

NOTICE OF FILING

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
UNITED SUPER PTY LTD ACN 006 261 623 AS TRUSTEE FOR THE
CONSTRUCTION AND BUILDING UNIONS SUPERANNUATION FUND
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

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.



Concise Statement

No. _____ of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

UNITED SUPER PTY LTD ACN 006 261 623 as Trustee for the CONSTRUCTION AND BUILDING UNIONS SUPERANNUATION FUND

Defendant

IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. At all material times, the Defendant, United Super Pty Ltd ACN 006 261 623 as Trustee for the Construction and Building Unions Superannuation Fund (**Cbus**) held, and continues to hold, an Australian Financial Services Licence number 233792 (**AFSL**) and a Registrable Superannuation Entity (**RSE**) licence. The AFSL authorises it to deal in a financial product by issuing, applying for, acquiring, varying or disposing of a financial product in respect of superannuation, and provide a superannuation trustee service to retail and wholesale clients.
2. The Plaintiff (**ASIC**) alleges that, in the period between at least 1 September 2022 and the date of this document (**Relevant Period**), Cbus failed to process death and total and permanent disability (**TPD**) benefits claims made by its members (and/or their dependents/claimants) within reasonable time-frames, including by failing to properly assess delays in processing death and TPD benefits claims encountered by the service provider it had subcontracted those tasks to, failing to take prompt and appropriate action when aware of those delays, and failing to properly identify the risks that its claims processing system posed to members and claimants.

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, Applicant
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(include state and postcode)

3. By 31 December 2022, these delays had affected thousands of members and claimants and meant that:
 - a. of 7,731 TPD claims, 4,366 (56%) were claims which had not been resolved within 365 days, and only 830 (11%) claims were less than 90 days old; and
 - b. of 3,622 death benefits claims, 1,946 (53%) were claims which had not been resolved within 365 days, and only 405 (11%) claims were less than 90 days old.
4. Cbus stated in its breach report lodged with ASIC on 19 December 2023 that affected members and claimants suffered an estimated \$20,000,000 in losses. Even though Cbus was aware of inordinate delays affecting thousands of members and claimants, it failed to take prompt and effective action to prevent and/or reduce such losses.
5. ASIC also alleges that Cbus failed to lodge a 'reportable situation' report with ASIC in relation to its conduct within the time required by the *Corporations Act 2001 (Cth)* (**Corporations Act**).
6. Further, ASIC alleges that Cbus lodged a 'reportable situation' report with ASIC, and subsequently clarified that report, which contained statements making the report and the clarification false or misleading. Cbus failed to take all reasonable steps to ensure that the report and the clarification were not materially false or misleading because of the statements.

The Defendant

7. Cbus is the RSE licensee and trustee of the Construction and Building Unions Superannuation Fund ABN 75 493 363 262 (**Fund**). The Fund is a public offer industry fund and one of the largest industry super funds for the building, construction and allied industries. As at 30 June 2024, Cbus had more than \$94 billion under its management in the Fund, and the Fund had more than 920,000 members.
8. The Fund offers its superannuation members death, terminal illness, TPD and income protection insurance benefits cover through its insurance provider TAL Life Limited (**TAL**).

Cbus outsources material business activities

9. Cbus engages external service providers for several of its material business activities, including administration, custodial services and investment management. Cbus has an outsourcing policy, supporting processes and reporting in place to oversee these arrangements. Pursuant to that policy and prudential requirements determined by the Australian Prudential Regulation Authority, Cbus is ultimately responsible for any outsourced material business activities. Under the trust deed for the Fund, Cbus also covenanted with members of the Fund to perform all prudential requirements and obligations imposed under the Corporations Act.

10. Mitsubishi UFJ Trust & Banking Corporation, a subsidiary of Mitsubishi UFJ Financial Group, Inc (**MUFG**), is a provider of scaled, technology-enabled administration solutions. MUFG is the ultimate parent company of MUFG Pension & Market Services Holdings Limited, a provider of services in Australia's superannuation administration industry (**MUFG Pension & Market Services**). MUFG Pension & Market Services operates through its subsidiaries, including Australian Administration Services Pty Limited ACN 003 429 114 (**AAS**).

