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Beneficiary, Investor, Citizen: Characterising Australia's super fund participants

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Abstract

One of the primary objectives of the regulatory regime governing superannuation funds is to safeguard the interests of members. However members are implicitly characterized in different ways in different parts of the regulatory regime. This causes inconsistencies in the way different parts of the regime recognize the needs, interests and expectations of members. They also give rise to frictions where different parts of the regulatory regime overlap.

Beneficiary, Investor, Citizen

Characterising Australia's super fund participants

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Introductory comments

Over the past twenty years superannuation [1] has assumed an increasingly important role in the provision of financial security in retirement. Approximately 90% of the Australian workforce are now members of superannuation funds. [2] The assets held in superannuation funds in Australia now dwarf those in life insurance companies and in non-super investment vehicles such as unit trusts [3] and total benefit payments from superannuation funds already exceed government payments for the Age Pension. [4]

As this retirement 'nest egg' has grown, so too have the array of rules regulating its activity. The rules span direct legislative involvement, such as *Superannuation Industry (Supervision) Act 1993* (Cwth), ('*SIS*') and the *Corporations Act 2001* (Cwth)('*Corporations Law*'), through legislation having an indirect bearing, such as the *Income Tax Assessment Act 1936* (Cwth), to the regulatory rules imposed by APRA and ASIC and the rules of self-regulatory bodies such as the ASX.[5]

There are many issues that this cacophony of regulation inspires. [6] This paper aims to address just one: do different parts of the regulatory scheme exhibit different assumptions about the purpose of the scheme as a whole? This is clearly a question of fundamental importance, capable of being approached from many angles. This paper takes a somewhat unusual approach. It attempts to infer a characterisation of the beneficiaries of the regulation (that is, the members of superannuation funds) from different parts of the regime. In so do doing, it attempts to highlight the inconsistencies in a less arid, more lively way than might be the result of a conventional comparison of the relevant statutory and regulatory provisions. It also begins to respond to Professor Pearson's observation that

> 'Risks to the consumer have not been sufficiently articulated in the conversations around the massive changes to the regulation of Financial Services in Australia … If regulation is about collective goals and a moral community … then the conversations in the regulatory system should involve more than technical discussions about the cost, length or even utility of disclosure documentation and other compliance obligations.' [7]

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1 The term superannuation is used in Australia and NZ synonymously with the way that 'occupational pension' is used in other common law jurisdictions, such as the UK, Canada and the US. However differences in the statutory regime and the development of equitable principle make references to jurisprudence in NZ, Canada and the US hazardous.

2 Australian Bureau of Statistics, *6310.0 - Employee Earnings, Benefits and Trade Union Membership*, Australia, Aug 2006.

3 Department of Innovation, Industry, Science and Research, *Executive Briefing: Managed Funds in Australia*, (AGPS, Canberra, 2008).

4 Total benefits from superannuation funds (lump sum plus pensions) in calendar year 2005 were approximately $32.5bn, compared to $22.5bn paid by the government in age pension over the same period. APRA, *Insight*, Issue 2 2007, Table 3, 23; Australian Bureau of Statistics, *5206.0 - Australian National Accounts: National Income, Expenditure and Product*, Sep 2007.

5 It is not surprising, given the degree of overlap, that the multi-layered nature of this regulatory scheme is increasingly a feature of corporate law also. See for instance Stephen Bottomley, 'Where did the law go? The delegation of Australian corporate regulation' (2003) 15 *AJCL* 105.

6 Some of these are introduced in Michael Adams, 'Overlap in superannuation licensing doubles the costs' (2006) *Australian Super News*, Issue 5, 26 May, 82.

