

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/03/2021 12:14:06 PM ACDT 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: SAD25/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
STATEWIDE SUPERANNUATION PTY LTD
Registry: SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/03/2021 12:22:39 PM ACDT

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.

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.



Federal Court of Australia

District Registry: South Australia

Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

STATEWIDE SUPERANNUATION PTY LTD (ACN 008 099 223)

Defendant

A. INTRODUCTION

1. The defendant (**Statewide**) is the trustee and registrable superannuation entity licensee in respect of the Statewide Superannuation Trust (ABN 54 145 196 298) (**Fund**), a Fund with approximately 160,000 member accounts as at 30 June 2019. It holds Australian Financial Services Licence 243171 (**AFSL**). This claim concerns Statewide between around May 2017 and June 2020 (the **Relevant Period**):
 - a. issuing correspondence to certain Fund members expressly or impliedly representing current insurance coverage; and
 - b. deducting insurance premia from the superannuation accounts of certain Fund members,at times when those members did not have insurance cover.
2. ASIC claims contraventions of ss 912A(1)(a), 912A(1)(c) and 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), and ss 12DA(1) and 12DB(1)(g) and (i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) in relation to the above. Further, ASIC alleges that Statewide failed to lodge a written report with ASIC in relation to these matters in the time required by, and in contravention of, ss 912D(1B) and 912D(3) of the *Corporations Act*.
3. ASIC seeks declarations, pecuniary penalties, costs and ancillary relief against Statewide: see the originating process.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIMS

4. The terms of superannuation products offered within the Fund are contained in the Fund trust deed, product disclosure statements and other member information documents issued by Statewide from time to time. The terms include the provision of insurance within superannuation products.
5. At all relevant times, Statewide maintained group life and income protection insurance policies with MetLife Insurance Limited (ABN 75 004 274 882) (collectively, **Statewide Insurance Policies**) under which members of the Fund were eligible to be insured pursuant to policy terms from time to time.
6. Insurance cover for death, total and permanent disablement and income protection was provided to members of the Fund (with certain exceptions) during the Relevant Period. A member could apply to reduce or cancel cover by notification to Statewide. The cost of member insurance cover was deducted monthly by Statewide from the member's superannuation account.

7. During the Relevant Period, the Statewide Insurance Policies included terms automatically ceasing insurance cover for a member, subject to reinstatement, at each of the following times (among others):
 - a. on the date that there was insufficient money in the member's account to cover the next premium payment (**Nil Balance Rule**); and
 - b. (from 1 July 2016 until 1 November 2018, employer-sponsored members) on the date that was 3 months after the end of the quarter in which an employer-sponsored member's account balance fell below \$4,000 and had not received an on-time employer contribution for 10 months, provided that neither an on-time employer contribution, nor a rollover from another superannuation fund to increase the member's account balance to more than \$4,000, had been received in the first-mentioned 3 month period (**U\$4K Rule**).
8. In around May 2017, Statewide changed its superannuation administration system to a system known as Acurity. Correspondence to and charging of members occurred through operation of, and with regard to data recorded in, the Acurity system. Member data was required to be migrated and coding developed and implemented for the administration of Statewide Insurance Policies within that system. The U\$4K Rule was manually administered by Statewide until June 2018, when it was administered through the Acurity system.
9. The data migration of insurance data and coding of insurance rules into Acurity was not completed correctly. Statewide did not conduct structured, successful testing of insurance data and end of month processes by which insurance statuses were updated and premia deducted within Acurity prior to its implementation. The insurance coverage status of certain members within Acurity could, and did, differ from their status under the Statewide Insurance Policies during the Relevant Period.
10. On and from shortly after May 2017, and in any event by around November 2017, Statewide personnel engaged with Acurity's service provider to correct errors in member insurance data and status within Acurity. This engagement occurred for 2 years. Statewide did not maintain policies or structures requiring managerial authorisation or consideration of the implementation of changes within Acurity. As at May 2020, insurance status errors continued to exist in Acurity.

