



Myer class action: finally guidance on guidance?

5 November 2019

Key takeaways

- Guidance related statements made by company directors and senior management in earnings calls, annual general meetings (**AGMs**) and other conversations that are intended to be made publicly available, may be construed as formal guidance – notwithstanding how informal their manner of expression might be.
- In order to make out a claim under s 674 of the Corporations Act (the **Act**), it is necessary to identify with some precision the information the company was allegedly aware of and should have disclosed. An opinion held by senior management (e.g. a CEO and CFO) may be sufficient to constitute 'awareness' for the purposes of s 674. It follows that if senior management disagree (i.e. do not hold the same opinion) about internal information or a statement, it may not constitute 'awareness'.
- A variance of 5% to guidance may be material.
- Forecasts contained in analyst reports or consensus NPAT figures cannot be used as a proxy for information as to what a company expects its future earnings to look like, and accordingly is not information that is 'generally available' – in other words, companies who give express guidance may not be able to rely on analysts' identification of certain risks or challenges that are not disclosed by the company. The position may be different for companies which do **not** give express guidance however.
- The Court agreed with Myer's arguments in relation to the defence under Listing Rule 3.1A, in that the 'information' the applicant pointed to was 'insufficiently definite to warrant disclosure' because it was: (i) not presented to, nor approved by the board; (ii) incomplete and comprised draft working documents; (iii) contained opportunities and risks to achieving forecasts; and (iv) carried a high degree of speculation and uncertainty. However, the Court found that a company is unable to rely on this defence if it releases a statement that warrants correction once new information becomes known by it. Had Myer not made a public disclosure of its FY15 NPAT forecast, this defence would probably therefore have been available.
- Market-based causation has been accepted. Applicants do not need to prove that they and every single class member relied on a company's alleged contravening disclosure in deciding whether or not to purchase the company's shares, so long as they can prove that the misrepresentation or non-disclosure artificially inflated the company's share price.
- Applicants will need to identify what the company ought to have said (i.e. the counterfactual) in order to calculate the amount by which the price of shares was wrongfully inflated as a result of alleged contraventions. While Myer breached its continuous disclosure obligations and engaged in misleading or deceptive conduct, the Court found no share price inflation as a result of the contraventions, because the Applicant's expert used the wrong counterfactual. Even though a share price drop occurred on 19 March 2015, the Court found that this drop represented the market reacting to new information (that FY15 NPAT would be below analyst consensus), rather than the market reacting to the information that Myer's FY15 NPAT would be below FY14 NPAT.

Summary of key facts

1. On 11 September 2014, Myer announced Net Profit After Tax (**NPAT**) for FY14 of \$98.5m (the **FY14 ASX Release**). Later that same day at an earnings teleconference with analysts and financial journalists, Myer's then CEO, Bernie Brooks, stated that Myer anticipated NPAT growth in FY15 in excess of Myer's previous NPAT year (the **September Representation**).
2. On 19 March 2015, Myer announced that its expected FY15 NPAT at that time was between \$75-\$80m. Following this announcement Myer's share price fell approximately 10%.
3. On 29 December 2016, a class action was commenced by TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund (**TPT Patrol**) on behalf of all persons who acquired Myer shares between 11 September 2014 and 19 March 2015 (the **Relevant Period**), and suffered loss and damage caused by Myer's alleged breaches of its continuous disclosure obligations and alleged misleading or deceptive conduct.
4. TPT Patrol (on behalf of itself and class members) advanced only a market-based causation theory, and a share price inflation-based measure for its loss analysis. That is, class members claimed that they suffered loss when they purchased Myer shares at an 'inflated' price caused by the September Representation, but did not plead that they read or heard and relied on the September Representation.

The September Representation was a public statement


5. Despite Myer making no official comments regarding its expected FY15 NPAT in the FY14 ASX Release, the Court found that the September Representation constituted a public statement to the market. Relevantly, the CEO's representations made on the call to journalists and analysts were open to the public to view online, and the recording was also subsequently made available on Myer's website. Further, the Court found that the language used by the CEO to describe Myer's FY15 NPAT expectations in the September Representation was not that of 'mere personal opinion', but that he was talking on behalf of Myer. His language confidently '*conveyed Myer's considered expectation of improved FY15 NPAT performance*'.
6. Accordingly, the Court concluded that Myer had, at the least, announced 'de facto earnings guidance' by making the September Representation, despite the fact that no formal, numerical guidance was given to the ASX, or stated on Myer's website.

