

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/06/2022 3:40:08 PM AEST 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: VID366/2022  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
MERCER FINANCIAL ADVICE (AUSTRALIA) PTY LTD (ACN 153 168  
293)  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 29/06/2022 4:31:18 PM AEST

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.



## Concise Statement

No. of 2022

Federal Court of Australia  
District Registry: Victoria  
Division: General

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

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

Defendant

#### A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM

##### *Nature of proceeding*

- 1 This proceeding concerns the issuing and contents of fee disclosure statements and the charging of ongoing fees by Mercer Financial Advice (Australia) Pty Ltd (**MFA**) to its clients in the period 6 January 2012 and 30 June 2019 (**Relevant Period**) and in the period 1 July 2016 and 30 June 2019 (**Penalty Period**) giving rise to various contraventions by MFA. In particular:
  - (a) MFA contravened s 962P of the *Corporations Act 2001* (Cth) (the **Corporations Act**) by continuing to charge ongoing fees to certain retail clients, despite the applicable ongoing fee arrangement with these clients having been terminated by operation of ss 962F and 962G through MFA's failure to provide them with a fee disclosure statement;
  - (b) MFA contravened s 962S of the *Corporations Act* by failing to give certain retail clients a fee disclosure statement as required by that provision;
  - (c) MFA made false or misleading representations in contravention of ss 12DB(1)(a), (e), and/or (i) of the *Australian Securities and Investments Act 2001* (Cth) (the **ASIC Act**), within fee disclosure statements provided to certain clients;
  - (d) MFA failed to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the *Corporation Act*, in that it:
    - (i) failed to have in place systems, practises and or policies capable of preventing the contraventions referred to in (a) to (c) above; and or
    - (ii) failed to provide certain clients with invitations to review meetings.
  - (e) further to (a) to (c) above, MFA contravened s 912A(1)(c) of the *Corporations Act*.
- 2 MFA distributed financial products and provided financial product advice to clients under MFA's financial services licence (AFSL No 411766). Financial product advice was provided to a client on an ongoing basis pursuant to an 'Ongoing Service Arrangement' entered into by MFA and the applicable client.

Filed on behalf of (name & role of party)	Australian Securities & Investments Commission (Plaintiff)		
Prepared by (name of person/lawyer)	Kim MacKay		
Law firm (if applicable)	Holding Redlich		
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- 3 Each Ongoing Service Arrangement made provision for services to be provided to the client including, relevantly, an entitlement to a formal review meeting at agreed intervals to assist in tracking the client's progress against their original financial plan and to review their financial position (the **Review Meeting**).
- 4 The Review Meetings were to occur half-yearly, annually or biennially, depending upon the Ongoing Service Arrangement package. Further details as to the timing of Review Meetings, by package, is set out in **Annexure A**.
- 5 Each Ongoing Service Arrangement also made provision for MFA to charge fees for provision of the services.
- 6 During the Relevant Period, MFA issued purported fee disclosure statements (**MFA FDSs**) to Ongoing Service Arrangement clients. Throughout the Relevant Period, the contents of the MFA FDSs remained substantially the same.
- 7 During the Relevant Period, MFA failed to provide compliant MFA FDSs containing the information required in s 962H of the Corporations Act.
- 8 In particular, the MFA FDSs did not contain information about services the clients were entitled to receive from MFA under the arrangement during the previous year. In particular:
- (a) the MFA FDS did not identify that the client had been entitled to receive a Review Meeting. It instead stated that clients were entitled to an invitation to such a meeting; and/or
  - (b) the MFA FDS did not identify (in some cases) that the client had not received an invitation to a Review Meeting. It instead indicated that the client had received such an invitation; and/or
  - (c) the MFA FDS did not refer to whether a Review Meeting had or had not been conducted.
- 9 Further, by issuing an MFA FDS:
- (a) to a Post-FOFA FDS Affected Client (see section C below), and in all the circumstances, MFA represented to each client that a binding ongoing fee arrangement was on foot (**Binding Contract Representation**). This was made in each MFA FDS by the statements, '*You are currently on the Mercer Financial Advice [name of particular Ongoing Service Arrangement package]*';
  - (b) to a No Compliant FDS Client (see section C below), and in all the circumstances, MFA represented to each client that in respect of the FDS Period, MFA had provided to them all service entitlements as set out in the terms of the Ongoing Service Arrangement (**All Services Provided Representation**). This was made through the provision of a table in each MFA FDS setting out a list of services in a column titled '*Service Inclusions*' and a tick adjacent to all services listed in a column titled '*Services Provided*';
  - (c) to a Post-FOFA FDS Affected Client (see section C below), and in all the circumstances, MFA represented to each client that in respect of the FDS Period, MFA was contractually entitled to charge, and that client was contractually obliged to pay, the ongoing fees (**Entitlement to Fees Representation**). This was made in each FDS in the section titled '*Fee Summary*' and which stated, '*The following table outlines the fees paid to Mercer Financial Advice for the services provided*';

