

NOTICE OF FILING

Details of Filing

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
FIRSTMAC LIMITED (ACN 094 145 963)
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Concise Statement

No. of 2022

Federal Court of Australia
District Registry: Queensland
Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

FIRSTMAC LIMITED (ACN 094 145 963)

Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. These proceedings concern contraventions of the design and distribution obligations (**DDO**) relating to financial products for retail clients in Part 7.8A of the *Corporations Act 2001* (Cth) (the **Act**) by **Firstmac** Limited between 5 October 2021 and 9 September 2022 (**Relevant Period**).
2. Part 7.8A of the Act commenced on 5 October 2021 to promote the provision of suitable financial products to consumers. In particular, the DDO were designed to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric focus in designing, marketing and distributing financial products.
3. The DDO require the issuer of a financial product to make a target market determination (**TMD**) prior to offering the product for distribution to consumers. Among other things, a TMD must describe the class of retail clients that comprises the target market and specify any conditions and restrictions on retail product distribution conduct in relation to the product (known as **distribution conditions**). Retail product distribution conduct relevantly includes giving a product disclosure statement for the product to a retail client under Part 7.9 of the Act. The DDO require distributors to have taken reasonable steps that would have, or would have been reasonably likely to have, resulted in such conduct being consistent with the TMD.
4. The contraventions in these proceedings arise from a failure by Firstmac to take reasonable steps that would have, or would have been reasonably likely to have, resulted in the retail product

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distribution conduct it engaged in during the Relevant Period being consistent with the TMD in accordance with s 994E(3) of the Act. That conduct comprised giving a product disclosure statement for the registered managed investment scheme known as Firstmac **High Livez** ARSN 147 322 923 to retail clients on 870 occasions during the Relevant Period. Section 994E(3) is a civil penalty provision pursuant to s 1317E of the Act.

Firstmac and Perpetual

5. **Perpetual** Trust Services Limited is the responsible entity of High Livez and the issuer of redeemable units in High Livez. High Livez has two classes of redeemable units: retail units for retail clients; and wholesale units for wholesale clients. Each unit in High Livez is a financial product within the meaning of s 994AA(1)(a). Units in High Livez are acquired by retail clients by issue from Perpetual and are redeemable once per month on request, subject to the redemption limits in the constitution for High Livez.
6. On 9 April 2019, Perpetual issued a product disclosure statement for the retail class of units in High Livez, which it had prepared pursuant to Part 7.9 of the Act (**2019 PDS**). On 1 September 2021, Perpetual made a TMD in respect of High Livez. On 29 November 2021, Perpetual issued an updated product disclosure statement for retail class units in High Livez (**2021 PDS**). This Concise Statement refers to the 2019 PDS and the 2021 PDS together as the **PDS**.
7. Firstmac is a financial services licensee holding AFSL 290600 and is subject to the DDO in Part 7.8A of the Act as a regulated person within the meaning of s 994A(1) of the Act. On or about 15 December 2010, Firstmac entered into an investment management agreement with Perpetual, pursuant to which Perpetual appointed Firstmac as the investment manager of High Livez. Firstmac's functions as investment manager included managing the assets of High Livez and promoting and marketing High Livez.

The TMD

8. The TMD summarised the target market as consumers who sought regular income as part of an investment portfolio where the consumers had a three to five year timeframe and a low risk/return profile. The TMD stated that there were no distribution conditions.
9. The TMD defined the target market by reference to certain consumer attributes. It contained a "TMD Indicator Key" which used colour coding to indicate whether those attributes indicated that the consumer was:
 - a. "In target market" (green);
 - b. "Potentially in target market" (amber); or
 - c. "Not in target market" (red).
10. The TMD relevantly provided that a consumer was generally unlikely to be in the target market for the product if one or more of their consumer attributes corresponded to a red rating. The consumer

attributes were listed in the TMD and included the consumer's investment objective, the consumer's intended product use, the consumer's investment timeframe, the consumer's risk and return profile and the consumer's need to withdraw money.

11. Relevantly, the TMD indicated that:
 - a. if the consumer's investment objective was "Capital Guaranteed" the TMD indicator was red such that the consumer was not in the target market. The term "Capital Guaranteed" was defined in the TMD as meaning that the consumer sought a guarantee or protection against capital loss whilst still seeking the potential for capital growth (**Capital Guaranteed Objective**); and
 - b. if the consumer's investment timeframe was "Short (≤ 2 years)" the TMD indicator was red such that the consumer was not in the target market. The term "Short (≤ 2 years)" was defined in the TMD as meaning that the consumer had a short investment timeframe and may wish to redeem within two years (**Short Investment Timeframe**).

