CLIMATE CHANGE TEST CASE SETTLES: $57BN AUSTRALIAN SUPER FUND RESPONDS TO PRESSURE ON CLIMATE CHANGE POLICY

The *McVeigh v Rest* settlement announced 2 November 2020 is likely to result in an increased focus by Australian superannuation funds and other managed funds globally on the management and disclosure of climate change and other ESG risks.

Key issues

- Settlement of the climate change-related action launched by Mr Mark McVeigh against Australian super fund Rest was announced on 2 November 2020.
- Climate change was acknowledged by Rest as a material, direct and current financial risk to the superannuation fund.
- Rest accepted that climate change could lead to catastrophic economic and social consequences.
- A wide range of businesses, including financial institutions, corporates and global investment funds, are likely to face increased scrutiny from their stakeholders with respect to their climate change and ESG risk policies.
- Businesses should ensure they have clear procedures and systems for managing and disclosing the impact to their business of ESG risks as a whole, including climate change risks.

MCVEIGH V REST

On 2 November 2020, Mark McVeigh's action relating to climate change risk assessment and disclosure obligations against one of Australia's largest superannuation funds, Retail Employees Superannuation Trust (**Rest**) came to an early end. Just a few days before a 3-day hearing was due to commence, Rest announced that it had reached a settlement with Mr McVeigh.[1]

Mr McVeigh's allegations

The Australian Federal Court action was commenced in 2018 by Mr McVeigh (a member, beneficiary and financial contributor to the Rest fund), who claimed that Rest had breached its obligations under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the **SIS Act**) and the *Corporations Act 2001* (Cth) (the **Corporations Act**) with respect to its management and disclosure of climate change-related business risks.[2] McVeigh had made requests for information from Rest in August 2017 regarding Rest's knowledge and opinion of its climate change business risks (including both the physical impacts and transitional impacts of climate change), and the actions taken by Rest to respond to such risks. While some information was provided by Rest to McVeigh, he alleged this was not sufficient to allow him to understand or make an informed judgement about the management and financial condition of Rest, or its investment performance.

McVeigh sought declarations that Rest had breached the SIS Act and the Corporations Act (as well as equitable duties owed to him) on the basis that a prudent superannuation trustee would have:

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[1] Retail Employee Superannuation Trustee, 'Rest reaches settlement with Mark McVeigh' REST (Press Release, 2 November 2020) https://rest.com.au/why-rest/about-rest/news/rest-november-statement

[2] Mark McVeigh v Retail Employees Superannuation Pty Limited ACN 001 987 739, NSD 1333 of 2018, Concise Statement filed 21 September 2019 http://www.envirojustice.org.au/wp-content/uploads/2018/10/180921-Amended-Concise-Statement-STAMPED.pdf

(a) required its investment managers to obtain information regarding Rest's climate change business risks; and

(b) ensured it has processes in place for managing investments and disclosing its climate change business risks to beneficiaries in compliance with the Task Force on Climate-related Financial Disclosures (**TCFD**).

McVeigh also sought declarations that the failure by Rest to provide him with the climate change information that he requested amounted to a breach of the Corporations Act or the SIS Act, and sought an injunction requiring Rest to provide the requested information.[2]

Although the matter did not ultimately proceed to trial, Rest made a number of important acknowledgements in its public statement on 2 November 2020. Other Australian superannuation funds (and other managed funds globally) are likely to follow suit or risk facing a similar action by their members or other key stakeholders.

