

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 21/09/2018 4:15:06 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: NSD1333/2018
File Title: MARK MCVEIGH v RETAIL EMPLOYEES SUPERANNUATION PTY LTD ACN 001 987 739
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 24/09/2018 2:30:06 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.

Amended Concise Statement



Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 1333 of 2018

Mark McVeigh

Applicant

Retail Employees Superannuation Pty Limited ACN 001 987 739

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

A.1 Parties

1. The Respondent (**REST**) was, and remains:
 - (a) a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - (b) the corporate trustee of the Retail Employees Superannuation Trust ABN 62 653 671 394 (**REST Trust**);
 - (c) a registrable superannuation entity (**RSE**) for the purposes of the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
2. The Applicant (**Mr McVeigh**) at all material times was, and remains:
 - (a) a REST member and beneficiary of the REST Trust, since about January 2013;
 - (b) a financial contributor to the REST Trust in the past;
 - (c) a continuing financial contributor to REST for amounts equivalent to 9.5% of his employment related income: s 19 *Superannuation Guarantee (Administration) Act 1992* (Cth);
 - (d) subject to a 'preservation age' of 60 years and unable to access his superannuation held by REST until January 2055: r 6.01 *Superannuation Industry (Supervision) Regulations 1994* (Cth); and
 - (e) a person born on 24 January 1995.

A.2 REST, the SIS Act and s 1017C of the Corporations Act

3. At all material times REST's governing rules contained covenants that must be complied with by reason of s 55 of the SIS Act, which required REST:

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- (a) to exercise, in relation to all matters affecting the REST, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments: s 52(2)(b) *SIS Act*;
 - (b) to perform its duties and exercise its powers in the best interests of the beneficiaries: s 52(2)(c) *SIS Act*;
 - (c) to formulate, review regularly and give effect to an investment strategy for the whole of REST, and for each investment option offered by REST, having regard to the matters set out in s 52(6)(a) of the *SIS Act* and to exercise due diligence in developing, offering and reviewing regularly each investment option and to formulate, review regularly and give effect to a risk management strategy that relates to the matters set out in s 52(8)(a) *SIS Act* and to maintain and manage in accordance with prudential standards financial resources to cover the operational risk to the entity (cumulatively **REST's Due Diligence Risk Duties**); and
 - (d) to allow a beneficiary access to the information or documents prescribed by the Superannuation Industry (Supervision) Regulations 1994 (Cth), which relevantly includes the information and documents that are available to a concerned persons under s 1017C of the *Corporations Act*, which is prescribed information for the purposes of s 52(2)(j) of the *SIS Act*.
4. REST, pursuant to a duty imposed by s 102(1) of the *SIS Act*, has agreements with all its investment managers which enables REST to require its investment managers to provide information as to i) the making of and return on investments and ii) enable REST to assess the capability of the investment manager to manage the investments of REST.
5. For the purposes of s 1017C of the *Corporations Act*:
- (a) REST is:
 - (i) an issuer of a superannuation product and financial product; and
 - (ii) a superannuation entity.
 - (b) Mr McVeigh is a concerned person.

A.3 REST and Climate Change

- 6. At all material times, there has existed a significant likelihood that the climate is changing, and will continue to change, as the result of anthropogenic influences (**Climate Change**).
- 7. Climate Change is likely to include, or result in, acute and chronic changes including: higher mean and maximum temperatures; higher minimum temperatures; decreases in precipitation; increases in the severity of droughts; decreases in relative humidity; increases in the intensity of rainfall; increases in the intensity of cyclones and storms; and increases in the mean sea level (the **Physical Impacts**).
- 8. Australia and other nation states aim to prevent dangerous Climate Change and hold the increase in global average temperature to 1.5 degrees Celsius above pre-industrial levels, and to well below 2 degrees Celsius above pre-industrial levels, and those aims have caused, and will increasingly continue to cause, changes to Australian and international policy, laws, legal actions, markets, technology and customer or community perceptions towards companies and investors (the **Transition Impacts**).

9. At all material times and, in particular, during and since the 2016 financial year, publicly available information indicated that:
- (a) the Australian and international body of scientific knowledge recognised the existence of Climate Change and the likelihood of the Physical Impacts;
 - (b) the Physical Impacts and the Transition Impacts were foreseeable, material and actionable by Australian investors; and
 - (c) Climate Change, the Physical Impacts, and the Transition Impacts, individually or in any combination, have posed, and will increasingly continue to pose, material or major risks to the financial position of many of REST's investments (**REST's Climate Change Business Risks**).
10. By reason of the matters in [6] to [9] at all material times REST knew or ought to have known, that REST's Climate Change Business Risks may, or were likely to, have a material or major impact on the financial condition and/or investments performance of REST and of REST sub plans:

A.4 Requests and replies

11. Mr McVeigh requested information from REST:
- (a) in an email on 4 August 2017, (**4 August Information**), in a further email on 23 August 2017 (**23 August Information**); and
 - (b) in a Concise Statement served on 26 July 2018 concerning:
 - (i) REST's knowledge of REST's Climate Change Business Risks;
 - (ii) REST's opinion of Climate Change, the Physical Risks, the Transition Risks and REST's Climate Change Business Risks;
 - (iii) REST's actions responding to REST's Climate Change Business Risks;
 - (iv) REST's compliance with the duties set out in [3] and [4] above with respect to REST's Climate Change Business Risks;
 - (v) REST's compliance with s 1017C of the *Corporations Act*;
 - (vi) the steps taken by REST to require its investment managers to provide the information the subject of s 102(1) of the *SIS Act* which relates to REST's Climate Change Business Risks and the information obtained from those steps.
- ((a) and (b) together, **Climate Change Information Requests**)
12. The information the subject of the Climate Change Information Requests is information Mr McVeigh reasonably requires for the purposes outlined in s 1017C of the *Corporations Act*.
13. In response to the Climate Change Information Requests, REST:
- (a) purported to identify and provide all of the information requested in the Climate Change Information Requests (**Climate Change Information**);

