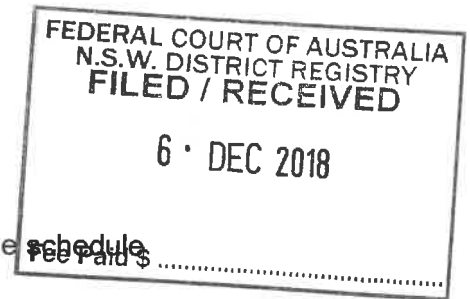


Concise Statement

No. of

Federal Court of Australia
 District Registry: New South Wales
 Division: Commercial & Corporations



AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY
 Applicant

CHRISTOPHER FRANCIS KELAHER and the others named in the schedule
 Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The First to Fifth Respondents are the Managing Director (**Kelaher**), the Chairperson (**Venardos**), the Chief Financial Officer (**Coulter**), the General Manager – Legal, Risk and Compliance and Company Secretary (**Vine**), and Group General Counsel (**Riordan**) of IOOF Holdings Limited (**IOOF Holdings**), the ultimate parent company of the IOOF group of companies. Kelaher is also a substantial shareholder in IOOF Holdings.
2. At all relevant times, the IOOF group carried out the business of a superannuation trustee through the Sixth and Seventh Respondent: I.O.O.F. Investment Management Ltd (**IIML**) and Questor Financial Services Limited (**Questor**). Until around September 2018, each of Kelaher, Venardos, Coulter, Vine and Riordan held the same positions in respect of IIML and Questor's superannuation business as they held in respect to IOOF Holdings, and were 'responsible officers' of those superannuation trustees for the purposes of the *Superannuation Industry (Supervision) Act 2013* (Cth) (**SIS Act**).
3. In 2015, the Australian Prudential Regulation Authority (**APRA**) identified a number of issues concerning the IOOF group of companies that it considered demonstrated that Questor and IIML had failed to maintain the structures, policies and procedures required to manage conflicts of interest in their superannuation business. In particular, APRA identified that on three separate occasions in 2015, Questor and IIML had contravened the SIS Act by deciding to differentially compensate superannuation beneficiaries and other non-superannuation investors for losses caused by Questor, IIML or their service providers, with superannuation beneficiaries being compensated from their own reserve funds rather than the trustees' own funds or third-party compensation. APRA further identified that Kelaher had rejected a proposed fund transfer without considering the interests of the relevant superannuation beneficiaries. The details of these instances are set out further below.
4. Since 2015, Kelaher, Venardos, Coulter, Vine and Riordan have refused to properly acknowledge APRA's concerns in this regard, and have failed to cause Questor and IIML to take the necessary actions to ensure ongoing compliance with the SIS Act and applicable prudential standards. APRA alleges that Kelaher, Venardos, Coulter, Vine and Riordan's involvement in the contraventions of the SIS Act and failure to appropriately engage with

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and respond to APRA's prudential supervision demonstrate that they should no longer remain responsible officers of a superannuation trustee, and APRA seeks disqualification orders in respect of each of them.

Conflicted structure

5. At all material times, each of Questor and IIML carried out dual roles in the IOOF group of companies. *First*, they were the trustees of superannuation funds. IIML was the trustee of the IOOF Portfolio Service Superannuation Fund (**IPS Super**) and Questor was the trustee of The Portfolio Service Retirement Fund (**TPS Super**) until June 2016 (at which time TPS Super was successor transferred into the IPS Super). *Secondly*, they were the responsible entities (**RE**) for certain Managed Investment Schemes (**MIS**) within the meaning of Part 5C of the *Corporations Act 2001* (Cth). In their roles as superannuation trustee, each of Questor and IIML invested the funds of their superannuation beneficiaries in MIS in which they or a related entity was the RE.
6. Up until 2018, the Boards of IIML and Questor did not distinguish between when they were acting as the Board of a superannuation trustee or the Board of a RE of a MIS, and did not identify potential or actual conflicts of interest arising from these dual roles. Further, the Board of IIML and Questor included members of the Board of IOOF Holdings Ltd (including Kelaher and Venardos) and relied upon group Board committees to carry out their functions.

Failures to prioritise interests of superannuation beneficiaries

Pursuit breach

7. From around 2007, IIML failed to act on instructions of Pursuit investor directed portfolio services (IDPS) clients to reinvest income distributions, meaning those distributions remained in the investor's cash account rather than being reinvested in accordance with their instructions. IIML failed to detect the Pursuit Breach until August 2014 (the **Pursuit Breach**). The affected investors included both superannuation beneficiaries and non-superannuation investors.
8. On 13 May 2015, Vine and Riordan recommended to the Board of IIML, in its capacity as trustee, that they compensate investors who had suffered losses because of the Pursuit Breach by (a) paying the non-super investors from IIML's own funds; but (b) paying superannuation beneficiaries from IPS Super's Operational Risk Financial Reserve (**ORFR**) (the **Pursuit Breach Compensation Plan**). The IPS Super ORFR was an asset of IPS Super and trust property. The Board of IIML (including Kelaher and Venardos) approved the plan on 27 May 2015 without identifying that it involved any conflict of interest between the interests of superannuation members and the interests of non-superannuation investors.
9. In meetings with APRA at or around the time the Pursuit Breach Compensation Plan was developed, APRA informed IIML representatives that IIML should either fund the compensation for the Pursuit Breach itself or seek compensation from its service provider, IOOF Service Co Pty Ltd (**IOOF Service Co**). Vine and Riordan recommended to the Board of IIML that it not take either of these steps, and the Board endorsed this recommendation. No steps have since been taken to replenish the IPS Super ORFR.

