

KELLEHERS AUSTRALIA

Newsflash - Super Funds & Climate Change

Mark McVeigh v Retail Employees Superannuation Pty Limited

Superannuation savings are an integral component to any individuals' long-term financial security and future provision for family upon death. The compulsory employer contributions and optional personal contributions are often the base for an individual's core retirement income and can be the major asset transferred upon death. Superfund investments have major consequences for Australians.

Kellehers Australia is following two interesting legal matters recently concerning the duties of Superfund trustees. They concern climate change and the duty to act in members' best interests.

Climate Change and Investment Decisions

A recently launched Federal Court of Australia case, by a Superfund member sought information as to the trustees' knowledge of climate change impacts on investments and how they intended to respond to that knowledge.

Specifically, the member argued that he was a 'concerned person'. A 'concerned person' is a beneficiary who is, or was within 12 months of seeking information, a member of a Superfund (s1017C(9) *Corporations Act 2001*) (CA Act). A Superfund must, on the request of a 'concerned person', provide information required to make an informed decision about the management and financial condition of the fund (S1017C(2) CA). 'Information' is that which a concerned person reasonably requires, in relation to a Superfund in order to:

- a) understand any benefit entitlements that they may have;
- b) understand the main features;
- c) make an informed judgment about the management and financial condition;
- d) make an informed judgment about the investment performance; or
- e) understand the particular investment (s1017C(2) CA).

The member, in this case, considered himself entitled to the following 'information' with respect of the Superfund and the Trustee Directors:

1. knowledge of climate change business risks to the Superfund;
2. opinion of the physical and transition risks that climate change poses to the Superfund;
3. the Superfund's proposed actions to respond to climate change business risks; and
4. compliance with their duties to exercise requisite degree of care, skill and diligence, and to act honest and in the best interests of the beneficiaries (s52(2)(a)-(c) *Superannuation Industry (Supervision) Act 1993*) ("*SIS Act*").

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Whilst provided with some information, the member sought sufficient information to make an informed judgment about the Superfund's management and financial condition, especially its long-term financial securities.

This case argues that 'information' includes detailed analysis and strategies to deal with climate-related risks (s1017C CA).

Superannuation funds clearly invest in long-term assets and such investments potentially are placed at risk by projected climate change and associated risks such as fire, drought and sea level rise. Superfund beneficiaries, particularly young people, generally will not access their superannuation for decades to come and face risk to their assets without adequate strategic approaches.

Best Interests of the Members

A widow, after her husband's death, discovered that he held a Superfund with a life insurance policy. However, it then emerged that the insurance policy had lapsed shortly before his death due to the insurance premiums, fees and charges that exceeded the amount of funds held in the Superfund account. As a result, the insurance policy has been cancelled.

Superfund Trustees have a duty to act 'honestly' and in the 'best interests' of beneficiaries (s52(2)(a)(c) *SIS Act*). However, the usual civil penalties, and criminal offences where there is a dishonest, deceptive or fraudulent contravention of a civil penalty, do not apply to such a breach (s193 and 202 *SIS Act*). This is a legislative anomaly. Nevertheless, an aggrieved investor may bring private legal action.

Kellehers Australia will report further on these cases as they continue.

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