

**PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS
AND FINANCIAL SERVICES**

**INQUIRY INTO THE STRUCTURE AND OPERATION OF
THE SUPERANNUATION INDUSTRY**

SUBMISSION by the Hon MALCOLM McLELLAND QC¹

1. This submission is directed to a matter relevant to the safety of the regulatory structure under the Superannuation Industry (Supervision) Act 1993.
2. At a very basic level the safety of the superannuation industry, and the maintenance of public confidence in that industry, depend upon a fund member being securely protected against the risk of the trustee's paying out the member's benefits to the wrong person.
3. The possibility of this occurring is not negligible, particularly having regard to the increasing incidence and sophistication of identity theft.
4. Under general principles of law, it would be the duty of the trustee to ensure that payment of a benefit is in fact made to the member (or other person entitled). The risk of making a payment to the wrong person would fall on the trustee, since such a payment would not effectively discharge the trustee's relevant obligation.
5. However the trust deeds of a number of funds have included provisions purporting to shift from the trustee to the member the risk of a member's benefit being paid by the trustee to the wrong person. Such provisions are typically to the effect that the trustee is discharged from its obligations in respect of a benefit if the trustee pays it in good faith to a person who the trustee believes to be entitled to it. Examples which came to my notice in 2002 (when I had occasion, for family reasons, to examine several trust deeds) are listed in the Appendix.
6. Provisions of this kind are inconsistent with the prescribed payment standards in SIS Regulations 6.22 and 6.26, which a trustee is required by s 34(1) of the SIS Act to "ensure . . . are complied with at all times." However, this fails to protect fund members since the effect of subs (1) of s 34 is relevantly negated by subs (3), which states: "A contravention of subsection (1) does not affect the validity of a transaction".
7. Since the authentication and implementation of applications for the payment of benefits is wholly within the control of the trustee, members are unnecessarily and unreasonably left vulnerable to misappropriation of their benefits by fraudulent withdrawals, against which they have no effective means of protecting themselves, with potentially ruinous consequences.
8. It is submitted that the SIS Act should be amended to ensure that no such shifting of risk can validly occur. So long as the prescribed payment standards in SIS Regulations 6.22 and 6.26 remain in their present form, it may be sufficient to substitute for subs (3) of s 34 of the SIS Act a new subsection (3) stating:

(3) If the governing rules of a superannuation entity are inconsistent with the prescribed standards applicable to the operation of the entity, the governing rules are, to the extent of the inconsistency, invalid.

An analogous provision may be found in the present s 58(3).
9. Disclosure of interest: In 2002 I became a member of a fund which did not then have a risk-shifting clause in its trust deed, but has subsequently purported to insert one.

¹ Formerly Chief Judge in Equity of the Supreme Court of New South Wales

APPENDIX

Examples of risk-shifting clauses - as at 2002 (not exhaustive)

- Colonial First State First Choice Superannuation Trust
(Trustee: Colonial First State Investments Ltd)
Trust Deed (25/3/2002)
cl 8.17: *The Trustee is discharged from all obligations in respect of a benefit if the Trustee pays it in good faith to or on behalf of a person who the Trustee believes to be entitled to it.*

- Universal Super Scheme
(Trustee: MLC Nominees Pty Ltd)
Trust Deed (Consolidated as at 12/9/2001)
cl 10.4: *The Trustee is completely discharged in respect of any payment in accordance with this Deed including a payment to a person the Trustee believes in good faith is entitled to the benefit.*
Sch 2 Part A rule 8.7:
The Trustee is discharged from all obligations in respect of a benefit if the Trustee pays it in good faith to or on behalf of a person who the Trustee believes to be entitled to it.

- Perpetual's Investor Choice Retirement Fund
(Trustee: Perpetual Investment Management Ltd)
Trust Deed (as amended to 29/4/2002)
rule 7.15: *The Trustee is discharged from all obligations in respect of a benefit if the Trustee pays it in good faith to or on behalf of a person the Trustee believes to be entitled to it.*

- Zurich Master Superannuation Fund
(Trustee: Zurich Australia Superannuation Pty Ltd)
Trust Deed (as amended to 28/6/2001)
cl 10.4: *The Trustee is completely discharged in respect of any payment in accordance with this Deed including:*
 - (a) *a payment to or on behalf of a person the Trustee believes in good faith is entitled to the benefit;*
 - (b) *a payment made directly by the insurer in good faith to or on behalf of a person that the Trustee believes on good faith is entitled to the benefit.*

7 August 2006

Malcolm McLelland