When a company becomes 'aware'

7. In any continuous disclosure claim under s 674 of the Act, it is necessary to identify with some precision the information the company was allegedly aware of and should have disclosed.
8. The Applicant alleged that Myer had formed an opinion on 11 September 2014 that its FY15 NPAT would be materially less than \$98.5m (in contrast to the September Representation), and the formation of this opinion constituted 'awareness' for the purposes of ASX Listing Rule 3.1. This was because among other things, on 10 September 2014, the Myer board unanimously resolved that no guidance would be provided to the market.
9. The Court disagreed and distinguished the words 'would not give guidance', and 'could not give guidance'. Each of Myer's directors expressed an opinion that they were confident that FY15 NPAT would exceed the \$98.5m figure in FY14, at the time of the September Representation, and the Court held that the directors had a demonstrable basis for this belief – for example, expected performance from new stores. The Court therefore held that the September Representation (at the time it was given) was based on reasonable grounds and was not misleading or deceptive.
10. Separately, in considering the concept of 'awareness', the Court hypothesised a scenario where senior management disagreed between themselves about internal information or a statement. In this case, the Court doubted whether the company was 'aware' of disclosable information, for the purposes of ASX Listing Rule 3.1.

The continuing nature of the misrepresentation(s)

11. In support of its allegation that the September Representation was and continued to be misleading after 11 September 2014, the Applicant relied on Myer's internal documents and correspondence, including:

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- a) high-level draft reforecast documents that were still the subject of ongoing work, further consideration and did not reflect the outcome of any management meeting;
 - b) internal emails noting that Myer's financial performance in the year to date had not been in line with its expectations; and
 - c) internal documents which stated that sales were very hard to predict and NPAT was hard to forecast given the fickle nature of the consumer market.
12. The Court rejected the Applicant's reliance on such documents, finding that it was only from 21 November 2014 that Myer should have disclosed that its FY15 NPAT would likely not be materially above FY14 NPAT. This is because, by the end of November 2014, draft forecasts and other information in Myer's possession (including sales data and an approved reforecast document showing FY15 NPAT at \$100m) meant that the September Representation was no longer sustainable.
13. The Court found that Myer had an opportunity to explain its position to the market at its AGM held on 21 November 2014, but the decision was made not to do so, despite the fact there was evidence that Myer was considering the reliability of its FY15 NPAT forecast. In relation to this, the Court noted that:
- "... I very much suspect that Myer chose to keep all balls in the air so to speak and to deliberately refrain from expressly crystallising its views as to the likely FY15 NPAT in an endeavour to get beyond Myer's annual general meeting so that the Chairman could avoid any detailed or embarrassing interrogation on these matters".*
14. The Court found that the September Representation was a continuing representation, and that by no later than 21 November 2014, Myer ought to have corrected it. Myer's failure to correct the September Representation at each of Myer's board meetings that occurred between December 2014 and March 2015, was therefore misleading or deceptive conduct in contravention of s 1041H of the Act. Further, by failing to disclose information that corrected the September Representation at each of those points in time, Myer also contravened s 674 of the Act.

The correct test for 'materiality'

15. The Court also commented on Myer's approach to 'materiality'. Myer appeared to determine 'materiality' (that is, whether it thought it needed to make a disclosure of its FY15 NPAT forecast), principally on the basis of whether its forecast was materially different to the Bloomberg consensus. Myer argued that because its anticipated FY15 NPAT was consistent with the Bloomberg consensus, no disclosure was required as the market was already 'aware' of this information.
16. The Court disagreed with Myer's approach for several reasons, including that such a practice was inconsistent with the standard test for materiality, in that information ought to be disclosed if a reasonable person considered that the disclosure of that information would, or would be likely to, influence those persons in deciding whether to acquire or dispose of that company's securities. This is because Myer's decision to make a disclosure only if its internal forecasts materially differed to the Bloomberg consensus (being a median or mean of a small set of analysts' expectations) was much narrower than the 'reasonable person' approach to assessing materiality. Further, the Court noted that 'mum and dad investors' and retail investors would not be aware of Bloomberg consensus and may have continued to be influenced by the September Representation.
17. In considering the concept of materiality, the Court referred to ASX Guidance Note 8, which defines the concept of materiality as falling somewhere within a range of a variance of 5 to 10%, in the context of considering changes to an earnings guidance. In the Court's view, *'equal to or greater than 5% is and should have been the relevant standard in the present context'*.

When information is 'generally available'

18. In addition to 'materiality', a company is only obliged to disclose information under s 674 of the Act, if that information is not 'generally available'. Myer argued that since the majority of analyst reports contained forecasts and information that Myer's FY15 NPAT would be lower than FY14 NPAT, this information was 'generally available' and did not need to be disclosed.
19. The Court disagreed – finding that it was difficult to conclude or infer this information (that Myer's FY15 NPAT would be below FY14 NPAT) simply from the forecasts contained in analyst reports, and therefore the information was not 'generally available'. Critically, the Court noted that forecasts in

analyst reports or a consensus FY15 NPAT figure cannot be used as a proxy for information as to what a company expects its future earnings to look like.