7 Gail Pearson, 'Risk and the Consumer in Financial Services Reform' (2006) 28 *Sydney Law Review* 99, 99.

A point of departure

The analysis presented in this paper suggests that several distinct leitmotifs clamour for attention within regulatory scheme. This is not a new idea. Lord Justice Hoffman, speaking at the 1994 edition of this conference, described the interplay of four juridical sources at play in superannuation:

- contract;
- equitable principles;
- statutory regulation; and
- administrative discretion.[8]

A year earlier, Moffatt had sought to apply a conceptual map to the doctrinal developments present in the flurry of pension cases in the UK in the early 1990s.[9] Applying a taxonomy borrowed from the Critical Legal Studies movement, he distinguished three spheres of social life: *family and friendship*, within which he placed trust law; *work and exchange*, within which he placed employment law; and *state and citizenship*. The doctrinal friction present in the UK cases arose, under his framework, because pension plans' location in both trust and employment law meant they straddled two different spheres. Had he been writing in Australia, he might easily have recognised the impact of compulsory superannuation in bring superannuation law into the third sphere, *state and citizenship*, also.

This paper contains echoes of both these descriptions, but proposes a slightly different taxonomy. It identifies three distinct models:

1. The Traditional Model, essentially an amalgam of contract, equity and employment law;
2. The Investor Model, in which the member is perceived as a risk-taking consumer of financial products; and
3. The Public Model, in which the superannuation fund is treated as a quasi-public institution.

The three sections of the paper deal with each in turn. Along the way, the paper asks two important questions: Is the Investor model compatible with the Traditional Model it has partially eclipsed? and second, to what extent has the Public Model had an impact on the legal environment in which superannuation funds operate, and is it, in turn, inconsistent with the other models? To the extent that the answer to any of these questions is "No", then the seminal question, whether 'different parts of the regulatory scheme exhibit different assumptions about the purpose of the scheme as a whole?' will be answered in the affirmative.

8 Lord Hoffman, "The Direction of Equity and its Role for Superannuation/Pensions in the 90s" *Superannuation 94 - A National Conference for Lawyers on Superannuation.*

9 Graham Moffatt 'Pension Funds: A Fragmentation of Trust Law' (1993) 56 *MLR* 471, 488.

1. The Traditional Model

In the traditional model, superannuation is sited firmly within the general law governing trust law and contracts. This is enshrined in *SIS* which employs both the mechanisms of trust law (the trustee, beneficiary and quarantine of the fund corpus) and its language. Employment law also makes a cameo appearance.

The member as 'beneficiary'

The beneficiary in a traditional trust arrangement is entitled to have the trust administered in accordance with the terms of the trust instrument. [10] In addition, Equity will impose certain constraints (fiduciary or otherwise)[11] on the behaviour of the trustee, to the extent those constraints are not modified or excluded in the trust instrument. The terms of the trust instrument are thus of paramount importance in defining the interests (sometimes termed 'expectations', to differentiate them from property rights) of beneficiaries. Moreover, the courts have been loathe to fetter the freedom of settlors to include whatever terms they, the settlors, saw fit to include in the trust instrument, subject to some irreducible core that ensures that the arrangement created remains a trust.[12]

Superannuation funds historically followed a similar pattern. Subject to a few provisions that ensured that the trust respected the concessional taxation treatment they received, neither legislators nor the courts felt a need to interfere in the freedom of employers (mostly) to specify the terms of the superannuation funds they created. The close attention (and respect) paid to the precise terms of the relevant trust instruments in surplus cases, such as *Re Courage Group's Pension Schemes*, [13] *Mettoy Pension Trustees v Evans* [14] and *Lock v Westpac* [15] is testament to this 'hands-off' attitude.

Despite the legislative programme of the past fifteen years in Australia, great flexibility remains. *SIS* imposes a handful of requirements on the structure of the trust but does not prescribe its precise terms. So for instance, s52(2) incorporates a set of covenants into the trust instrument that ensure that certain important trustee duties cannot be excluded or modified. [16] Similarly s62, the so-called 'sole purpose' requirement, requires that trustees ensure the fund is maintained for the provision of retirement benefits.