(collectively, **Representations**). Further details as to contents of the documents giving rise to the Representations are set out in **Annexure C**.

- 10 The Binding Contract Representation was false or misleading because there was no binding ongoing fee arrangement on foot with that client.
- 11 The All Services Provided Representation was false or misleading because MFA had not provided that client with all service entitlements, namely a Review Meeting.
- 12 The Entitlement to Fees Representation was false or misleading because MFA was not contractually entitled to charge that client the amount of the ongoing fees.
- 13 MFA has provided remediation to approximately 3,475 clients who held Ongoing Service Arrangements during the Relevant Period in the amount of \$45,182,071.51. The proceeding relates to a subset of these clients, being those clients where a contravention occurred during the Penalty Period.

## **B. RELIEF SOUGHT FROM THE COURT**

- 14 The Plaintiff seeks declarations, pecuniary penalties and ancillary orders as set out in the Originating Process.

## **C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

### *Ongoing fee arrangements*

- 15 Relevant Ongoing Service Arrangements were 'ongoing fee arrangements' within the meaning of s 962A(1) of the Corporations Act, in that:
  - (a) MFA gave personal advice to the client as a retail client;
  - (b) the client had entered into an arrangement (being the applicable Ongoing Service Arrangement) with MFA; and
  - (c) under the terms of the Ongoing Service Arrangement, a fee was to be paid during a period of more than 12 months.
- 16 The fee payable under each relevant Ongoing Service Arrangement was an 'ongoing fee' within the meaning of s 962B of the Corporations Act.
- 17 For each relevant Ongoing Service Arrangement, MFA was the 'fee recipient' within the meaning of s 962C of the Corporations Act, in that:
  - (a) MFA had entered into an ongoing fee arrangement; and
  - (b) MFA's rights under the arrangement had not been assigned to another person.
- 18 Pursuant to ss 962G(1) and 962S of the Corporations Act, MFA was required to give Ongoing Service Arrangement clients a 'fee disclosure statement', as prescribed by s 962H, each year no later than 30 days (prior to 19 March 2016) or 60 days (from 19 March 2016) following:
  - (a) the anniversary of the day on which the ongoing fee arrangement was entered into, where no 'fee disclosure statement' had been given since the arrangement was entered into; or
  - (b) the anniversary of the day immediately after the last 'fee disclosure statement' was given to the client, where a 'fee disclosure statement' in relation to the

ongoing fee arrangement had been given since the arrangement was entered into.

