

Shifting Geer

Welcome to *Shifting Geer*, Herbert Geer's superannuation and funds management newsletter.

1. APRA AND ASIC UPDATES

1.1 APRA letter to trustees: Operational governance risks issues to consider when implementing change

On 28 February 2011, the Australian Prudential Regulation Authority (APRA) wrote to trustees outlining its expectations of trustees when they consider and implement mergers, restructures, successor fund transfers or changes to trustees or service providers. APRA has stated that it requires trustees to ensure that there is a well documented Change Management Plan in place which includes the following:

- (a) a reasonable set of assumptions detailing the steps undertaken to implement the change and outlining the rationale for those assumptions;
- (b) allowing sufficient time for a proper due diligence assessment to be completed;
- (c) trustees should ensure adequate resources are available to manage both the change and the ongoing day to day at both the trustee office level and for material outsourcing service providers;
- (d) governance implications are properly considered and addressed which includes the consideration of conflicts of interest;
- (e) a review of the risk management plan to identify and monitor the impact of the change and monitor the efficacy of compensating controls with attention given to updating the plan;
- (f) trustees should complete an equivalent rights assessment as required under the successor fund provisions of the

Superannuation Industry (Supervision) Act 1993 (Cth) (SIS) and:

- (i) ensure it is conducted at arms length and in the best interests of members;
- (ii) refer to the relevant APRA superannuation circulars; and
- (iii) where a successor fund transfer is taking place between two superannuation funds with the same trustee, that trustee needs to apply to APRA for a modification declaration to facilitate the required equivalent rights sign off;
- (g) ensure that a complying material outsourcing agreement is in place before the change of service provider takes effect. Consideration also needs to be given as to whether portability relief is required for any interim blackout period exceeding 30 days; and
- (h) trustees need to identify any legal issues that may need to be addressed prior to the change taking place and allow sufficient time to adequately resolve such matters particularly where interaction with APRA is required. APRA notes two specific examples:
 - (i) impact on legal instruments which may need to be applied for, or transferred, in respect of the fund and/or the trustee (for example portability relief for frozen or suspended investments, family law splitting relief and certain defined benefit fund and sub-fund transfer requirements where there are less than 50 members); and

- (ii) the impact of any conditions on the trustee's registrable superannuation entity (**RSE**) licence (for example capital requirements particularly where a custodian is involved).

APRA will consider exemptions, portability suspension requests and applications to vary an RSE licence under SIS on a case by case basis. APRA would expect a copy of a due diligence undertaken and the handover arrangements to be detailed in any application or relief request. Any applications for suspension or variation of obligations to roll over or transfer amounts under regulation 6.37 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**) must outline the exceptional circumstances and present a business case that would warrant APRA granting relief for roll overs and transfers.

APRA strongly encourages trustees to contact their responsible APRA supervisor as soon as possible when considering restructures, transfers and changes in service providers.

Herbert Geer Comment

In respect to changing service providers (rather than just for successor fund transfers), our experience has demonstrated that Trustees are not allowing enough lead time in order to negotiate new major service provider contracts and will find themselves potentially in breach of their RSE Licence, when the service has commenced, but the contract has not been finalised and executed. This will include change of second custodian provisions in the RSE licence if a change to the administrator is made.

1.2 **ASIC commences shadow shopping research**

On 21 March 2011, the Australian Securities and Investments Commission (**ASIC**) announced its intention to examine the quality of financial advice via "shadow shopping" research (**Research**), with a focus on advice provided to people at retirement.

The definition and gradations of "quality" retirement financial advice will be established by ASIC in consultation with an expert reference group that includes both industry and consumer group representation.

ASIC has stated that approximately 20% of the current superannuation pool is in retirement products, such as de-accumulation products, and this is likely to double over the next decade and accordingly it is critical that fund members receive quality retirement advice to make the most of their retirement savings.

According to ASIC, the objective of the Research is to define good quality advice to give industry guidance and help consumers maximise their retirement savings.

Additionally the Research aims to:

- (a) improve ASIC's understanding of how consumers and investors view and experience the retirement financial advice process;
- (b) provide general feedback to the financial advice industry, in particular identifying areas where conduct needs to be improved and identify areas of suspected misconduct for further action;
- (c) encourage continued professionalisation of retirement advisers; and
- (d) encourage people to seek financial advice when planning for retirement.

A report detailing the Research's findings will be issued when complete.

1.3 **ASIC accepts legally enforceable undertaking from UBS Wealth Management Australia**

On 17 March 2011, ASIC stated that it has accepted a binding commitment in the form of an enforceable undertaking (**EU**) from UBS Wealth Management Australia Ltd (**UBS WMA**) to modify key aspects of its compliance culture and frameworks and remedy past compliance failures in the provision of financial advice to retail clients.

UBS WMA is a subsidiary of UBS AG and operates a financial services business in Australia which includes the provision of financial product advice.

