

# SUPERANNUATION UNDER THE MICROSCOPE

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Pullman Adelaide | South Australia

THE SUPERANNUATION COMMITTEE OF THE  
LEGAL PRACTICE SECTION OF THE LAW COUNCIL OF AUSTRALIA



Law Council  
OF AUSTRALIA

*Legal Practice Section*

## Extent and Limits of APRA's and ASIC's Regulatory Powers

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## RECAP: large expansion in liability exposure for RSE licensees

*From presentation on 'Trustee Resilience' to Superannuation Lawyers Conference 2022*

### 2019

- *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.1) Act 2019 (Cth)*
  - new civil and criminal penalties for contravening covenants (ss 52 and 52A SIS Act, ss 54B and 54B)

### 2019

- *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)*
  - significantly increased civil penalties
  - increased penalties for certain criminal offences under Corporations Act and ASIC Act
  - created new ordinary criminal offences to sit alongside existing strict and absolute liability offences
  - new civil penalty regimes eg s 912A(1)(a) Corporations Act
  - expanded infringement notice regime

### 2021

- *Treasury Laws Amendment (Your Future, Your Super) Act 2021 (Cth)*
  - 'best financial interests' duty (ss 52(2)(c), 52A(2)(c) SIS Act) (but: *what does it all mean?*)
  - evidential burden of proof for BFID reversed, onus now on RSE trustee (s 220A SIS Act) (so: *what must a trustee do?*)



## HOT TOPICS

- Investigations
- Fines and 'infringement' notices
- 'Settling' enforcement actions
- Suspending or removing trustees
- 'Mandating' SFTs
- 'Harnessing' external remedies
- Other issues on the policy agenda

# Investigations

- Power to commence an investigation
  - s 13 ASIC Act ('reason to suspect ... contravention' 'may have been committed')
  - s 263 SIS Act ('appears ... contravention ... may have occurred or be occurring')
- Notices - *ASIC v Maxi EFX Global AU* (2020) 148 ACSR 123 [2020] FCA 1263
- Non compliance with notices - *Provide Nominees Pty Ltd v ASIC* [2024] FCAFC 25
- Power to give copies of record of examination: s 281 and s 282 SIS Act
  - eg where trustee contemplating 'in good faith' a proceeding in re a related matter
- Concluding or terminating investigations
  - ASIC 'no action' letters: RG 108
  - APRA report of inspector: s 284 SIS Act

# Fines and 'infringement' notices

- Recent: [Future Super](#) [Cruelty Free Super](#) [Vanguard HESTA](#), [Maritime Super](#)
- Infringement notices touted as a type of 'on the spot fines' in lieu of court action
- Payment of fine *not* admission of liability: see 'Your rights': ASIC Information Sheet 275
- Both regulators given guidance but when not appropriate? NB Hayne RC:
  - *'for provisions requiring evaluative judgment'*
  - *'beyond purely administrative failings when infringing party large corporation'*
- Growing issues for super trustees
  - capacity to pay and non-indemnification
  - cost/benefit analysis: time/distraction/reputation
  - no merits review for issue - but potential for judicial review as to basis for issue

# 'Settling' enforcement actions

- 'Why not litigate?' Power and authority to compromise; subject to Court approval
- Enforceable undertaking available? s 262A SIS Act
- Quantum of pecuniary penalty & principles of specific and general deterrence:  
*Australian Building & Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13
- Trustee's capacity to pay pecuniary penalty, costs of investigation, and defending action
- Agreeing facts, managing LPP waiver and operation of penalty privilege for individuals  
eg *Australian Building and Construction Commissioner v O'Halloran* [2021] FCAFC 185
- Non pecuniary options (or add ons): compliance program including self assessment/expert reporting s 1101B(1) CA and/or s 12GLA(2)(b) ASIC Act  
eg *ASIC v Westpac (Omnibus)* (2022) 407 ALR 1; (2022) 159 ACSR 381; [2022] FCA 515
- Court appointed referee re systems & culture audit rather than self assessment?  
Eg *ASIC v Westpac (Penalty Hearing)* [2024] FCA 52

# Suspension or removal of trustee

- Only in circumstances specified in s 133(1)(a)-(g), includes "*RSE licensee breaches any of the conditions of its RSE licence*": s 133(1)(e) (see s 29E and s 29EA SIS Act)
- Discretionary ("*may suspend or remove*": s 133(1) SIS Act)
- Must be by written notice given to trustee, notice must:
  - set out decision (s 133(4)(c)) and
  - give the reasons for that decision (s 133(4)(b))
- Appointment of acting trustee: s 134 SIS Act
- Examples of trustee removal
  - *Trio Capital (2009), APRA v Derstepanian [2005] FCA 1121 Pruess and APRA [2005] AATA 748*
  - See also *Host-Plus Pty Ltd v Australian Hotels Association [2003] VSC 145*
- Reviewable decision: s 344, s 10(taa) SIS Act

