

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	7/09/2023 3:54:37 PM AEST
Date Accepted for Filing:	7/09/2023 4:10:02 PM AEST
File Number:	VID718/2023
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v AUSTRALIANSUPER PTY LTD ACN 006 457 987
Registry:	VICTORIA 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.



Federal Court of Australia

District Registry: Victoria

Division: General

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**AUSTRALIANSUPER PTY LTD (ACN 006 457 987)**

Defendant

**A. INTRODUCTION**

1. The defendant (**AustralianSuper**) is the trustee of the AustralianSuper Fund (**the Fund**), a public offer industry fund. The Fund is the largest superannuation fund in Australia in terms of total assets and membership. The Fund is a regulated superannuation fund and a registrable superannuation entity for the purpose of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). AustralianSuper holds Australian Financial Services Licence 233788 (**Licence**).
2. The proliferation of unintended multiple superannuation accounts is a longstanding problem in the superannuation sector which has resulted in the erosion of members' superannuation balances through the payment of multiple administration fees, insurance premiums and the lost opportunity to earn investment returns on those amounts.
3. In order to address this issue, s 108A of the SIS Act (**s 108A**) came into effect on 1 July 2013. That section requires a trustee of a superannuation entity to establish rules that (a) set out a procedure for identifying when a member has multiple accounts in the entity; (b) require the trustee to carry out that procedure at least annually; and (c) require the trustee to merge multiple accounts (without fee) if it reasonably believes that it is in the member's best interests to do so.
4. This claim arises out of AustralianSuper's failures:
  - (a) to efficiently identify, escalate and rectify its ongoing failure to comply with s 108A;
  - (b) to promptly establish rules which set out a procedure to identify and merge multiple accounts of members in accordance with s 108A;
  - (c) to promptly identify and merge multiple accounts in the way that those rules would have required if AustralianSuper had established those rules promptly; and
  - (d) to promptly remediate affected members.
5. A superannuation trustee who has allowed members' superannuation balances to be eroded by multiple fees and premiums as a result of multiple accounts, and who then fails to take the steps identified above, is not a trustee who provides financial services to its members efficiently, honestly and fairly, or with the care, skill and diligence of a prudent superannuation trustee, or who exercises its powers in the best interests of its members.

Filed on behalf of  
Prepared by  
Tel  
Email  
Address for service

Australian Securities and Investments Commission, Plaintiff  
Savas Miriklis, Lawyer, ASIC  
(03) 9280 3442  
Savas.Miriklis@asic.gov.au  
Australian Securities and Investments Commission  
Level 7, 120 Collins Street, Melbourne, VIC 3000  
Attention: Savas Miriklis / Joshua McGeechan

6. ASIC therefore alleges that AustralianSuper contravened ss 912A(1)(a) and 912A(5A) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by its conduct between 13 March 2019 and 11 May 2023 and ss 52(2)(b) and 52(2)(c) and 54B(1) of the SIS Act by its conduct between 6 April 2019 and 11 May 2023.

## **B. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

### **The Duplicate and Dual Account processes**

7. Prior to 1 July 2013, and at all times since, AustralianSuper had business rules in relation to unmerged multiple accounts. In broad terms, and allowing for numerous amendments to each process, two parallel processes have been set out in the business rules, namely:
  - (a) the **Duplicate Account process**, which applied where a member had an active accumulation account that was less than 12 months old, had no member-led changes to insurance, was in the same division of the Fund as another account of that member, and was not created for a 'special employer arrangement' employer; and
  - (b) the **Dual Account process**, which applied where a member had multiple active accumulation accounts that were more than 12 months old, and the account was not otherwise an 'excluded account'.
8. Between 1 July 2013 and 19 June 2022:
  - (a) the Dual Account process was removed from the business rules on 5 March 2014, and was later reinstated from 29 November 2015;
  - (b) the business rules required the Duplicate Account process, but did not require the Dual Account process, to be carried out at least once each financial year;
  - (c) the Dual Account process was only run as part of ad hoc campaigns in 2013 and in 2016, with low response rates of less than 10% for each campaign; and
  - (d) at various points in time – and at all times between March 2019 and 19 June 2022 – the Dual Account process was either solely member-initiated or required some cohorts of members to actively opt-in in response to an ad hoc campaign.
9. AustralianSuper's business rules for the Dual Account process did not comply with s 108A, in that the rules did not require that process to be conducted at least once each financial year and did not require AustralianSuper to merge multiple accounts without member opt-in or consent if it reasonably believed that merging the accounts would be in the member's best interests. Together, the Duplicate and Dual Account processes did not provide for the identification and merger of multiple accounts of all affected members in the way that s 108A requires.