Between January 2006 and 31 March 2010, UBS WMA failed to provide statements of advice to 764 retail clients who invested in a category of financial products classified by UBS WMA as structured products. The failure to

provide statements of advice also extended to retail clients who invested in additional classes of financial products.

Under the EU, UBS WMA:

- (a) will write to the relevant clients and provide them with a claim form, which will facilitate any claim for compensation that the clients may be entitled to make, in respect of UBS WMA's failure to provide the required statements of advice;
- (b) will complete a program to address its failure to foster and maintain a proper commitment to, and culture of, compliance within its business, and to remedy compliance deficiencies. The program will be thoroughly reviewed by an independent expert who will regularly report to ASIC and the final expert's report will be provided within 14 months, following which UBS WMA will implement any final requirements. UBS WMA's remediation plan will address ASIC's concerns, set out in the EU, including:
 - (i) a poor compliance culture and framework, meaning that deficiencies in processes were not identified, escalated or remedied in an appropriate or timely manner;
 - (ii) inadequate risk management;
 - (iii) a breakdown in general processes;
 - (iv) inadequate training and education;
 - (v) deficiencies in the production of statements of advice for investors; and
 - (vi) inadequate breach assessment and reporting.

ASIC has stated that UBS WMA cooperated throughout its investigations and has already responded to the deficiencies including by undertaking a business restructure with the appointment of a number of senior executives to the business.

The EU relates to UBS WMA only and does not include the parent company UBS AG or other UBS group entities.

2. ATO UPDATES

2.1 *Key superannuation rates and thresholds for the 2012*

On 7 March 2011, the Australian Taxation Office (ATO) released the key superannuation rates and thresholds as they will apply for the 2012 Financial Year.

The rates and thresholds remain as for the 2011 Financial Year with the exception of:

- (a) the capital gain tax (CGT) cap amount (for which non-concessional contributions can be excluded from the non-concessional contributions cap up to the CGT cap amount) will be increased from \$1,155,000 to \$1,205,000;
- (b) the low rate cap amount (applied to lump sum payments) will be increased from \$160,000 to \$165,000;
- (c) the untaxed plan cap amount (which limits the concessional tax treatment of benefits that have not been subject to contributions tax in the fund) will be increased from \$1,155,000 to \$1,205,000;
- (d) the employment termination payment (ETP) cap amount for life benefit termination payments will be increased from \$160,000 to \$165,000;
- (e) the ETP cap amount for death benefit termination payments will be increased from \$160,000 to \$165,000; and
- (f) the lower cap amount on the transitional ETP cap amount will be increased from \$160,000 to \$165,000

2.2 *ATO ID 2011/24 - Self managed superannuation fund: waiver of disqualified person status - meaning of 'serious dishonest conduct'*

On 8 March 2011, the ATO stated that an offence committed by the member (and therefore a trustee/trustee director) of a self managed superannuation fund (SMSF) was an

offence involving "serious dishonest conduct" for the purposes of section 126B of SIS.

The ATO stated that the member was a disqualified person within the meaning of section 120(1)(a)(i) of SIS because he was convicted of an offence against the Commonwealth, being an offence in respect of dishonest conduct. Individuals who are disqualified may apply to the Commissioner of Taxation (**Commissioner**) for a declaration waiving their status as a disqualified person provided the offence was not one involving serious dishonest conduct.

Under section 126B(2)(a) of SIS, an offence involves serious dishonest conduct if the penalty actually imposed for the offence is a term of imprisonment of at least two years.

The member was sentenced to imprisonment for a period greater than two years, but by virtue of a recognisance release order under section 20(1)(b) of the *Crimes Act 1914* (Cth), the court ordered that he be released after he had served a specified period of his sentence (less than two years) upon giving security. However, the Full Federal Court has previously held that despite the fact that a recognisance release order has the effect of reducing a prisoner's time spent in prison, the order does not alter the fact that a longer prison term was imposed on the prisoner (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409).

The ATO States that the purpose of section 126B (and associated provisions) is to allow the Commissioner to waive the disqualified person requirements for a trustee if the Commissioner believes that the individual is highly unlikely to be a prudential risk to a superannuation entity (for example, an individual whose only offence was a minor offence involving dishonesty, such as shoplifting, 20 years ago). An individual is not eligible to apply for a waiver unless the offence that he or she has committed results in imprisonment or a monetary penalty less than that stipulated under section 126B(2) of SIS. Other factors, such as the length of time since committing the offence, are only considered by the Commissioner if the individual is eligible to apply (section 126D(1A) of SIS).

Hence, the gravity of the offence is the most important factor in determining if an individual is a prudential risk to a superannuation fund. In this context, the phrase "penalty actually imposed for the offence" for the purposes of paragraph 126B(2) of SIS means the term of

imprisonment that the court considers to be appropriate for the offence rather than the actual period of time that the offender spends in prison.

Herbert Geer Comment

Despite the fact that the interpretative decision refers to the trustee/trustee director of an SMSF, the principles apply equally to the board of directors of large public offer funds as well as the agents that these boards may outsource their material business activities to.