This flexibility has had its critics. There have been repeated assertions that trust law is anachronistic and perhaps ill-suited to the task of governing the activities of the modern financial institution that superannuation funds have become. [17] Others

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10 *Bartlett v Bartlett* (1845) 4 Hare 631, 67 ER 800.

11 Examples include the fiduciary 'proscriptive' duties identified by the High Court in *Breen v Williams* (1996) 186 CLR 71, as well as the non-fiduciary prescriptive duties, the equitable duty of care and the duty to invest prudently. Pamela Hanrahan, 'The Responsible Entity as Trustee' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law*, (LexisNexis Butterworths, Sydney, 2002), 227.

12 See David Hayton, 'The Irreducible Core Content of Trusteeship' in Anthony Oakley (ed), *Trends in Contemporary Trust Law*, (Clarendon Press, Oxford, 1996), 48.

13 *Re Courage Group's Pension Schemes v Imperial Brewing and Leisure* [1987] All ER 528.

14 [1991] 2 All ER 513.

15 (1991) 25 NSWLR 593.

16 Based on recommendation of the Law Reform Commission in *Collective Investments: Superannuation*, Report No.59 (1992).

17 See for instance Gordon Clark, 'Pension Fund Governance: expertise and organizational form', (2004), 3 *Journal of Pension Economics and Finance*, 233.

see the superannuation fund as a 'sui generis species of trust'[18] respecting its genesis in trust law, requiring a distinct approach. [19] Nevertheless the courts continue to recognise the equity that infuses the duties that arise in the trust instrument. [20] Similarly, reviews in both the UK and Australia have returned a verdict in favour of trust law after failing to find a viable alternative. [21] Thus, despite vigorous suggestions to the contrary, in *Cowan v Scargill*, Megarry V-C concluded that he could find

> 'no reason for holding that different principles apply to pension fund trusts from those which apply to other trusts' [22]

Naturally, superannuation's unique context affects the way trust law principles apply to superannuation funds. Characterising the member, not as the hapless and vulnerable beneficiary of Equity lore, but as a competent economic actor, influences the way in which the courts interpret the trust instrument and balance the equities between the parties. [23] Lord Browne-Wilkinson in the House of Lords and Justice Bryson, in the Supreme Court of New South Wales, have been especially critical of simple-minded application of trust principles to commercial applications, including superannuation. Browne-Wilkinson LJ in *Target Holdings v Redferns*, [24] a case involving a payment to a solicitor as part of a conveyancing transaction that gave rise to a 'bare' trust, noted

> 'The fundamental principles of equity apply as much to such trusts as they do to the traditional trusts in relation to which those principles were originally formulated. But in my judgment it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of a quite different kind.'[25]

Specifically in the superannuation context Bryson J has noted,

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18 David Hayton, 'Pension Trusts and Traditional Trusts: Dramatically different species of trust', (2005) *Conv*. 229, 229. Scott Charaneka, 'Legal Darwinism: the Evolution of a New Trust Species', (2000) 11 *Insurance Law Journal* 1. To similar effect see Moffatt, above at n 9. Cf Sir Robert Walker, 'Some Trust Principles in the Pension Context', in Oakley, above at n 12, who argues

> 'it hard to see the point of debate on whether occupational pension schemes should continue to be regulated by trust law',

noting that superannuation funds require some legal form and implying that trust law is as good a starting place as any, 124.

19 Marina Milner, 'Pension Trusts: a New Trust Form', [1997] *Conveyancer and Property Lawyer* 89.

20 Windeyer J in *CARE v Bishop (*1997) Unreported judgment of Federal Court of Australia (BC9703370).

21 See for instance Law Reform Commission, above at n 16, and in the UK (*Report of the Pension Law Review Committee (the Goode Report): fourth report of the Social Security Committee together with the proceedings of the Committee. HMSO,* (1993).