Sweep breach

10. In around 2011, Questor failed to reinstate the automatic investment plan instructions given

to Questor by approximately 1,300 investors. Questor failed to detect the Sweep Breach until January 2015 (the **Sweep Breach**). The affected investors included both superannuation beneficiaries and investors in MIS products.

11. In around May 2015, Vine and Riordan recommended to the Board of Questor, in its capacity as trustee, that it compensate investors who had suffered losses because of the Sweep Breach by (a) paying the investors in TPS MIS from Questor's own funds; but (b) paying superannuation beneficiaries in TPS Super from TPS Super's ORFR (the **Sweep Breach Compensation Plan**). The ORFR was an asset of TPS Super and trust property. The Board of Questor (including Kelaher and Venardos) approved the plan on 27 May 2015 without identifying that it involved any conflict of interest between the interests of superannuation members and the interests of non-superannuation investors.
12. Despite APRA's requests in relation to the Pursuit Breach, Vine and Riordan recommended to the Board that Questor not pay for the compensation itself nor seek compensation from IOOF Service Co. The Board endorsed this recommendation. No steps have since been taken to replenish the TPS Super ORFR.

CMT breach

13. Until around 2 January 2014, Questor was the RE of two MIS known as the Cash Management Trust (**CMT MIS**) and The Portfolio Service Plan (**TPS MIS**). Questor invested the funds of the TPS Super Fund and the TPS MIS in the CMT MIS.
14. In around May 2009, Questor as RE for the CMT MIS made an overpayment to the unitholders in the CMT MIS, including to itself as trustee of the TPS Super and RE of the TPS MIS, and that overpayment was subsequently distributed to individual investors in TPS Super and the TPS MIS (the **CMT Overpayment**). Questor informed APRA that it only identified the CMT Overpayment in 2011. To address the CMT Overpayment, Questor determined to recover the overpayment by causing a reduction in distributions from the CMT MIS to unit holders over a period of three years (**CMT Remediation Plan**). This plan prejudiced new members in TPS Super who had not received any of the CMT Overpayment.
15. On 16 October 2015, Coulter and Vine recommended to the Board of Questor that Questor, as superannuation trustee, agree to a compensation plan that involved (a) fully compensating the investors in the TPS MIS from amounts received from a settlement with Questor's custodial services provider (the **NCS Settlement Amount**), and (b) partially compensating the superannuation beneficiaries of TPS Super from the remainder of the NCS Settlement Amount, and by making up the shortfall from the TPS Super general reserve (which was trust property) (the **CMT Compensation Plan**). The Board of Questor (including Kelaher and Venardos) approved the plan on 28 October 2015 without identifying that it involved any conflict of interest between the interests of superannuation members and the interests of non-superannuation investors.
16. The CMT Compensation Plan continued to be implemented by IIML following the successor fund transfer of TPS Super to IPS Super. IIML did not replenish the general reserve of TPS Super or IPS Super until October 2018 (following repeated requests from APRA).

Failure to consider beneficiaries interests on proposed transfer

17. On about 2 February 2015, Singtel Optus Pty Ltd (**Optus**) requested that IIML transfer the Optus employee default superannuation arrangements from IPS Super to an AMP fund by

way of a successor fund transfer (**Proposed Optus SFT**). In requesting the transfer, Optus told IIML that it was concerned that Optus members would be prejudiced by IIML's proposal to move certain members to its MySuper product, which would involve them moving from conservative default options into the more aggressive IOOF MySuper strategy.

18. On about 10 February 2015, Kelaher, acting on behalf IIML as trustee of IPS Super, rejected the Proposed Optus SFT. Kelaher and IIML did not take any or adequate steps to consider whether the Proposed Optus SFT was in the best interests of the relevant superannuation beneficiaries before rejecting the transfer.

Conduct in response to APRA concerns

19. Since September 2015, APRA has raised (in writing and in person) concerns regarding Questor and IIML's management of conflicts of interest, as well as the lack of compliance by Questor, IIML and their directors with their respective obligations under the SIS Act and prudential standards. This included drawing the Respondents' attention to the instances identified above.
20. In their responses (in writing and in person), the Respondents have each demonstrated an inability to properly identify and appreciate conflicts of interest; a lack of understanding of their obligations under the SIS Act and the general law; and a lack of contrition in relation to the breaches of the SIS Act identified by APRA. They have also failed to properly implement a robust conflicts management framework, as required by SPS 521, which documents all conflicts (including those arising from dual role of Questor and IIML), includes processes for prioritising the interests of superannuation beneficiaries in accordance with s52 and s52A of the SIS Act, requires conflicts to be recorded in Board minutes, and requires conflicts arising from the use of service providers to be recorded. In addition, the Respondents have failed to ensure that Questor and IIML complied with APRA's requirements and recommendations in a timely manner or at all. Further, their conduct demonstrates a failure to comply with SPS 520, which requires responsible officers of a superannuation trustee to be aware of their legal obligations.