3. LEGISLATION

3.1 **Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011 (Cth)**

On 21 March 2011 a Private Members Bill (**PM Bill**) was read for the second time in the House of Representatives. The PM Bill proposes to repeal section 27(1)(a) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA**) which currently provides an upper age limit of 70 years (which the federal Government proposes to increase to 75 years) of employees for which an employer is to make calculations with respect to calculating employees individual superannuation guarantee shortfalls under section 19 of the SGA. In the event the PM Bill is passed all employees will receive superannuation guarantee contributions irrespective of their age. The Bill is yet to be read in the Senate.

3.2 **Tax Laws Amendment (2011 Measures No. 2) Bill 2011 (Cth)**

The *Tax Laws Amendment (2011 Measures No 2) Bill 2011 (TLA Bill)* was introduced in the House of Representatives on 24 March 2011. The TLA Bill proposes to:

- (a) amend SIS in order to enable new legislative standards to be set in the SIS Regulations in respect of SMSF trustees that make, hold or realise investments involving collectables or personal use assets; and
- (b) allow superannuation funds to use tax file numbers (**TFN**) to identify member accounts and to facilitate the consolidation of multiple member accounts from 1 July 2011.

Collectibles

The TLA Bill proposes to insert a new section 62A into SIS enabling the SIS Regulations to prescribe rules for SMSFs "making, holding and realising investments" involving:

- (a) artwork (within the meaning of the Income Tax Assessment Act 1997 (Cth));
- (b) jewellery;
- (c) antiques;
- (d) artefacts;
- (e) coins or medallions;
- (f) postage stamps or first day covers;
- (g) rare folios, manuscripts or books;
- (h) memorabilia;
- (i) wine;
- (j) cars;
- (k) recreational boats;
- (l) memberships of sporting or social clubs; or
- (m) assets of a particular kind, if assets of that kind are ordinarily used or kept mainly for personal use or enjoyment (not including land).

The TLA Bill's explanatory memorandum states that the provisions are intended to apply where the asset is the primary investment and also where the asset is a related benefit of an investment. The proposed new section 62A will not override the sole purpose test.

It is intended that these proposed amendments will commence on 1 July 2011 and will apply to investments made before, during and after this time.

Tax File Numbers

The TLA Bill proposes to insert a new section 299LA into SIS in order to enable a superannuation fund trustee to use a TFN quoted by a fund member (or an applicant) to

locate, in the records or accounts of the entity, amounts held for the benefit of the person. The purpose of the amendments is to enable fund members to locate and consolidate their various superannuation account balances.

The TLA Bill also provides for regulations to be made in order to impose conditions on the use of TFNs by trustees for the purposes of the proposed section 299LA.

The use of TFNs as a primary identifier will not be compulsory and trustees will not be obliged to increase their use of TFNs. While a superannuation fund will be permitted to match a member's lost or multiple accounts, the trustee will still need to contact the member and request permission to consolidate them. A member will still have the right to choose not to participate in account consolidation.

The amendments will not alter an individual's right to choose not to quote their TFN and there will not be additional consequences for not quoting a TFN. However, where a TFN is not provided, a superannuation fund cannot accept member contributions, and there may be adverse tax consequences.

It is intended that these proposed amendments will commence on 1 July 2011 with the amendments regulating the consolidation of accounts to commence on 1 January 2012 or an earlier date to be proclaimed.

Herbert Geer Comment

Depending on the trust deed, TFN provisions should be reviewed and/or amended to ensure consistency with the Act, in the event these provisions are enacted. Further, depending on the drafting of the relevant fund's administration agreement, the service provisions relating to TFNs may require review and/or amendment.

4. CASES

4.1 *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8

On 1 February 2011, the Full Federal Court (Full Court) upheld an appeal by the Board of Trustees of the State Public Sector Superannuation Scheme (Trustee) that the respondent's (Edington) appeal against a decision of the Superannuation Complaints Tribunal (SCT) in the Federal Court failed to

raise a question or questions of law and that the Federal Court's decision (that the SCT had failed to exercise its powers of review as required by section 37 of the Superannuation (Resolution of Complaints) Act 1993 (Cth) (SRC Act)) was incorrect.

Facts

The Facts behind this matter and the decision at First Instance were reported in our August 2010 issue of *Shifting Geer* (paragraph 3.1). Briefly stated the Federal Court ruled that the SCT committed an error of law by affirming the Trustee's decision to deny a fund member a total and permanent disability benefit because the SCT failed to properly discharge its duties by:

- (a) failing to identify the trustee's reasoning process and then conducting an analysis of it to assess whether it was fair and reasonable; and
- (b) reaching its own decision by an alternative method of reasoning and introducing new evidence to make a decision.

Section 37 of the SRC Act requires that the SCT determines whether a trustee's decision was fair and reasonable in the circumstances.

