

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/12/2016 9:09:00 AM AEDT 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:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	VID1494/2016
File Title:	TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 30/12/2016 10:03:44 AM AEDT

A handwritten signature in blue ink, reading "Warwick Soden".

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.



Statement of claim

No. of 20

Federal Court of Australia

District Registry: Victoria

Division: Commercial and Corporations NPA

TPT PATROL PTY LTD as trustee for Amies Superannuation Fund

Applicant

MYER HOLDINGS LIMITED

Respondent

1. The Applicant brings this group proceeding pursuant to Part 4A of the *Federal Court Act 1976* (Cth).
2. The proceeding is commenced by the Applicant on its own behalf and on behalf of all persons who acquired ordinary shares in the Respondent on or after 11 September 2014 and who were at the commencement of trading on 19 March 2015 holders of any of those shares (**Group Members**).
3. The Respondent is, and at all material times was:
 - a. a company incorporated pursuant to the *Corporations Act 2001* (Cth) and is capable of being sued;
 - b. a listed disclosing entity within the meaning of section 111AL(1) of the *Corporations Act 2001* (Cth);
 - c. subject to and bound by the Listing Rules (**Listing Rules**) of the Australian Securities Exchange Limited (**ASX**); and
 - d. engaged in Australia in the operation of department stores and a loyalty card program.

Filed on behalf of (name & role of party)	TPT Patrol Pty Ltd att Amies Superannuation Fund - Applicant		
Prepared by (name of person/lawyer)	Anthony Zita, Solicitor		
Law firm (if applicable)	Portfolio Law Pty Ltd		
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Applicant's shareholding

4. The trustees of the Amies Superannuation Fund, Mr C and Miss J Amies (**the trustees**), purchased 40,000 ordinary fully paid shares in Myer Holdings Limited (**MYR ED securities**) on 17 November 2014, with settlement on 20 November 2014.

Particulars

The trustees' purchase is recorded in a Morgans Financial Limited buy confirmation.

The trustees' holding is recorded in a CHESS Holding statement issued by ASX Settlement Pty Limited.

Both documents are available for inspection.

5. The trustees paid \$1.7575 for each MYR ED security which were acquired on-market on 17 November 2014.
6. The trustees held those 40,000 MYR ED securities at the opening of the market on 19 March 2015.
7. The Applicant was appointed trustee of the Amies Superannuation Fund on 31 July 2015 and by law the trust property of the Amies Superannuation Fund vested in the Applicant from that time.

Particulars

The appointment of the Applicant as trustee of the Amies Superannuation Fund is recorded in resolutions of the trustee and members of Amies Superannuation Fund.

8. By reason of the matters alleged in paragraphs 4, 6 and 7 above, the Applicant is a Group Member.
9. The Applicant, as trustee of the Amies Superannuation Fund, continued to hold the MYR ED securities following its appointment as trustee until their sale on 1 November 2016 at a price of \$1.1650 for each MYR ED security.

Particulars

The Applicant's holding is recorded in a CHESS Holding statement issued by ASX Settlement Pty Limited.

The Applicant's sale is recorded in a Morgans Financial Limited sell confirmation.

Both documents are available for inspection.

The Respondent's internal reporting systems

10. At all material times, the Respondent had internal reporting systems that, according to the Respondent's public claims, ensured adequate and timely reporting of all material or significant developments concerning the Respondent's performance that a reasonable person would expect to have a material effect on the price or value of the Respondent's securities.

Particulars

The Respondent's internal reporting systems are described in:

- i. the Board Charter referred to in the Respondent's 2013 Annual Report (the 2013 Annual Report) and the Respondent's 2014 Annual Report (the 2014 Annual Report), pursuant to which the Board's role and key responsibilities include inter alia oversight of the Respondent's financial resources, contributing to and approving management development of corporate strategy including by setting performance objectives and approving operating budgets, monitoring corporate performance and implementation of strategy and policy, monitoring capital management, monitoring management processes aimed at ensuring the integrity of financial and other reporting, overseeing the Respondent's processes for making timely and balanced disclosure, review of the Respondent's exposure to economic risk and the management of economic risk, and oversight of the internal auditor;
- ii. the charter of the Respondent's board's Audit, Finance and Risk Committee and the Risk Management Policy referred to in the 2013 and 2014 Annual Reports, including oversight of the Respondent's financial controls and systems, management of the process of identifying and managing risk, assisting the Board in relation to the reporting of financial information; and
- iii. the Respondent's Continuous Disclosure Policy referred to in the 2013 and 2014 Annual Reports.