- (b) provided the Climate Change Information to Mr McVeigh;
 - (c) asserted that the provision of the Climate Change Information was in compliance with REST's duties to provide that information in response to the Climate Change Information requests;
 - (d) in the alternative to [13](a), (b) and (c), there is further information in the possession of REST which it is under a duty to provide in response to the Climate Change Information Requests that has not been provided to Mr McVeigh (**Further Climate Change Information**).
14. The Climate Change Information does not allow Mr McVeigh to:
- (a) understand the particular investments of REST and of any relevant sub-plan;
 - (b) understand the benefit entitlements of Mr McVeigh's superannuation product;
 - (c) understand the main features of any relevant sub-plan;
 - (d) to make an informed judgment about, inter alia:
 - (i) the management and financial condition of REST and any relevant sub-plan;
 - (ii) the investment performance of REST and of any relevant sub-plan.
15. At all material times, a prudent superannuation trustee under the duties imposed under s 52(2)(b) and (c) and under the Due Diligence Risk Duties under the *SIS Act* would have, inter alia:
- (a) required its investment managers to provide information to it for consideration by REST's Board of Directors, or the Board's Investment Committee, in the nature of information that was the subject of the Climate Change Information Request;
 - (b) ensured that the processes it has in place for managing investments and disclosing REST's Climate Change Business risks to beneficiaries complied with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).
16. At no material time has REST required its investment managers to provide to it information the subject of the Climate Change Information Requests, notwithstanding REST's entitlement to do so by reason of s 102(1) of the *SIS Act*, its duties under s 52(2)(b) and (c) of the *SIS Act* and its Due Diligence Risk Duties.
17. At no material time has REST set in place processes or taken the steps necessary to enable its officers to inform its Board of Directors, or the Board's Investment Committee, about REST's climate change business risks in accordance with the recommendations of the TFCFD.
18. By reason of the matters pleaded at [13] to [17] (separately and cumulatively), REST has breached ss 52(2) (b) and (c) and 52(2)(j) of the *SIS Act*, its Due Diligence Risk Duties and/or s 1017C of the *Corporations Act*.
19. Further and in the alternative, Mr McVeigh has a right in equity to be provided by REST with the Climate Change Information and to enforce the performance by REST of the duties equivalent to those set out in ss 52(2)(b) and (c) and 52(2)(j) of the *SIS Act* and s 1017C of the *Corporation Act*.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

20. For the purposes of s 315 of the *SIS Act*:

- (a) by reason of the matters pleaded at [13] to [18] REST has engaged, and continues to engage, in conduct that constitutes a contravention of the *SIS Act*: s 315(1)(a);
- (b) Mr McVeigh is a person whose interests have been and are affected by the conduct pleaded in the preceding sub-paragraph.

- 21. Further and alternatively, by reason of the matters pleaded in [13(d)] REST has contravened s 1017C of the *Corporations Act*.
- 22. Further and alternatively, by reason of the matters pleaded in [13] to [17] and [19] REST breached its equitable duties to McVeigh.

D. RELIEF SOUGHT

- 23. Mr McVeigh seeks the following
 - (a) primary relief:
 - (i) declarations that REST has breached ss 52(2)(b), 52(2)(c) and 52(2)(j) of the *SIS Act* and its Due Diligence Risk Duties in the manner set out above;
 - (ii) a declaration that REST has breached its equitable duties to Mr McVeigh in the manner set out above;
 - (iii) injunctions pursuant to s 315 of the *SIS Act* and in the equitable jurisdiction of the Court (as the case may be), in such terms as the Court deems fit restraining REST from continuing to breach ss 52(2)(b), 52(2)(c) and 52(2)(j) of the *SIS Act*, its Due Diligence Risk Duties and its equitable duties in the manner set out above.
 - (b) alternative relief:
 - (i) a declaration that by failing to give Mr McVeigh the Further Climate Change Information, REST has contravened s 1017C of the *Corporations Act* and/or s 52(2)(j) of the *SIS Act*;
 - (ii) a declaration that REST was under an equitable obligation to give the Further Climate Change Information to Mr McVeigh;
 - (iii) an injunction under s 1324(1) of the *Corporations Act*, s 315 of the *SIS Act* and/or in the equitable jurisdiction of the Court requiring REST to give the Further Climate Change Information to Mr McVeigh.
 - (c) other relief:
 - (i) such further or other orders as to the Court may seem appropriate;
 - (ii) such orders as to costs as to the Court seem appropriate.

Date: 21 September 2018

This Amended Concise Statement was settled by Ron Merkel QC and James Mack.

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Environmental Justice Australia

Solicitors for the Applicant

Certificate of lawyer

I, David Barnden, certify to the Court that, in relation to the Amended Concise Statement 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: 21 September 2018

A handwritten signature in black ink, consisting of stylized initials 'DB' followed by a horizontal line.

Signed by David Barnden

Lawyer for the Applicant