

## Superannuation Law

Recent Superannuation Cases by Marita Wall and Paul Cosgrave SC



### 1. ***Clarke v Commissioner of Taxation***

The High Court has granted special leave to appeal. This matter involves a Member of the South Australian Parliament challenging the constitutional validity of the surcharge legislation.

### 2. ***Smith v Superannuation Complaints Tribunal [2008] FCA 1528***, Collier J

**Facts** – The SCT (at review) rejected a complaint as being outside jurisdiction.

**Judgment** – Collier J held that the SCT did not accord procedural fairness by failing to give the applicant an opportunity to make submissions regarding jurisdiction. His Honour remitted the matter to the SCT.

**Impact** – If an adverse determination is received from the SCT, consider whether the parties have been given an opportunity to address the SCT on all the pertinent aspects of the decision.

### 3. ***Australian Reward Investment Alliance v SCT & Anor [2008] FCA 1548***, Graham J

**Facts** – Ms Matthews ceased work due to incapacity. Her benefit from the superannuation fund was calculated according to various factors, including ‘final average salary’. Ms Matthews disputed the Trustee’s calculation of her final average salary, which in turn depended on her retirement date. The SCT found in favour of the complainant, as it considered that she was able to select her own retirement date, in which case the Trustee should have provided her with certain information about making her selection. The SCT determined that a further amount was payable to the complainant by the Trustee (in reliance on the compromise power in the *Trustee Act of the ACT*).

**Judgment** – On appeal, the Court set aside the decision of the SCT and affirmed the Trustee’s decision for the following reasons:

- The SCT’s determination that Ms Matthews could select her own retirement date was ‘ludicrous.’ It followed that the SCT also erred in finding that the Trustee should have given her certain information.
- The *Trustee Act* (and hence the compromise power) did not apply to the Trustee.

- Further, Graham J held that the SCT could not use a compromise power to pay a benefit in excess of that provided for under the Trust Deed.
- The SCT's review related to the complaint about calculation of final average salary. The SCT incorrectly extended the review to the conduct of the Trustee in not giving certain information to the complainant and not compromising the claim. A complaint about a 'decision' differs from a complaint about 'conduct', which relates to the proceedings before making a decision.

**Impact** – When acting for any party in a matter before the SCT or an appeal from a decision of the SCT, careful attention should be paid to the ambit of the complaint to the SCT. Further, when the SCT is considering relying on, or has relied on, a compromise power in a determination, consideration should be given to whether it would or has been used to pay a benefit in excess of that provided for under the relevant trust deed.

#### 4. *Finch v Telstra Super Pty Ltd [2008] VSC 481*, Byrne J

**Facts** – The Plaintiff ceased working for Telstra and subsequently worked for two other employers. He then claimed a total and permanent invalidity benefit from Telstra Super. The Trustee of the Telstra Super Fund rejected his claim and provided its reasons to Mr Finch for doing so. The Trustee's decision was challenged on three grounds – that the reasons were not sound; that the decision was one which no reasonable trustee could have reached on the evidence before it; and that the trustee failed to act in good faith/failed to give genuine consideration to the claim.

**Judgment** - the Trustee's decision was held to be void on the third ground, with Byrne J noting that the Trustee:

- rejected the strong medical evidence which all supported of the Plaintiff's claim and accepted evidence from the Plaintiff's workplace managers who may not have been impartial;
- did not enquire about the Plaintiff's last months at work to evaluate his claims about what led him to leave work;
- made no enquiry about the Plaintiff's claims that subsequent work was failed rehabilitation;
- placed weight on a statement from a telephone call with the Trustee's CEO about the Plaintiff's subsequent employment without information about the context or interpretation being given to the other directors. This was the only evidence against the Plaintiff's claim that his subsequent employment was failed rehabilitation. Further, the director was acting as witness and decision-maker and the Plaintiff was not given an opportunity to comment on his statement; and
- addressed the question as to whether the plaintiff was 'incapable of' rather than 'unlikely to' engage in suitable work (as required under the trust deed). This caused His Honour to be '*uneasy*' with the trustee's determination, as capacity was '*only one aspect as to the likelihood that he would ever engage in gainful work*'.

His Honour also found that the subsequent part-time employment was not gainful employment (as the claimant worked full time before ceasing work with the employer)

but was relevant to the extent that it might 'provide a basis for a conclusion that he was not unlikely to secure such employment in the future'.

The Court also rejected the Trustee's argument that the requirement in the Trust Deed that a member be absent from active work for 6 months had to be satisfied *prior to* ceasing employment with the employer. His Honour found that the 6 months' absence was required to be satisfied as at the date of the trustee's determination.

**Impact** – When determining TPD claims, superannuation fund trustees should:

- be cautious in giving greater weight to material provided from a source that may not be independent;
- make enquires before rejecting otherwise uncontroverted information;
- provide the claimant with an opportunity to comment on adverse information; and
- be careful to determine a claim according to the exact words in the trust deed.

Note: In *Finch v Telstra Super Pty Ltd (No 2) [2008] VSC 527*, Byrne J determined that the claim be remitted to the Trustee, as Byrne J was not satisfied that His Honour should depart from the normal practice. In particular, he noted that there had been no finding of mala fides and the reviewed decision could still be reviewed by the SCT (although it appears from the facts of the case that the Plaintiff was out of time to lodge a complaint with the SCT).

## Other Superannuation Developments

### 1. Same sex superannuation

The Act's Interpretation (Registered Relationships) Regulations 2008 were registered on 15 December 2008 to prescribe the kinds of relationships which are "registered relationships" for the purposes of the definition of "de facto partner" in the *Acts Interpretation Act 1901*. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* has removed the previous distinction which existed in superannuation law between heterosexual and homosexual couples. The definition of "spouse" in the *SIS Act* has been correspondingly amended. It includes another person, whether of the same or a different sex, with whom a person is in a relationship registered under a law of a State or Territory. For present purposes, the Regulations recognise a relationship registered pursuant to the *Relationships Act 2008* (Vic).

### 2. Australian Taxation Office releases SMSF Determination 2008/3

In SMSFD 2008/3, the ATO has said that section 59 of the *SIS Act* and Regulation 6.17A of the *SIS Regulations* do not apply to self-managed superannuation funds. This means that the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee whether or not they comply with the rules in Regulation 6.17A. However, a death benefit nomination will not bind the trustee to the extent that it nominates a person who cannot receive a benefit in accordance with the operating standards in the *SIS Regulations*.