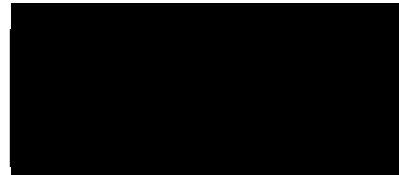


## NOTICE OF FILING

### Details of Filing

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Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
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Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



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## CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL

NO VID

OF 2024

### AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY

Applicant

### MICHAEL JOSEPH O'CONNOR

Respondent

#### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

##### The Trustee

1. At all relevant times, First Super Pty Ltd (ABN 42 053 498 472) (**Trustee**) was a registrable superannuation entity licensee under s 29D of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**), and was the trustee of First Super (ABN 56 286 625 181) (**First Super**).
2. At all relevant times, First Super was a regulated superannuation fund within the meaning of the SIS Act and a registrable superannuation entity within the meaning of that Act.
3. The Respondent has been a director of the Trustee since 1 July 2008 and has been Chair or Co-Chair of the Trustee's board since late 2019.

##### The Union

4. At all relevant times, the organisation currently known as the Construction, Forestry and Maritime Employees Union (**Union**) was a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).
5. Since at least 2007, the Respondent has been the National Secretary of the Manufacturing Division of the Union. From about 2009 to about November 2020, the Respondent was also the National Secretary of the Union.

##### The MESC Contract

6. On 5 October 2017, the Trustee entered into a member and employer coordinator services agreement with the Union (the **MESC Contract**). Under the MESC Contract, among other things:
  - 6.1. the Union agreed to provide to the Trustee the membership recruitment and retention, member servicing and fund promotion services identified in Schedule 1 to the MESC Contract (**Services**); and

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Filed on behalf of the Applicant, the Australian Prudential  
Regulation Authority

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- 6.2. the Trustee agreed to pay the Union fees, and reimburse the Union for expenses, as consideration for the provision of the Services, in accordance with Schedule 2 to the MESC Contract.
7. The Union employed staff as MESC Coordinators to provide the Services. Under the MESC Contract, the consideration paid by the Trustee to the Union for the provision of the Services included amounts referable to the salaries and entitlements of the staff employed by the Union as MESC Coordinators, as set out in Schedule 2 to the MESC Contract.
8. It was the usual practice of the Union to issue quarterly invoices to the Trustee for an amount that reflected the number of MESC Coordinators employed by the Union over the period covered by the invoice. If the position of a MESC Coordinator was vacant for some or all of the period covered by an invoice, the amount payable by the Trustee decreased by the amount referable to the vacant position. When the position of a MESC Coordinator was filled, the amount payable by the Trustee under the MESC Contract increased by an amount referable to that position.
9. On about 1 October 2020, the Trustee and the Union agreed to extend the MESC Contract and vary some of its terms. The MESC Contract expired on 31 March 2023.

#### **Conduct in relation to BT**

10. From October 2019 to March 2020, BT was employed by the Union as a Member Support and Retention Organiser (**MSR Organiser**). In that role, BT reported to the Respondent. Her duties included: onboarding new Union members, following up leads of prospective members, involvement in campaigns to promote Union membership, engaging in organiser and communications work for the Union, and performing administrative duties.
11. In about March 2020, the Manufacturing Division of the Union was experiencing financial difficulties, and considering redundancies for some of its employees. At that time, there was a vacant position for a MESC Coordinator. That position had been advertised in about December 2019, but had not been filled.
12. In March 2020, the Respondent:
  - 12.1. instructed CS, who was then employed by the Union as the MESC Contract Manager, to include the cost of an additional MESC Coordinator in the invoice to the Trustee under the MESC Contract for the June quarter;
  - 12.2. decided to withdraw the vacant position for a MESC Coordinator that had been advertised;
  - 12.3. discussed with BT the possibility of her being employed as a full-time MESC Coordinator, but doing both work as a MESC Coordinator and work forming part of her role as a MSR Organiser for the Union; and
  - 12.4. appointed BT as a full-time MESC Coordinator, with effect from 1 April 2020.
13. The Respondent arranged for BT, in her role as MESC Coordinator, to continue to report to him instead of to CS. The Respondent did not tell BT that she should cease doing work associated with her previous role for the Union, including as a MSR Organiser.
14. During the period from April 2020 to October 2021, while employed as a MESC Coordinator, BT spent a substantial proportion of her time doing the work of her previous role for the Union, including as a MSR Organiser for the benefit of the Union, and did little work in her role as MESC Coordinator for the benefit of the Trustee.
15. During the period from April 2020 to October 2021, the Respondent was aware of the matters in paragraph 14 above. He was also aware that the salary and entitlements

referable to BT's position as a full-time MESC Coordinator were being invoiced by the Union to the Trustee under the MESC Contract.

