

LAWS6264
Compliance: Theory & Practice in the Financial Services Industry

Specialist Compliance Issues: Superannuation

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Trusts and industrial context of Australia's superannuation system

- J. Leow & S. Murphy, *Australian Master Superannuation Guide* (Wolters Kluwer, 2022)
- M. S. Donald & L. Butler Beatty (eds), *The Evolving Role of Trust in Superannuation* (The Federation Press, 2017).
- N. D'Angelo, *Transacting with Trusts and Trustees* (Lexis Nexis, 2020).
- JD Heydon and Mark Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016).
- P. Matthews, et. al. (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis, 20th ed, 2022).
- G Thomas, *Thomas on Powers* (Oxford University Press, 2nd edn, 2012).
- Tucker et. al., *Lewin on Trusts* (Sweet & Maxwell, 20th ed, 2020).
- Chief Justice French, *Superannuation – A Confluence of Legal Streams*, Speech to the Law Council of Australia Superannuation Committee Conference, February 2009
- *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218; (2016) 334 ALR 692 at [89]-[91] (Bathurst CJ, Macfarlan and Gleeson JJA agreeing)
- *Scott v Federal Commissioner of Taxation (No 2)* (1966) 40 ALJR 265, 278 (Windeyer J).
- *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, [10].
- *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 272 [35].
- *FCT v Interhealth Energies Pty Ltd ATF Interhealth Superannuation Fund* [2012] FCA 120 [11]-[13] (Logan J).
- *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593, 609–610.
- Australian Constitution ss 51(xx) and 51(xxii).
- *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) ss 3, 7, 10(1), 19(2).
- Governing rules of a superannuation fund: SIS Act s 10.

Nature of a member's interest in a superannuation fund

- *Shimshon v MLC Nominees* [2021] VSCA 363

Role of the regulators

- ASIC and APRA issue updated MOU - [19-327MR](#) (29 November 2019)
- ASIC [Information Sheet 86](#), *How do the RSE and AFS licensing application processes work together?* (December 2021)
- APRA, [Information paper](#) *Modernising the prudential architecture* (12 September 2022)
- M.S. Donald, 'Regulating Superannuation in the Shadows of Twin Peaks' (2020) 31 *JBFLP* 57
- Davies, Walpole and Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks Towards Twin Peaks' (2021) 38 *C&SLJ* 332

Fees and Costs Disclosure

- ASIC [Regulatory Guide 97](#) *Disclosing fees and costs in PDSs and periodic statements* (updated July 2020)
- ASIC [Regulatory Guide 168](#) *Product disclosure statements (and other disclosure obligations)* (issued 6 July 2022)
- ASIC [Regulatory Guide 252](#) *Keeping superannuation websites up to date*
- [ASIC Information Sheet 155](#), *Shorter PDSs – Complying with requirements for superannuation products and simple managed investment schemes* (November 2021)
- [ASIC Information Sheet 168](#), *Giving and collectively charging for intra-fund advice* (October 2019)
- Corporations Act ss 962-962S
- Corporations Act ss 1311, 1021C-1021P
- Corporations Regulations 7.7A.10(3)
- SIS Act s 99F
- Corporations Act s 1017BA (MySuper product dashboard)
- ASIC [Information Sheet 170](#) *MySuper product dashboard requirements for superannuation trustees* (2014)

Conflicted Remuneration

- Corporations Act s 963A-963C, 963E-963L
- SIS Act s 29SAC
- ASIC, [Regulatory Guide 246](#) - *Conflicted remuneration and other banned remuneration*, December 2020

Advertising, correspondence and other statements

- Corporations Act ss 1041E, 1041G, 1041H

Design and distribution obligations (DDO) and Product Intervention Power

- Corporations Act ss 994A, 994B, 994D, 994J - to 994Q, 1317E, Schedule 3
- ASIC, [Regulatory Guide 274](#) *Product design and distribution obligations* (11 December 2020)
- Corporations Act, Pt 7.9A ss 1023A – 1023R
- ASIC, [Regulatory Guide 272](#) *Product intervention power* (17 June 2020)
- [ASIC and APRA letter to superannuation trustees on Member Outcomes obligations and Product design and distribution obligations](#) (15 December 2020)

Complaints handling and dispute resolution

- Corporations Act, Pt 7.10
- ASIC [Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*
- ASIC [Regulatory Guide 271](#) *Internal dispute resolution*
- ASIC [Regulatory Guide 165](#) *Licensing: internal and external dispute resolution*
- [Media Release \(20-171MR\)](#) *ASIC releases final updated guidance on complaints handling* (30 July 2020)

Breach reporting

- *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*
- ASIC [Regulatory Guide 78](#) *Reportable situations for AFS licensees and credit licensees* (RG 78)
- ASIC [Information Sheet 259](#) *Complying with the notify, investigate and remediate obligations* (INFO 259).

Duties and obligations of superannuation trustees

- K. Hayne, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019), Vol. 1, pp. 234-245 ('Trustees' Obligations to Members')
- J.C. Campbell, 'Some aspects of the civil liability arising from breach of duty by a superannuation trustee' (2017) 44 *Australian Bar Review* 24.

Duty to act personally

- *Dagenmont Pty Ltd v Lugton* [2007] QSC 272
- M.S. Donald, 'Delegation by Superannuation Trustees' (2020) 37 C&SLJ 319.

Best interests duty

- *Cowan v Scargill* [1985] Ch 270
- *Australian Prudential Regulation Authority v Kelaher* (2019) FCA 1521 [1-7], [38-81]
- D. Pollard, 'The Shortform 'Best Interests Duty': Mad, Bad and Dangerous to Know' (2018) 32 *Trust Law International* 106 and 176

Conflicts of interest

- *Re Cuesuper Pty Ltd* [2009] NSWSC 981
- J. Campbell, 'Obligations and Powers of Superannuation Trustees Concerning Situations of Actual or Possible Conflict' (2020) 49 *Australian Bar Review* 1.