Disclosures concerning the Respondent's outlook for the 2015 financial year

11. On 11 September 2014, the Respondent announced net profit after tax (NPAT) for the year ended 26 July 2014 (2014 financial year) of \$98.5 million.

Particulars

The Applicant refers to the Respondent's ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014" and "Preliminary Financial Report" each published on 11 September 2014.

12. On 11 September 2014 the Respondent disclosed to the market that it forecast profit growth in the financial year ending on 26 July 2015 (**2015 financial year**).

Particulars

In a statement made by the Respondent's then Chief Executive Officer, Bernie Brookes on 11 September 2014 as part of the Respondent's "Preliminary 2014 Myer Holdings Ltd Earnings Call", the Respondent disclosed to the market that its outlook in 2015 was that "[w]e will therefore not only have anticipated sales growth, but anticipated profit growth this year."

13. On 11 September 2014 the Respondent, in announcing its 2014 NPAT and its expectation of profit growth as alleged in paragraphs 11 and 12 above, disclosed to the market that its forecast NPAT for the 2015 financial year would be in excess of \$98.5 million.

Misleading or deceptive conduct

14. The Respondent's disclosure of "anticipated profit growth" in the 2015 financial year made on 11 September 2014 was a representation with respect to a future matter, namely that the Respondent expected to achieve NPAT in excess of \$98.5 million in the 2015 financial year.

Particulars

The Applicant repeats the particulars to paragraph 12 above.

15. The Respondent had no reasonable grounds for making the representation alleged in paragraph 14 above and accordingly the representation is taken to be misleading pursuant to s 769C(1) of the Act.

Particulars

The Respondent had no reasonable grounds for making the representation because:

- a. the Respondent on 11 September 2014 in its ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014" disclosed to the market an expectation and strategy for the 2015 financial year whereby the Respondent said that:

- i. its underlying cash cost of doing business would increase by approximately 3% (a cost increase of approximately \$30 million); and
- ii. it would incur additional expenditure of between \$35 and \$50 million on renewal costs, of which the majority would be classed as operating expenditure;

which was expected to result in an overall cost increase of \$60 million (11 September 2014 "Preliminary 2014 Myer Holdings Ltd Earnings Call", answer given by Bernie Brookes to question by Michael Courtney, Bank of America Merrill Lynch Analyst) to \$70 million (John Durie, "McClintock runs out of reasons to retain Brookes", The Australian, 13 September 2014);

- b. the Respondent's stated expectation of increasing NPAT in the 2015 financial year was therefore reliant upon the Respondent increasing its revenue (sales), but the Respondent's sales had declined from \$3.3 billion in the 2010 financial year to \$3.1 billion in the 2014 financial year, and the Respondent's expectations as to the basis for sales growth disclosed to the market on 11 September 2014 for the 2015 financial year were speculative (see: "Preliminary 2014 Myer Holdings Ltd Earnings Call" and ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014"); and
- c. the Respondent on 11 September 2014 was able to specifically identify only approximately \$100 million in increased sales, based on the assumed effect of refurbished and new stores and online sales (11 September 2014 "Preliminary 2014 Myer Holdings Ltd Earnings Call", answer given by Bernie Brookes to question by Shaun Cousins, JP Morgan Analyst) which given an operating gross profit margin of approximately 41% could only add approximately \$41 million to the Respondent's EBITDA,

indicating that the Respondent's expectations of revenue growth capable of outweighing the Respondent's increased costs, so as to justify the representation of increasing NPAT in the 2015 financial year, lacked reasonable grounds.

16. The Respondent's publication of the statements made by the Respondent's then Chief Executive Officer, Bernie Brookes, on 11 September 2014 as part of the Respondent's "Preliminary 2014 Myer Holdings Ltd Earnings Call" was conduct by the Respondent in relation to a financial product (namely MYR ED securities) that was misleading or deceptive or was likely to mislead or deceive in breach of s 1041H of the Act because

the publication is taken to be misleading or deceptive by operation of s 769C(1) of the Act.

