

“Order in the House: Royal Commissions, Trustee Duties and Superannuation”

Superannuation Committee of the Law Council of Australia

Superannuation Lawyers’ Conference 2018

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Chief Justice Murrell

Introduction

I acknowledge the First Peoples who are the traditional and continuing custodians of this land, and I pay my respects to their Elders—past, present and emerging.

Today is International Women’s Day. One of the themes of International Women’s Day in 2018 is “leave no woman behind. Together we can empower women across the globe.”¹ Financial empowerment and protection is critical to this aspiration. It is sobering to reflect that, in Australia, one third of women have no superannuation at retirement and those who do retire with superannuation have about half the superannuation of men.²

Welcome to Canberra. Our city is delighted to host this Conference.

The Conference Committee has organised an interesting program that considers important current issues.

However, if you don’t fit the conventional mould of the actuary and two days of superannuation law does not promise enthrallment, don’t worry. Canberra too has broken from its staid old ways. It is no longer a cultural and culinary desert populated by public servants in brown cardigans. According to Lonely Planet, when it comes to tourist destinations in 2018, Canberra is the third best city in the world to visit.³ Forget about Sydney and Melbourne. You are at the hipster centre of the planet. I am sure that that is what the organisers had in mind when they decided against Paris and New York and instead chose Canberra as the conference venue.

While you are here, consider a visit to Enlighten, the Canberra light festival so strategically positioned around Old Parliament House.

For many, though, superannuation law itself provides enough thrills, with the 2011 ‘Stronger Super’ reforms and the current Royal Commission. Perhaps these are the

¹ Australian Human Rights Commission, *International Women’s Day* <<https://www.humanrights.gov.au/news/events/international-womens-day-0>>.

² Laura Hartnell, ‘Superannuation: 1 in 3 women retire with nothing, Senate report finds’, *ABC News* (online), 28 February 2017 <http://www.abc.net.au/news/2016-04-29/one-in-three-women-retire-with-no-super/7370302>.

³ The Lonely Planet, *Best in Travel 2018: Top Cities* <<https://www.lonelyplanet.com/best-in-travel/cities>>.

types of disturbances contemplated by the theme of this year's conference: "Order in the House".

Over the next two days you will hear from speakers much more learned in superannuation law than I. However, I will offer some general remarks about the Royal Commission.

The Royal Commission

The letters patent outline the Terms of Reference for the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. As the name suggests, both industry and retail superannuation funds—which collectively pool more than \$2 trillion—are within the crosshairs.

Commissioner Hayne is tasked with inquiring whether "use by financial services entities of superannuation members' retirement savings ... does not meet community standards and expectations or is otherwise not in the best interest of those members".⁴

There are good reasons for this inquiry: pension money is held by way of trust and paid not by bounty or charity, but rather, through consideration. Browne-Wilkinson VC in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*⁵ explained best why superannuation trustees are so closely scrutinised:

Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive.

...

Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases ... membership of the pension scheme is a requirement of employment. ... Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration.⁶

In other words, superannuation has been earned by the beneficiary—it is theirs. Consequently, control by a third-party trustee should be monitored rigorously. Commissioner Hayne's Terms of Reference make this clear: the "highest standards of conduct are critical to the good governance and corporate culture of those [superannuation] providers".

Trustee Duties

⁴ Commonwealth Government, *Letters Patent—Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (14 December 2017) <<https://financialservices.royalcommission.gov.au/Documents/Signed-Letters-Patent-Financial-Services-Royal-Commission.pdf>>.

⁵ [1991] 1 WLR 589.

⁶ *ibid* 597.

There is some uncertainty about how “high” these “high standards” currently are from a legal perspective. In *Finch v Telstra Super Pty Ltd (Finch)*⁷ the High Court of Australia considered the extent to which the principles in *Karger v Paul*⁸ (the *Karger* principles) about trustee discretion were modified in the case of superannuation trusts. The Court flagged that a higher level of judicial control may be appropriate in relation to decisions by superannuation trustees as compared to traditional trustees. However, the question of how far the principles should be modified was postponed to another time.

Finch was applied in *Alcoa of Australia Retirement Plan Pty Ltd v Frost*⁹ by the Victorian Court of Appeal, and followed and distinguished by the Federal Court of Australia in *Miljevic v Holden Employee Superannuation Fund Pty Ltd*.¹⁰ Both decisions declined to comment on the application of the *Karger* principles to superannuation trusts.

But not all courts have remained neutral. Bryson J of the New South Wales Supreme Court said in *Vidovich v Email Superannuation Pty Ltd*:

It is a marked anomaly to use mechanisms drawn from fields of law remote from employment and relating to trusts for bounty or charity to administer important entitlements in an employment relationship ... a construction in which one party has an entire and unreviewable power to determine whether that party will pay a lump sum to the other or retain it in its own funds has an element of absurdity.¹¹

Similar sentiments were echoed in *Kowalski v MMAL Staff Superannuation Fund (No 3)*¹² and *Tufteviski v Total Risks Management Pty Ltd*.¹³

Superannuation lawyers may view *Finch* as a “lost opportunity”¹⁴ for the High Court to clarify the law about the scope of judicial control over the decisions of superannuation trustees.