Decision

On the question of law the Full Court held that:

- (a) no appeal under section 46 of the SRC Act (which requires that a party may appeal a decision of the SCT on a question of law) will lie from the SCT's findings of fact, unless those findings were reached in a manner giving rise to a question of law. Accordingly, if the question is whether the Trustee in answering questions of fact:
 - (i) failed to take into account a relevant consideration;
 - (ii) had regard to an irrelevant consideration;
 - (iii) adopted a wrong approach; or
 - (iv) reached a decision so unreasonable that no reasonable

decision-maker could have come to it,

then that question is a question of law;

- (b) Edington's claim to the Federal Court failed to state any questions of law, but affirmed numerous propositions that were said to be the occasion for legal error on the SCT's part;
- (c) Edington's claim to the Federal Court also contained questions of mixed fact and law, however a mixed question of fact and law is not a question of law within the meaning of section 46 of the SRC Act; and
- (d) Edington's claims were presented as bald assertions, as opposed to distinct questions of law.

On the question as to whether the SCT exercised its powers of review in accordance with the law, the Full Court held that the SCT did exercise its powers correctly. In doing so, the Full Court stated that:

- (e) the SCT's role was to decide whether or not the Trustee's decision to affirm its previous decision was fair and reasonable in relation to Edington in all the circumstances. "Unreasonable" and "unfair" have been said to be "words of broad content", which are not readily defined;
- (f) in contrast to the Administrative Appeals Tribunal (**AAT**), the SCT is not called upon to determine whether a trustee made the correct or preferable decision. Rather, the SCT stands in the shoes of the trustee and determines, based on all the information before it, whether or not a decision taken by that trustee was fair or reasonable in the circumstances;
- (g) in determining whether a decision is "fair and reasonable" the SCT is directed to whether the actual decision, rather than the process that led to the decision, was fair and reasonable;
- (h) if the SCT is satisfied that the decision of the trustee was not fair and reasonable, the SCT makes a decision that is fair or reasonable in substitution for the trustee's decision, always providing that

the SCT cannot do anything contrary to law, the rules of the fund, or the terms of insurance. Otherwise the SCT must affirm the decision in the event that it is satisfied, in the circumstances, that the trustee's decision was fair and reasonable;

- (i) the SRC Act does not specify the considerations that the SCT is bound to take into account in deciding whether or not a trustee's decision was fair or reasonable; considerations must therefore be determined by reference to the subject-matter, scope and purpose of the SRC Act which includes ensuring that members and beneficiaries are not adversely affected by unfair and unreasonable decisions of insurers and trustees;
- (j) the SCT may have to make its own findings of fact but it is necessary to make such findings of fact only for that purpose. The SCT does not decide afresh all findings of fact of the primary decision-maker as if that decision had not been made. It does not, in that sense, simply stand in the shoes of the primary decision-maker;
- (k) the SCT must ascertain the facts for itself upon the material before it and satisfy itself by reference to these facts whether the trustee's decision was fair and reasonable in the circumstances; and
- (l) the SCT is not required to determine whether a trustee's reasoning process was fair and reasonable.

4.2 ***Sadleir v Motor Trades Association of Australia Superannuation Fund Pty Ltd*** [2011] FCA 33

On 2 February, the Federal Court set aside a decision of the SCT after ruling that its failure to give reasons for an earlier decision amounted to an error of law.

Facts

The Facts behind this matter and the decision at First Instance were reported in our November 2010 issue of *Shifting Geer* (paragraph 3.2). Briefly stated, on 27 August 2010, the Federal Court dismissed an appeal against a decision of

the SCT which had affirmed that a trustee's apportionment of a death benefit in favour of the deceased member's de facto spouse was fair and reasonable in the circumstances. At First Instance the Court found that the applicant had failed to raise a question of law to appeal the SCT's determination as required under section 46 of the SRC Act. However, the Court provided the applicant with an opportunity to file a notice of motion to amend her notice of appeal to include a ground that the SCT failed to give adequate reasons and for an order for the hearing of that ground of appeal.

Decision

The Court held that the SCT failed to provide adequate reasons for its decision under section 40 of the SRC Act as to why the trustee's decision to distribute a deceased member's superannuation benefit in a certain manner was fair and reasonable in the circumstances. Instead the SCT had only recorded its decision by stating its findings of fact and declared that the decision was fair and reasonable.

In reaching its decision, the Court outlined the relevant principles that the SCT must follow in providing adequate reason:

- (a) there is no standard of perfection required in the preparation of a reason, but what is required is that the reasons should be expressed in clear language so that they are capable of being understood;
- (b) the reasons need not deal with every detail of the evidence but must set out those parts of the evidence which are important for the conclusions arrived at;
- (c) the reasons must disclose the SCT's reasoning process;
- (d) finally, in determining whether the reasons are adequate they must be considered fairly rather than combed through "with a fine appellate toothcomb to find an error";
- (e) that a recitation of facts and conclusions fails to demonstrate an adequate reasoning process; and
- (f) one of the purposes of the requirement to give reasons is to inform the person against whom the decision is made why

the decision was made so that the person knows why the trustee's decision was or was not fair and reasonable in the circumstances.

