

Chapter 13

Exercise by Superannuation Trustees of Discretionary Powers

The Hon Joseph Campbell

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Introduction

The general topic on which I have been asked to speak is the nature of the obligations of the trustee of a superannuation fund when exercising discretions, the nature of the entitlements of members of superannuation funds concerning the exercise of discretions, and whether the member has any contractual entitlements. More specifically, I have been asked to address:

- what are the boundaries of such exercise of discretion;
- the scope of the *Karger v Paul* principles, and their applicability to superannuation trusts;
- judicial commentary on this aspect in the New South Wales Supreme Court, and the impact and nature of a member's entitlement as a non-volunteer and potentially as a party contracting with the trustee.

As well it has been suggested to me that there has been an increased focus by courts on reasonableness and regard to the rights and expectations of beneficiaries in the context of the exercise of discretions (eg *Vidovic v Email Superannuation Pty Ltd*).¹

Finally, it has been suggested to me that courts might increase scrutiny of decisions concerning potential beneficiaries of superannuation funds because superannuants are not volunteers.

I feel some difficulty in addressing any of these questions in the abstract. That difficulty arises from a fundamental feature of the office of trustee.

In the most general terms, a trustee is someone who has title to property, subject to obligations to deal with it faithfully for the benefit of a person or purpose other than the trustee. But to progress beyond that generality, and say with any precision what a particular trustee must do, and what a particular trustee is free to do if it so chooses, you need to look to the facts about the particular trust in question and the particular

¹ Unreported, Supreme Court of New South Wales, Bryson J, 3 March 1995.

This is a preview. Not all pages are shown.