Preface

Trusting in the Trust

It is no exaggeration to say that in the last 25 years the provision of superannuation in Australia has been revolutionised in the common good by the compulsory Superannuation Guarantee Scheme and the *Superannuation Industry (Supervision) Act 1993* (the 'SIS' Act), bolstered by Financial Services Regulation ('FSR'). Superannuation has itself become a specialist area of law and practice, developed by annual conferences organised by the Superannuation Committee of the Law Council of Australia and at which I have spoken.

This stimulating collection of papers, selected from papers delivered at such conferences since 1992, provides insight into the vibrant development of regulated superannuation funds. They provide necessary reinforcement to complement the public old age pension and private savings, thereby helping to make retirement comfortable.

The collection's primary focus is upon regulated superannuation trust funds that are vehicles to receive employers' Guarantee Scheme contributions and voluntary contributions. The papers clearly show that the trust entity is the best vehicle for efficiently and safely securing that the promised superannuation benefits are available to beneficiaries after a lengthy gestation period.

The trust fund, via its trustee, is a conveniently taxable entity segregated from the trustee's and beneficiaries' assets and those of any sponsoring employer, so as to be unaffected by any insolvency. Moreover, proprietary remedies via the tracing process are available to recover wrongly transferred assets and their traceable product. The problem is that if assets are squandered so as not to be traceable, then only monetary compensation can be sought against the wrongdoer, so being of no assistance if the latter is insolvent. The trustee, however, is an ideal figure for prudential regulation under a licensing regime, so as to minimise any squandering of the trust assets. The beneficiaries do not have fractional interests in the trust fund that would interfere with the trustees' flexible operation of the fund in dealing with the multifarious interests of beneficiaries. Indeed, to deal with the diversity of superannuation funds, trust deeds can be drafted to suit widely varying circumstances.

The trust's flexibility, however, can be a great weakness since so many protective obligations of trust law can be ousted by a skilful draftsperson so as to leave a tiny irreducible core of obligations: the obligation to act honestly and in good faith for the benefit of the beneficiaries and the obligation to ensure that the identity of the trust property is known.

Hence there is a need for legislation to ensure that there is an irreducible core of substantial obligations imposed on trustees of superannuation funds. The SIS Act has done this by including certain obligations in the trust deed as covenants by the trustee and covenants by directors of corporate trustees, the latter covenants going beyond the ordinary trust law position. The SIS Act also requires trustees and directors thereof to comply with prudential standards issued by the Australian Prudential Regulatory Authority ('APRA').

The symbiosis between trust law and statute law remains to be worked out in some areas. To what extent does statute law replace trust law? To what extent does it leave as the default law trust law as developing from time to time via case law? To what extent does it provide remedies in addition to trust law remedies?

The SIS Act s 52(2)(b) appears to replace trust law with a higher standard of care in requiring the trustee to exercise 'the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments'. A prudent superannuation trustee is defined as 'a person whose profession, business or employment is or includes acting as a trustee of a superannuation entity and investing money on behalf of beneficiaries of the entity'.

Section 52(2)(d), in referring to the 'no conflict' duty of undivided loyalty owed to beneficiaries, refers only to 'where *there is a conflict* between the duties of the trustee to the beneficiaries' and does not deal with situation where *there is a real sensible possibility of a conflict,* which is the trust law position. Query whether ignoring a real sensible possibility of conflict might even contravene s 52(2)(b). Indeed, APRA Prudential Standard SPS 521 para 18(a) requires trustees to have a 'Conflicts Management Policy' for 'identifying and monitoring all potential and actual conflicts'.

Section 52(2)(c) requires a trustee 'to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries' as if the duty to act in the beneficiaries' best interests was a stand-alone absolute duty. This is fine for ordinary family trusts, but in the case of a defined benefit scheme, where advantageous provision is sensibly made for the employer to benefit from amendments or payments, it now seems clear that regard should be had to the beneficiaries' best interests in so far as is consistent with the proper purposes of the trust: see the English case, *Re Merchant Navy Ratings Pension Fund* [2015] EWHC 448 (Ch); [2015] PLR 239. Intriguingly, in the light of the SIS Act s 117 permitting surplus funds being returned to the employer, Byrne J in *Invensys v Austrac* [2006] VSC 112; (2006) 15 VR 87 holistically considered such a return to have complied with s 52(2)(c).

Where there is a contravention of the covenants contained, or taken to have been contained, in the governing rules, under s 55(3) a person who suffers loss or damage as a result of another person's breach 'may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention'. It is unclear whether this is to be regarded as co-extensive with equitable remedies or wider, especially in the case of an 'involved' person.

What is clear is that the combination of trust law and regulation under the SIS Act, APRA and FSR maximises the likelihood of a well-provided-for retirement, having minimised the risks by ensuring prudent and efficient management of superannuation funds held as a ring-fenced protected fund. One does not know how things may change in the coming decades, but this collection of papers shows that trust law combined with regulatory law should be able to cope with any challenges that may materialise, taking account of how such a combination has already coped well with the challenges that materialised earlier.

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