Deemed covenants in governing rules of a superannuation fund:

- general covenants (s 52(2)(a)–(j), 52(3)–(5))
 - (a) honesty
 - (b) care, skill and diligence
 - (c) best financial interests
 - (d) conflicts duty
 - (e) act fairly in dealing with classes beneficiaries
 - (f) act fairly in dealing with beneficiaries within a class
 - (g) keep money and other assets separate
 - (h) not hinder functions and powers
 - (i) manage reserves
 - (j) allow beneficiary access to prescribed information or documents.
- investment covenants (s 52(6))
- insurance covenants (s 52(7))
- covenants relating to risk (s 52(8))
- covenants relating to annual outcomes assessments (MySuper and choice products) (s 52(9)–(11))
- covenant to promote financial interests of beneficiaries (s 52(12))
- covenant relating to funds offering MySuper products (s 52(13)), and
- covenants relating to funds failing annual performance assessments (s 52(14))

Investment covenants

- APRA, [SPS 515](#) *Strategic Planning and Member Outcomes*.
- APRA, [SPS 530](#) *Investment Governance*.
- APRA Letter to RSE Licensees, *Response to Submissions - Strengthening Investment Governance* (20 July 2022)
- M. S. Donald, *Modern Challenges to the Prudence Expected of Pension Fund Trustees*, (2022) *King's Law Journal*, DOI: 10.1080/09615768.2022.2034593

Insurance covenants

- APRA, [SPS 250](#) *Insurance in Superannuation* (1 July 2022)
- H. Insall, 'The scope of a superannuation trustee's obligations in dealing with and litigating member claims', (2019) *Superannuation Law Bulletin* August: 59.

Covenants relating to risk management

- APRA, [SPS 114](#) *Operational Risk Financial Requirement* (2013)
- APRA, [SPS 220](#) *Risk management* (1 January 2020)
- APRA, [SPS 515](#) *Strategic Planning and Member Outcomes* (1 January 2020)
- APRA, [Discussion Paper](#), *Strengthening Financial Resilience in Superannuation*, 19 November 2021.
- ASIC, [RG 259](#) - *Risk management systems of responsible entities* (2017).

Retirement income covenant

- *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth) Schedule 9
- APRA, *Letter to trustees on the Implementation of the Retirement Income Covenant*, 7 March 2022 [link](#)

Covenants relating to annual outcomes assessments, interests of MySuper members

- SIS Act ss 52(9) to (12), (14)
- *Treasury Laws Amendment (Your Super, Your Future) Act 2021* (Cth)
- Annual performance test, Part 6A of SIS Act

Directors' covenants

- SIS Act s 52A, s 54B, s 54C.
- *Australian Prudential Regulation Authority v Kelaher* (2019) FCA 1521 [1-7], [38-81]
- APRA, [SPS 510](#) – *Governance* (2017)
- ASIC, *Surveillance of investment switching by super fund executives identifies concerns with trustees' conflicts arrangements*, [MR 21-282](#) (27 October 2021)
- ASIC, *Superannuation trustees strengthen governance practices following ASIC surveillance of investment switching*, [MR 22-081](#) (6 April 2022)

Civil and criminal consequences for breach of covenant

- SIS Act ss 54B, 54C, 55 and 202
- Civil consequences may arise from an act or omission resulting in a contravention of a covenant regardless of whether or not the act or omission was intentional
- Criminal consequences require proof of dishonesty or intention in relation to a contravention of a covenant: s 202.

Sole purpose test

- SIS Act, s 62
- SIS Act ss 68, 68A.
- D. Hogan-Doran, *Current Thinking on the Sole Purpose Test*, Law Council of Australia Superannuation Lawyers Conference, March 2019 [link](#)
- ASIC [Information Sheet 241](#), *Prohibition on influencing employers' superannuation fund choice: section 68A of the SIS Act*, August 2021.

Fines and penalties and trustee's right of indemnity

- *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; (2019) 268 CLR 524
- *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019* (Cth)
- *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)
- *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth)
- *QSuper Board* [2021] QSC 276
- *AustralianSuper Pty Ltd v McMillan* [2021] SASC 147
- D. Hogan-Doran, *Trustee Resilience: Balancing Liability and Indemnity* (Law Council of Australia Superannuation Lawyers Conference, February 2021)

Climate-related disclosure and Greenwashing

- APRA, [SPS 530](#) *Investment Governance in Superannuation*
- APRA, [CPG 229](#) *Climate Change Financial Risks*, November 2021 [link](#)
- Financial Stability Board, Task Force on Climate-related Financial Disclosures <https://www.fsb-tcfd.org>
- *Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021* (UK) October 2021 [link](#)
- Retail Employee Superannuation Trustee, *Rest reaches settlement with Mark McVeigh*, Media Release, 2 November 2020 [link](#)

Mergers and Successor Fund Transfers

- *Superannuation Industry (Supervision) Regulations 1994* (Cth), rr. 6.29 and 1.03
- M. S. Donald, 'Might Superannuation Trustees Owe a Duty to Merge?' (2020) 48 *Australian Business Law Review* 304.
- *BT Funds Management Ltd as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401
- M. Scott Donald, 'Playing ball with s 249E of the NSW Crimes Act 1900' (2022) 33:7 & 8 *Australian Superannuation Law Bulletin*, 91
- *Mercy Super Pty Ltd v Attorney General for the State of Queensland & Ors*, Queensland Supreme Court (reserved, 13 September 2022)