### **AustralianSuper's awareness of its failure to establish rules in accordance with s 108A**

10. In April 2018, AustralianSuper's Chief Executive Officer, the Group Executive, Product Brand and Reputation and the Group Executive, Membership, received a memorandum titled 'Current State – Duplicate Accounts'. The memo identified that, as at 28 February 2018, AustralianSuper had (at least) 43,605 members who had multiple accumulation accounts. The covering email attaching the memo stated, '*Once we have improved our capacity to track and report on [intended duplicate accounts] we need to run a campaign to reduce unintended duplicate accounts*'. The Group Executive, Product Brand and Reputation responded, '*Maybe the first step is to fix this appalling problem?*'
11. Following a meeting of the three senior executives in early May 2018, the duplicate accounts issue was '*nominated as a priority*'. In June 2018, work began within the Operations team on a potential Dual Account campaign.

12. Upon being asked to provide regulatory guidance, a regulatory compliance analyst (the **Analyst**) raised concerns with the Operations team about AustralianSuper breaching s 108A. On 29 October 2018, the Analyst sent an email in which he extracted s 108A and stated *'As I understand it, we have not done [a Dual Account campaign] for about 2 years now and as we don't merge accounts for [members] but instead ask them for express consent, we may have breached our legislative requirements'*. A senior business analyst replied, *'looks like we've opened a can of worms, but a can that's in the best interest of the members'*.
13. On 7 November 2018, the Analyst sent an email to the Operations Delivery Lead (**OD Lead**) and others in which he stated, *'I think the dual account process is short of meeting the SIS requirements and think our business rules should be reviewed to ensure there is a procedure to identify dual accounts and merge them'*.
14. On 4 December 2018, the Analyst sent another email to the OD Lead, copied to the then Head of Operations (later Head of Service Delivery and then Head of Operations & Oversight), which reiterated his concerns, *'noted the gaps'* with the Dual Account process, and indicated that he would need to raise an incident in AustralianSuper's Governance, Risk and Compliance system (**GRC**).
15. The Analyst then raised incident **INC-2106** in the GRC. The OD Lead was designated as the 'incident owner'. The incident description described the *'key issues with not meeting the requirements of s 108A'* as the requirement to carry out the procedure to identify duplicate members at least once each financial year, and that previous Dual Account campaigns required members' express consent to merge duplicate accounts. It also noted that members were impacted by paying multiple administration fees and insurance premiums.
16. In February 2019, a senior regulatory compliance analyst reviewed INC-2106 and assessed (incorrectly) that AustralianSuper had appropriate business rules in place to comply with s 108A. The assessment was approved (incorrectly) by the General Manager, Compliance, and INC-2106 was updated accordingly in the GRC.

