



Federal Court of Australia

District Registry: Victoria

Division: General

No: VID366/2022

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

MERCER FINANCIAL ADVICE (AUSTRALIA) PTY LTD (ACN 153 168 293)

Defendant

ORDER

JUDGE: JUSTICE MCEVOY

DATE OF ORDER: 23 November 2023

WHERE MADE: Melbourne

THE COURT NOTES THAT:

In these orders, the following definitions apply:

‘ASIC Act’ means the *Australian Securities and Investments Commission Act 2001* (Cth).

‘Corporations Act’ means the *Corporations Act 2001* (Cth).

‘FCA Act’ means the *Federal Court of Australia Act 1976* (Cth).

‘FDS Period’ means the period ending on the day that was no more than 60 days before that on which the fee disclosure statement was to be given (for the purposes of s 962H(1)(b) of the Corporations Act).

‘MFA’ means the Plaintiff.

‘Ongoing Service Arrangement’ means the contractual arrangement between MFA and a client, pursuant to which MFA was to provide financial product advice, also being an ‘ongoing fee arrangement’ within the meaning of s 962A(1) of the Corporations Act.

‘Penalty Period’ means 1 July 2016 to 30 June 2019.

‘Pre-FOFA Client’ means a client not being a Post-FOFA Client.



‘**Post-FOFA Client**’ means a client first provided advice services after 1 July 2013.

‘**Relevant Period**’ means 6 January 2012 to 30 June 2019.

‘**Review Meeting**’ means the formal review meeting to be provided to a client pursuant to the Ongoing Service Arrangement.

THE COURT DECLARES THAT:

1. Pursuant to s 21 of FCA Act, s 1317E of the Corporations Act 2001, and/or s 12GBA of the ASIC Act (as in force on and from 13 March 2019; in respect of contraventions of the ASIC Act occurring on and from 13 March 2019), MFA:
 - (a) contravened s 962P of the Corporations Act on each of the 1,237 occasions during the Penalty Period that MFA charged an ongoing fee to a Post-FOFA Client after the deemed termination of their Ongoing Service Arrangement;
 - (b) contravened s 962S(1) of the Corporations Act on each of the 2,933 occasions during the Penalty Period that MFA failed to give a Pre-FOFA Client a ‘fee disclosure statement’ within the meaning of s 962H;
 - (c) contravened s 12DB(1)(i) of the ASIC Act:
 - (i) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that a binding Ongoing Service Arrangement was on foot with contractual rights to services and obligations to pay for services, which representations were false or misleading in that the Ongoing Service Arrangement had been terminated by operation of s 962F(1);
 - (ii) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that in respect of the FDS Period, MFA was contractually entitled to charge and such client was contractually obliged to pay the ongoing fees, which representations were false or misleading in that MFA was not contractually entitled to charge, and such client was not contractually obliged to pay, the ongoing fees,
- and which were representations concerning the existence or effect of a right.



- (d) contravened ss 12DB(1)(a) and (e) of the ASIC Act, on each of the 3,593 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that it had provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement, which representations were false in that MFA had not provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement, and which were representations that:
- (i) services were of a particular standard or quality; and
 - (ii) services had performance characteristics, uses or benefits.
2. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, on each occasion MFA contravened ss 962P or 962S(1) of the Corporations Act, or s 12DB(1) of the ASIC Act, as referred to in paragraph 1 above, MFA failed to comply with financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act.
3. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, by its conduct during the Penalty Period, in:
- (a) failing to have in place adequate systems, practises and or policies capable of preventing the contraventions referred to in paragraph 1 above; and
 - (b) failing to provide approximately 842 clients with an invitation to a Review Meeting,

MFA breached its obligations 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.

THE COURT ORDERS THAT:

4. MFA pay pecuniary penalties to the Commonwealth:
- (a) pursuant to s 1317G(1E)(b)(iv) of the Corporations Act as in force until 12 March 2019, and s 1317G(1) of the Corporations Act as in force from 13 March 2019, in respect of its contraventions of s 962P of the Corporations Act referred to in declaration 1(a) above;
 - (b) pursuant to s 1317G(1E)(b)(v) of the Corporations Act as in force until 12 March 2019, and section 1317G(1) of the Corporations Act as in force from 13



March 2019, in respect of its contraventions of s 962S(1) of the Corporations Act referred to in declaration 1(b) above;

- (c) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, and s 12GBB of the ASIC Act as in force from 13 March 2019, in respect of its contraventions of s 12DB(1) of the ASIC Act referred to in declaration 1(c) above,

in the amount of \$12,000,000.

5. Pursuant to s 12GLB(1)(a) of the ASIC Act and s 1101B of the Corporations Act, within 30 days of this order MFA publish, at its own expense, a written adverse publicity notice in the terms set out in Annexure 1 in the form of a press release.
6. There be liberty to apply, as necessary, in relation to the arrangements for the publication of the adverse publicity notice which is the subject of order 5.

Date that entry is stamped: 23 November 2023

Sia Lagos
Registrar



ANNEXURE 1

MISCONDUCT ALERT

Ordered by the Federal Court of Australia

The Court found that Mercer Financial Advice (Australia) Pty Ltd (ACN 153 168 293) (MFA) had committed contraventions of the *Corporations Act 2001* and the *Australian Securities and Investments Act 2001* in relation to the inadequate issuing and contents of fee disclosure statements, the charging of ongoing fees for financial advice services without entitlement, and related system deficiencies.

On 23 November 2023, Justice McEvoy of the Federal Court ordered MFA to pay a pecuniary penalty of \$12 million to the Commonwealth. From 1 July 2016 to 30 June 2019, MFA had committed:

- 1,237 contraventions of s 962P of the Corporations Act by continuing to charge ongoing fees to 761 retail clients, despite the applicable ongoing fee arrangement having been terminated through MFA's failure to provide them with a fee disclosure statement;
- 2,933 contraventions of s 962S(1) of the Corporations Act by failing to give 1,578 retail clients a fee disclosure statement as required by that provision; and
- 5,881 contraventions of s 12DB(1) of the Australian Securities and Investments Act, by making false or misleading representations within fee disclosure statements provided to retail clients.

MFA failed to provide fee disclosure statements to certain retail clients. Other retail clients received fee disclosures statements that were deficient in that they failed to adequately disclose and were misleading as to significant financial services to which the client had been entitled but had not used.

Affected clients suffered \$14,465,343 in inappropriate ongoing fees.

MFA has remediated these clients and others affected earlier. It cooperated with ASIC in the investigation, commencement and finalisation of the proceeding. MFA made full admissions at the earliest opportunity.



The Court ordered MFA to publish this Misconduct Alert.

Further information

For further information, visit ASIC's media release [insert link].