22 [1985] 1 Ch 270 at 290. In Australia, see *Fouche v The Superannuation Fund Board* [1952] 88 CLR 609; *Locke v Westpac*(1991) 25 NSWLR 593. See also Gummow J's *obiter* muse on whether construction of a superannuation trust deed required any 'special' approach, such as that proposed in some UK cases; *Caboche v Ramsay* (1993) 119 ALR 215, 233. The implication of the comment, though it is admittedly ambiguous, is that no special approach is required.

23 Michael Bryan, 'Reflections on Some Commercial Applications of the Trust', in Ramsay, above at n 11, 205. Also Blackett-Ord J in *Palmer v Abney Park Cemetery* (1985) unreported decision of Chancery Division, cited in Samantha Traves, 'Superannuation Fund Surplus: Another problem for trustees', (1992) 1(2) *Griffith Law Review* 210.

24 [1995] 3 All ER 785.

25 ibid at 795.

> The parties' relationship [in a superannuation fund] is quite different to the relationship between beneficiaries and trustees who are administering a trust instrument which expresses the bounty of a settlor. … The context … is a contractual context in which an employee ... and the employer adhere to the Plan as a set of rules to regulate part of their employment relationship. Superannuation rights are not granted out of grace or bounty and members contribute their own money. [26]

As Bryson J notes, the point of distinction between superannuation funds and trusts in general that is typically highlighted is the fact that members are typically not volunteers.[27] That is, superannuation members have generally provided consideration to secure their participation in the trust. In Australia they are also not volunteers in the colloquial sense of the word; membership of a complying fund is more or less compulsory for adults in the workforce.[28]

The member as 'employee'

The fact that the courts will also have regard to the context in which the superannuation entitlement arises in defining the obligations of the trustee and legitimate expectations of the members is consistent with the general principle that the courts will have regard to relevant context, the 'matrix of fact' to borrow Lord Wilberforce's phrase,[29] in interpreting contractual provisions. In effect the status of the member as an 'employee' is recognised. [30]

The characterisation of the member as an employee most often strengthens the member's position. It was noted above that the courts have been prepared to recognise that superannuation being a component of the employment contract means that members are not volunteers. The members' status as employees has also been held relevant where the employer has sought to amend the terms of the trust instrument, a power sometimes specifically reserved for the employer in superannuation trust deeds. In that circumstance, the courts have on occasion imposed a duty of good faith on the employer, consistent with the bilateral duty of good faith that is held to exist between employer and employee. [31] So for instance in *Imperial Group Pension Trust v Imperial Tobacco,*[32] Browne-Wilkinson V-C found

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26 *Dillon v Burns Philp Finance Ltd* (1988) unreported decision of the Supreme Court of NSW, (BC8801719), 14.

27 *Mihlenstedt v Barclays Bank* [1989] IRLR 522; *Imperial Group Pension Trust v Imperial Tobacco* [1991] 2 All ER 597. In Australia see *Dillon v Burns Philp Finance Ltd* above at n 26; *Minehan v AGL Employees Superannuation Pty Ltd* (1998) 134 ACTR 1; *Telstra Super v Flegeltaub* (2000) 2 VR 276 at 286. This contribution has inspired some writers to describe the members as being settlors of the trust; Dimity Kingsford Smith, 'Who Knows Best? Review of Discretionary Powers in Superannuation Funds', (2000) 28 *ABLR* 428. It is not obvious that such a characterization achieves much, and in so far as the contributing members have no ability to influence the terms of the trust, such an appellation does as much to mislead as to inform.

28 Of course there are exceptions and exemptions, especially for workers younger than 18 or older than 70, or earning below a threshold amount per week.

29 *Prenn v Simmonds* [1971] 3 All ER 237 per Wilberforce LJ, 239.

30 *Re Courage Group*, above at n 13. Whether this recognition stretches far enough was questioned by Paatsch and Smith in 1992 but it is at least possible that the subsequent judicial statements quoted above may have quelled the fires of their discontent. Dean Paatsch and Graham Smith., 'The Regulation of Australian Superannuation: An Industrial Relations Law Perspective', (1992) 5(2) *Corporate and Business Law Journal*, 131, 133.