Accordingly, the Court held that the SCT's failure to provide adequate reasons amounted to an error of law and accordingly the matter would need to be remitted to the SCT for further consideration.

4.3 **Olesen v MacLeod [2011] FCA 229**

On 17 March 2011, the Federal Court held that the continued payment of money out of an SMSF to its sole member in contravention of sections 62 and 65 of SIS was a "serious one" for which a court could make a penalty order under section 196 of SIS.

Facts

Subsequent to establishing an SMSF in August 2005, and rolling over \$45,000 into the fund's bank account, the respondent commenced to make separate withdrawals from the fund's account to the value of approximately \$64,000 over the period of September 2005 to May 2009. In May and August 2009, the respondent subsequently repaid the combined amount of \$3,403.25 to the fund.

The Deputy Commissioner for Taxation (Superannuation) (**Deputy Commissioner**) subsequently sought declarations that the respondent contravened sections 62 and 65 of SIS and an order that he pay the Commonwealth a monetary penalty.

Decision

The issues for the court to determine were:

- (a) whether the single course of conduct, represented by the contraventions, was a "serious one", as that expression was used in section 196(4) of SIS;
- (b) whether it was appropriate to make a civil penalty order under section 196(3) of SIS; and
- (c) if so, what the monetary penalty should be.

The Court held that the contraventions were serious. SIS does not define the term "serious" and, accordingly, its ordinary meaning should

be given, which in the context the court held to mean "not trifling or superficial". The Court held that the contraventions were serious on the basis that the fund's principal asset was completely disposed of, other than in accordance with the fund's governing rules. A deliberate decision was made to establish an SMSF in order to access the funds and in each case a deliberate decision was made to remove the funds, as though the fund was the respondent's personal bank account, for the purposes of initially settling threatened legal proceedings between the respondent and a third party and, subsequently for a variety of personal uses. The respondent also benefitted from the availability of concessional tax treatment as a result of operating the fund.

The Court also made an order for a monetary penalty and that the respondent pay the Deputy Commissioner's legal costs on the basis that the contravention was a serious one. The monetary penalty of \$12,500 was based upon the Court's need to deter the respondent against engaging in any like conduct in the future as well as a form of punishment. The Court noted that the respondent is also obliged to and (accordingly) has agreed to pay the relevant assessed taxed amounts owing to the ATO, due to the contraventions

4.4 **On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366**

On 13 April 2011 the Federal Court held that interpreters engaged by a business (**the Applicant**) to provide interpreting and translating services were "employees" for superannuation guarantee purposes, and not independent contractors. In upholding the superannuation guarantee assessments, the Court applied a "multi-factorial totality test" of the relationship to find that the interpreters were common law employees under section 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SG Act**).

Facts

The Applicant operates an interpretation and translation services business and from 1 July 2002 to 30 June 2007 (**the Period**) failed to make superannuation guarantee contributions in respect of approximately 2,500 interpreters it engaged on the basis that the Applicant regarded the interpreters as independent contractors. The Commissioner determined that the interpreters were casual or part-time

employees and, accordingly, issued the Applicant with superannuation guarantee charge assessments for the Period.

Decision

The Court ruled that the interpreters were common law employees under section 12(3) of the SG Act by considering a “multi-factorial”, rather than the traditional “control” test, by considering the totality of the relationship between the Applicant and the interpreters. In reaching its decision, the Court considered two questions:

- (a) whether the interpreter performing the work was an entrepreneur who owns and operates a business (**Business Question**); and
- (b) whether the interpreter is working in and for his or her own business as a representative of that business and not for the Applicant who receives the benefit of the work (**Benefit Question**).

With respect to the Business Question, the Court held that the Applicant had failed to establish that the majority of interpreters owned and operated a business. Further the evidence suggested that the market for interpreting services involves agencies providing services to large institutional clients and, therefore, there is little scope for one-person businesses in the market. While most of the interpreters had multiple purchasers of their services, the Court noted that the bulk of the purchasers were agencies and, accordingly, the pattern of the interpreters’ work was not much different to that of casual or part-time employees working for a small number of employers. The Court also noted that the interpreters performed their work personally and did not delegate or engage in sub-contracting and that they generally accepted the payment rates set by the Applicant without negotiation.