The Rest announcement

First, Rest aligned itself with the TCFD's acknowledgment of the economic risks associated with climate change, stating that "[c]*onsistent with the Task Force on Climate-related Financial Disclosures (TCFD), Rest acknowledges that climate change could lead to catastrophic economic and social consequences and is an important concern of Rest's members*".[1]

Second, Rest acknowledged at a high level the significance and types of climate change risks for its investments and its members, stating that "[c]*limate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks*".[1]

Third, in respect of disclosures to members, Rest announced that "*Rest's policy requires that the management of climate change risks also involves the disclosure to members of those risks, as well as the systems, policies and procedures maintained by the trustee to address those risks*". [1]

Rest has also announced a number of initiatives that it has sought to implement (with McVeigh's acknowledgement and support), including but not limited to:[1]

- implementing a long-term objective to achieve a net zero carbon footprint for the fund by 2050;
- measuring, monitoring and reporting outcomes on its climate related progress and actions in line with the recommendations of the TCFD;
- encouraging its investee companies to disclose in line with the TCFD recommendations;
- publicly disclosing the fund's portfolio holdings;
- enhancing its consideration of climate change risks when setting its investment strategy and asset allocation positions, including by undertaking scenario analysis in respect of at least two climate change scenarios (including one scenario consistent with a lower-carbon economy well below 2°C this century); and
- actively considering all climate change related shareholder resolutions of investee companies and otherwise continue to engage with investee companies and industry associations to promote

business plans and government policies to be effective and reflect the climate goals of the Paris Agreement.

Interestingly, Rest's statement was not just limited to dealing with climate change risks, as Rest also committed to take steps to ensure their investment managers "*consider, measure and manage financial risks posed by* […] *other relevant ESG risk*s".[1] This is consistent with the growing recognition globally of the importance for Australian and international businesses to identify and manage ESG risks as a whole.

WHAT DOES THIS MEAN FOR SUPER FUNDS AND BUSINESS GENERALLY?

There is a wide range of businesses and individuals that are likely to be affected by the outcome of this action. For the purposes of this briefing, we take a brief look at the outcome for (i) other Australian superannuation funds and their members; (ii) businesses that receive investment funding from Australian superannuation funds; and (iii) global investment funds, corporates and financial institutions.

(i) Australian superannuation funds and their members

With the resolution of this matter in a manner favourable to the member, other Australian superannuation funds are likely to face increasing pressure to, at a minimum, follow similar initiatives to those announced by Rest on 2 November 2020 in order to remain competitive and avoid similar actions being launched by their members.

With the ground-breaking foundations in this significant action having been set by Mr McVeigh and his legal representatives, members of Australian superannuation funds may feel empowered to demand more from their respective superannuation funds in terms of their disclosure and assessment of not only climate related risks, but ESG risks as a whole on their investments.

(ii) businesses that receive capital and investment from Australian superannuation funds

As at July 2019, the total Australian-superannuation assets were worth a combined value of AUD $2,870 billion(with AUD $747 billion of that in self-managed super funds).[3] Given the significant investment from superannuation funds in businesses around Australia and globally, these businesses are likely to come under increasing pressure to have appropriate measures in place to manage climate change and ESG risks in order to continue to benefit from such investment.

(iii) global investment funds, corporates and financial institutions

The claim by McVeigh and Rest's response may be a litmus test for other pension and investment funds worldwide, which are subject to similar duties to act with due care and diligence, and in the best interests of their beneficiaries. These institutions are facing increased scrutiny from internal and external stakeholders on their management and disclosure of climate change and ESG risks. The outcome in this case serves as a clear marker of the direction in

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[3] Australian Prudential Regulation Authority, 'APRA releases superannuation statistics for July 2019' APRA (Media Release, 5 September 2019)< https://www.apra.gov.au/news-and-publications/apra-releases-superannuation-statistics-for-july-2019>

which these institutions must go – towards enhanced disclosure of climate change and ESG risks, as well as moves to set concrete objectives to achieve net-zero carbon emissions. The move to net-zero carbon is also being adopted at a State level including by three of Asia's largest carbon emitters – Japan (by 2050), South Korea (by 2050) and China (by 2060).

We will continue to provide updates on any responses from other industry players and other developments. It is significant that Rest's announcement clearly acknowledged that "*climate change could lead to catastrophic economic and social consequences*".

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