

SUPERANNUATION – A CONFLUENCE OF LEGAL STREAMS*

Chief Justice Robert French

Canberra 26 February 2009

There are few areas of the law which engage more strands of Australia's national legal, social, economic, industrial and political history than superannuation. There are few areas of practice which engage more extensively with the common law, equity and statute law. There are few which change with such rapidity.

No doubt there are lawyers who designate themselves as superannuation specialists. There may even be a few in the room today. If that term is used it is something of an oxymoron. Superannuation requires a generalist's skills. It straddles private and public law. It attracts the application of equitable doctrines, particularly the law relating to trusts and fiduciary obligations. It also falls within the scope of contractual relations between employers and employees. It is affected by statutory regimes both specific to superannuation, and of more general application.

Its development has been linked to that of industrial relations law and from time to time it engages with the Constitution.

*

Law Council of Australia, Superannuation Committee Conference, Canberra, 26 February 2009

2.

Overlapping regulatory arrangements affect the administration of superannuation funds and may impact on the rights and duties of trustees and beneficiaries. The Australian Prudential Regulatory Authority is the principal regulator, and has been since 1998, but the Australian Securities and Investments Commission also has responsibilities in the area. The substantive law defining their powers and functions is only part of the regulatory framework. Their administrative policies and practices form part of the "soft" law that defines the regulatory environment in which practitioners in this field work. The taxation of superannuation contributions and earnings and the oversight of small self-managed superannuation funds attract the involvement of the Commissioner of Taxation. His rulings lack statutory force however they afford statutory protections for those who rely upon them and are another important part of the regulatory environment. One recent example is a draft ruling relating to the Commissioner's understanding of the terms "ordinary time earnings" and "salary or wages" found in s 6(1) of the *Superannuation Guarantee (Administration) Act 1992 (Cth)*. It is on your Conference agenda for discussion¹. Such rulings can have important administrative and financial implications for those who have to order their affairs consistently with them.

The various legal intersections affecting superannuation are reflected in the range of topics in your conference programme for the next three days. They include trustees' duties, restitution and estoppel in the context of payments made under mistake and trustees' liabilities for investment decisions. The approach of the regulators and new policy developments under consideration by government are also to be discussed. The importance of superannuation in Australian society is evidenced by the existence of a Ministerial portfolio for Superannuation and Corporate Law and the attendance of

¹ ATO Draft Superannuation Guarantee Ruling SGR 2008/D2. For discussion of the draft ruling see Levy and Mathieson: "ATO Changes its Views on Ordinary Time Earnings" (2009) 20 (6) *Australian Superannuation Law Bulletin* 82.

3.

the Minister, Senator Sherry, to speak at this conference on Friday. Government policy affecting superannuation seems inevitably to attract debate².

I cannot claim to address you today as one who has ever had to delve deeply into the law as it affects superannuation arrangements. That delving, no doubt, is part of the daily burden and forms the basis of advices given and actions undertaken by lawyers practising in the field. I can claim, however, from personal experience, some understanding of the risks of administering a superannuation fund. When practising at the Bar in Perth in 1985, I became Chairman of the Board of Trustees for the Robe River Iron Associates Provident Fund. I succeeded Ian Temby QC who was then also Vice-President of the Law Council of Australia. He was appointed in 1985 as the first Commonwealth Director of Public Prosecutions and so had to resign the Chairmanship of the Board. That Chairmanship seemed a fairly innocuous appointment, if not something of a sinecure. The Board comprised equal numbers of management and union representatives. The Chairman was an independent person. The Fund was performing well, with a judicious mix of equities and other forms of investments. Returns were of the order of 20 to 30%. The most intense debates on the Board concerned the extent to which the Fund's earnings should be allocated to a reserve so that some of the benefits of the good times could be held over to the bad and fluctuations in returns smoothed out. The other major challenge was to comprehend the impenetrable jargon with which the Fund's managers reported upon its performance.

Part of the way through what should have been a fairly comfortable term as Chairman, disaster struck. There was a change in the leadership of Robe River Iron

² See, for example, recent papers published by the Australia Institute: Fear and Pace, "Choosing not to Choose – Making superannuation work by default", Australia Institute and Industry Super Network Discussion, Paper No 103, November 2008; Ingles, "The Great Superannuation Tax Concession Rort", Australia Institute Research Paper No 61, February 2009.