Because the Court held that the majority of interpreters neither owned nor operated a business, the Court was not required to consider the Benefit Question. However, the Court concluded that the interpreters’ activities (including the activities of two witnesses, who were engaged by the Applicant who did run businesses) were performed for the Applicant’s benefit. In doing so, the Court in considering the “multi-factorial totality test” took into account each of the following:

- (a) control test: in this case, the Court did not regard the extent to which the Applicant could and did exercise control of the interpreters as a determinative factor in this case;
- (b) representation of user’s business: the economic activities of interpreters were represented and portrayed as the Applicant’s activities rather than the interpreters’. The requirement for interpreters to wear identification badges, and the content of those badges, portrayed the interpreters as representing the Applicant;
- (c) goodwill: the goodwill created by the interpreters’ work overwhelmingly advantaged the Applicant;
- (d) result test: the Court was not satisfied that interpreting or translating was remunerated for an agreed result. However, the fact that the work had a connection to time and dislocation was neutral in this case and did not mean the interpreters were employees;
- (e) delegation: the Court stated that the absence of delegation of tasks by the interpreters tends significantly against the conclusion that the work the provided was performed in and for their own businesses;
- (f) integration test: the Court considered that economic dependency, integration and exclusivity was not an indicator of any utility in this case. While the lack of exclusivity (in other words, the fact that interpreters also worked for competitors) suggested a lack of integration, the Court stated that this is also a feature of casual and part-time work; and
- (g) profit and risk: the interpreters took little or no risk but had some capacity to manage their affairs so as to maximise their remuneration. Although poor performance may have led to no further assignments, there was no penalty or denial of payment. Further, the Applicant held professional indemnity insurance that also covered the interpreters’ actions.

The Court also held that the interpreters were the Applicant’s “employees” within the under section 12(3) of the SG Act as they were

engaged under contracts that were wholly or principally for the labour of the person. The Court observed that section 12(3) seeks to facilitate occupational superannuation for workers who sell their labour in employment and employment-like settings. In this respect, the Court stated that the Applicant had failed to establish that its relationship with the interpreters was not employment-like.

4.5 *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50

On 15 March 2011 the New South Wales Supreme Court of Appeal (**Court of Appeal**) held that a litigation funding agreement is a "financial product" under section 763A of the *Corporations Act 2001* (Cth) (**Corporations Act**). As the appellant did not hold an Australian Financial Services Licence to deal in financial products, the Court ruled that the respondent had a statutory right of rescission under section 925A of the *Corporations Act*.

Facts

The appellant, International Litigation Partners Pte Ltd (**ILP**), a Singaporean corporation, had entered into an agreement to fund litigation commenced by Chameleon Mining NL (**CHM**). The agreement included an early termination clause that specified that the agreement could be terminated subject to a \$9 million fee if there was a change in control of CHM. In the absence of termination, ILP was entitled to a funding fee (a percentage of any sum awarded). ILP was neither licensed to provide financial services nor exempt from requiring a license.

In August 2010, a change in CHM's control triggered the early termination fee. However, a notice of rescission of the agreement was given to ILP according to section 925A of the *Corporations Act* on the grounds that the agreement was a financial product issued by a non-licensee. ILP contested the rescission and claimed the early termination fee as well as the funding fee. The New South Wales Supreme Court held that the funding agreement was not a financial product and held that the agreement could not be rescinded. Accordingly, the court found that ILP was entitled to the early termination fee, but that it was not entitled to the funding fee. Both parties appealed the respective decisions.

Decision

The Court of Appeal ruled that the litigation funding agreement is a "financial product" under the *Corporations Act* on the basis that it is a facility for managing financial risk. Accordingly, the Court considered that the funding agreement was validly rescinded under section 925A of the *Corporations Act*.

The Court of Appeal's majority held that the funding agreement:

- (a) is not excluded from being a financial product under sections 762B or 763E; and
- (b) is neither a "derivative" nor a "credit facility" under the *Corporations Act*.

In allowing the cross-appeal, the Court of Appeal ruled that the obligations and entitlements of ILP under the funding agreement ceased when there was a change in CHM's control. As a result, ILP was only entitled to the \$9 million early termination fee but not any funding fee.

4.6 *Re The Taxpayer and Commissioner of Taxation* [2011] AATA 168

On 15 March 2011, the Administrative Appeals Tribunal (**AAT**) affirmed a superannuation excess non-concessional contributions tax assessment against a taxpayer for breaching the \$1 million non-concessional contributions cap during the transitional period to 30 June 2007.

On 31 July 2006, an amount of \$1,489,402.31 was contributed to the taxpayer's SMSF. The SMSF subsequently lodged the member contribution statements in respect of the 2007 Financial Year on 3 March 2008 which reported contributions of \$1,253,100 in respect of the taxpayer and \$400,671 in respect of another fund member.

The taxpayer's affairs were subsequently audited and the excess contribution was identified. The Commissioner issued an assessment setting out the additional tax payable to which the taxpayer subsequently lodged an amended return and revised statements from the fund which reduced the contribution amount that had been allocated to the taxpayer's account and increased the amount that had been allocated to the other

member. However the other member was not admitted to the fund until 30 June 2007.

The taxpayer claimed that the contribution amount was an error of the taxpayer's accountant and that there was no intention on the taxpayer's behalf to mislead the Commissioner and that it was "unjust, unfair and otherwise inappropriate" for him to be required to pay the tax in the circumstances.