Corrective disclosure

17. On 19 March 2015 the Respondent issued a release to the ASX which disclosed that it expected that the Respondent's NPAT for the 2015 financial year would be in the range of \$75 to \$80 million (excluding one-off costs).

Particulars

The Respondent disclosed its revised forecast for the 2015 financial year in an ASX & Media Release of 19 March 2015 entitled "Myer First Half 2015 Results and Full Year 2015 Guidance."

18. The Respondent's disclosure to the ASX on 19 March 2015 alleged in paragraph 17 above advised the market for the first time that the Respondent would not achieve NPAT in the 2015 financial year in excess of \$98.5 million (**the earnings forecast matter**).

Disclosure failure

19. The information concerning the earnings forecast matter that a reasonable person would have expected to have a material effect on the price or value of the Respondent's ED securities, if that information was made generally available, was that:
 - a. the Respondent had no reasonable grounds for representing that it would achieve NPAT in the 2015 financial year in excess of \$98.5 million;
 - b. the Respondent's sales would not increase in the 2015 financial year as previously forecast;
 - c. the Respondent's operating gross profit margin would not improve in the 2015 financial year as previously forecast;
 - d. the Respondent's cash cost of doing business in the 2015 financial year would increase more than previously forecast; and
 - e. the Respondent's NPAT in the 2015 financial year would be materially lower than in the 2014 financial year.

(together **the information about the earnings forecast matter**)

Particulars

When information about the earnings forecast matter was released by the Respondent to the ASX on 19 March 2015, there was an immediate and sharp drop in the Respondent's share price, totalling approximately \$114 million of the

Respondent's pre-disclosure market capitalisation, reflecting the fact that information about those matters was price sensitive.

20. On 11 September 2014, the Respondent was aware that the Respondent had no reasonable grounds for representing that it would achieve NPAT in the 2015 financial year in excess of \$98.5 million (as alleged in paragraph 19(a) above).

Particulars

The Applicant refers to the particulars to paragraph 15 above and the operation of the Respondent's internal reporting systems as alleged in paragraph 10 above.

21. On a date that the Applicant is unable to specify prior to discovery of documents from the Respondent's internal reporting systems (as alleged in paragraph 11 above), but which was not later than 11 November 2014, the Respondent was aware of the information about the earnings forecast matter which is alleged in paragraphs 19(b)-(e) above.

Particulars

It is reasonable to infer that the Respondent was aware of the information about the earnings forecast matter on or before 11 November 2014 because:

- i. Pursuant to the Respondent's Board Charter, the Respondent's board was *inter alia* required to oversee the Respondent's financial resources and implementation of strategy which required board oversight of the performance of the Respondent's business, a matter that was highly probably regularly considered by the Respondent's senior management and board given the importance of monitoring sales and margins in a department store business;
- ii. The Respondent has and at all material times had in place internal reporting systems, as alleged in paragraph 10 above, which systems would have informed the Respondent at all relevant times how the Respondent's business was performing;
- iii. The Respondent disclosed to the market on 11 November 2014 that it had achieved only 0.1% sales growth in the first quarter of the 2015 financial year and it therefore appears that the Respondent knew that its forecast for materially increased sales in the 2015 financial year was overly optimistic (the Respondent's "Q1 2015 Myer Holdings Ltd Corporate Sales Call" of 11 November 2014);

- iv. It is reasonable to infer that as of 11 November 2014 the Respondent also had information concerning its operating gross profit margin, cash cost of doing business and net profitability for the first quarter of the 2015 financial year;
 - v. Because it is reasonable to infer that the Respondent was aware of the underperformance of its business as of 11 November 2014, it is reasonable to infer that as of 11 November 2014 the Respondent knew of the remaining information about the earnings forecast matter.
22. Despite the Respondent's awareness alleged in paragraphs 20 and 21 above, the information about the earnings forecast matter was not generally available until the Respondent made it generally available by releasing the information about the earnings forecast matter to the ASX on 19 March 2015.

Particulars

The Respondent did not release to the ASX any information about the earnings forecast matter until 19 March 2015 (paragraphs 17 and 18 above).