16. Despite being aware of the matters in paragraphs 14 and 15 above, during the period from April 2020 to October 2021, the Respondent:
  - 16.1. directed BT to carry out, or approved her carrying out, work in her previous role for the Union, including as a MSR Organiser for the benefit of the Union rather than in her role as MESC Coordinator for the benefit of the Trustee;
  - 16.2. did not inform or disclose to the employer representative or independent directors or staff of the Trustee that BT was carrying out work of that kind, or seek their approval for her to carry out that work; and
  - 16.3. did not take steps to ensure that the Trustee was not invoiced for the full amount of the salary and entitlements referable to BT's position as MESC Coordinator.
17. The Respondent engaged in the conduct identified in each of paragraphs 12, 13 and 16 above for the purpose of ensuring that BT would continue to do substantial work in her previous role for the Union, including as a MSR Organiser for the benefit of the Union rather than in her role as MESC Coordinator for the benefit of the Trustee, while having her employment funded by the Trustee.
18. Alternatively, the Respondent engaged in the conduct identified in paragraph 16 above for the purpose identified in paragraph 17.

#### **Conduct in relation to the extension of the MESC Contract**

19. On 17 February 2020, the Trustee approved the commencement of negotiations with the Union to extend the MESC Contract for a period of two years.
20. During the period from January 2020 to 23 April 2020, the Respondent was involved in formulating the Union's initial offer to the Trustee, which was ultimately presented to the Trustee on 23 April 2020. In particular, the Respondent:
  - 20.1. provided instructions to CS and TW, a consultant engaged by the Union to assist with the negotiation of the extension of the MESC Contract, about the offer;
  - 20.2. received updates about the offer from CS and TW; and
  - 20.3. approved the communication by which the offer was presented to the Trustee on 23 April 2020.
21. The offer presented to the Trustee on 23 April 2020 proposed significant increases in the amounts payable by the Trustee under the MESC Contract. It included, among other things, a 5 per cent increase in the fees payable under the contract and an additional one-off "roll over" fee of \$350,000.
22. The Respondent engaged in the conduct at paragraphs 20 and 21 with the intention of increasing the fees to be charged to the Trustee under the MESC Contract without any corresponding increase in benefits to the Trustee under the MESC Contract.
23. Further or alternatively, the Respondent engaged in the conduct at paragraphs 20 and 21 with the intention of benefiting the Union at the expense of First Super and its members' interests.
24. After the Trustee responded to the offer presented on 23 April 2020, the Respondent was involved in the ongoing conduct of the negotiation on behalf of the Union. In particular, the Respondent:
  - 24.1. received updates about the ongoing negotiation from CS and TW;
  - 24.2. provided instructions to CS and TW in relation to the negotiation;

- 24.3. approved the positions of the Union to be communicated to the Trustee in relation to the negotiation; and
  - 24.4. provided progress updates to the Union Finance and Administration Committee and the Union Divisional Executive to inform their decision-making processes in relation to the MESG Contract.
25. The Respondent did not disclose his conduct referred to in paragraphs 20 and 24 above to the staff or directors of the Trustee.