The AAT's decision

The AAT stated that even if it accepted that the failure to admit the other fund member within the relevant time was due to an unfortunate error in the office of the accountant, that error does not change the fact that the taxpayer was the only member of the fund to whom contributions could be allocated at the relevant time. Accordingly, the taxpayer's liability for taxation could not be judged on the basis of what he should have done but on the basis of what he (or his agent) actually did do.

Accordingly, the AAT affirmed the Commissioner's assessment and implied that the taxpayer should consider any potential legal remedies against his accountant.

5. OTHER RECENT DEVELOPMENTS

5.1 **WorkSafe Victoria: new superannuation entitlements**

WorkSafe Victoria (**WorkSafe**) has stated that it will pay a 9% superannuation entitlement into an injured worker's superannuation fund from April 2011 where an eligible worker has been receiving workers' compensation payments for 12 months. WorkSafe states that this measure follows the Victorian Government's April 2010 reforms to the *Accident Compensation Act 1985* (Vic).

To qualify for this superannuation entitlement, a person must:

- (a) have been injured on or after 5 April 2010;
- (b) have been receiving weekly payments for 52 weeks;
- (c) be under the age of 65, and
- (d) must not be receiving superannuation from his or her employer as part of

accident make-up pay under an award or agreement.

Injured workers will be notified by a WorkSafe agent if they are eligible for this superannuation entitlement. The WorkSafe agent (as opposed to the employer) will make superannuation contributions at 9% of the injured worker's gross weekly payment to a superannuation fund chosen by the injured worker. WorkSafe states that an employer's only obligation as a result of this entitlement is to notify their WorkSafe agent if an injured worker in receipt of weekly payments is receiving superannuation from the employer as part of accident make-up pay under an award or agreement.

5.2 **Financial Assistance to Trio Capital Limited's Superannuation Fund Investors**

On 13 April 2011, the Assistant Treasurer announced that over 5,000 victims of fraud from the collapse of Trio Capital Limited (**Trio**), will be compensated for 100% of their eligible losses (valued at approximately \$55 million).

Trio was the trustee of four superannuation funds (the Astarra Superannuation Plan, the Astarra Personal Pension Plan, the My Retirement Plan and the Employers Federation of NSW Superannuation Plan) and one pooled superannuation trust (**Trio Funds**). Trio invested a proportion of the Trio Funds' assets into the Astarra Strategic Fund of which most of its assets were purportedly directed into hedge funds, located in the Caribbean. According to ASIC, there is little, if any, credible evidence that the purported investments were actually made, or if they were, that they have any realisable value. Most of the assets invested were subsequently lost.

There were more than 6,000 investors in the Astarra Strategic Fund of which 5,000 were Trio Funds members and hence APRA-regulated.

The Federal Government's assistance is granted under Part 23 of the *Superannuation Industry (Supervision) Act 1993* (Cth) only to APRA-regulated members and previously, it was the Federal Government's practice to only provide assistance for 90% of the value of such eligible loss. The grant of financial assistance will be recovered by way of a levy on regulated superannuation funds under the *Superannuation (Financial Assistance Funding) Levy Act 1993* (Cth).

Self-managed super funds (SMSFs) and investors other than APRA-regulated superannuation fund members will not be eligible to receive compensation as Part 23 of SIS does not apply to these investors.

5.3 **Consultation paper: Review of compensation arrangements for consumers of financial services**

On 20 April 2011, the Federal Government released its consultation paper titled *Review of compensation arrangements for consumers of financial services (Consultation Paper)* in response to the Ripoll Report which was released in November 2009.

The Consultation Paper frames issues and raises questions on the need for, and costs and benefits of, a statutory compensation scheme for retail clients who suffer damage or incur loss as a result of misconduct by financial services providers.

Licensed providers of financial services (**Licensees**) who deal with retail clients are required to have in place:

- (a) a dispute resolution system that meets specified standards under section 912A of the *Corporations Act*; and
- (b) arrangements for compensating clients for loss or damage suffered because of a breach by the Licensee of its statutory obligations, in accordance with section 912B of the *Corporations Act*.

Issues of interest

The Consultation Paper seeks submissions from interested parties with respect to matters including:

- (a) the professional indemnity insurance (**PI**) market:
 - (i) the capacity of the insurance market to supply Licensees with adequate and appropriate PI cover, considering the specific ASIC requirements;
 - (ii) the circumstances in which the market has been able to supply run-off cover to a Licensee;

- (iii) the conditions, in terms of access and price, for reinsuring the risk of PI provided to Licensees;
 - (iv) changes in the availability of PI for Licensees since 2008 when section 912B arrangements came into full operation;
 - (v) the longer-term outlook for the insurance market with respect to the supply, cost and coverage of PI for Licensees in accordance with the legal and regulatory requirements; and
 - (vi) the circumstances in which Licensees have found it difficult to acquire PI cover that meets their needs;
- (b) the adequacy of PI:
- (i) the utility and effectiveness of ASIC guidance in enabling Licensees to assess the adequacy of their PI cover;
 - (ii) the adequacy of the current administrative approach in providing assurance that Licensees meet their requirements to have adequate insurance cover;
 - (iii) the appropriateness of the current exemptions from the need to hold PI cover; and
 - (iv) the scope for a Licensee in practice to make alternative compensation arrangements with the approval of ASIC;
- (c) the process for claiming and recovering compensation:
- (i) the awareness by retail clients of the available dispute resolution schemes and compensation arrangements, and the degree of clarity to consumers about using those processes;
 - (ii) any issues arising from the existence of separate compensation schemes and arrangements in various