- 19 Each MFA FDS was required to:
- (a) relate to a period of 12 months ending on a day that was no more than 60 days before that on which the statement was given (**FDS Period**); and
  - (b) include, relevantly, information about the services that the client was entitled to receive and had received from MFA under the arrangement during the FDS Period.
- 20 During the Penalty Period, MFA failed to provide a MFA FDS to a client (each a **No MFA FDS Client**) on approximately 518 occasions within the periods referred to above.
- 21 During the Penalty Period, MFA provided an MFA FDS to clients (each a **No Compliant FDS Clients**) on approximately 3,544 occasions, where the document was not a 'fee disclosure statement' within the meaning of s 962H of the Corporations Act, in that the MFA FDS did not include information about the services, in particular about a Review Meeting, the client was entitled to receive and had received from MFA under the arrangement during the previous year.
- 22 The No MFA FDS Clients and the No Compliant FDS Clients are referred to collectively as the **FDS Affected Clients**. Further details as to the FDS Affected Clients are set out in **Annexure B1**.
- 23 Certain FDS Affected Clients:
- (a) entered into the Ongoing Service Arrangement (being an ongoing fee arrangement) with MFA on or after 1 July 2013; and
  - (b) had not been provided with personal advice as a retail client by MFA (or its representatives) before 1 July 2013,
- (s 962D of the Corporations Act (**Post-FOFA FDS Affected Clients**)). Further details as to the Post-FOFA FDS Affected Clients are set out in **Annexure B2**.
- 24 In failing to give a Post-FOFA FDS Affected Client a 'fee disclosure statement' (within the meaning of s 962H) within the time provided (as referred to above), MFA failed to comply with s 962G(1) as to the applicable arrangement. By reason of this failure and by operation of s 962F(1), each applicable arrangement terminated. Further details as to the deemed termination of the Ongoing Service Arrangements of Post-FOFA FDS Affected Clients are set out in **Annexure B2**.
- 25 During the Penalty Period, MFA charged an ongoing fee to approximately 601 Post-FOFA FDS Affected Clients notwithstanding the termination of their arrangement in contravention of s 962P of the Corporations Act. As further detailed in **Annexure B2**, during the Penalty Period MFA charged an ongoing fee to Post-FOFA FDS Affected Clients notwithstanding the termination of their arrangement on at least 1,052 occasions.
- 26 Other FDS Affected Clients were not Post-FOFA FDS Affected Clients: s 962R(1) of the Corporations Act (**Pre-FOFA FDS Affected Clients**). Further details as to the Pre-FOFA FDS Affected Clients are set out in **Annexure B3**.
- 27 Further, in failing to give a Pre-FOFA FDS Affected Client a 'fee disclosure statement' (within the meaning of s 962H) within the time provided (as referred to above), MFA contravened s 962S(1) of the Corporations Act as to the applicable arrangement in respect of approximately 1,542 Pre-FOFA FDS Affected Clients during the Penalty

Period. As further detailed in **Annexure B3**, during the Penalty Period MFA contravened s 962S(1) in respect of Pre-FOFA FDS Affected Clients on approximately 2,902 occasions.

*The MFA FDSs contained false or misleading representations*

28 MFA made the Representations:

- (a) in trade or commerce; and
- (b) in connection with the supply or possible supply of 'financial services' within the meaning of s 12BAB(1) of the ASIC Act (being the provision of financial product advice),

29 By making a Binding Contract Representation to a Post-FOFA FDS Affected Client, during the Penalty Period MFA on approximately 1,063 occasions made a false or misleading representation to each client concerning the existence or effect of a right (because there was no binding arrangement in place) in contravention of s 12DB(1)(i) of the ASIC Act. Further details as to relevant Post-FOFA Affected Clients are set out in **row (B) of Annexure B2**.

30 By making an All Services Provided Representation to a No Compliant FDS Client, during the Penalty Period MFA on approximately 3,544 occasions made a false or misleading representation to each client that:

- (a) services were of a particular standard or quality (because the client had not received a Review Meeting), in contravention of s 12DB(1)(a) of the ASIC Act; and/or
- (b) services had performance characteristics, uses or benefits (because the client had not received a Review Meeting), in contravention of s 12DB(1)(e) of the ASIC Act.

Further details as to relevant No Compliant FDS Clients is set out in **row (B) of Annexure B1**.

31 By making an Entitlement to Fees Representation to a Post-FOFA FDS Affected Client, during the Penalty Period MFA on approximately 1,063 occasions made a false or misleading representation to each client concerning the existence or effect of a right (because it was not contractually entitled to charge the ongoing fees) in contravention of s 12DB(1)(i) of the ASIC Act. Further details as to relevant Post-FOFA Affected Clients are set out in **row (B) of Annexure B2**.

*MFA's contraventions of 912A(1)(a) and (c)*

32 On each occasion MFA contravened sections 962P, 962S and 12DB as referred to above, MFA contravened its obligation as provided for by s 912A(1)(c) of the Corporations Act to comply with the financial services laws.

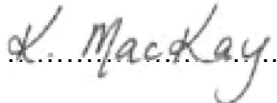
33 Further, MFA failed to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporation Act, in that it:

- (a) failed to have in place systems, practises and or policies capable of preventing the contraventions referred to above; and or
- (b) failed to provide certain clients with invitations to Review Meetings.