**AustralianSuper's failure, from March 2019, to efficiently identify and rectify its non-compliance with s 108A**

17. In late March 2019, the Analyst prepared and circulated a memorandum entitled 'Multiple Account Merge Process - Compliance Considerations' to members of the Operations team and to the Head of Governance and Company Secretary. The memorandum again identified the s 108A requirements and noted the *'gaps'* in the Dual Account process.
18. In April 2019, the Analyst emailed the Head of Governance and Company Secretary and stated that *'greater traction'* was needed on both *'implementing the Dual Merge process for this current financial year and ensuring the 2016 campaign had been completed appropriately, as per SIS requirements S108A'*.
19. In June 2019, the s 108A obligations were added as 'Obligation M10.24' in AustralianSuper's Obligation Library. However, no control was implemented to require periodic attestation that the obligation was being complied with.
20. In August 2019, the Head of Service Delivery (previously Head of Operations) emailed the OD Lead and identified that an action plan in relation to INC-2106 was significantly overdue and had triggered reporting to the Executive. In reply, the OD Lead stated that the delay was as the result of *'time and priorities'*.
21. Between August 2019 and November 2021, little work was done by AustralianSuper to investigate and resolve INC-2106 or otherwise ensure it complied with s 108A.
22. In September 2019, the Head of Service Delivery sent the OD Lead a further request for an update on INC-2106, for inclusion in her report for the October Executive Committee meeting. The

Operations Manager told the OD Lead that she was very concerned about these requests, and asked what the Operations Delivery team was doing to support her. The OD lead said that her team needed help and was *'at huge risk of becoming a bottle neck'*. Another operations specialist was assigned to assist the OD Lead, but she was advised that her team still owned INC-2106.

23. In late September 2019, an internal meeting was held to discuss aligning the planned Dual Account campaign with an existing 'CRN Merge' project, which was designed to consolidate multiple member records under a single record with unique customer reference number.
24. Between March and September 2020, the Dual Account campaign and CRN Merge project were placed on hold in response to the COVID-19 pandemic. AustralianSuper obtained a new Obligations Library, in which the s 108A obligation was added as 'Obligation 30851' in place of former Obligation M10.24, but no control requiring periodic attestation of compliance was inserted until February 2022. In around July 2020, the then Acting OD Lead (later Senior Manager of Operations & Transition) replaced the OD Lead as the incident owner of INC-2106.
25. In planning for the proposed Dual Account campaign, a number of 'Action Plans' linked to INC-2106 were created. However, in November 2020, the Acting OD Lead referred INC-2106 for closure within the GRC. In December 2020, an assurance manager determined that the identified compliance issues had not yet been resolved and the incident should not be closed.
26. In August 2021, the Head of Operations & Oversight (previously Head of Service Delivery) asked the Senior Manager of Operations & Transition (previously Acting OD Lead) to *'see what is going on with [INC-2106] .... Given its ageing, I don't want it to become an unintended issue and get unnecessary attention'*. Over the subsequent months, INC-2106 was reassessed by Member Experience Line 1 Risk & Compliance, escalated to the Member Experience Incident Review Group and then considered by the Breach Reporting Panel.
27. AustralianSuper lodged breach reports with ASIC on 22 December 2021, 22 June 2022, and 5 August 2022. The two later breach reports stated that AustralianSuper's analysis to date showed that since 1 July 2013, approximately 47,282 members had been affected, with a financial impact of approximately \$16.1 million.
28. On 20 June 2022, AustralianSuper amended its business rules to require that the Dual Account process be carried out at least annually and to require accounts to be merged (without needing member consent) if AustralianSuper determines that is in the member's best financial interests.
29. On around 11 May 2023, AustralianSuper began remediating affected members for the financial harm quantified in paragraph 39 below. By August 2023, it had substantially completed the remediation program.

