

NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	VID691/2021
File Title:	JESSICA AMY CHALLENGOR v QSUPER BOARD (ABN 32 125 059 006)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 24/11/2021 9:00:09 PM AEDT

A handwritten signature in blue ink, reading "Sia Lagos".

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.



No. 2021*

Federal Court of Australia

District Registry: Victoria

Division: Commercial and Corporations National Practice Area

JESSICA AMY CHALLENGOR

Applicant

And

QSUPER BOARD ABN 32 125 059 006

Respondent

CONCISE STATEMENT

1. The Applicant (Jessica Amy Challenor) brings this proceeding as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976 (FCAA Act)* on their own behalf and on behalf of the Group Members described and defined in of the originating motion. There are at least seven Group Members.
2. Jessica Amy Challenor claims that the Respondent (**the Board**):
 - (a) failed to provide Jessica Amy Challenor with information reasonably necessary for them to understand a material change to a matter, or a significant event that affects a matter, concerning their interest in the QSuper superannuation fund (**QSuper Fund**) in contravention of s1017B(1) of the *Corporations Act 2001 (Act)*;
 - (b) further or in the alternative, contravened the statutory covenant implied in the governing rules of the QSuper Fund by:
 - (i) section 52(2)(b) of the *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)*, to exercise the same degree of care, skill and diligence as a prudent superannuation trustee would exercise;
 - (ii) section 52(2)(c) of the SIS Act to perform its duties and exercise its powers in the best interests of the beneficiaries of the QSuper Fund; and
 - (iii) section 52(2)(d)(i) to (iii) of the SIS Act, there being a conflict between its duties to the beneficiaries of the QSuper Fund and the interests of the QSuper Board or an associate of the QSuper Board, to give priority to the duties and interests of the beneficiaries, and to ensure that the duties to the beneficiaries were met despite

Filed on behalf of the Applicant

Jessica Amy Challenor

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the conflict and that the interests of the beneficiaries were not adversely affected by the conflict;

- (c) further or in the alternative to (a) and (b), breached its general law duties as trustee of the QSuper Fund to:
 - (i) exercise the care, diligence and skill of a prudent professional trustee in the managing of the assets of the QSuper Fund of which it is the trustee;
 - (ii) perform its duties and exercise its powers in the best interests of the beneficiaries of the QSuper Fund;
 - (iii) subjection to section 58B of the SIS Act, avoid conflicts between its duties to beneficiaries on the one hand, and its personal interests or interests of associated third parties; and
 - (iv) subject to section 58B of the SIS Act, avoid obtaining, and to avoid associated third parties obtaining, unauthorised profits by reason of acting as trustee of the Fund.

IMPORTANT FACTS GIVING RISE TO THE CLAIM

3. The QSuper Fund was established by the *Superannuation (State Public Sector) Act 1990*, and its operation is governed by the *Superannuation (State Public Sector) Deed 1990* (**QSuper Deed**). The QSuper Board is responsible for the administration of the QSuper Fund.
4. Jessica Amy Challenor and each Group Member were at all relevant times members (**Accumulation Members**) of the QSuper Fund, in an accumulation category, pursuant to clauses 5 and 22 and Chapter 3 of the QSuper Deed.
5. At all relevant times prior to 1 July 2016:
 - (a) pursuant to clauses 23I(1) and 23K of the QSuper Deed, the Board provided insurance to Jessica Amy Challenor and Group Members against death or disablement (**QSuper Insurance**), and deducted premiums for that insurance from their accumulation account or non-public sector accumulation account; and
 - (b) the insurance premiums deducted did not, save for the members employed as Police officers, differ depending on the occupation in which the member of the QSuper Fund was employed.
6. On 1 July 2016, the QSuper Board effected changes to the terms of the QSuper Insurance (**Insurance Change**), such that:
 - (a) pursuant to the power in clause 23I(2) of the QSuper Deed, the QSuper Board entered into a policy of group life assurance (**Insurance Policy**) with QInsure Ltd (**QInsure**), a subsidiary of the QSuper Board, for the payment of insurance benefits to Jessica Amy

Challenor and group members as members of the QSuper Fund in the event of their death or disablement;

- (b) the quantum of the premiums payable under the Insurance Policy would be determined by the application of the schedules to the Insurance Policy (**Premium Schedules**);
 - (c) pursuant to clause 10.7.1 of the Insurance Policy, Jessica Amy Challenor and Group Members could, by written election to the QSuper Board or in a form approved by QInsure, elect for the quantum of their insurance premiums to be determined by the application of Occupational Rates, which were set out in the Premium Schedules;
 - (d) pursuant to the Premium Schedules, if a member of the QSuper Fund was employed or otherwise engaged in an occupation to which the Professional Rate or White Collar Rate applied (as defined in Schedule 4 to the Insurance Policy), and:
 - (i) made the necessary election as set out in (c) above, that member would be charged premiums that were between 60% and 70% of the premiums set out in the Premium Schedules, depending on the type and level of cover provided;
 - (ii) did not make the necessary election as set out in (c) above, that member would be charged premiums at the Standard Rate, which was equivalent to premium amounts in the Premium Schedules, and would not be entitled to the discounts in (i).
7. On or about 17 May 2016, the QSuper Board caused to be sent to some or all of the Accumulation Members, including Jessica Amy Challenor and the Group Members, a notice titled 'Introducing changes to your insurance' (**Notice**) that stated to the effect that from 1 July 2016, *inter alia*:
- (a) the QSuper Board would be making changes to the insurance cover offered to members of the QSuper Fund;
 - (b) the insurance cover that a member of the QSuper Fund would be entitled to receive would vary depending on the member's age, current level of cover and employment situation;
 - (c) the QSuper Board was introducing occupational ratings, and 'for some members, choosing to be occupationally rated may reduce your premiums. There will be more information on occupational rating and premiums in the *Accumulation Account Insurance Guide*'.
8. The QSuper Board sent the Notice to some or all Accumulation Members of the QSuper Fund who had an accumulation account under cover of a letter that stated in relation to the proposed changes to the members' insurance coverage '[y]ou don't have to do anything – the changes we've outlined to your insurance cover will happen automatically on 1 July 2016' (**Insurance Changes Representation**). Contrary to the Insurance Charge Representation, it was