20. Further, the Court speculated that a recommendation made by one analyst to their clients may not amount to public disclosure of information, owing to the nature of its restricted circulation, and noted the existence of a 1973 US authority that analysts' reports were not 'generally available'. Applicants may seek to interpret this comment as a broader, more generalised description of the 'general availability' - or lack thereof - of content contained in analysts' reports. However, the better interpretation appears to be that the comment was limited to the particular circumstances of the case and the reliance by Myer on forecasts contained in the analyst reports (particular those used for the purposes of Bloomberg consensus). This is because his Honour describes (elsewhere in the judgment) the usefulness of analyst reports in (i) reflecting information that was available at the time; (ii) providing an objective measure of the contemporaneous beliefs and expectations of market participants; and (iii) discussing announcements of new information about a company's future prospects and impacts on earnings and/or valuation estimates.

Why the defence under Listing Rule 3.1A did not apply

21. Myer raised the defence under Listing Rule 3.1A in relation to its obligation to disclose information about its FY15 NPAT. While Myer satisfied the first two limbs of the defence (i.e. that (i) the information was generated for internal management purposes and 'insufficiently definite to warrant disclosure'; and (ii) it was 'confidential'), Myer failed on the third limb, as the Court found that a reasonable person would have expected the information to be disclosed.
22. This is because once Myer had made a public disclosure of its FY15 NPAT forecast in the September Representation, a reasonable person would have expected Myer to immediately disclose any information necessary to correct or prevent a false market, once it became aware of information that would have rendered the September Representation incorrect.
23. Interestingly, the Court noted that had the CEO not made a public disclosure of its FY15 NPAT forecast, the defence under Listing Rule 3.1A would probably have been available to Myer.

Market-based causation confirmed

24. The Court accepted market-based causation, which means that applicants will not need to prove that they and every single class member relied on a company's alleged contravening disclosure in deciding whether or not to purchase the company's shares, so long as they can prove the disclosure wrongfully inflated the company's share price at the time of purchase. In accepting this theory, the Court considered the overriding purpose of Listing Rule 3.1 and s 674 of the Act, which was to produce a well-informed market leading to greater investor confidence, combined with the intention to impose legal responsibility on the company for the consequences of its failure to disclose.
25. However, the Court left open a possibility that class members may still be required to give some evidence to address circumstances where those class members either: (i) knew the truth; or (ii) did not care about the truth. The Court clarified this requirement by saying it would not be onerous, and could, for example, be done by a statutory declaration or ticking of boxes in a verified questionnaire, after judgment on the common issues. It leaves open questions about the capacity of investors who bet on a share price decline (such as some short sellers) to rely on market causation.

Why there was a share price drop on 19 March 2015, but no loss

26. A 10% share price drop occurred on 19 March 2015 when Myer announced that its FY15 NPAT would be between \$75m and \$80m. The Court found that this drop was not the market reacting to the information that Myer's FY15 NPAT would be below FY14 NPAT (which would have been contrary to the September Representation), but rather, the market reacting to new information that FY15 NPAT would be below analyst consensus.
27. In relation to the former, Myer's contraventions did not artificially inflate the share price because market participants had already factored in a FY15 NPAT below what was announced in the September Representation. The Court noted that:

'...the hard-edged scepticism of market analysts and market makers at the time of the contraventions had already deflated Mr Brookes' inflated views. So, any required corrective statement that should have been made at the time of the contraventions, if it

had been made, is likely to have had no or no material effect on the market price of MYR ED securities.'

28. Further, the Applicant's event study expert used the Bloomberg consensus as a proxy to determine how the market would have reacted to the information that Myer's FY15 NPAT would be below FY14 NPAT. The Court found that, on the Applicant's approach, the market price of Myer shares would not likely have altered from what it was if the counterfactual disclosures the Court found should have been made, had been made. This is because the Bloomberg consensus figures were already tracking at those reduced FY15 NPAT levels, in line with what the Court found that Myer should have disclosed.

Still no guidance on calculating loss and damage

29. Since the Court made no findings on inflation, it was not required to make a finding on how loss would be calculated. It remains unclear as to whether Courts prefer a Last In First Out (**LIFO**), First In First Out (**FIFO**) or netting (a method where class members' purchases and sells in the relevant period are offset against each other) approach to determine the correct number of 'harmed' shares that have been affected by inflation.

30. In the meantime, this remains a significant issue for parties to shareholder class actions, as each approach has the potential to materially impact the amount of loss and damage.



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