Representations to members about insurance and charging premia for cancelled cover

11. During the Relevant Period, insurance cover of approximately 12,500 Fund members ceased due to operation of the Nil Balance Rule or U\$4K Rule under the terms of the Statewide Insurance Policies, without the corresponding insurance status update in Acurity (those members, **Affected Members**).
12. During the Relevant Period, Statewide deducted monthly insurance premia from the superannuation accounts of certain Affected Members whose insurance cover had ceased by operation of either the U\$4K Rule or the Nil Balance Rule, and where the Affected Member did not otherwise have insurance cover under Statewide Insurance Policies (**Mischarging Conduct**). It did so in respect of approximately 2,000 Affected Members in the year ending 30 June 2018, 3,000 Affected Members in the year ending 30 June 2019 and 700 Affected Members in the year ending 30 June 2020.
13. During the Relevant Period, Statewide issued written correspondence to certain Affected Members in standard form (save as to insertion of data in respect of that member) representing that the member held insurance cover (a **Currently Insured Representation**), at times when he/she did not hold cover under the Statewide Insurance Policies. This occurred in:
 - a. annual statements for the years ending 30 June 2018 and 2019 that stated insurance cover of greater than nil as at 30 June, sent to approximately 276 Affected Members for the year ending 30 June 2018 and 2,744 Affected Members for the year ending 30 June 2019;
 - b. annual statements to Affected Members referred to in paragraph 12, for the years ending 30 June 2018 and/or 2019, which expressed that monthly insurance premia had

been deducted from the Affected Member's superannuation account after the date that insurance cover had ceased;

- c. letters warning that existing insurance cover would cease or be cancelled in accordance with the U\$4K Rule or the Nil Balance Rule, which requested members take steps if they wished to maintain their insurance cover (**U\$4K Rule Warning Letter** and **Nil Balance Warning Letter** respectively), sent to approximately:
 - i. 2,310 Affected Members in the year to 30 June 2017;
 - ii. 3,417 Affected Members in the year to 30 June 2018;
 - iii. 4,592 Affected Members in the year to 30 June 2019;
 - iv. 500 Affected Members in the year to 30 June 2020; and
- d. letters sent indicating that the member held insurance cover and that, unless specified action was taken before a future date, that insurance cover would be cancelled pursuant to the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (**PYS Warning Letter**), sent to approximately 4,892 Affected Members by letters dated between April 2019 and 30 June 2019 and to approximately 185 Affected Members by letters dated between 1 July 2019 and 30 June 2020.

Breach reporting by Statewide

14. From at least January 2017, a small group of senior Statewide executives known internally as the Leadership Team (**Leadership Team**), which included the CEO, CFO, CRO and General Counsel, met weekly to discuss and coordinate with one another matters of importance to Statewide's operations.
15. Since at least November 2018, the Leadership Team, with the CRO, was actually authorised and obliged pursuant to Statewide policy (including the Incident and Breach Reporting Policy (**IBR Policy**) approved by Statewide's board) to determine whether a matter was reportable to ASIC pursuant to s 912D of the Corporations Act. At all relevant times, the IBR Policy was known to Leadership Team members. The IBR Policy required reporting determinations to be made within 10 business days of the Leadership Team becoming aware of an incident occurring.
16. On around 20 September 2019 Statewide lodged a breach report with ASIC that identified a contravention of s 912A(1)(a) of the Corporations Act occurring on 19 June 2019 in respect of Currently Insured Representations to up to 12,500 Affected Members, of which breach Statewide was expressed to have become aware on 10 September 2019 (**Breach Report**). No written report of these matters was made to ASIC prior to 20 September 2019.

Statewide awareness of matters relevant to breach reporting

17. By no later than around 22 July 2019, or in the alternative by no later than around 20 August 2019, Statewide, through its Leadership Team, became aware of a significant breach by it of obligations not to mislead Fund members and to take all necessary steps to ensure that financial services covered by its licence were provided efficiently, honestly and fairly, in respect of Currently Insured Representations and Affected Members, having regard to the following:
 - a. the terms of the IBR Policy;
 - b. on and from at least November 2017, the identification to the Leadership Team of the existence of ongoing errors in the insurance data of Fund members and the completion of 'data fixes' within Acurity, including several Leadership Team members attending a meeting with Statewide insurance personnel in August 2018 in which incorrect correspondence to members was a topic;
 - c. in May 2018, the Leadership Team identified Mischarging Conduct in respect of approximately 1,300 Fund members, due to discrepancy between Acurity and Statewide Insurance Policies. Statewide did not notify those members of the Mischarging Conduct in or around May 2018, Statewide did not prevent continued charging for ceased

insurance cover for all such members, and it did not prevent these members from subsequently receiving erroneous Currently Insured Representations;