4.

Associates. On 31 July 1986, the entire senior management of the company was replaced and it looked as though the whole of the workforce, effectively all the members of the Fund, might be dismissed. This action was taken in response to a perception by the new leadership of the company of widespread restrictive work practices and their toleration by management³. The somewhat depleted Board of the Fund was faced with the possibility of having to wind-up what was then a \$14M fund within the space of a month or so, to pay out all the entitlements of the workforce. The Trust Deed was simply not designed to cope with such a singular event.

Happily, the workforce and the company resolved their differences and the winding-up of the Fund was averted. For a time, however, there was a distinct adrenalin rush not normally incidental to the role of Chairman of such a body. I resigned from the Board at the end of 1986 upon my appointment to the Federal Court. I asked a friend who was senior counsel at the Western Australian Bar, to take over the job. He agreed. Late in 1987, he found that the returns to the Fund (which had been running at around 20 to 30%) went down, after the share market crash of that year, to minus 2%. His reproachful question – "what did I ever do to you?" haunts me to this day.

I have in preparation for this opening address read a little of the history of superannuation in Australia. Without traversing it at any length, it is an interesting story and a political story. The history pre-dates the creation of the Australian

³ For one perspective on these events, see Lonie "Productivity Improvements at Robe River " Engineering for a Competitive World: International Mechanical Engineering Congress and Exhibition: Conference Five: Cost Effective Bulk Materials Handling: Pre prints of papers at 65 -73 Barton ACT Institute of Engineers Australia, 1991, National Conference Publication (Institute of Engineers Australia) Number 91/11.

5.

Commonwealth⁴. Superannuation benefits had been paid from the mid-19th century to some public service employees and employees of large corporations and provided them with an independent retirement income. The first private scheme was set up by the Bank of New South Wales in 1862⁵. The history since Federation is connected with that of old age pensions and their means testing, the introduction and evolution of income tax law in Australia and the development of industrial relations law and awards which incorporated superannuation contributions by employers.

The history of superannuation has given rise to several cases in the High Court. The first of these, in 1965, concerned the validity of provisions of the *Income Tax Assessment Act 1936* (Cth) which conditioned exemptions from liability to tax on the relevant fund having a specified proportion of its investments in Commonwealth bonds. The decision, which upheld the validity of those provisions, left the Commonwealth Parliament with the capacity, through the taxation power to regulate superannuation funds.

The case turned on the proposition succinctly stated in the short concurring judgment of Windeyer J who said:

"It is a familiar incident of laws with respect to taxation, especially of income tax and estate duty, that they provide for a great variety of exemptions, concessions, rebates and deductions, some of them absolute, some conditional, the product of policies or purposes that the parliament wishes to advance."⁶

⁴ I have relied upon the following references: Commonwealth Treasury Paper, "Towards Higher Retirement Income for Australians: A History of the Australian Retirement Income System Since Federation" 2001 Centenary Edition of Economic Roundup at 6; Nielson and Harris, "Chronology of Superannuation and Retirement Income in Australia", (6 February 2008 updated 3 July 2008), accessed on 25 February 2009 - Parliament of Australia, Parliamentary Library Background Note; Fear and Pace op cit.

⁵ Fear and Pace op cit at 2.

⁶ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 18 - 19.

6.

In 1985, the ACTU in its National Wage Case claim before the Conciliation and Arbitration Commission proposed that industrial agreements and awards should provide for employers to contribute 3% to an industry superannuation fund. Under a second version of the Accord between the Commonwealth Government and the ACTU it was agreed that increased remuneration to employees should comprise a 2% wage rise, a 3% employer contribution to superannuation and tax cuts to operate from 1 September 1985. The Commission said it would approve industrial agreements providing for contributions to approved superannuation funds resulting for wage increases of up to 3%.

The decision of the Commission was challenged in the High Court on the basis that the payment of superannuation benefits could not be an element of an industrial dispute for the purposes of the Conciliation and Arbitration power under s 51(xxxv) of the Commonwealth Constitution. The challenge was unsuccessful and the High Court held that the Commission had jurisdiction to arbitrate on superannuation matters⁷.