- segments of the financial services sector and the possible scope for bringing together some of these schemes and arrangements or moving towards some form of common administration;
- (iii) the experience of parties in responding to compensation claims in terms of time, cost and outcomes, including claims pursued through an internal or external dispute resolution (**EDR**) scheme or the courts;
 - (iv) any practical difficulties arising from differences between the standards of liability for Licensees under the *Corporations Act*, the general law and under external dispute resolution schemes, and the ambit of liability covered in PI policies obtainable by Licensees;
 - (v) any issues in practice with compensation claims against Licensees by retail clients in regard to the distinction between inappropriate advice or misconduct by a Licensee on the one hand and investment losses in the absence of such misconduct on the other; and
 - (vi) the ability of Licensees to seek recourse against other Licensees or parties, who may bear some responsibility for the loss or damage in respect of a retail client's successful compensation claim;
- (d) the trends in premiums for PI borne by Licensees:
- (i) the trend in premiums for PI taken out by Licensees, and the factors behind that trend;
 - (ii) the trend in claims paid under PI held by those Licensees and the value of claims made under those policies which are still outstanding; and
 - (iii) the typical grounds upon which claims under PI policies are not met;
- (e) the effectiveness of current compensation arrangements:
- (i) the costs and benefits of PI for Licensees and the financial services industry more broadly;
 - (ii) the level of assurance to retail clients that claims for loss or damage will be dealt with and awards for compensation paid; and
 - (iii) the contribution of the current compensation arrangements in maintaining confidence by retail clients in dealing with financial services providers, including financial advisers, and in underpinning responsible behaviour by Licensees;
- (f) how compensation arrangements for financial services operate in other countries:
- (i) the practical operation of those arrangements in contributing to consumer protection and the underpinning of consumer confidence in relevant markets; and
 - (ii) the possible relevance of those arrangements as models for the compensation of consumers of financial services in Australia; and
- (g) additionally:
- (i) the nature and extent of any shortfall in the delivery of compensation under current arrangements;
 - (ii) the scope for further measures to lift the standards of Licensee conduct or assist consumers in looking after their own interests;
 - (iii) the scope for a tighter approach to the administration of the current requirement to hold PI;
 - (iv) the scope for more standardisation in the kind of PI cover available for financial

service Licensees or classes of Licensee;

- (v) the usefulness of improved disclosure about a Licensee's PI policy;
- (vi) possible arrangements to deal with claims for compensation after a Licensee ceases to trade;
- (vii) the case for additional requirements in regard to the financial security of Licensees; and
- (viii) the merits, and key design components, of a last resort scheme to provide compensation for retail clients, including the approach to industry funding.

The closing date for submissions is 1 June 2011.

5.4 **Future of Financial Advice Information Pack, April 2011**

On 28 April 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation released a Future of Financial Advice (FOFA) Information Pack (**Information Pack**).

The Information Pack details the Federal Government's further FOFA reforms as:

- (a) a prospective ban on up-front and trailing commissions and like payments for both individual and group risk within superannuation from 1 July 2013;
- (b) a prospective requirement for advisers to get clients to opt-in (or renew) their advice agreement every two years from 1 July 2012;

- (c) a prospective ban on any form of payment relating to volume or sales targets from any financial services business to dealer groups, authorised representatives or advisers, including volume rebates from platform providers to dealer groups;

- (d) a prospective ban on soft dollar benefits, where a benefit is \$300 or more (per benefit) from 1 July 2012. The ban does not apply to any benefit provided for the purposes of professional development and administrative IT services if set criteria are met;

- (e) expanding a new form of limited advice called scaled advice, which can be provided by a range of advice providers, including superannuation trustees, financial planners and potentially accountants, creating a level playing field for people who provide advice. Scaled advice is advice about one area of an investor's needs, such as insurance, or about a limited range of issues;

- (f) a limited carve out from elements of the ban on conflicted remuneration and best interests duty for basic banking products where employees of an Australian Deposit-taking Institution (ADI) are advising on and selling their employer ADI's basic banking products (eg savings accounts, first home saver account deposit accounts and non-cash payment products such as travellers cheques and cheque accounts); and

- (g) the Government will explore whether the term 'financial planner/adviser' should be restricted under the *Corporations Act*.

No draft legislation has been released with respect to these proposed reforms.

**These articles were produced by Herbert Geer.
They are intended to provide general information in summary form on legal issues.
The contents do not constitute legal advice and should not be relied upon as such.**

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