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20-211MR NAB superannuation trustee companies to pay \$57.5 million penalty for fees for no service breaches

The Federal Court of Australia has ordered two entities in NAB's wealth management division to pay a total \$57.5 million penalty after the Court found that NULIS Nominees (Australia) Limited (NULIS) and MLC Nominees Pty Ltd (MLC Nominees) made false and misleading representations to superannuation members about their entitlement to charge plan service fees and members' obligations to pay the fees. The Court also made declarations that MLC Nominees and NULIS failed to ensure that their financial services were provided efficiently, honestly and fairly.

MLC Nominees will pay a total penalty of \$49.5 million for its contraventions, while NULIS will pay a penalty of \$8 million for its contraventions.

Between 8 September 2012 and 30 June 2016, MLC Nominees misled members in the MasterKey Product and deducted approximately \$33.6 million in Plan Service Fees from approximately 220,000 members of MasterKey Business Super (MKBS) and MasterKey Personal Super (MKPS), divisions of the MasterKey Product, who did not have a Plan Adviser.

Between 8 September 2012 and 30 September 2018, MLC Nominees and NULIS misled members and deducted approximately \$71.9m Plan Service Fees from approximately 457,000 members of MasterKey Personal Super linked to Plan Advisers where Plan Advisers were not required to provide services and members did not receive services or any services they could not otherwise obtain for free.

The Federal Court made declarations to the effect that NULIS and MLC Nominees breached the *ASIC Act* for misleading and deceptive conduct and by making false or misleading representations, for which the civil penalties have been ordered. The Court also made declarations that NULIS and MLC Nominees breached the *Corporations Act* by failing to ensure that the financial services were provided efficiently, honestly and fairly, whereby Yates J said the contravening conduct was represented by MLC Nominees' and NULIS' failure to inform members that, when they transferred from MKBS to MKPS, they could "turn off" their plan service fee; its failure to exercise its own right, as trustee, to terminate the plan service fee of members who had transferred from MKBS to MKPS; and the fact that it made or authorised the making of monthly deductions from the accounts. Other declarations related to failing to comply with the financial services laws, for misleading and deceptive conduct and for issuing a defective Product Disclosure Statement. The Court also ordered that the defendants' pay ASIC's costs of the proceedings.

In his decision, Justice Yates described NULIS and MLC Nominees' contraventions of s12DB of the *ASIC Act* as "very serious" and, in determining the amount of penalties to impose, found it was appropriate to consider the very large scale of the business within the MLC Wealth segment of the NAB Group in which NULIS and MLC Nominees operated.

ASIC Deputy Chair Daniel Crennan QC said 'The penalty imposed by the court reflects the very serious contraventions by MLC Nominees and NULIS and is the largest total penalty yet imposed in a civil action filed by ASIC. As the court observed, civil penalties must be sufficiently high to deter repetition by the contravener and others who might be tempted to contravene. Achieving specific and general deterrence by pursuing civil penalties through the courts is a key focus of the Office of Enforcement.'

'Fees for no service conduct is particularly egregious, having resulted in substantial financial loss for thousands of unsuspecting consumers. ASIC will continue to bring enforcement action against this misconduct and other case studies from the Financial Services Royal Commission. This demonstrates our resolve to deliver on the public's expectation that we hold wrongdoers of all dimensions to account.'

ASIC acknowledges that MLC Nominees and NULIS made admissions of liability during the proceedings and notes that this cooperation was taken into account by Justice Yates in determining the penalty.

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Background

MLC Nominees was the Trustee of The Universal Super Scheme (TUSS) until 30 June 2016. TUSS became the MLC Super Fund and NULIS was the Trustee of the MLC Super Fund from 1 July 2016. The MasterKey Product was an MLC branded corporate superannuation product established as part of TUSS (and subsequently part of the MLC Super Fund).

ASIC commenced proceedings against NULIS and MLC Nominees on 6 September 2018 ([18-259MR](#)). Although these proceedings commenced before the publication of the Financial Services Royal Commission [Volume 2 Final Report](#), NULIS was a Superannuation Case Study.

The maximum penalty per contravention at the time the unlawful conduct occurred ranged from \$1.1m to \$2.1million. The maximum penalty per contravention for conduct of this kind occurring after 13 March 2019 was increased by Parliament to the greater of \$10.5million, three times the benefit obtained or 10% of the company's annual turnover. Increased maximum penalties also apply to contraventions of s912A *Corporations Act* occurring after 13 March 2019 which did not attract civil penalties before this date.

Between October 2016 and June 2017, NULIS remediated No-Adviser members approximately \$35.9m (including interest and less fund tax of \$6m). As at 30 April 2019, a further total of \$178,101 (excluding fund tax) was remediated to a further 1,120 No-Adviser member accounts.

By 31 May 2019, NULIS had paid \$116,659,241 (excluding fund tax) to No-Adviser members and Linked Members.

ASIC also imposed, by consent, additional licence obligations on NULIS in January 2017 following its inquiries in relation to several breach reports, including the Plan Service Fee.

ASIC has been monitoring remediation for fees for no service failures by financial services institutions including NAB and its associated entities ([18-229MR](#), [20-028MR](#)).

This was the first enforcement action commenced by ASIC concerning fees for no service (FFNS) activity. In 2019, ASIC also commenced civil penalty proceedings in the Federal Court against NAB itself for alleged contraventions of the ASIC Act and the Corporations Act for FFNS activity. These proceedings are being case managed by the court to trial, a date is yet to be scheduled ([19-360MR](#)).

In August 2020, ASIC commenced civil penalty proceedings in the Federal Court against State Super Financial Services Australia Limited for charging at least 36,592 members fees for financial advice that StatePlus promised it would provide but did not provide ([20-189MR](#)).

Also in August 2020, ASIC commenced civil penalty proceedings in the Federal Court against Asgard Capital Management Limited for charging adviser fees to 404 customers for financial advice that was not provided and also against Asgard and BT Funds Management Limited for making misleading representations in half-yearly or annual account statements regarding the charging of the adviser fees ([20-190MR](#)).

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