TITLE: **"Superannuation – Some Introductory Thoughts"**

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It is my great pleasure to welcome the Superannuation Conference back to Melbourne for the first time in several years. The first ever Conference was in fact held in Melbourne in the 1990s. I am pleased to see it come back to the place where it all began. Given that the Commonwealth Games will begin in just a few weeks from now, the theme for this year's Law Council Superannuation Conference – 'Staying in the Race' – would appear to be an especially appropriate one. That title also refers of course to the need for Conference participants to keep abreast of numerous recent developments in superannuation law; so I expect you will all have a busy few days exchanging ideas while you are here.

As diverse as the cases are which come before the Supreme Court, I confess that I can recall only two cases on which I have sat as a trial judge and which come to mind as having dealt directly with issues concerning superannuation funds. The cases I am referring to were: *BHLSPF Pty Ltd v Brashs Pty Ltd & Ors*,[1] in 2001, and *Ansett Australia Ground Staff Superannuation Pty Ltd & Anor v Ansett Australia Ltd & Ors*,[2] in 2002. To some extent, both cases involved discussion of the duties, powers and responsibilities of trustees relative to members. In particular, the *Ansett* case also concerned the role of the administrator, the benefit entitlements of employees under legislation and the priority of employee entitlements. I shall briefly discuss that case in due course.

Superannuation matters cross through many areas of the law, and often involve issues with which courts are constantly faced. For instance, although not always in the superannuation context, most judges will have heard innumerable cases concerning the law of equity, on the duties, powers and obligations of trustees relative to beneficiaries. That is just one aspect of superannuation law. Superannuation also often involves various aspects of family law, taxation, corporations law and insolvency law. In other words, one cannot simply summarise superannuation law neatly into a page of dot points – it is complicated and it is constantly evolving.

That was not always the case. Superannuation was once a benefit provided only to politicians, public servants and senior, long-serving employees of private sector companies, such as large banks. Up until very recent times, most private sector employees were expected to rely upon their personal savings to fund their retirement plans. No more than a few employees were able to access pension plans at the end

[1] *BHLSPF Pty Ltd v Brashs Pty Ltd & Ors* (2001) 8 VR 602.
[2] *Ansett Australia Ground Staff Superannuation Pty Ltd & Anor v Ansett Australia Ltd & Ors* [2002] VSC 576.

of the nineteenth and beginning of the twentieth centuries. Those workers were generally public servants who were fortunate enough to meet strict tests laid down by government.

It was not until perhaps the 1960s – just forty years ago - that superannuation became more popular when the tax treatment of contributions to funds became more generous for the self-employed. At the time, concerns were raised about the costs of super funds and the methods by which they operated. Misgivings were voiced about the possible misuse of favoured tax treatment in the interest of the fund sponsors rather than actual fund members.

Most troubling of all at this time was the fact that most Australians were still unable to receive superannuation at all, despite significant tax incentives. The 1960s, we must remember, was also the end of the 'baby boom', an era of great prosperity for this country, however, also a time where the government began to realise that, although the boomers were still young, one day the nation would face a sizeable, ageing population and something would have to be done about it. There were a series of government inquiries throughout the 1960s, 70s and 80s, with the result that by 1992, the Commonwealth introduced compulsory super for all employees.

We now have a wealth of legislation and regulations governing superannuation law. It is a part of the law which, like it or not, has become a part of every Australian's life. It is also becoming an increasingly complex area. The title of this Conference, 'Staying in the Race', is for this reason appropriate in terms of the race to keep up with the recent run of reforms and amendments.

For some years now, the federally-administered tribunals, such as the Superannuation Complaints Tribunal, and the federal courts, particularly the Federal Court of Australia, have held the direct power to decide such matters falling under Commonwealth legislation, for example, the *Superannuation (Resolution of Complaints) Act 1993*, the many federal Superannuation Acts and regulations, as well as all those superannuation-related matters which fall under the *Corporations Act 2001* (Cth), the *Workplace Relations Act 1996* (Cth) and so on. Although State public sector superannuation schemes are often also controlled by their own separate Acts and as a result we do see some of these types of matters coming before the State courts, the majority of superannuation matters continue to be dealt with at the federal level. Notable exceptions to that rule include cases falling under equity law, for instance, where the law governing the relationship of trustees to members of superannuation funds is called into play. In the past five years the Victorian Supreme Court has decided some landmark cases in that particular area.

For instance, the case of *Flegeltaub v Telstra Super Pty Ltd*[3] heard before Byrne J in 2000 and subsequently before the Court of Appeal.[4] That case concerned the decision of Telstra Super Pty Ltd, as trustee, to deny a retired member's claim for a disablement benefit. It raised the question of procedural fairness – and whether there is a requirement to give members an opportunity to respond to adverse information which a trustee uncovers as part of its decision-making process.