Firstmac's cross-selling strategy to Firstmac Term Deposit Holders

12. From about 2012, Firstmac adopted a cross-selling strategy of marketing and distributing investments in High Livez to investors in a term deposit product marketed and distributed by Firstmac (**Firstmac Term Deposit**) who were retail clients. The Firstmac Term Deposit was issued by BNK Banking Corporation Limited, an Australian bank holding AFSL 246884, which was an ADI within the meaning of s 5 of the *Banking Act 1959* (Cth). In this Concise Statement, investors in the Firstmac Term Deposit are referred to as **Firstmac Term Deposit Holders**.
13. Firstmac Term Deposit Holders may be consumers with a Capital Guaranteed Objective, as an investment in the Firstmac Term Deposit was guaranteed by the Commonwealth Government in the amount of up to \$250,000 per account holder, the capital invested in the Firstmac Term Deposit did not fluctuate in value and the holder received the full amount of the capital invested at maturity plus any return. In contrast, there was no guarantee on the return of capital or income on an investment in High Livez and the unit price in High Livez was subject to fluctuation and volatility such that unitholders may have suffered a loss in the unit price on exit from the fund.
14. Firstmac Term Deposit Holders may be consumers with a Short Investment Timeframe as the maturity terms offered by Firstmac for the Firstmac Term Deposit ranged from 30 days to two years. In contrast, Firstmac recommended an investment timeframe for High Livez of a minimum of three years up to five years.
15. During the Relevant Period, as part of its cross-selling strategy of marketing and distributing investments in High Livez to Firstmac Term Deposit Holders, Firstmac sent Firstmac Term Deposit Holders the following documents:
 - a. by email:

- i. a cover email referring to the holder's term deposit and providing information about High Livez;
 - ii. the PDS;
 - iii. a High Livez Application Form; and
 - iv. a Term Deposit Maturity Instruction Form, which included a section in which the client could elect to invest the principal or the principal and interest from his/her or its Firstmac Term Deposit into High Livez (together, the **High Livez Documents**); and/or
 - b. by post:
 - i. a cover letter referring to certain features of High Livez;
 - ii. the PDS; and
 - iii. a High Livez information sheet (together, the **High Livez Information** and, together with the High Livez Documents, the **High Livez Material**).
- 16. From the commencement of the Relevant Period until around April 2022, the High Livez Documents were sent only to Firstmac Term Deposit Holders whose term deposits were nearing maturity. From around 29 August 2022 to the end of the Relevant Period, Firstmac sent the High Livez Information to Australian resident Firstmac Term Deposit Holders, regardless of maturity date. The total number of times Firstmac sent a PDS to a Firstmac Term Deposit Holder during the Relevant Period was 870. The total number of Firstmac Term Deposit Holders who received the High Livez Material during the Relevant Period was 817.
- 17. By adopting a cross-selling strategy of providing the High Livez Material to Firstmac Term Deposit Holders, and by reason of the matters referred to in paragraphs 13 and 14, there was a likelihood that those consumers would be outside the target market for High Livez. This strategy exposed those consumers to the risk of obtaining a financial product that was not appropriate to their objectives, financial situation and needs. However, Firstmac did not take reasonable steps to satisfy itself that those consumers did not have a Capital Guaranteed Objective or a Short Investment Timeframe or to bring to the attention of Firstmac Term Deposit Holders that an investment in High Livez would not be appropriate if they held a Capital Guaranteed Objective or a Short Investment Timeframe.

B. RELIEF SOUGHT FROM THE COURT

- 18. ASIC seeks the relief set out in the Originating Process.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 19. A regulated person contravenes section 994E(3) of the Act if relevantly: a target market determination for a financial product has been made; the product is on offer for acquisition by issue;

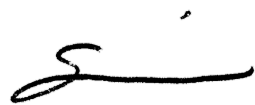
a regulated person engages in retail product distribution conduct in relation to the product; and, the regulated person fails to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the retail product distribution conduct being consistent with the determination.

20. Section 994E(5) of the Act relevantly provides that without limiting s 994E(3), reasonable steps are steps that, in the circumstances, the regulated person is reasonably able to take that will, or are reasonably likely to, result in retail product distribution conduct in relation to the financial product being consistent with the target market determination for the product, taking into account all relevant matters including the matters set out in subsections 994E(5)(a) to (d).
21. Firstmac is a regulated person within the meaning of s 994A(1) of the Act and is required to comply with s 994E(3). Each unit in High Livez is a financial product within the meaning of s 994AA(1)(a) of the Act, which was offered by Perpetual for acquisition by issue. Perpetual made the TMD for that financial product. The Firstmac Term Deposit Holders were retail clients within the meaning of s 761A of the Act.
22. By reason of the matters referred to in paragraphs 15 and 16 above, Firstmac provided the PDS to 817 Firstmac Term Deposit Holders and, in so doing, engaged in retail product distribution conduct within the meaning of s 994A(1)(c) of the Act on 870 occasions (the **Distribution Conduct**).
23. By reason of the matters referred to in paragraphs 8 to 17 above, on each of the occasions it engaged in the Distribution Conduct, Firstmac failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the Distribution Conduct being consistent with the TMD. In the premises, Firstmac contravened s 994E(3) of the Act on 870 occasions.

D. HARM SUFFERED

24. During the Relevant Period, Firstmac engaged in the Distribution Conduct with respect to 817 Firstmac Term Deposit Holders.
25. Firstmac's failure to take reasonable steps to ensure that the Distribution Conduct with respect to each of the Firstmac Term Deposit Holders was consistent with the TMD in accordance with section 994E(3) exposed the Firstmac Term Deposit Holders to the risk that they might obtain a financial product (High Livez) that was not appropriate to their objectives, financial situation and needs.

Dated: 15 December 2022

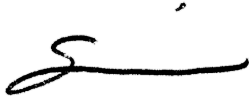


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Signed by Gina Wilson
Lawyer for the Plaintiff

Certificate of lawyer

I Gina Wilson 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 concise statement.

Dated: 15 December 2022



Signed by Gina Wilson

Lawyer for the Plaintiff