Administration Agreement

11. On or around 23 December 2020, Cbus, AAS and Pacific Custodians Pty Limited (**Pacific Custodians**) entered into an administration agreement (**Administration Agreement**). Under the Administration Agreement, AAS was to provide administration and other services to the Fund, and Pacific Custodians was to provide custody services to the Fund. The Administration Agreement was varied on or around 14 June 2022 and remains in effect.
12. On or around 1 July 2021, Cbus and TAL entered into a service level agreement.

Cbus failed to properly assess the scale of delays and take prompt action

13. From at least about February 2020 onwards, Cbus's management received insurance consolidation reports from AAS containing data about the age of death and TPD benefits claims and their status, as required under the Administration Agreement. That data showed very large numbers of death and TPD benefits claims: (a) older than 90 days; and (b) even older than 365 days, especially in the second half of 2022. Further, Cbus had its own information recording: (a) the date on which every death and TPD claim was first made; and (b) the date on which every such claim was accepted or rejected. That information was sufficient to enable Cbus to determine the volume and ageing of all such claims.
14. Despite being aware of this data and information, reporting to Cbus's board committees did not suggest any cause for alarm and gave the impression that any problem was being adequately addressed, at least until August 2023. As a result, Cbus failed to properly assess the scale of delays in the processing of death and TPD claim and take prompt and appropriate action to redress those delays.

Cbus's failed to take appropriate action to reduce delays when it identified claim processing problems

15. On 10 October 2022, Cbus implemented a 'Claims Reengineering Plan' with AAS, which was brought about by AAS's poor performance in meeting service levels under the Administration Agreement, including in relation to the timely performance of tasks connected with processing of death and TPD benefits claims. The purpose of the plan

was to clear backlogs (including in respect of death and TPD benefits claims) and process incoming claims within a reasonable time. Ultimately, it failed to meet this purpose.

16. On 23 November 2022, as part of an 'Interim Risk Report' considered at Cbus's Risk Committee meeting, Cbus formed the view that AAS was not performing its services adequately (including the timely processing of death and TPD benefits claims) and that the 'root cause' of missed performance standards under the Administration Agreement was large numbers of death and TPD benefits claims and human resource planning issues and/or failures (at AAS).
17. On 14 February 2023, Cbus's Risk Committee met and noted that there had been an increase in complaints related to insurance claim delays and service. It was apparent at this time that the 'Claims Reengineering Plan' Cbus implemented with AAS had failed.
18. On 22 August 2023, Cbus's Risk Committee met and noted that its insurance team had observed a significant turnover in staff in AAS's claims team and identified various matters that were apparent in October 2022 suggesting that AAS's claims processing staff were not adequately trained.
19. Under the Administration Agreement, Cbus had various measures available to it that could have been used to identify and then rectify delays in processing death and TPD benefits claims. Those measures included: (a) requiring AAS to prepare a report identifying the cause for any failure to comply with service levels and the steps taken by AAS to prevent the failure from reoccurring; (b) requesting any documents or information in AAS's control relating to AAS's services; (c) requiring AAS to keep and maintain particular records and providing those records to Cbus; and (d) audit AAS's provision of the services. Cbus failed to implement, or adequately implement, those measures in a manner that would redress the delays in processing death and TPD benefits claims.

Cbus's failed to properly and promptly identify the risks that its claims processing system posed to members and claimants

20. In the period between 2 February 2022 and 22 August 2023, Cbus's Risk Committee met on various occasions and noted: (a) increases in death and TPD benefit claims volumes; (b) AAS's plans to recover from delays in processing claims; and (c) the ongoing failures of those plans to address the problem. In February 2023, Cbus' Risk Committee placed the 'Insurance Offering' material risk on 'heightened watch', but it did not rate this material risk as a 'high' risk.
21. Concerns about AAS's failures to process death and TPD benefits claims in reasonable timeframes were raised by Cbus in late-2021 as possible systemic issues, with those concerns being discussed in November and December 2022 in its meetings with AAS.