31 Whilst in theory this 'good faith' gloss acts both ways, to date at least, it has mostly served to strengthen the position of the member. It is however possible to imagine circumstances, for instance when a member makes a disability claim, where the duty of good faith might be imposed in the opposite direction, on the member.

32 Above at n 27, 606.

that the obligation of good faith implied in contracts of employment arose also in the trust deed and rules of the company's pension scheme. [33] A similar obligation was found by Waddell CJ in the Supreme Court of NSW in *Lock v Westpac* [34] and by the Australian Industrial Relations Commission in *AMWU v Shell.*[35]

Glover, writing in the immediate aftermath of *Lock v Westpac*, [36] saw the encroachment of employment contracts as constituting a near-eclipse of trust law, concluding

> 'The law of trusts has a role subordinate to the law of contract, and possibly subordinate to other categories as well, in the regulation of employee superannuation schemes.' [37]

With respect, that assessment overstated the situation in 1992. However events have caught up with the observation, in the form of the increasingly popular 'master' trusts. Master trusts are, to all intents and purposes, unit trusts configured to achieve 'complying' status under s45 *SIS*. They are offered by financial institutions directly to the public and, except to the extent that they are nominated as the default fund by employers, don't exhibit the employment nexus between member and fund that was customary in 'occupational' superannuation funds. More importantly, the rights and expectations of members more closely resemble those inherent in a unit trust than those in a traditional occupational scheme. This circumscribed set of trustee duties, when combined with member investment choice, has inspired the present author in another setting to describe trustees of these funds as 'prudent eunuchs' for the peculiar combination of impotence and lack of accountability they enjoy.[38]

Concluding comments

Whilst the relevance of the traditional trust law characterisation of a 'beneficiary' may be diminishing, it is important not to overstate the importance of the contractual context. In important ways, members display the 'vulnerability' that attracts fiduciary obligations in other fields. For instance, they have no proprietary interest in the assets of the fund per se.[39] Their interest is better described as 'an expectancy'.[40] Also, the preservation rules applying to superannuation balances mean that members have extremely limited ability to gain access to their superannuation balance prior to their reaching retirement age, albeit that Fund Choice legislation now permits them to transfer between funds more easily than was hitherto the case. Members also have limited ability to examine the detailed operation of the fund in which they are invested. Taken together, these vulnerabilities mean that the protections afforded at equity and in *SIS* are important not just for the actual protection of members' interests, but for the confidence they inspire in members that their interests will be safeguarded.

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33 Cf Anthea Nolan, 'The Role of the Employment Contract in Superannuation: An Analysis Focusing on Surplus Repatriation Powers Conferred on Employers.' (1996) *ABLR* 341.

34 Above at n 15.

35 *Australian Metal Workers Union v Shell Refining* (1993) 27 ATR 195.

36 Above at n 15.

37 John Glover, 'Lock v Westpac Banking Corporation and the Problem of Superannuation Fund Surpluses', (1992) 9 *Aust Bar Rev* 172, 172.

38 Scott Donald, 'The Prudent Eunuch', presentation to 14th Colloquium of Superannuation Researchers, UNSW, 2006.

39 *Re HIH Superannuation* [2003] NSWSC 65; *Baird v Baird* [1990] 2 All ER 300, 305 per Oliver LJ.

40 *Re Coram* (1992) 109 ALR 353, 356-7 per O'Loughlin J. See also *Australian Petroleum Nominees v SCT* (1997) Unreported judgment of Federal Court of Australia (BC9707169). Also Graham Hill, 'The True Nature of a Member's Interest in a Superannuation Fund', (2002) 5 *Journal of Australian Taxation* at 1.

2. The Investor Model

Superannuation funds administer large investment portfolios on behalf of their members. In that sense, superannuation funds are unambiguously 'investment' vehicles. However in recent years it has been presumed that this further implies that fund members are properly considered 'investors'. This section assesses the extent to which this characterisation fundamentally challenges the Traditional Model described in the previous section.