necessary for an Accumulation Member to make an election pursuant to clause 10.7.1 of the Insurance Policy to be entitled to Occupational Rates.

RELIEF SOUGHT FROM THE COURT

9. Jessica Amy Challenor seeks the relief set out in the Originating Application.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

10. Pursuant to s1017B(1) and (1A) of the Corporations Act, the QSuper Board, as the issuer of the financial product constituted by the superannuation interest held by each Accumulation Member in the QSuper Fund, was required to notify each such member in writing or electronically of any material change to a matter, or significant event that affected a matter, that would have been required to be specified in a Product Disclosure Statement for the interest in the QSuper Fund prepared on 30 June 2016 (**Significant Events Notice**).
11. Pursuant to s1017B(4) of the Corporations Act, a Significant Events Notice was required to give the holder of the interest in the QSuper Fund the information that was reasonably necessary for the holder to understand the nature and effect of the change or event.
12. The Insurance Change was a material change to a matter, or a significant event that effects a matter, that would have been required to be specified in a Product Disclosure Statement, namely the amounts that would or may be payable by an Accumulation Member by way of insurance premiums after their acquisition of the interest in the QSuper Fund within the meaning of s1013D(1)(d)(ii) of the Corporations Act.
13. The Notice did not give the Accumulation Members the information that was reasonably necessary for them to understand the Insurance Change, because it did not identify to those members that it was necessary to make an election to be entitled to Occupational Rates and any reduced insurance premiums.
14. By reason of the matters in paragraphs 12 and 13 above, the QSuper Board contravened s1017B(1) of the Corporations Act.
15. Further or in the alternative to 14, by reason of the matters in paragraphs 6(c) and 8 above, the QSuper Board engaged in conduct in relation to the QSuper Fund that was misleading or deceptive conduct in contravention of s1041H of the Corporations Act and/or s12DA of the *Australian Securities and Investments Commission Act 2001*.
16. Further or in the alternative to 14, by failing to identify to Accumulation Members that it was necessary to make an election to be subject to Occupational Rates, or provide the Accumulation Members sufficient information to identify their eligibility or to make a fully informed decision to so elect, the QSuper Board contravened the statutory covenant implied in the governing rules of the QSuper Fund by the operation of:

- (a) section 52(2)(b) of the SIS Act, to exercise the same degree of care, skill and diligence as a prudent superannuation trustee would exercise;
 - (b) section 52(2)(c) of the SIS Act to perform its duties and exercise its powers in the best interests of the beneficiaries of the Fund;
 - (c) section 52(2)(d)(i) to (iii) of the SIS Act, there being a conflict between its duties to the Accumulation Members and the interests of the QSuper Board or QInsure, to give priority to the duties and interests of the Accumulation Members, and to ensure that the duties to the beneficiaries were met despite the conflict and that the interests of the beneficiaries were not adversely affected by the conflict;
17. Further or in the alternative to 14 and 16, by failing to identify to Accumulation Members that it was necessary to make an election to be subject to Occupational Rates, or provide the Accumulation Members sufficient information to identify their eligibility or to make a fully informed decision to so elect, the QSuper Board breached its general law duties as trustee of the QSuper Fund to:
- (a) exercise the care, diligence and skill of a prudent professional trustee in the managing of the assets of the Fund of which it is the trustee;
 - (b) perform its duties and exercise its powers in the best interests of the beneficiaries of the QSuper Fund;
 - (c) subject to section 58B of the SIS Act, avoid conflicts between its duties to beneficiaries on the one hand, and its personal interests or interests of associated third parties; and
 - (d) subject to section 58B of the SIS Act, avoid obtaining, and to avoid associated third parties obtaining, unauthorised profits by reason of acting as trustee of the Fund.

ALLEGED HARM

18. Jessica Amy Challenor and each Group Member has suffered loss or damage, being the difference between the premiums they have in fact paid since 1 July 2016 under the QSuper Deed and Insurance Policy, and the premiums they would have paid had they made the election to be subject to Occupational Rates, together with interest or a reasonable return on the premiums paid which would not otherwise have been paid (whether characterised as a diminution in the present day value of their account in the QSuper Fund, or otherwise).

Date: 23 November 2021



Shine Lawyers

This Concise Statement was prepared by Tim Chalke of counsel, and settled by William Edwards of counsel.

Certificate of lawyer

I Joshua Aylward certify to the Court that, in relation to the statement of claim 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 November 2021

A handwritten signature in black ink, appearing to read 'Joshua Aylward', written in a cursive style.

Signed by Joshua Aylward

Lawyer for the Applicant