**B. RELIEF SOUGHT FROM THE COURT**

26. The Applicant seeks the relief set out in the accompanying Originating Application.

**C. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

**Declarations**

27. By reason of the matters set out in paragraphs 1 to 3 above, the Respondent is, and was at all relevant times, a director of a corporate trustee of a registrable superannuation entity within the meaning of the SIS Act. Under s 52A(1) of the SIS Act and cl 14(b) of the trust deed of First Super, the governing rules of First Super at all relevant times contained the covenants set out in s 52A(2) of the SIS Act. Accordingly, the Respondent was required to comply with the covenants in s 52A(2) of the SIS Act.
28. By reason of the matters set out in paragraphs 4 and 5 above, the Union is, and was at all relevant times, an “associate” of the Respondent within the meaning of the SIS Act.
29. By engaging in the conduct referred to in paragraphs 10 to 17 above, or alternatively, paragraphs 10 to 16 and 18 above, in the period from March 2020 to October 2021, the Respondent:
- 29.1. failed to act honestly in all matters concerning First Super, in breach of the covenant set out in s 52A(2)(a) of the SIS Act;
  - 29.2. failed to exercise, in relation to all matters affecting First Super, the same degree of care, skill and diligence as a prudent superannuation entity director would exercise, in breach of the covenant in s 52A(2)(b) of the SIS Act;
  - 29.3. failed to perform his duties and exercise his powers as director of the Trustee in the best financial interests of the members of First Super, in breach of the covenant in s 52A(2)(c) of the SIS Act; and
  - 29.4. in circumstances of a conflict between, his duties to, and the interests of, the members of First Super, and, his duties to, and the interests of, the Union: (i) failed to give priority to the duties to and interests of the members of First Super over the duties to and interests of the Union; (ii) failed to ensure that his duties to the members of First Super were met despite the conflict; and (iii) failed to ensure that the members of First Super were not adversely affected by the conflict, in breach of the covenant in s 52A(2)(d) of the SIS Act,
- and therefore, in each case, contravened s 54B(2) of the SIS Act.
30. Further, by engaging in the conduct referred to in paragraphs 19 to 22 and 24 to 25 above, or alternatively paragraphs 19 to 21 and 23 to 25 above, in the period from January 2020 to October 2020, the Respondent engaged in further conduct identified in each of subparagraphs 29.1, 29.2, 29.3 and 29.4 above and therefore, in each case, contravened s 54B(2) of the SIS Act.

31. Under s 196(1) and (2) of the SIS Act, if the Court is satisfied that a person has contravened a civil penalty provision of that Act, the Court must make a declaration in accordance with s 196(2).
32. At all times since 6 April 2019, s 54B(2) of the SIS Act has been a civil penalty provision. All of the conduct referred to in paragraphs 10 to 25 above occurred after 6 April 2019.

#### **Monetary penalties**

33. Under s 196(3) and (4) of the SIS Act, if the Court is satisfied that a person has contravened a civil penalty provision of the Act, and is satisfied that the contravention is a serious one, the Court may order that the person pay a monetary penalty to the Commonwealth.
34. Each of the Respondent's contraventions of s 54B(2) of the SIS Act identified in paragraphs 29 and 30 above are serious.
35. The Respondent's conduct in relation to BT involved the Respondent causing money to be deliberately taken from an entity of which he was a director, to benefit an associate of his, without disclosing that fact to the first entity.
36. The Respondent's conduct in relation to the MESC Contract extension involved the Respondent seeking to increase the amount of money paid by an entity of which he was a director, to an associate of his, where there was no corresponding benefit for the increase. Further or alternatively, it involved the Respondent pursuing the interest of the Union when in a position of conflict of duties as between his role as director of the Trustee and the National Secretary of the Manufacturing Division of the Union, in circumstances where he was aware of that conflict.

#### **Disqualification**

37. Under s 126H(1), (2) and (3) of the SIS Act, if the Court is satisfied that a person has contravened the SIS Act on one or more occasions, and that the nature or seriousness of the contravention(s), or the number of contraventions, provides grounds for disqualifying the individual, and that the disqualification is justified, the Court may disqualify the individual from being or acting as a responsible officer of any corporate trustee of a superannuation entity.
38. For the reasons in paragraphs 27 to 30 and 34 to 36 above, there are grounds for disqualifying the Respondent from being or acting as a responsible officer of any corporate trustee of a superannuation entity, and the disqualification is justified.

#### **D. ALLEGED HARM**

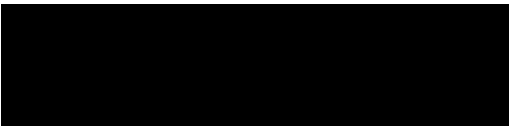
39. The Respondent's conduct caused the harm outlined in paragraph 35 above.
40. Further, the covenants in s 52A(2) of the SIS Act are central to the proper conduct of trustees of registrable superannuation entities and the protection of the interests of members of such entities, who are vulnerable to the consequences of breaches of the covenants. Among other things, those covenants protect the interests of members and ensure public confidence in the prudent management of regulated superannuation funds. The public must have confidence that these covenants are upheld across an industry that currently manages \$8.6 trillion of retirement income of Australians.

This concise statement was prepared by J D Watson of Counsel and settled by M I Borsky KC.

**CERTIFICATE OF LAWYER**

I Katrina Close certify to the Court that, in relation to the concise statement filed on behalf of the Australian Prudential Regulation Authority, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 5 September 2024



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Katrina Close  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant