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Details of Filing

Document Lodged: Concise Statement
File Number: QUD54/2021
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 24/02/2021 4:30:15 PM AEST

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: QUEENSLAND
DIVISION: GENERAL

NO QUD OF 2021

IN THE MATTER OF NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)
Defendant

A IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. Between at least 20 July 2007 and 22 February 2019 (**Relevant Period**) the Defendant (**NAB**) charged fees for making periodical payments (**PP Fees**) that it was not entitled to charge under its standard contractual terms (**PP Fees overcharging**). Between 25 February 2015 and 22 February 2019 (**Penalty Period**), NAB engaged in PP Fees overcharging on at least 195,305 occasions with a total value of \$365,454.60 involving 4,874 personal banking customers and 913 business banking customers. **Annexure A** sets out information on the value and number of occasions on which NAB engaged in PP Fees overcharging during the Penalty Period.
2. Between at least January 2017 and 22 February 2019, NAB continued to charge customers PP Fees even though it knew that PP Fees overcharging was occurring and it did not have systems to prevent those fees being charged incorrectly. NAB did not change its systems in relation to the PP Fees to prevent overcharging until 22 February 2019, when it ceased to charge customers PP Fees.
3. As at June 2020, NAB has paid or intends to pay remediation in the amount of approximately \$2,693,210 (plus compensatory interest) in respect of 1,273,563 transactions for PP Fees charged during the Relevant Period as part of its PP Fees remediation program involving 13 types of personal accounts and 7 types of business accounts.

Background to the conduct

4. At the date of filing, NAB is one of the five largest listed companies by market capitalisation in Australia. As at close of market on 22 February 2021, NAB's market capitalisation was approximately \$81.373 billion. As at 30 June 2020, NAB's total assets exceeded \$866 billion. NAB at all material times held Australian financial services licence number 230686.
5. NAB offered bank accounts to its customers on standard contractual terms throughout the Relevant Period. The standard terms relevant to Personal Banking and Business Banking are identified in **Annexure B**. At all times during the Relevant Period, NAB had adopted the Banking Code of Practice (as amended from time to time) published by the Australian Banking Association and which applied to NAB's Personal Banking and Business Banking accounts.
6. NAB's standard terms provided that customers would be entitled to PP Fee exemptions for certain transactions during the Relevant Period:
 - 6.1. For personal banking customers, PP Fee exemptions applied from personal accounts, identified in **Annexure C**, to certain types of accounts identified in **Annexure B**.

- 6.2. For business banking customers, PP Fee exemptions applied from certain types of business accounts identified in **Annexure B** to business loans.
7. During the Relevant Period, NAB's standard terms for each of Personal Banking and Business Banking, provided relevantly that NAB would charge \$1.80 for periodical payments to other accounts within NAB, and \$5.30 for periodical payments to accounts at another bank.
 8. From at least 20 July 2007, NAB charged some customers: (a) a PP Fee of \$1.80 or \$5.30 when they were entitled to a PP Fee exemption under NAB's standard terms; or (b) a PP Fee of \$5.30 when the correct fee under NAB's standard terms was \$1.80.
 9. From at least 20 July 2007, when NAB charged a PP Fee to a customer, that fee would be shown on the customer's bank statement as "Incl Tfr Fee \$[amount of fee]" against the transfer of funds transaction. The relevant notifications which appeared on customer bank statements are set out in **Annexure A** in respect of each type of PP Fee overcharging as described above. Otherwise, the bank statements did not refer to the PP Fee charges, including in the "transaction summary" part of the bank statement which (when present) provides to customers a summary of the fees and charges levied against the account. None of the statements contained any reason why the fee was charged, or provided any information about the circumstances in which the customer would be entitled to an exemption from a PP Fee or the amounts of PP Fees to be charged in particular circumstances.
 10. During the Relevant Period, PP Fee arrangements could be established in a NAB branch by a NAB employee. To establish a periodical payment, NAB required the customer to complete and sign a Periodical Payment Authority Form to authorise the periodical payment from their account. In some instances, a separate periodical payment authority was used to authorise the periodical payment for loans. NAB staff were required to manually enter the correct status for the periodical payment into NAB's computer system when they set up the periodical payment, which if entered incorrectly, could result in customers being wrongly charged PP Fees.

NAB identification of PP Fees overcharging

11. NAB first identified the risk of PP Fees overcharging in September 2016, following a media release issued by ASIC in relation to another Australian bank concerning an issue similar to the PP Fees overcharging.
12. By the end of October 2016, NAB had identified it was charging PP Fees in error to both Business Banking and Personal Banking customers.
13. Although NAB initially (in 2017) decided that the PP Fees overcharging affected customers who had established a PP Fee arrangement from 2014, from 23 March 2018, NAB knew that the PP Fees overcharging affected customers who had established a PP Fee arrangement from at least February 2002.
14. It took NAB until July 2018 to (a) notify ASIC of the PP Fees overcharging; (b) notify any customer of the PP Fees overcharging or their entitlement or potential entitlement to remediation; and (c) begin remediating customers in relation to the PP Fees overcharging. NAB notified ASIC and customers of the PP Fees overcharging, and began remediation of customers, based on an incorrect view that the data available to it about establishment dates for periodical payments was unreliable, and so it calculated remediation for customers for a maximum period of seven years from October 2011.

Notification of SERP

15. From the time NAB identified the PP Fees overcharging at the end of October 2016, NAB considered whether to refer the PP Fees overcharging to the Significant Events Review Panel (**SERP**), being the body within NAB that, at November 2016, would determine whether an incident was reportable to ASIC under s 912D of the *Corporations Act 2001* (Cth) (**Corporations Act**).
16. While preparing for the SERP meeting, NAB identified that the PP Fees overcharging had been happening since March 1999. On 7 November 2016, NAB determined that it would not take

the matter to SERP, but would continue to identify and remediate affected customers with a view to possibly taking the matter to SERP at a later stage. At that time, NAB believed that the total of all PP Fees charged over the previous four years was only \$64,000 in revenue.

17. It was not until 20 June 2018 that the PP Fees overcharging was determined by SERP to be reportable under s 912D of the Corporations Act, and not until 4 July 2018 that the PP Fees overcharging was reported to ASIC, and not until mid-July 2018 that NAB began remediating customers overcharged PP Fees from 2011 (**Initial Remediation Program**).

Initial Remediation Program

18. The customers within the scope of the Initial Remediation Program were derived from two point in time data extracts created by NAB in September 2016 and January 2018 for the purposes of determining whether it had incorrectly established PP Fee arrangements.
19. NAB's breach report lodged on 4 July 2018 related to those customers it had identified from the September 2016 and January 2018 data extracts.
20. The Initial Remediation Program was undertaken on the basis of a number of assumptions, and in some cases those assumptions were used due to NAB's incorrect understanding about its data. For customers with PP Fee arrangements in place since 2014, NAB assumed that the incorrect fee configuration had been in place since the PP Fee arrangement commenced, and for customers with the PP Fee arrangements in place before 2014, NAB provided refunds for a maximum of seven years (between 26 October 2011 and 26 October 2018).
21. Until July 2018, NAB did not have a system in place to detect whether a customer was being charged correctly for PP Fees. In July 2018, NAB implemented a "monthly exception reporting" process, where it would obtain data on a monthly basis to help it to identify incorrect PP Fee configurations as at the date of the extract, and enable it to correct them. In certain scenarios, NAB's exception reporting process would not have identified incorrect PP Fee configurations.
22. The incorrect charging did not cease entirely until NAB removed PP Fees for all periodical payments on 22 February 2019.

NAB's systems were inadequate

23. At all times during the Relevant Period, NAB did not have adequate systems or processes in place to ensure that wrongful charging of PP Fees did not occur, to detect wrongful charging of PP Fees when it did occur; or to identify and remediate customers affected by wrongful charging of PP Fees.
24. At all times during the Relevant Period, NAB did not have adequate systems in place to ensure that its employees could access the data relevant to PP Fees to properly and fully remediate affected customers. Between December 2016 and February 2019, the employees undertaking the work to identify the customers who were affected by the PP Fees overcharging did not have the skills to know how to obtain the data relevant to this issue and incorrectly understood that the data challenges were insurmountable, and that NAB did not have the data to be able to identify the start date of either the pre-2014 or post-2014 arrangements.
25. NAB's inadequate record-keeping practices, inadequate systems and lack of skilled employees prevented NAB from identifying all customers affected by the PP Fees overcharging, caused NAB to delay remediating affected customers and prevented NAB from ceasing charging customers PP Fees incorrectly, and continued to cause harm to those customers.

Payment of remediation

26. On 13 July 2018, NAB commenced remediation payments to customers under the Initial Remediation Program. NAB remediated at least 4,579 customers a total of \$688,318.41 under the Initial Remediation Program.
27. On 28 February 2019, NAB informed ASIC that it could access the data required to identify all customers who had been overcharged PP Fees, enabling it to remediate customers who were affected by the overcharging as far back as August 2001 (**Supplementary Remediation**

Program). As at 4 December 2020, NAB had paid \$7,714,314.48 under the Supplementary Remediation Program and some payments were still to occur.

28. Not all customers who were overcharged PP Fees were remediated. Remediation payments were not made to customers who did not have an open NAB account and NAB was unable to locate those customers. Where a former customer's remediation payment was less than \$20, NAB stated it would pay the amount directly to charity without attempting to contact the customer.

B RELIEF SOUGHT FROM THE COURT

29. The plaintiff seeks the relief set out in the accompanying originating process.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

30. On each occasion that NAB charged a PP Fee or notified the charging of a PP Fee to the customer, NAB expressly or impliedly represented in trade or commerce in connection with the supply or possible supply of financial services that it had a contractual entitlement to do so, when it did not.

31. By charging or notifying the customer of charging PP Fees, NAB, acting in trade or commerce in connection with the supply or possible supply of financial services, on each occasion during the Relevant Period:

31.1. engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, and/or made false or misleading representations concerning the existence or effect of a condition, right or remedy in contravention of ss 12DA and/or 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*; and

31.2. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

32. Further, by its conduct:

32.1. in continuing to charge PP Fees to customers from in or about January 2017, when NAB knew about the PP Fees overcharging until in or about July 2018, when a monthly exception process was implemented to identify and correct wrongly charged PP Fees; and

32.2. additionally or alternatively, in failing to inform any of its customers during this period about the PP Fees overcharging, or suggest that customers review the PP Fees charged to their accounts;

NAB:

32.3. engaged in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act; and

32.4. breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

33. Further, by its conduct:

33.1. during the Relevant Period of imposing PP Fees on customers when it had no contractual entitlement to do so;

33.2. additionally or alternatively, during the Relevant Period of failing to have adequate systems and processes to:

33.2.1. ensure that PP Fees overcharging did not occur;

33.2.2. detect PP Fees overcharging when it did occur; and

33.2.3. identify and remediate customers affected by PP Fees overcharging;

33.3. additionally or alternatively, during the period of around January 2017 to July 2018:

- 33.3.1. in continuing to impose PP Fees on customers when NAB knew about the PP Fees overcharging;
- 33.3.2. in failing to inform any of its customers about the PP Fees overcharging, or suggest that customers review the PP Fees charged to their accounts;

NAB breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

- 34. The conduct alleged in the preceding paragraph contravened s 912A(1)(a) because it fell below the standard of conduct the public is entitled to expect from a major Australian bank.

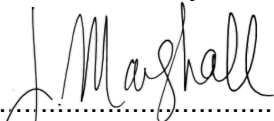
D. HARM SUFFERED

- 35. NAB customers suffered financial loss and inconvenience as a result of the conduct because they were required to pay PP Fees that NAB was not entitled to charge under its standard terms.
- 36. Due to NAB's inadequate record-keeping practices, inadequate systems and lack of skilled employees, the process of compensating customers has taken longer than was reasonable.
- 37. NAB has not compensated all customers who were incorrectly charged PP Fees because funds have not reached some customers. ASIC is unable to precisely quantify how many affected customers have not been compensated.

CERTIFICATE OF LAWYER

I, Jody Marshall, 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: 24 February 2021



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Jody Marshall
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Plaintiff

Annexure A: Value of and occasions fee exemptions not applied and fees incorrectly charged

No	Account type	Time period	Type of PP Fee overcharging	Notification text	Value of fees incorrectly charged	Occasions fees incorrectly charged
1.	Personal	25 February 2015 – 22 February 2019	Failure to apply fee exemption	“Incl Tfr Fee \$5.30” “Incl Tfr Fee \$1.80”	\$306,213.80	169,796
			Incorrect fee charged	“Incl Tfr Fee \$5.30”	\$15,694	4,484
2.	Business	25 February 2015 – 22 February 2019	Failure to apply fee exemption	“Incl Tfr Fee \$5.30” “Incl Tfr Fee \$1.80”	\$31,807.80	17,671
			Incorrect fee charged	“Incl Tfr Fee \$5.30”	\$11,739	3,354

Annexure B: Terms and conditions relevant to PP Fee overcharging

Product	Summary of Periodical Payment Fees in NAB's Personal Fees Guide in the period from 20 July 2007 to 22 February 2019		
Personal Banking		Charge / Fee	Period PP Fee applied
	Establishment (of PP arrangement)	Free	20 July 2007 to 22 February 2019
	To NAB Home Loan	Free	20 July 2007 to 22 February 2019
	To NAB Personal Loan	Free	20 July 2007 to 22 February 2019
	To NAB Goal Saver Account	Free	20 July 2007 to 31 August 2011
	To NAB Smart Reward Saver	Free	20 July 2007 to 24 November 2013
	To NAB Smart Junior Saver	Free	20 July 2007 to 24 November 2013
	To NAB Reward Saver	Free	25 November 2013 to 22 February 2019
	To other accounts at same or other NAB branch	\$1.80	20 July 2007 to 22 February 2019
	To account at another bank	\$5.30	20 July 2007 to 22 February 2019

