-Martin.