**D. HARM**

- 34 During the Penalty Period the Post-FOFA FDS Affected Clients suffered loss and damage in the amount of approximately \$8,041,878.87 (prior to remediation), being the total fees charged to the Post-FOFA FDS Affected Clients following the termination of their Ongoing Service Arrangement in accordance with s 962P of the Corporations Act.
- 35 During the Penalty Period the Pre-FOFA FDS Affected Clients suffered loss and damage in the amount of approximately \$11,550,123.06 (prior to remediation), being the remediation amount paid to the Pre-FOFA FDS Affected Clients in respect of the Penalty Period.
- 36 Further to the Representations, the No Compliant FDS Clients received false or misleading information as to their Ongoing Service Arrangement which deprived these clients of the ability to make an informed decision concerning the utility of continuing that arrangement.

**Date:** 29 June 2022



Signed by Kim MacKay


Lawyer for the Plaintiff

This concise statement was prepared by Dean Luxton of Counsel and settled by Cam H Truong QC.

**Certificate of Lawyer**

I, Kim MacKay, 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: 29 June 2022

.....

Signed by Kim MacKay

Lawyer for the Plaintiff



**Annexure A**

	<b>Package</b>	<b>Period offered</b>	<b>Review Meeting interval</b>
1.	Platinum Service Review	6 January 2012 to July 2012	Half-yearly
2.	Gold Service Review	6 January 2012 to July 2012	Annual
3.	Ongoing Service Package	From August 2012	Annual
4.	GESB Ongoing Service Package	From 8 November 2012	Annual
5.	Alcoa Ongoing Service Package	From April 2014	Annual
6.	Accumulator Ongoing Service Package	From October 2017	Annual
7.	Direct Service Package	From 24 April 2013	Biennial

**Annexure B1: FDS Affected Clients who received remediation in respect of failures to provide Review Meetings between 2016-19**

Total occasions	Year of MFA failure to provide compliant FDS (Relevant Period)									Totals	
	(Pre Penalty Period)					Penalty Period					
	2012	2013	2014	2015	2016 to 30 June	2016 from 1 July	2017	2018	2019	Penalty Period	Relevant Period
(A) Failures to provide FDS (to No FDS Clients)	0	938	482	15	5	13	21	20	464	518	1,958
(B) Provision of non-compliant MFA FDS (to No Compliant FDS Clients) – arising out of failure to refer to non-provision of Review Meeting	55	776	810	936	623	543	1,307	1,379	315	3,544	6,744
<b>Failure to provide compliant FDS (to FDS Affected Clients) [A + B]</b>	55	1,714	1,292	951	628	556	1,328	1,399	779	4,067	8,702

**Annexure B2: Post-FOFA FDS Affected Clients who received remediation in respect of failures to provide Review Meetings between 2016-19**

Total occasions	Year of MFA failure to provide compliant FDS (Relevant Period)									Totals	
	(Pre Penalty Period)					Penalty Period				Penalty Period	Relevant Period
	2012	2013	2014	2015	2016 to 30 June	2016 from 1 July	2017	2018	2019		
(A) Failures to provide FDS	0	4	3	2	2	9	14	13	61	97	108
(B) Provision of non-compliant MFA FDS – arising out of failure to refer to non-provision of Review Meeting	0	4	21	99	89	137	365	416	145	1,063	1,276
<b>Failures to provide compliant FDS (to Post-FOFA FDS Affected Clients) [A + B]</b>	0	8	24	101	91	146	379	429	206	1,160	1,386
<b>Occasions Ongoing Fees subsequently charged to Post-FOFA FDS Affected Clients [in contravention of s 962P]</b>	n/a	0	2	15	35	71	245	446	290	1,052	1,104
<b>Total of Ongoing Fees subsequently charged to Post-FOFA FDS Affected Clients</b>										<b>\$8,041,878.87</b>	

**Annexure B3: Pre-FOFA FDS Affected Clients who received remediation in respect of failures to provide Review Meetings between 2016-19**

Total occasions	Year of MFA failure to provide compliant FDS (Relevant Period)									Totals	
	(Pre Penalty Period)					Penalty Period					
	2012	2013	2014	2015	2016 to 30 June	2016 from 1 July	2017	2018	2019	Penalty Period	Relevant Period
(A) Failures to provide FDS	0	934	479	13	3	4	7	7	403	421	1,850
(B) Provision of non-compliant MFA FDS – arising out of failure to refer to non-provision of Review Meeting	55	772	789	837	534	406	942	963	170	2,481	5,468
<b>Failure to provide compliant FDS (to Post-FOFA FDS Affected Clients) [in contravention of s 962S(1)] [A + B]</b>	55	1,706	1,268	850	537	410	949	970	573	2,902	7,318

## Annexure C

Relevant MFA FDSs (where the package provided for an annual Review Meeting) included:

*Attached to this letter is your annual Fee Disclosure Statement (FDS) which includes information about the services provided to you and fees charged in the preceding 12 months.*

...

