

25 August 2003

Mr S Frappell
Acting Secretary
Senate Select Committee on Superannuation
Parliament House
CANBERRA ACT 2600

BY E-MAIL: Stephen.Frappell@aph.gov.au

Dear Secretary

Portability Enquiry

At the request of your committee, the Law Council of Australia ("**Council**") responds to the submissions of the Treasury Superannuation, Retirement and Savings Division regarding the protection of trustees in the context of the new *Superannuation Industry (Supervision) Regulations 1994* SR196/03. The Treasury submission expressed an opinion that sections 341 and 310 of the *Superannuation Industry (Supervision) Act 1993* ("**SIS Act**") adequately protected trustees for the purposes of division 6.5 in the *Superannuation Industry (Supervision) Amendment Regulations 2003* ("**SISA Regulations**").

Section 341 of the SIS Act

Section 341 of the SIS Act provides protection to a trustee but is limited to liability for civil proceedings in relation to an act done in the fulfilment of an obligation imposed by the SIS Act or SISA Regulations. The Section provides inadequate protection for trustees on two grounds.

First, the provision can only be used as a defence to an action brought against a trustee rather than a true immunity for the fulfilment of obligations imposed on a trustee in accordance with the SIS Act and SISA Regulations. Secondly, the defence is limited by the fact that it only covers acts which are done in "fulfilment of an obligation". This will not cover ancillary acts of a trustee.

For example, in the context of the proposed SISA Regulation 6.34, a trustee will only be protected in relation to actions pertaining to ensuring that a member is aware that they may ask the trustee for information regarding the entitlements that the member

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may have. This will not cover information provided by the trustee pursuant to a request from a member.

Section 310 of the SIS Act

Section 310 of the SIS Act provides the court with the power to grant relief of liability for civil proceedings brought against a superannuation official for official misconduct in the capacity of their role. A court may release a party from such liability where it appears that the official may be liable in respect of a claim and the official has acted honestly and having regard to all the circumstances of the case he or she ought fairly be excused for the official misconduct.

The Council believes that section 310 is inadequate to protect trustees in relation to the SIS Regulations on three grounds. First, as with section 341, the provision grants only a defence to a civil proceeding or potential civil proceeding rather than a true immunity. Secondly, the power to grant relief is confined to actions for "official misconduct" which is of no relevance to division 6.5 of the SIS Regulations. Finally, some commentators have questioned the constitutional validity of the provision.

Proposed Protection

For these reasons, the Council believes that the current protection afforded to trustees is not adequate having regard to the obligations imposed on them under the SIS Regulations.

The Council believes there is a need to protect trustees with a specific provision and suggests that a provision be modelled on section 90MZE of the *Family Law Act 1975*. Accordingly, the Council suggests that the SIS Regulations contain a provision to the effect that:

"The trustee of an eligible superannuation plan is not liable for loss or damage suffered by any person because of anything done (or not done) by the trustee in good faith:

- (a) *in relation to any roll over or transfer of a withdrawal benefit under this division; or*
- (b) *where the trustee has made an application under regulation 6.37 to APRA to suspend the trustee's obligations to roll over or transfer a withdrawal benefit and APRA has not responded within 90 days; or*
- (c) *where the trustee is unable to facilitate a roll over or transfer of withdrawal benefit due to a delay resulting from a request made by APRA for further information in accordance with an application made under regulation 6.37."*

The Council appreciates the opportunity to respond to the issues raised by Treasury.

Yours faithfully

A handwritten signature in black ink, appearing to read 'M. Lavarch', written in a cursive style.

Michael Lavarch
Secretary-General