



ASIC
Australian Securities &
Investments Commission



S02589480

INFRINGEMENT NOTICE

Section 12GX of the *Australian Securities and Investments Commission Act 2001* (Cth)

Date of giving this notice: 17 October 2023

Unique identification code: S02589480

TO: H.E.S.T. Australia Ltd (ACN 006 818 695) (**HESTA**)

1. ASIC gives this infringement notice under section 12GX of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
2. Payment for this infringement notice is due on 14 November 2023, being 28 days from the day after this notice is given, unless the time is extended, an arrangement is made for payment by instalments or the notice is withdrawn.
3. ASIC has reasonable grounds to believe that HESTA has contravened an infringement notice provision as follows:
 - (a) From around 21 October 2022 to 20 June 2023 (**Relevant Period**), HESTA contravened section 12DB(1)(e) of the ASIC Act by, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services, making a false or misleading representation that services have particular performance characteristics.
 - (b) HESTA is the trustee of the superannuation fund, HESTA (Superannuation Fund Number 129638949), which offers consumers a range of investment options, including the 'Balanced Growth Option' (**Option**).
 - (c) HESTA developed, approved and published during the Relevant Period a sponsored advertisement for the Option on Facebook and Instagram (the **advertisement**) which included the statement:

"Make an impact on your future savings and the world around you. Our Balanced Growth option has returned 8.53% average returns p.a. over the past 10 years."
 - (d) Versions of the advertisement were published between 21 October 2022 and 26 October 2022, 17 November 2022 and 28 February 2023, 7 March 2023 and 20 June 2023, and 5 May 2023 and 20 June 2023. Each version contained the 8.53% figure.
 - (e) HESTA made a representation about financial services having a particular performance characteristic that was false or misleading in contravention of section 12DB(1)(e) of the ASIC Act because:
 - i. the advertisement conveyed that the Option returned an average of 8.53% per annum over the 10 years immediately prior;
 - ii. the 8.53% figure was for the 10-year period ending 30 June 2022, and not for the 10-year period immediately prior to the Relevant Period (being 21 October 2022 to 20 June 2023);

- iii. in respect of the versions of the advertisement published:
 - a. as at 21 October 2022, the latest available figure was 8.01% being 0.52% less than the advertised figure;
 - b. as at 17 November 2022, the latest available figure was 8.23% being 0.3% less than the advertised figure;
 - c. as at 7 March 2023, the latest available figure was 7.87% being 0.66% less than the advertised figure; and
 - d. as at 5 May 2023, the latest available figure was 7.99% being 0.54% less than the advertised figure,and, during the Relevant Period, updated figures were available to HESTA on a monthly basis; and
- iv. the difference between the figure published in the advertisement and the latest available figure was likely to mislead consumers as to the performance of the Option.

Amount payable under this notice

- 4. The amount payable under this notice in relation to the alleged contravention is \$16,500. This amount can be paid using the method detailed in the covering letter accompanying this notice.
- 5. HESTA may, in writing, apply to ASIC to have the period in which to pay the amount extended or for an arrangement to pay the amount by instalments.

Consequences of paying the amount payable under this notice

- 6. If HESTA pays the amount stated in this notice within the time for payment mentioned above then (unless this notice is withdrawn):
 - (a) any liability of HESTA for the alleged contravention is discharged;
 - (b) HESTA will not be liable to be prosecuted in a court, and proceedings seeking a pecuniary penalty order will not be brought, in relation to the alleged contravention of the infringement notice provision; and
 - (c) HESTA will not be regarded as having contravened the infringement notice provision or having been convicted of an offence constituted by the same conduct.
- 7. Payment of the amount payable under this notice is not an admission of guilt or liability.

Consequences of not paying the amount payable under this notice

- 8. HESTA may choose not to pay the amount specified in this notice.
- 9. If HESTA does not pay the amount specified in this notice within the time for payment specified in paragraph 2, and the notice is not withdrawn, then HESTA may be prosecuted in a court, or proceedings seeking a pecuniary penalty order may be brought, in relation to the alleged contravention of the infringement notice provision.
- 10. The maximum pecuniary penalty that a court may order HESTA to pay for the alleged contravention is the greatest of:

- (a) \$13,750,000; and
 - (b) if the court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and
 - (c) either:
 - i. 10% of annual turnover of the body corporate for the 12-month period ending at the end of the month in which HESTA contravened, or began to contravene, the civil penalty provision;
 - ii. if the amount worked out under subparagraph (i) is greater than an amount equal to \$687.5 million – \$687.5 million.
11. The maximum criminal penalty that a court may order HESTA to pay for the alleged contravention is \$5,500,000.

Applying for more time to pay the amount payable under this notice

12. ASIC may at its discretion extend the time to pay the amount payable under this notice if it is satisfied it is appropriate to do so.
13. If HESTA wishes to apply for an extension of time to pay the amount specified in this notice, it must do so in writing within 28 days after the day the notice is issued (see paragraph 20).

Applying to pay the amount payable under the notice by instalment

14. ASIC may at its discretion arrange for HESTA to pay the amount payable by instalments if ASIC is satisfied that it is appropriate to do so.
15. If HESTA wishes to apply for an arrangement to pay the amount payable under the infringement notice by instalments, it must do so in writing within 28 days after the day the notice is issued to HESTA (see paragraph 20).

Applying to have this notice withdrawn

16. Within 28 days after the day on which this notice is given, HESTA may apply to have this notice withdrawn by making written representations to ASIC (see paragraph 20).

Withdrawal of this notice

17. ASIC may at its discretion, by written notice given to HESTA, withdraw this notice if ASIC is satisfied that it is appropriate to do so, whether or not HESTA has applied to have this notice withdrawn (**withdrawal notice**).
18. If the withdrawal notice is given after HESTA has paid the amount specified in this notice, ASIC will refund to HESTA the amount paid under the notice.
19. If the notice is withdrawn, then HESTA may be prosecuted in a court, or proceedings seeking a pecuniary penalty order may be brought, in relation to the alleged contravention of the infringement notice provision.

Requirements for applications

20. An application to have this notice withdrawn, for more time to pay the amount payable under this notice or to pay by instalments:
- (a) must be in writing;
 - (b) must include the unique identification code set out at the top of this notice;
 - (c) must include HESTA's reasons for making the application; and

(d) may be made by forwarding HESTA's application to ASIC at the address in paragraph 21.

21. HESTA may contact ASIC in relation to this notice by contacting:

Brendan Caridi
Australian Securities and Investments Commission
GPO Box 9827
BRISBANE QLD 4000
or by email: ACLInfringementNotices@asic.gov.au, copying
andrew.fleming@asic.gov.au



Brendan Caridi
as a delegate of the Australian Securities and Investments Commission