23. The Respondent's failure to disclose the information about the earnings forecast matter to the market immediately upon becoming aware of the earnings forecast matter constituted a breach of s 674(2) of the *Corporations Act 2001* (Cth) (the Act).
24. The Respondent's publication of each of the:
- a. Myer Holdings Limited 2014 Annual Report on 21 October 2014;
 - b. "Q1 2015 Myer Holdings Ltd Corporate Sales Call" on 11 November 2014;
 - c. Myer Holdings Limited Annual General Meeting Chairman's Address on 21 November 2014;
 - d. "Myer Holdings Ltd Strategic Review Conference Call" on 2 March 2015;
 - e. ASX & Media Release of 2 March 2015 entitled "Myer announces CEO succession and update on strategic review to transform business for future growth"; and
 - f. Letter to shareholders on 3 March 2015;

was conduct by the Respondent that was misleading or deceptive or was likely to mislead or deceive, in breach of s 1041H of the Act, because none of those publications disclosed any information about the earnings forecast matter.

Loss and damage

25. The Applicant and Group Members held their interests in MYR ED securities in a market:

- a. regulated by, inter alia, the Listing Rules and the Act; and
- b. where the price or value of MYR ED securities would reasonably be expected to be informed and affected by information disclosed in accordance with the Listing Rules and the Act.

26. The Applicant:

- a. expected that the Respondent had complied with its obligations under the Listing Rules and the Act as alleged in paragraph 25; and
- b. had no knowledge of the information about the earnings forecast matter, when it purchased the 400 MYR ED securities on 14 November 2014.

Inflated price prior to the commencement of trading on 19 March 2015

27. The Applicant and the Group Members acquired their MYR ED securities in a market:

- a. in which the Respondent had failed to disclose information about the earnings forecast matter that a reasonable person would expect to have a material effect on the price or value of MYR ED securities;
- b. in which the Respondent had engaged in the misleading or deceptive conduct alleged in paragraphs 16 and 24 above (where each instance of misleading or deceptive conduct affected the Applicant and those sub-groups of Group Members who acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged in paragraphs 16 and 21 above); and
- c. in which the significant falls in the price of MYR ED securities on and after 19 March 2015 were caused by and were a result of the disclosure of information about the earnings forecast matter.

28. The failure to disclose the information about the earnings forecast matter caused the market price for MYR ED securities prior to 19 March 2015 to be substantially greater than:

- a. their true value; further or alternatively
- b. the market price for MYR ED securities that would have prevailed but for the Respondent's failure to disclose the information about the earnings forecast matter at any time prior to 19 March 2015.

29. The Applicant and Group Members have each suffered loss and damage because of and resulting from the failure to disclose the information about the earnings forecast matter to the market, and the Applicant and those sub-groups of Group Members who

acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct by the Respondent alleged in paragraphs 16 and 24 above have also suffered loss by that misleading or deceptive conduct, and all Group Members are entitled to compensation pursuant to sections 1041I, 1317HA and 1325 of the Act.

Particulars

The Respondent's failure to disclose the information about the earnings forecast matter caused the Applicant and the Group Members to suffer loss and damage because the failure to disclose caused the market price for MYR ED securities prior to 19 March 2015 to be substantially greater than their true value, further or alternatively the market price for MYR ED securities that would have prevailed but for the Respondent's failure to disclose the information about the earnings forecast matter. Accordingly the Applicant and the Group Members overpaid for their MYR ED securities.


The losses will be the subject of expert evidence in due course. They are comprised of the difference between the prices at which the MYR ED securities were acquired by the Applicant and the Group Members and the prices that would have prevailed at the times of those acquisitions had the information about the earnings forecast matter been disclosed at that time and, as relevant to the Applicant and those sub-groups of Group Members who acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged in paragraphs 16 and 24 above, had the Respondent not engaged in the alleged misleading or deceptive conduct.

AND THE APPLICANT AND GROUP MEMBERS SEEK:

- A. Declaration that the Respondent has contravened s 1041H of the Act.
- B. Compensation pursuant to s 1041I, s 1317HA and s 1325 in respect of the Respondent's contraventions of s 674(2) and s 1041H of the Act.
- C. Interest pursuant to statute.
- D. Costs.
- E. Such further or other relief as the Court considers just.

This pleading was prepared by Norman O'Bryan SC and Michael Symons of counsel.

Date: 29 December 2016




Signed by Anthony Zita
Lawyer for the Applicant

Certificate of lawyer

I Anthony Zita certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 29 December 2016



Signed by Anthony Zita
Lawyer for the Applicant