### **FEE DISCLOSURE STATEMENT**

**You are currently on the *Mercer Financial Advice [Name of Relevant] Package***

*Your service inclusions and services provided over the 12 month period are noted below:*

SERVICE INCLUSIONS	SERVICES PROVIDED
<b>A personal Financial Adviser who will provide:</b>	
• Financial coaching to ensure you're on track to meet your goals or to modify your goals and strategy as needed.	✓
• An initial point of contact and 'sounding board' for changes to your personal circumstances and legislative developments.	✓
• An invitation to a formal annual review meeting.	✓
• A review document detailing your investment portfolio and asset allocation, and providing performance and fund manager information.	✓
• Telephone and email interaction at no extra charge.	✓
• Regular e-communications outlining legislative changes and developments that may affect your financial strategy and investments.	✓
• An invitation to a mid year seminar each year in our major capital city locations.	✓
<b>ADDITIONAL SERVICES</b>	
<b>In addition to the above services, you also have access to:</b>	
– Our full range of professional services including personal risk insurances, Self Managed Superannuation Fund services, estate planning services, aged care analysis, social security planning and lending services.	
– Advice in relation to switches and withdrawals where appropriate, noting there might be an implementation charge in some circumstances.	
– A 20% discount off standard rates for initial financial advice provided to any family or friends.	

[For the Platinum Service Review, the table also included '*an invitation to a half-yearly meeting where required*'.

For the Direct Service Package, the table did not include the invitation for an annual review but included '*an invitation every 2 years for a phone-based review meeting with a Financial Adviser to ensure you're on track to meet your goals and strategy as needed. The anniversary of your ongoing service agreement will determine whether this invitation occurred in the last 12 months or the year prior.*']

**FEE SUMMARY**

The following table outlines the fees paid to Mercer Financial Advice for the services provided:

Disclosure Period: <:=data['from_date']:> - <:=data['to_date']:> <:=\$client.first_name:> <:=\$client.last_name:>			
Investor / Invoice No	Fee Type	Provider	Ongoing Fees
<:for p in data['policies']:> <:if p.AdviserServiceFeeGross<>0:>			
<:=p.PolicyNumber:>	Adviser Service Fee	<:=p.Supplier:>	\$<:=currency(p.AdviserServiceFeeGross):>
<:end:> <:if p.OSPGross<>0:>			
<:=p.PolicyNumber:>	Invoice	<:=p.Supplier:>	\$<:=currency(p.OSPGross):>
<:end:> <:end:> <:if total>0:>			
N/A	Ongoing Service Fee	Direct Debit	\$<:=currency(total):>
<:end:>			
<b>Total</b>			\$<:=currency(sum([float(tr.AdviserServiceFeeGross+tr.OSPGross) for tr in data['policies']]) + floatify(total),2):>

**Explanation of Fee Types**

```

<:let flag = 0:><:let data = $client.commpay_policies($var('%From_YYYYMMDD%'),
$var('%To_YYYYMMDD%'), inc_type='RT'):><:for p in data['policies']:>
<:if floatify(p.AdviserServiceFeeGross) > 0:>
<:let flag = 1:><:end:>
<:end:>
<:if $partner:>
<:let data = $partner.commpay_policies($var('%From_YYYYMMDD%'),
$var('%To_YYYYMMDD%'), inc_type='RT'):><:for p in data['policies']:>
<:if floatify(p.AdviserServiceFeeGross) > 0:>
<:let flag = 1:><:end:>
<:end:>
<:end:>
<:for entity in list($superfund) + list($trust) + list($company):>
<:let data = entity.commpay_policies($var('%From_YYYYMMDD%'), $var('%To_YYYYMMDD%'),
inc_type='RT'):><:for p in data['policies']:>
<:if floatify(p.AdviserServiceFeeGross) > 0:>
<:let flag = 1:><:end:>
<:end:>
<:end:>
<:if flag == 1:>

```

Adviser Service Fee	Ongoing fee deducted from your account payable directly to Mercer Financial Advice for the provision of Financial Advice.
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