[3] *Flegeltaub v Telstra Super Pty Ltd* [2000] VSC 107.
[4] *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180, per Ormiston, Callaway and Batt JJA.

In the course of his judgment in *Telstra Super*, Justice Byrne suggested that members who claim a disablement benefit should be told during the claim-consideration process what impediments there are to the success of the claim so that the member has a chance to make submissions.

In his judgment, Justice Byrne said:

> 'It is clear that trustees are not bound by the rules of natural justice, but the circumstances of the case may demand, as a matter of fairness, that on a particular matter, the position of the applicant be sought so that a proper decision can be made on the matter.'[5]

However, on appeal, the Court of Appeal declined to follow his Honour's reasoning, stating that:

> '... one cannot decide a question of fact in good faith and give it real and genuine consideration without conducting some investigation and in some cases that will entail making an inquiry of a person who is willing to provide information and is in the best position to do so. It is not a matter of natural justice but *bona fide* inquiry and genuine decision making.'[6]

Thus, in effect, although the Court of Appeal did not expressly reject Byrne J's approach, it certainly diluted the single judge's requirement that trustees state more or less exactly what impediments the member faces. Some have suggested that the result of this case is essentially that the appellate court left standing the enduring principle that trustees do not, as a general rule, have to comply with natural justice requirements.

The question of the extent of the obligation of superannuation trust funds to provide information to members was also discussed in *Crowe v Stevedoring Employees Retirement Fund Pty Ltd*,[7] another Victorian Supreme Court case heard in 2003. The courts have traditionally held that, where pension scheme trustees reach a decision in good faith, they are not obliged to disclose the agendas or minutes of their meetings which disclosed the reasons for that decision, or any material which may have been used for the purposes of reaching their decision: *Re Londonderry's Settlement*.[8] In *Crowe*, the plaintiff sought various items of information relating to defined benefits. In discussing the obligations of the trustee to account to beneficiaries, Justice Balmford referred to what may be referred to as the basic 'Principle' on the one hand and the 'Exception' on the other. The basic 'Principle' being the proposition that the trustee 'must also, on demand, give a cestui que trust information and explanations as to the investment of, and dealings with, the trust property'.[9] The 'Exception' was expressed in terms of the *Re Londonderry's Settlement* principle, noted by her Honour as:

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[5] *Flegeltaub v Telstra Super Pty Ltd* [2000] VSC 107.
[6] *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180.
[7] *Crowe v Stevedoring Employees Retirement Fund Pty Ltd* [2003] VSC 316.
[8] *Re Londonderry's Settlement* (1965) Ch 918.
[9] *Crowe v Stevedoring Employees Retirement Fund Pty Ltd* [2003] VSC 316, [14]; her Honour was quoting Powell J in *Spellson v George* (1987) 11 NSWLR 300, 315, a passage which was approved by the Privy Council in *Schmidt v Rosewood Trust* [2003] 3 All ER 76, 94-95.

> 'to the effect that trustees exercising a discretionary power are not bound to disclose to the beneficiaries their reasons for exercising that power, and accordingly are not bound to disclose agendas, minutes and other documents prepared for their meetings.'[10]

Her Honour therefore determined that the material relating to defined benefits sought by the fund member was not prohibited by the principle espoused in *Re Londonderry's Settlement*.

As for *Ansett Australia Ground Staff Superannuation Pty Ltd & Anor v Ansett Australia Ltd & Ors*,[11] handed down in 2002, that Supreme Court case also concerned the relationship of the relevant trust to fund members, but this time where the employer company (Ansett Australia Ltd) had been placed into administration. It concerned an application by the trustee of Ansett Australia Ground Staff Superannuation Plan for advice from the court as to whether fund Plan members were entitled to retrenchment benefits. The chief findings in that case were as follows:

- Pursuant to the trust deed, members of the plan who were made redundant by the administrators since 12 September 2001 were entitled to retrenchment benefits;
- Pursuant to the superannuation statutory regime and the trust deed, the company (Ansett) was obliged to make contributions in accordance with the Actuary's Funding and Solvency Certificate;
- That particular obligation arose from the contract of employment which existed between the company (Ansett) and its employees who were members of the Ground Staff plan;
- The Funding and Solvency Certificate was valid and a shortfall arose that was required to be met pursuant to the obligations upon Ansett;
- The obligation did not, however, attract priority, constituting a debt provable in the administration of Ansett (the fund became a creditor).

Although the trustee in *Ansett* appealed the decision against the Court's dismissal of an application for a declaration regarding priority under s. 556 of the *Corporations Act 2001* (Cth), the Court of Appeal dismissed the action on the basis that it was 'inappropriate' to make a declaration in light of ancillary Federal Court proceedings.[12] The Court of Appeal did not determine the substantive superannuation issues. In any case, with regard to those proceedings, the parties were able to reach an out-of-court settlement.[13]

That case goes to prove what I was saying earlier about the growing complexity of superannuation cases. The judgment was 160 pages long and involved a relatively difficult and complicated factual matrix, as well as a range of legislation and

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[10] *Crowe v Stevedoring Employees Retirement Fund Pty Ltd* [2003] VSC 316, [25].
[11] *Ansett Australia Ground Staff Superannuation Pty Ltd & Anor v Ansett Australia Ltd & Ors* [2002] VSC 576.
[12] *Ansett Australia Ground Staff Superannuation Fund Pty Ltd v Ansett Australia Ltd* [2003] VSCA 117.
[13] See the judgment of Goldberg J, *Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as trustee of the Ansett Australia Ground Staff Superannuation Plan) v Ansett Australia Ltd (subject to deed of company arrangement) and Ors* [2004] FCA 130.

regulations, including relevant sections of the *Corporations Act 2001* (Cth) and many State and federal Superannuation Acts and regulations.[14] It seems to me that some areas of the law, such as tax and some areas of employment and corporations law are likewise becoming increasingly convoluted. Indeed, perhaps it could be said that Australian lawyers in many specialisations, not just superannuation, are struggling to 'Stay in the Race'. Wherever that phenomenon occurs, I wonder whether it can be easy to make that area or specialisation attractive to graduates and young lawyers. Is this is a concern that some of you in the audience may have? It is something I merely raise as a thought.

Whatever the case, superannuation is certainly a dynamic area of the law and it has grown enormously over the last few years, owing at least partly to the fact that all Australians must now make compulsory contributions. One never used to see any mention of superannuation in the newspapers and now it appears to me to be everywhere. Issues I have noticed mentioned a great deal recently have included ASIC's investigation into allegations that some superannuation funds are attempting to stop members from transferring savings, denying consumers the opportunity to choose funds which the introduction of the choice legislation specifically provides.[15] Other issues of note include calls to improve the safety of funds and super standards,[16] and discussions surrounding changes to the level of tax on superannuation contributions.[17] There is even consideration given to how a person's gender can affect superannuation entitlements.[18] Given all this change and movement, I predict that you can all look forward to some very busy days and years ahead.

Albert Einstein once famously said about science, which I think is also true of the law, that:

> 'The free, unhampered exchange of ideas and scientific conclusions is necessary for the sound development of science...'.[19]

This is what you must do over the next three days of this Conference – soundly develop your science – that is, your area of the law - strengthen the roots of your knowledge and exchange ideas. As I have said, superannuation is not easy nor is it straight-forward and there are often many aspects to it. For that reason, your task is made harder but infinitely more challenging. I wish you all the very best of luck over

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[14] Legislation and regulations considered in the *Ansett* case included: *Air Passenger Ticket Levy (Collection) Act 2001* (Cth); *Companies Act 1961* (Vic); *Companies Code* (Vic); *Corporations Act 2001* (Cth); *Income Tax Assessment Act 1936* (Cth); *Occupational Superannuation Standards Act 1987* (Cth); *Occupational Superannuation Standards Regulations* (Cth); *Superannuation (Resolution of Complaints) Act 1993* (Cth); *Superannuation Guarantee (Administration) Act 1992* (Cth); *Superannuation Guarantee (Administration) Regulations* (Cth); *Superannuation Guarantee Charge Act 1992* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *Superannuation Industry (Supervision) Regulations 1994* (Cth); *Workplace Relations Act 1996* (Cth). Also considered: the *Constitution of the Commonwealth of Australia* (namely, s 51(xxxv)).

[15] Peter Weekes, 'ASIC to Break Super Chains', *The Age*, 21/02/06.

[16] Jeremy Cooper, 'Super Standards Must be Met', *The Age*, 16/09/05; Mungo MacCallum, 'Older, Wiser… and Poorer', *The Weekend Australian Financial Review*, 23-27/12/05.

[17] Tim Colebatch, 'Get Rid of Super Tax, says Minchin', *The Age*, 23/02/06.

[18] P. Joye, 'Up, Up and Away with Super Woman', *The Age*, 22/02/06.

[19] Albert Einstein, attrib., 1952.

these next few days. For those inter-State visitors, I hope you enjoy your stay in Melbourne.