Product	Summary of Periodical Payment Fees in the Business Fees Guide from 20 July 2007 to 22 February 2019		
Business Banking	Periodical Payments		
	Payable on each payment made from your account under a Periodical Payment Authority		
		Charge / Fee (per payment)	Period PP Fee Exemption applied
	To accounts at the same branch or another branch	\$1.80	20 July 2007 to 22 February 2019
	To accounts at another financial institution	\$5.30	20 July 2007 to 22 February 2019
	Exemptions: Repayments to NAB business loans from the following accounts:		
	NAB Business Cheque Account	Free	20 July 2007 to 30 April 2010
	NAB Business Cheque Account (\$0 Monthly Fee Option)	Free	1 May 2010 to 14 August 2016
	NAB Business Everyday Account (\$0 Monthly Fee Option)	Free	7 March 2016 to 22 February 2019
	NAB Business Cheque Account (\$10 Monthly Fee Option)	Free	1 May 2010 to 14 August 2016
NAB Business Everyday Account (\$10 Monthly Fee Option)	Free	7 March 2016 to 22 February 2019	
NAB Business Management Account	Free	20 July 2007 to 6 March 2016	
NAB Business Farm Management Account	Free	20 July 2007 to 22 February 2019	

Annexure C: Summary of personal accounts subject to NAB's Personal Product Terms and to which the Personal Fees Guide applied from 20 July 2007 to 22 February 2019

	Personal accounts	Date	Document ID
1.	NAB eBanking	8 October 2007 to 21 January 2010	NAB.600.001.8103 NAB.600.001.7977
2.	NAB Classic Banking	8 October 2007 to 22 February 2019	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044 NAB.600.001.1941 NAB.600.001.2009 NAB.600.001.2260 NAB.600.001.2112 NAB.600.001.2476 NAB.600.001.1865 NAB.600.001.2552 NAB.600.001.2184 NAB.600.001.2332 NAB.600.001.5793 NAB.600.001.5873 NAB.600.001.5705 NAB.600.001.6186
3.	NAB Gold Banking	8 October 2007 to 9 August 2012	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044 NAB.600.001.1941
4.	NAB Concession Card Account	8 October 2007 to 17 March 2013	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044

	Personal accounts	Date	Document ID
			NAB.600.001.1941 NAB.600.001.2009
5.	NAB Retirement Account	8 October 2007 to 22 February 2019	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044 NAB.600.001.1941 NAB.600.001.2009 NAB.600.001.2260 NAB.600.001.2112 NAB.600.001.2476 NAB.600.001.1865 NAB.600.001.2552 NAB.600.001.2184 NAB.600.001.2332 NAB.600.001.5793 NAB.600.001.5873 NAB.600.001.5705 NAB.600.001.6186
6.	NAB Smart Junior Saver	8 October 2007 to 15 December 2013	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044 NAB.600.001.1941 NAB.600.001.2009 NAB.600.001.2260
7.	NAB Smart Reward Saver	8 October 2007 to 15 December 2013	NAB.600.001.8103 NAB.600.001.7977 NAB.600.001.2408 NAB.600.001.2044 NAB.600.001.1941

	Personal accounts	Date	Document ID
			NAB.600.001.2009 NAB.600.001.2260
8.	NAB Passbook Account	8 October 2007 to 21 January 2010	NAB.600.001.8103 NAB.600.001.7977
9.	NAB Passbook No-Interest Account	8 October 2007 to 21 January 2010	NAB.600.001.8103 NAB.600.001.7977
10.	NAB FlexiAccount	8 October 2007 to 23 May 2008	NAB.600.001.8103
11.	NAB Clear Banking	24 May 2008 to 21 January 2010	NAB.600.001.7977
12.	NAB Gold Banking-Private	10 August 2012 to 6 May 2018	NAB.600.001.2009 NAB.600.001.2260 NAB.600.001.2112 NAB.600.001.2476 NAB.600.001.1865 NAB.600.001.2552 NAB.600.001.2184 NAB.600.001.2332 NAB.600.001.5793 NAB.600.001.5873
13.	NAB Reward Saver	16 December 2013 to 22 February 2019	NAB.600.001.2112 NAB.600.001.2476 NAB.600.001.1865 NAB.600.001.2552 NAB.600.001.2184 NAB.600.001.2332 NAB.600.001.5793 NAB.600.001.5873 NAB.600.001.5705 NAB.600.001.6186