22. It was not until Cbus's Risk Committee meeting on 22 August 2023 that the 'Insurance Offering' material risk was re-rated from 'medium' to 'high'. That re-rating led to escalated actions by Cbus and AAS to address the delays in processing death and TPD benefits claims.
23. In its breach report lodged with ASIC on 5 August 2023, Cbus in effect acknowledged that the first instance of its failure to process death and TPD benefit claims efficiently, honestly and fairly occurred on 1 September 2022. That was almost 12 months before Cbus decided to re-rate the 'Insurance Offering' material risk as 'high'.
24. Cbus' failure to properly and promptly identify the risks that its claims processing system posed to members and claimants contributed to its failure to adequately redress the delays in the processing of death and TPD benefits claims.

Cbus failed to lodge a report within 30 days

25. Despite the matters alleged above, and despite failures to process death and TPD benefit claims efficiently being brought to the attention of Cbus' Risk Committee and Executive Risk Committee between September 2022 and February 2023, Cbus first lodged a report of its conduct with ASIC only on 5 August 2023.
26. Cbus' Head of Compliance was responsible for lodging a report of Cbus' conduct within 30 days of there being reasonable grounds to believe that a reportable situation had occurred. Despite that person attending Cbus' Risk Committee and Executive Risk Committee meetings between September 2022 and February 2023, and therefore being aware of the facts and circumstances noted by those committees giving rise to a reportable situation, Cbus failed to lodge a report of its conduct within the statutory time period.

Cbus' false or misleading statements

27. In the breach report lodged with ASIC on 5 August 2023, and the clarification of that breach report sent to ASIC by email by _____ on 1 September 2023, Cbus made various statements that made those communications with ASIC materially false or misleading. The relevant statements included statements to the effect that: (a) the last instance of Cbus' contravening conduct occurred on 7 June 2023; (b) its contravening conduct was first discovered on 7 June 2023; (c) it first became aware of the significance of its conduct on 7 July 2023; (d) its investigation into its conduct started on 7 June 2023; and (e) AAS's incomplete and inaccurate reporting hindered its ability to monitor AAS's claims processing efficiency.
28. Cbus failed to take all reasonable steps to ensure the 5 August 2023 breach report, and the clarification of that breach report sent by email on 1 September 2023, were not materially false or misleading because of the statements referred to above.

SUMMARY OF RELIEF SOUGHT FROM THE COURT

29. As set out in the Originating Application, ASIC seeks declaratory relief under section 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) and/or section 1317E of the Corporations Act, pecuniary penalty orders under section 1317G of the Corporations Act, injunctive relief under section 1101B(1) of the Corporations Act, and costs.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

30. By each of the following failures in the Relevant Period:

- a. failing to process death and TPD benefits claims within reasonable timeframes;
- b. failing to properly assess the scale of the delays in processing death and TPD benefits claims, the systemic nature of the problem, and take prompt action to reduce the delays;
- c. failing to take appropriate action to reduce delays in its death and TPD benefits claims processing, in circumstances where Cbus had recognised that problem and failed to properly address it; and
- d. failing to properly identify the risks that its claims processing system posed to members and claimants,

Cbus did not do all things necessary to ensure that financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened sections 912A(1)(a) and 912A(5A) of the Corporations Act.

31. By its failure to notify ASIC of a 'reportable situation' no later than 3 March 2023, in circumstances where it was aware of a reportable situation, Cbus contravened sections 912DAA(1) and 912DAA(7) of the Corporations Act.

32. By failing to take all reasonable steps to ensure the 5 August 2023 breach report, and clarification of that breach report sent on 1 September 2023, were not materially false or misleading because of statements made in those documents, Cbus contravened section 1308(5) of the Corporations Act.

HARM SUFFERED

33. During the Relevant Period, claimants who were experiencing stress by reason of their injuries or the death of a loved one, suffered harm by reason of the delays in processing of Death Benefits and TPD claims. Along with the added stress and uncertainty caused by the delays, this harm likely included financial loss by reason of the lost opportunity in having access to monies during the period of the delay, among other things.

Certificate of lawyer

I Howard Rapke certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 12 November 2024

A handwritten signature in blue ink, appearing to read "Howard Rapke", is written above a horizontal line.

Signed by Howard Rapke

Lawyer for the Plaintiff

This concise statement was prepared by S R Senathirajah KC and R J Boadle, counsel for the Plaintiff.