#### **C. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

30. ASIC seeks the declarations, monetary penalties and other relief set out in the accompanying Originating Process.

#### **D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

31. Since 1 July 2013, AustralianSuper has been required to ensure that rules are established to identify and merge multiple member accounts, in accordance with s 108A of the SIS Act.
32. As holder of the Licence, AustralianSuper must do all things necessary to ensure that it provides financial services efficiently, honestly and fairly: s 912A(1)(a) of the Corporations Act. Since 13 March 2019, a contravention of s 912A(1)(a) has been a contravention of s 912A(5A), which is a civil penalty provision pursuant to s 1317E(3)(a) of the Corporations Act.
33. Further, as the Fund is a registrable superannuation entity, its governing rules are taken to contain covenants by AustralianSuper:

- (a) to exercise, in relation to all matters ..., the same degree of care, skill and diligence as a prudent superannuation trustee would exercise ...: s 52(2)(b) of the SIS Act; and
  - (b) to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries – and, since 1 July 2021, in the beneficiaries' best financial interests: s 52(2)(c) of the SIS Act.
34. For the s 52(2)(c) covenant, AustralianSuper's duties include its duty to have multiple account merger rules in place in accordance with s 108A and, under s 29E(6E) of the SIS Act, to ensure that it complies with those rules. The provisions are '*Relevant Requirements*' to which AustralianSuper's powers to manage the Fund are expressly subject, by cl 4.2 of its trust deed.
35. Since 6 April 2019, a breach of the ss 52(2)(b) and 52(2)(c) covenants has been a civil penalty contravention: ss 54B(1), 54B(3) and 193(aa) of the SIS Act. For breaches of the 52(2)(c) covenant since 1 July 2021, it is presumed that the trustee did not perform its duties and exercise its powers in the best financial interests of beneficiaries unless the trustee adduces evidence to the contrary: s 220A of the SIS Act.
36. Despite s 108A being in effect since 1 July 2013 and AustralianSuper being aware from at least October 2018 that it may have breached and been continuing to breach s 108A, from at least 13 March 2019 to 11 May 2023, AustralianSuper failed:
- (a) to efficiently identify, escalate and rectify its ongoing failure to comply with s 108A;
  - (b) to promptly establish rules which set out a procedure to identify and merge multiple accounts in accordance with s 108A until 20 June 2022;
  - (c) to promptly identify and merge multiple accounts of members in the way those rules would have required if AustralianSuper had made those rules promptly; and
  - (d) to promptly remediate affected members.
37. By reason of those failures, AustralianSuper committed serious contraventions of the Corporations Act and the SIS Act, in that it:
- (a) did not do all things necessary to ensure that it provided financial services efficiently, honestly and fairly between 13 March 2019 and 11 May 2023 and therefore contravened ss 912A(1)(a) and 912A(5A) of the Corporations Act;
  - (b) did not exercise the same degree of care, skill and diligence as a prudent superannuation trustee would have exercised between 6 April 2019 and 11 May 2023 and therefore contravened the covenant implied by s 52(2)(b) of the SIS Act; and
  - (c) did not perform its duties and exercise its powers in the members' best interests between 6 April 2019 and 11 May 2023 (or in the members' best financial interests from 1 July 2021) and therefore contravened the covenant implied by s 52(2)(c) of the SIS Act.

## **E. ALLEGED HARM**

38. AustralianSuper's conduct resulted in a large number of members being exposed to avoidable financial losses. Members with unmerged multiple accounts paid multiple administration fees and insurance premiums and lost the opportunity to earn investment returns on those amounts.
39. From 1 July 2013 until 31 March 2023, approximately 90,700 members had multiple accounts that would have been identified and merged if AustralianSuper had established rules in accordance with s 108A, and incurred approximately \$69 million in losses through multiple administration fees and insurance premiums and lost investment earnings on those amounts.

40. From 13 March 2019 until 31 March 2023, approximately 43,000 members had multiple accounts, and incurred approximately \$12 million in losses through multiple administration fees and insurance premiums and lost investment earnings on those amounts.

This Concise Statement was prepared by Tom Clarke and Simone Kipen of counsel.

**Certificate of lawyer**

I Savas Miriklis 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: 7 September 2023

*Savas Miriklis*

Signed by Savas Miriklis

Lawyer for the Plaintiff