The Wallis Committee

The Financial System Inquiry of 1996, (commonly known as the "Wallis Committee" after its chairman, Mr Stan Wallis AO) heralded a new era for superannuation regulation in Australia. Ambitious in scope, the Inquiry was charged with identifying

> 'the regulatory arrangements that will best ensure an efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness.'[41]

The Committee's report, tabled in March 1997 inspired a legislative program (the Corporate Law Economic Reform Program No. 6 – "CLERP 6")[42] that culminated in the *Australian Securities and Investments Commission Act 1998,* the *Australian Prudential Regulation Authority Act 1998* and the *Financial Services Review Act 2002*.

Importantly for present purposes, the Committee sought to remove any distinctions between the regulation of superannuation and the regulation of other forms of collective investment. This means that it effectively treated superannuation fund members as 'investors', a characterisation quite different from that which prevailed up to that point.

The member as 'consumer'

The Wallis Committee was the first comprehensive review of financial sector regulation in Australia since the Campbell Committee of 1981. [43] It adopted an avowedly econo-centric perspective. Its focus on markets caused 'efficiency' to be accorded a pre-eminent position amongst the regulatory objectives. It noted,

> 'The general case for regulation is founded in market failure, where efficient market outcomes are inhibited.'[44]

The primary mechanism for promoting the efficiency of the system was to be competition. Competition implied a 'level playing field' for equivalent financial products and services and this, combined with an implicit assumption that

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41 Financial Systems Inquiry, *Terms of Reference*, (Wallis Committee Report, 'Wallis') found at http://fsi.treasury.gov.au/content/terms.asp

42 Commonwealth of Australia, *Financial Markets and Investment Products: Promoting competition, financial innovation and investment*, Corporate Law Economic Reform Program, Proposals for Reform Paper No.6, (AGPS, Canberra, 1997).

43 The Martin Committee of 1984 was provided with a wide scope of reference but focused primarily on the banking sector. See Guay Lim, 'The Martin Report', (1984) 66 *Australian Economic Review* 26.

44 Wallis above at n 41 at 175.

superannuation was simply another form of private saving, saw superannuation more explicitly brought within the realm of financial service regulation. [45]

This had quite profound implications. Regulation of superannuation was to be included alongside other financial intermediaries such as banking, insurance and investment entities in the remit of two new, over-arching regulators, the Corporations and Financial Services Commission and the Australian Prudential Regulation Commission (which became ASIC and APRA in 1998).[46]

The Wallis Committee's decision to include superannuation within the ambit of 'financial product' brought about a fundamental shift in regulatory policy. Even the words used to characterise the active elements of the superannuation fund changed. Funds became 'products' and members became 'customers', a change in rhetoric that highlights graphically the quite different way in which they were each perceived by the Wallis Committee. And in 1998, insult was added to injury when the familiar 'trustee' was replaced with the ungainly 'responsible entity'. [47]

More important perhaps than the terminology, was the implication of this change in perspective for the choice of regulatory strategy. 'Financial safety' regulation was to be reserved for situations

> 'where promises are judged to be very difficult to honour and assess, and produce highly adverse consequences if breached.' [48]

The payments system was one such situation. Superannuation was not, though the Committee did recognize the 'implications of compulsory contributions and tax assistance for superannuation' in intensifying the level of regulatory 'assurance'.[49] Prudential regulation was therefore relevant to superannuation, but the regulators were to aim for a level of risk in accordance with the 'reasonable expectations' of the recipients of the financial promise. What was 'reasonable' where the promise was a superannuation fund member was not specified.