The High Court in 1992 revisited the issue in the context of a case about whether superannuation entitlements fell within the definition of an industrial dispute under the *Industrial Relations Act 1988* (Cth)⁸. Mason CJ, Deane, Toohey and Gaudron JJ, said⁹:

"It must now be accepted that the general question of superannuation entitlements is a matter which may form the subject of an industrial

⁷ *Re Manufacturing Grocers' Employees Federation (Aust); Ex parte Australian Chamber of Manufacturers* (1986) 160 CLR 341.

⁸ *Re Amalgamated Metal Workers Union of Australia; Ex parte The Shell Company of Australia Ltd* (1992) 174 CLR 345.

⁹ (1992) 174 CLR 345 at 356.

dispute. And that question is bound up with and determined by the form of the superannuation scheme involved. It follows that a dispute between an employer and its employees as to the form that a scheme should take is a matter pertaining to the relations of employers and employees. And that is necessarily so, whether the scheme has been or is yet to be established."

Other cases in the High Court since that time have considered whether the Superannuation Complaints Tribunal was invalidly clothed with the judicial power of the Commonwealth¹⁰ and whether the surcharge validly applied to the judicial pensions of State judges¹¹.

There are many other areas of legal interest in relation to superannuation yet to be fully developed. These include the effect upon the general or governing trustees' duties of the regulatory regimes applicable to superannuation¹². Another is the extent to which contract and equity give rise to inconsistent or different sets of duties in the administration of superannuation funds. As GE Dal Pont has observed:

"The relationship between member and employer is usually contractual, whereas the relationship between trustee and member is equitable. And the heightened standards of conduct required of trustees to the beneficiaries (members) do not translate to the relationship between employer and member. While the law requires undivided loyalty by a trustee to the beneficiaries, no such obligation is expected of employers vis-à-vis their employees¹³.

¹⁰ *Attorney General for the Commonwealth v Breckler* (1999) 197 CLR 83.

¹¹ *Austin v The Commonwealth of Australia* (2003) 215 CLR 185.

¹² Stone, "The Superannuation Trustee: Are Fiduciary Obligations and Standards Appropriate?" (2007) 1 *Journal of Equity* 167.

¹³ Dal Pont "The Amendment of Trust Deeds – A Super (annuation) Gloss?" (2008) 31 *Australian Bar Review* 1 at 4.

8.

The place of future entitlements to superannuation benefits in family law property settlements is another area yet to be developed¹⁴. Another continuing source of debate is the standard of review applicable to the exercise of a superannuation trustee's powers¹⁵. In *Karger v Paul*¹⁶, McGarvie J saw "no good reason for importing rules of natural justice into the exercise of discretion by the trustees ... of a will". However, in *Jeffrey Guy-Baker v Local Government Superannuation Scheme Pty Ltd* McDougall J found it at least arguable that superannuation and disability benefits were of "such importance to those in the workforce that there may be some room for the application of some measure of natural justice"¹⁷. His Honour revisited the matter in a more recent decision in 2008, raising the possibility of a different standard of review to be applied to the decisions of trustees of superannuation trusts¹⁸. As to those matters I express no view. However, they all contribute to the multi-faceted nature of this fascinating legal field. They are well reflected in the range of topics to be considered at this Conference. I wish you well in your consideration of them. I also congratulate the Law Council and its

¹⁴ *In the marriage of TH & HM Hauff* (1986) 10 Fam LR 1076 at 1081 per Fogarty and Murray JJ; *In the marriage of Evans* (1991) 104 FLR 130.

¹⁵ Heyton "Pensions Trusts and Traditional Trusts: Drastically Different Species of Trusts" (2005) 69 *Conveyancer* at 229.

¹⁶ (1984) VR 161 at 166.

¹⁷ [2007] NSWSC 1173 at [19].

¹⁸ *John Gilberg v Stevedoring Retirement Fund Pty Ltd* [2008] NSWSC 1318 at [18] referring to *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276 at 283 per Callaway J; per Ormiston JA at 278 and Batt JA at 285-286; See also *Kowalski v MMAL Staff Superannuation Funds Pty Ltd* [2008] FCA 691 at [25]-[26] per Finn J and also Vrisakis: "Natural Justice in the Exercise of Superannuation Trustee Discretions – Natural or Unnatural?" (2007) 19 (5) *Australian Superannuation Law Bulletin* 69 at 72.

9.

Superannuation Committee on the continuation of this long-standing and valuable event.