

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/07/2018 11:40:11 AM 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, reading 'Warwick Soden'.

Dated: 26/07/2018 2:22:02 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.



Form NCF1

Concise Statement

Federal Court of Australia

No. _____ of 2018

District Registry: New South Wales

Division: General

Mark McVeigh

Applicant

Retail Employees Superannuation Pty Limited ACN 001 987 739

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Parties

1. At all material times, the Respondent (**REST**) was, and remains:
 - (a) an Australian proprietary 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**);
 - (d) for the purposes of s 1017C of the *Corporations Act*:
 - (i) an issuer of a superannuation product and financial product;
 - (ii) the superannuation entity.
2. At all material times the REST Trust included sub-plans, including REST MySuper, which was, and remains:
 - (a) a MySuper product: Part 2C *SIS Act*;
 - (b) a relevant sub-plan for the purposes of s 1017C of the *Corporations Act*.

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3. At all material times REST was, and remains, bound by duties, including to:
 - (a) act honestly in relation to all matters concerning REST: s 52A(2)(a) *SIS Act*;
 - (b) exercise the requisite degree of care, skill and diligence on behalf of the beneficiaries: s 52(2)(b) *SIS Act*;
 - (c) perform its duties and exercise its powers in the best interests of the beneficiaries: s 52(2)(c) *SIS Act*;
 - (d) promote the financial interests of beneficiaries of REST MySuper: s 29VN(a) *SIS Act*.
4. At all material times REST was, and remains, governed by a board of directors (**Trustee Directors**) each of whom was bound by duties, including to:
 - (a) exercise their powers and discharge their duties with care and diligence: s 180(1) *Corporations Act*;
 - (b) exercise their powers and discharge their duties in good faith in the best interests of REST: s 181 *Corporations Act*;
 - (c) act in the best interest of the beneficiaries: s 52A(2)(c) *SIS Act*;
 - (d) exercise due care, skill and diligence in relation to all matters affecting the RSE REST: s 52A(2)(b) *SIS Act*;
 - (e) exercise care and diligence to ensure that REST promotes the financial interests of REST MySuper beneficiaries: s 29VO *SIS Act*;
 - (f) exercise care and diligence to ensure that REST carries out the duties in s 52 *SIS Act*, including those in [3a], [3b] and [3c] above: s 52A(2)(f) *SIS Act*;
 - (g) exercise the requisite degree of care, skill and diligence in relation to ensuring compliance with the RSE licensing regime: s 52A(2)(b) *SIS Act*.
5. The Applicant was born on 24 January 1995.
6. The Applicant at all material times was, and remains:
 - (a) a REST member and beneficiary, since about January 2013;
 - (b) a financial contributor to and beneficiary of a REST sub-plan;
 - (c) a 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);
- (e) a ‘concerned person’ for the purposes of s 1017C of the *Corporations Act*.

B. REST and climate change

7. 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**).
8. Climate Change is likely to include, or result in, 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**).
9. 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 regulatory activity and markets (the **Transition Impacts**).
10. 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**).
11. At all material times, each of REST and the Trustee Directors knew, or ought to have known about:
 - (a) the information set out in [10] above;
 - (b) REST’s Climate Change Business Risks.

12. By reason of the matters in [8] to [11] above, at all material times each of REST and the Trustee Directors knew, or ought to have known, that REST's Climate Change Business Risks were likely to have a material or major impact on the financial condition of:
- (a) REST;
 - (b) REST sub-plans, including REST MySuper.
13. By reason of the matters in [12] above, in order to make an informed judgment about the management and financial condition of REST, and REST sub-plans, concerned persons were entitled under s 1017C of the *Corporations Act* to reasonably require information concerning each of REST's and the Trustee Directors':
- (a) knowledge of REST's Climate Change Business Risks;
 - (b) opinion of Climate Change, the Physical Risks, the Transition Risks and REST's Climate Change Business Risks;
 - (c) actions responding to REST's Climate Change Business Risks;
 - (d) compliance with the obligations in [3] and [4] above with respect to REST's Climate Change Business Risks.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Application of s 1017C of the *Corporations Act*

14. At all material times, s 1017C of the *Corporations Act* required REST to give to a concerned person, being a REST member or a beneficiary, within a reasonable time, information requested by that person if the person reasonably required that information for the purposes of making an informed judgment about the management and financial condition of the superannuation entity and the relevant sub-plan.
15. At all material times, s 1017C of the *Corporations Act* required that REST, within a reasonable time, give a concerned person requesting the information that information, or a copy of a document, satisfying the requirements in [14] above.
16. The Applicant sent emails to REST on or about:
- (a) 4 August 2017 requesting from REST information falling within [13] above
(4 August Information);
 - (b) 23 August 2017 requesting from REST information falling within [13] above
(23 August Information).

17. The Applicant's lawyers, Environmental Justice Australia, requested the information in [16] above from REST on behalf of the Applicant in correspondence sent to REST on or about:
- (a) 11 April 2018;
 - (b) 20 June 2018.
18. The Applicant reasonably required the information described in [13], [14], [16] and [17] above in accordance with s 1017C of the *Corporations Act*.
19. REST gave certain information to the Applicant on or about:
- (a) 23 August 2017;
 - (b) 1 September 2017;
 - (c) 22 May 2018;
 - (d) 2 July 2018;
- but, in breach by REST of the duties set out in [3], [4] and [14] above, REST failed to provide the information described in [14], [16] and [17] above in accordance with its obligation to do so under s 1017C of the *Corporations Act*.
20. Further, or in the alternative, the Applicant has a right in equity to be provided by REST with the information, or materials containing the information, described in [14], [16] and [17] above.

D. RELIEF SOUGHT BY THE APPLICANT

21. The Applicant seeks:
- (a) a declaration that by failing to give to the Applicant the 4 August Information and/or the 23 August Information, or any substantial part thereof, REST contravened s 1017C of the *Corporations Act*;
 - (b) an injunction under s 1324(1) of the *Corporations Act* requiring REST to give the 4 August Information and the 23 August Information to the Applicant;
 - (c) alternatively to (a) above, a declaration in the equitable jurisdiction of the Court that REST was under an equitable obligation to give the 4 August Information and 23 August Information, or any substantial part thereof, to the Applicant;
 - (d) alternatively to (b) above, an injunction in the equitable jurisdiction of the Court requiring REST to give the 4 August Information and the 23 August Information to the Applicant;
 - (e) such further or other orders as to the Court may seem appropriate;
 - (f) such orders as to costs as to the Court seem appropriate.

Date: 23 July 2018

This Concise Statement was settled by Ron Merkel QC and Craig Lenehan.

A handwritten signature in black ink, appearing to be 'RM', with a long horizontal line extending to the right.

Environmental Justice Australia

Solicitors for the Applicant

Certificate of lawyer

I, David Barnden, certify to the Court that, in relation to the 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: 23 July 2018

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Signed by David Barnden

Lawyer for the Applicant