- d. by around March 2019, Statewide had increased its internal risk rating for its insurance team and had conducted meetings with the service provider of the Acuity system to, according to Statewide's head of insurance, "*get a better understanding of what exactly is the root cause of the ongoing system failures*". This resulted in ongoing briefings to Leadership Team meetings on matters relating to insurance and remediation by way of 'data fixes';
 - e. by around late June 2019, Statewide's General Counsel and CRO were informed by Statewide's head of insurance that erroneous Currently Insured Representations had been made, and on and from around 5 July 2019, as well as in informal discussions throughout July 2019, Leadership Team members met and discussed the same;
 - f. on around 7 July 2019, a briefing paper was distributed to Statewide's General Counsel and CRO, expressed to brief the Leadership Team and whose content was distributed to the Leadership Team, on a recent 'data fix' of around 12,800 member insurance records identified in mid-2018. The paper identified that it was '*highly likely that a number of members may have received statements inaccurately representing their insurance status in 2018 and, if not remediated in time, may have incorrect information in 2019*';
 - g. between around 9 and 18 July 2019, Statewide's General Counsel identified, through personal review of a sample of insurance records, that the U\$4K Rule was not being applied correctly and that, in fact, Currently Insured Representations had been made that were in error;
 - h. by 18 July 2019, a review of approximately 12,800 member records was contemplated and by 22 July 2019, Statewide's General Counsel had sent correspondence copied to the CFO which stated that, '*It is my view that this should be your top priority (so that we can correct misrepresentations to members in the shortest possible timeframe)*';
 - i. on 22 July 2019, the General Counsel circulated correspondence to approximately 5 other Leadership Team members setting out categories of potentially Affected Members who received Currently Insured Representations in annual statements and other correspondence;
 - j. by around 22 July 2019, it was known to the Leadership Team that there were approximately 12,500 members whose records had not been correctly updated in Acuity and who may have received incorrect correspondence, involving potential financial loss to Fund members; and
 - k. by around 20 August 2019, a further paper had been circulated to Statewide's CRO, CEO and CFO, for presentation to the Statewide board, containing substantially similar information as was ultimately contained in the Breach Report.
18. Statewide's Leadership Team continued to discuss and consider Currently Insured Representations made to Affected Members throughout August and September 2019, including development of a member communications plan and a remediation plan. On or around 10 September 2019, the Leadership Team deferred a decision as to whether a breach report was required. On around 19 September 2019, the Leadership Team met and determined to lodge a breach report to ASIC.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

19. ASIC seeks the declaratory, pecuniary penalty order and other relief set out in the accompanying originating process. ASIC reserves the right to be heard on the form of the same at the conclusion of the evidence to reflect the totality of the evidence adduced at the hearing.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

20. Chapter 7 of the Corporations Act and Part 2, Division 2 of the ASIC Act impose important consumer-protective obligations upon financial services licensees. At all relevant times, Statewide arranged for Fund members to acquire and maintain an interest in an insurance

product within the superannuation product offered by Statewide. It administered the payment of insurance premia by members of the Fund.

21. If the holder of an AFSL offers to clients financial services covered by its licence, it must do all things necessary to ensure those financial services are provided efficiently, honestly and fairly (s 912A(1)(a) Corporations Act). It must not engage in misleading or deceptive conduct in relation to those services or make false or misleading representations in connection with the supply of financial services (s 1041H Corporations Act, ss 12DA, 12DB ASIC Act). Representing that insurance cover is current, when it has ceased, is misleading or deceptive.
22. When Statewide issued annual statements that described monthly deduction of insurance premia on dates when insurance was not current, it conveyed false or misleading representations that Statewide was entitled to deduct, and the relevant Affected Member was required to pay, insurance premia on each of the dates stated (s 12DB(1)(i) ASIC Act), and that the amount the Affected Member was then obligated to pay as a member of the Fund included those insurance premia (s 12DB(1)(g) ASIC Act).
23. Additionally, s 912D(1B) of the Corporations Act required Statewide to lodge a written report with ASIC on matters of significant breach of obligations under relevant legislation, as soon as practicable and in any event within 10 business days of becoming aware of that breach. By reason of the awareness of members of Statewide's Leadership Team attributable to Statewide by reason of the common law and s 769B of the Corporations Act, Statewide's 20 September 2019 Breach Report was lodged late.

E. ALLEGED HARM

24. Deducting premia from the accounts of superannuation members for cancelled insurance cover deprived those members of the value of premia charged (and returns on those amounts) pending any remediation by Statewide.
25. Representing to members that they held insurance when they did not gave rise to a risk that the member may have been ineligible to make a claim should a claim event have occurred. Statewide's conduct did not promote confident and informed decision making by its members and had the potential to distort consumer choice. Members may have chosen not to seek insurance cover elsewhere having regard to the representations made. A member may also have been exposed to a risk that he or she was unable to obtain insurance elsewhere.
26. Further, a lack of timely self-reporting of certain breaches affects sound regulation of the financial services sector by impacting on timely detection of non-compliant behaviour.

Date: 4 March 2021

Certificate of lawyer

I, Hugh Daniel Copley 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 document.

Date: 4 March 2021



Signed by Hugh Copley

Lawyer for the Plaintiff