B. SUMMARY OF THE RELIEF SOUGHT

21. As against Questor and IIML, APRA seeks declarations under s21 of the *Federal Court of Australia Act 1976* (Cth) that they breached their duties as trustees and contravened relevant provisions of the SIS Act as set out below.
22. As against Kelaher and Venardos, APRA seeks declarations under s21 of the *Federal Court of Australia Act 1976* (Cth) that they contravened relevant provisions of the SIS Act as set out below and disqualification orders under s126H of the SIS Act. As against Coulter, Vine and Riordan, APRA seeks disqualification orders under s126H of the SIS Act.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

23. By failing to prevent or detect the Pursuit Breach, Sweep Breach or CMT Overpayment, Questor and IIML failed to exercise the degree of care, skill and diligence a prudent superannuation trustee would exercise as required by s52(2)(b) of the SIS Act. Further, by implementing the Pursuit Breach Compensation Plan, the Sweep Breach Compensation Plan and the CMT Breach Compensation Plan, and rejecting the Proposed Optus SFT, in circumstances where those actions prioritised the corporate interests of the IOOF group and/or the interests of non-superannuation investors in IOOF products, Questor and IIML

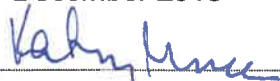
failed to (a) exercise their powers in the best interests of the beneficiaries of the superannuation funds, as required by s52(2)(c) of the SIS Act, and (b) give priority to the interests of the beneficiaries of the superannuation funds over the interests of all other persons, as required by s52(2)(d) of the SIS Act.

24. By failing to ensure that IIML and Questor detected and remediated the Pursuit Breach, Sweep Breach, CMT Overpayment and CMT Remediation Plan in a timely manner, and subsequently approving the Pursuit Breach Compensation Plan, the Sweep Breach Compensation Plan and the CMT Breach Compensation Plan, in circumstances where those plans prioritised the corporate interests of the IOOF group and the interests of non-superannuation investors in IOOF products, Kelaher and Venardos each failed to (a) exercise the degree of care, skill and diligence of a prudent superannuation entity director; (b) exercise their powers in the best interests of the beneficiaries of the superannuation funds, as required by s52A(2)(c) of the SIS Act; (c) give priority to the interests of the beneficiaries of the superannuation funds over the interests of all other persons, as required by s52A(2)(d) of the SIS Act; and (d) exercise reasonable care and diligence to ensure that Questor and IIML complied with their corresponding covenants, as required by s52A(2)(f) of the SIS Act. Further, by rejecting the Proposed Optus SFT, Kelaher failed to exercise his powers in the best interests of the beneficiaries of the superannuation funds, as required by s52A(2)(c) of the SIS Act. Each of the above breaches of the covenants in s52 and s52A constituted a contravention of s55(1) of the SIS Act by Kelaher and Venardos.
25. The disqualification orders against Kelaher, Venardos, Coulter, Vine and Riordan are sought on three alternative grounds. *First*, that the nature, seriousness and number of contraventions of s52A of the SIS Act by the Kelaher and Venardos provide grounds for disqualifying them pursuant to s126H(3) and the disqualification is justified. *Secondly*, that the Kelaher, Venardos, Coulter, Vine and Riordan were responsible officers of Questor and IIML when those entities contravened s52 and s34C of the SIS Act, and the seriousness and number of those contraventions of the SIS Act provide grounds for disqualifying them pursuant to s126H(4) and the disqualification is justified. *Thirdly*, that the contraventions of the SIS Act together with the conduct of that the Kelaher, Venardos, Coulter, Vine and Riordan in response to APRA's prudential supervision, demonstrate that they each are not a fit and proper person to be a responsible officer of a trustee of a superannuation entity, which are grounds for them to be disqualified under s126H(5).

Certificate of lawyer

I Katherine Alison Merrick certify to the Court that, in relation to the Concise Statement 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: 6 December 2018



Signed by Katherine Alison Merrick
Lawyer for the Applicant

Schedule

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: Commercial & Corporations

Respondents

First Respondent:	Christopher Francis Kelaher
Second Respondent:	George Venardos
Third Respondent:	David Coulter
Fourth Respondent:	Andrew Paul Vine
Fifth Respondent:	Gary William Riordan
Sixth Respondent:	I.O.O.F. Investment Management Ltd (ACN 006 695 021)
Seventh Respondent:	Questor Financial Services Pty Ltd (ACN 078 622 718)

Date: 6 December 2018