However, the observations in *Finch* and other cases show that the law in this area is evolving in line with community expectations. It is only in the last two or three decades that superannuation has become integral to the Australian economy. According to Wikipedia, Australia is now the fourth largest holder of pension fund assets in the world. It has taken the community some time to appreciate the significance of superannuation; most people still do not realise the importance of superannuation to their well-being later in life. And even if they do appreciate that superannuation is critical to their financial well-being, it is almost impossible for the average person to understand the relationship between superannuation, tax and

⁷ [2010] HCA 36; 242 CLR 254.

⁸ [1984] VR 161.

⁹ [2012] VSCA 238; 36 VR 618.

¹⁰ [2016] FCA 718.

¹¹ Unreported, NSW Supreme Court, 3 March 1995.

¹² [2009] FCA 53.

¹³ [2009] NSWSC 315.

¹⁴ Noel Davis, ‘*Finch v Telstra Super—A Lost Opportunity*’ (2011) 23(2) *Superannuation Law Bulletin* 22, 33.

pension eligibility. Consequently, close regulation of the industry is essential. At its heart, that means regulation of trustees. Consistency of government policy would also help.

To the extent that the Commission is enquiring into whether conduct by superannuation trustees meets community standards and expectations, it may be setting the bar too low. Most of the community do not understand how superannuation funds work. They do not understand the role of superannuation trustees. Indeed, beyond wanting security, financial growth and ready access to superannuation (inherently conflicting aspirations), the community has little idea of what to expect or demand from superannuation funds.

But whether the better perspective is that of community expectation or community need, we should all expect that the Royal Commission will recommend that there be more Order in the House.

The Royal Commission

I am sure that you will follow the Royal Commission with great interest. Some will be advising. Some may be appearing. I venture to offer some observations about the nature of royal commissions.

Royal commissions are not modern creatures; they have ancient roots. The death of Edward the Confessor left vacant the throne of England. Many made their claim, but William the Conqueror emerged victorious at the Battle of Hastings.

Following his ascension, in 1085, the new King sent his men

all over England into every shire [to] find out how many hides there were in the shire, what land and cattle the king had himself in the shire, what dues he ought to have in twelve months from the shire. Also he had a record made of how much land his archbishops had, his bishops and his abbots and his earls, and what or how much everyone who was in England had. ... So very narrowly did he have it investigated that there was no single hide nor yard of land, nor indeed ... one ox or cow or pig which was left out and not put down in his record, and these records were brought to him afterwards.¹⁵

It was, essentially, a great audit: it clarified who owned what land, who owed what taxes to the King, the possible sources of future funds and which barons might provide the greatest number of soldiers if called upon.¹⁶ The assessment of a person's holdings and their value could not be appealed—the assessments were described as being as unalterable as the Last Judgment.¹⁷ The records were compiled into a book—later apocalyptically named the *Doomsday Book*. It was the first royal commission.¹⁸

Royal commissions have evolved somewhat since the Norman Conquest.

¹⁵ British Broadcasting Corporation, *History: The Domesday Book*
<http://www.bbc.co.uk/history/british/normans/doomsday_01.shtml>

¹⁶ *ibid.*

¹⁷ Richard Fitzneale and Charles Johnson, *The Course of the Exchequer* (T Nelson, 1950) 60.

¹⁸ Thomas J Lockwod, 'A History of Royal Commissions' (1967) 5(2) *Osgoode Hall Law Journal* 172.

Now, there is only one commissioner instead of several.¹⁹ This means the commissioner will need all the assistance he can gather.

For those amongst us today anticipating an appearance at the Royal Commission, assistance will mean:

- Good preparation: familiarising yourselves with the functioning of the Commission, how evidence ought to be presented, and what information is likely to be sought; and²⁰
- Understanding the role of a participant in a royal commission. Royal commissions are not judicial inquiries. They are machines of the Executive, brought into existence by a Royal Commission Act. They are inquisitorial, not adversarial. The Commissioner has broad ranging coercive powers to embark on a “fishing expedition” to uncover truths that may have remained hidden.²¹ The role of a lawyer in a royal commission is to assist the commissioner; there is no adversary.

We can only hope that the title of Commissioner Hayne’s report is more positive than that of King William’s *Doomsday Book*.

Conclusion.

The letters patent state that “all Australians have the right to be treated honestly and fairly in their dealings with ... superannuation ... providers”.²² The willingness of superannuation lawyers to convene and contribute to the development of this area of law respects that right and helps to maintain public confidence in our superannuation system and those who administer it. Thank you for your enthusiasm for this conference.

I again congratulate the Superannuation Committee of the Law Council of Australia for organising what promises to be an excellent conference. And, once again, welcome to Canberra.

¹⁹ Ibid. That there were several commissioners is implied: William sent his “men” out.

²⁰ James Glissan, ‘Advocacy before Royal Commissions’ (2015) 126 *PRECEDENT* 30, 34–35.

²¹ Bob Whyburn, ‘The Powers of Royal Commissions’ (2004) 63 *Plaintiff: Journal of the Australian Plaintiff Lawyers Association* 46, 46–7.

²² Commonwealth Government, above n 4.