# 'Mandating' SFTs

- APRA's source of power?
  - Additional conditions power - s 29EA(1) SIS Act?
    - must not be inconsistent with a condition imposed by, or under s 29E: s 29EA(2)
  - Directions power - s 131D(2) SIS Act?
    - if APRA has 'reason to believe' a circumstance in s 131D(1) eg (a) contravened Act or prudential standard - (b) likely to contravene and direction reasonably necessary to deal with prudential matter(s) in re to trustee - (c) contravened condition or direction - (ca) failed to meet benchmark - (d) direction necessary in interests of beneficiaries - (i) failure to issue direction would materially prejudice interests or reasonable expectations of beneficiaries.
  - CPS 190 - *Recovery and exit planning* [22] 'exit action'?
- Trustee's source of power?
  - s 131FA SIS Act – confers power to comply with direction despite anything in constitution, contract, or arrangement to which is party [but not eg statute]



# 'Harnessing' external remedies

## Changing or forcing decision

- Prerogative writs, judicial review and merits review
- Quashing or setting aside decision (whole/part): ADJR Act s 16(1)(a)
- Referring matter to which decision relates for further consideration, subject to directions as Court thinks fit: ADJR Act s 16(1)(b)

## Declaratory relief

- declaration as to rights of parties: Federal Court Act s 21
- declaration as to rights of parties in re making of decision: ADJR Act s 16(1)(c)
- declaration as to right of parties in re conduct: ADJR Act s 16(2)(a)
- declaration as to failure to make decision: ADJR Act s 16(3)(b)

## Directions relief

- Order directing the making of a decision: ADJR Act s 16(3)(a)
- Order directing parties to do, or refrain from doing, act or thing, which Court considers necessary to do justice between parties: ADJR Act s 16(1)(d), (2)(d), (3)(c)

# ADJR Act grounds for challenge on review

- Breach of rules of natural justice: ADJR Act s 5(1)(a)
  - *non compliance with notice and/or hearing rules*
- Required procedures not observed: ADJR Act s 5(1)(b)
- Improper exercise of decision-making power: ADJR Act s 5(1)(e) (*see next slide*)
- Decision maker lacked jurisdiction / not authorised: ADJR Act s 5(1)(c), (d)
  - *additional condition inconsistent with RSE licensee law eg s 52(2)?*
  - *directions power not enlivened as circumstance(s) in s 131D(1) not present?*
- Decision involved an error of law / contrary to law: ADJR Act s 5(1)(f), (j)
  - *proper construction of trustee's RSE licence obligation or implied covenant?*
- No evidence or other material to justify making of decision: ADJR Act s 5(1)(h)
  - *inadequate investigation/erroneous assumptions?*

# Improper exercise of power

- taking an *irrelevant* consideration into account in exercise of a power: ADJR s 5(2)(a)
- *failing* to take a *relevant* consideration into account in exercise of a power: ADJR s 5(2)(b)
- an exercise of power for a purpose *other than* a purpose for which power is conferred: ADJR s 5(2)(c)
- an exercise of discretionary power in *bad faith*: ADJR s 5(2)(d)
- an exercise of personal discretionary power at the direction or behest of *another* person: ADJR s 5(2)(e)
- an exercise of discretionary power in accordance with a rule or policy *without regard to merits* of particular case: ADJR s 5(2)(f)
- an exercise of a power that is *so unreasonable* that no reasonable person could have so exercised power: ADJR s 5(2)(g)
- an exercise of a power in such a way that the result of exercise of the power is *uncertain*: ADJR s 5(2)(h)
- any other exercise of a power in a way that constitutes *abuse of power*: ADJR s 5(2)(j)

# Apprehended bias or prejudgment

- *Ebner* (2000) 205 CLR 337; *QYFM v Minister for Immigration* [2023] HCA 15 [38]
- Eg applied in *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58
- 3 step test:
  - (1) identify the fact or circumstance, which *might* lead decision-maker to decide case other than on its legal and factual merits
  - (2) demonstrate a logical connection between that fact or circumstance and the apprehended deviation from the course of deciding case or issue in question on its merits
  - (3) assess reasonableness of that apprehension from perspective of a fair-minded lay observer.

# Additional issues on policy agenda

- Future of merits review: what scope for the AAT's replacement?
- Financial Accountability Regime: scope and impact
- Impact of aggressive enforcement policy on insurability & trustee fees
- Future of 'twin peaks'
  - Can there be 'coherent and consistent' co-regulation?
  - What of their different resources, skills, and mandated objectives?

# Questions?

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