Characterising members as 'customers' implicitly provided that direction. As a general rule 'customer' protection is achieved by ensuring transparency and freedom of choice. This philosophy is sometimes called 'consumer sovereignty'. It seeks to empower individuals to pursue their own, personal interests, interests of which they themselves are held to be the best judge. CLERP 6 adopted this perspective quite literally. [50] This emphasis on self-reliance is a world away from the Traditional Model in which the trustee plays a paternalistic (or perhaps avuncular) role in determining the course of action that is in the beneficiaries' 'best interests'.

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45 For a thorough discussion of the extent of, and rationale, for this inclusiveness, see Dimity Kingsford Smith, 'Is "due diligence" dead? Financial services and products disclosure under the Corporations Act', (2004) 22 *C&SLJ* 128, 130.

46 Responsibility for self managed superannuation funds moved to the Australian Tax Office in 1999; ATO Media Release - Nat 99/71, available at www.ato.gov.au/corporate/content.asp?doc=/content/mr9971.htm

47 *Managed Investment Act 1998*, borrowing a phrase first appearing in LRC Report No.59 , above at n 16. In the same vein, there is a gentle irony in ASIC's decision to use the term 'member' rather than 'client' in the interests of 'plain language' in ASIC, *PS184: Superannuation: Delivery of product disclosure for investment strategies* (2006).

48 Wallis, above at n 41, 190.

49 Wallis, above at n 41, 193.

50 CLERP 6, above at n 42, 27.

The member as 'investor'

If the member of a superannuation fund is a 'consumer', then they are a very specific type of consumer; a consumer of financial products. And as the Wallis Committee noted, market-linked financial products at that. [51] Their exposure to market outcomes means that superannuation fund members are not just consumers, but 'investors'.

This is an important gloss. Where consumer protection exists to provide redress to consumers for faulty products, investment is by its nature risky and investors are expected to bear the consequences of that risk. CLERP 6 recognised that reality when it noted.

> 'Risk taking is a central component of financial markets. Market regulation is not intended to guarantee the success of a particular investment decision.' [52]

Moreover whilst individuals may, through good luck or good management, avoid losses, not all investors can enjoy this good fortune. Losses[53] will be experienced by some investors somewhere in the population. Finance theory makes it clear that some investments must fail – it is the *sine qua non* of the equity risk premium and the credit spread on non-sovereign debt securities. Implicit, then, in characterising members as 'investors' is an acceptance that the superannuation entitlements of some portion of the population will be inadequate, not because of anything in the power of the member, but due to the actuation of adverse investment outcomes. Put bluntly, investment markets inevitably have 'losers' as well as winners.

Such an outcome may be acceptable to a neo-classical economist, but it does not fit as well in a social policy context. Pearson puts the question well,

> 'Collectively we are asking the question of what is an acceptable risk to the financial system? We are barely asking the question of what is an acceptable risk for each individual who contributes to that system' [54]

The likelihood that a significant number of participants will have to rely on the 'safety net' of the government's Age Pension is a problem that ought not be ignored. For one thing, this transfer of risk places a great deal of pressure on that safety net to provide for a dignified retirement for those whose investment outcomes prove inadequate. There is an important moral hazard issue at play here. As Bellis notes, the safety net of the Aged Pension provides workers with a 'free' option, the value of which depends on where the safety net is set. Set the safety net too high and members may be inclined to 'gamble' with their superannuation investment strategies, knowing they can fall back on the government pension if it all goes horribly wrong. On the other hand, set it too low and members who have high expected superannuation balances will choose low volatility strategies (because the government pension is not worth falling back on) and those with low expected superannuation balances will have to gamble (because the combination of a low government pension and a low superannuation balance will be inadequate).[55]

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51 Wallis, above at n 41, 130 and 136. Also Pearson, above at n 7, 106 – 107.

52 CLERP 6, above at n 42, 28.

53 The term losses here is to be interpreted loosely. Whilst the actuation of risk may cause actual financial loss of capital, loss in this context also connotes investment outcomes where the rate of return is positive but unexpectedly low.

54 Pearson, above at n 7, 101

55 Bellis, C., 'Volatility in Superannuation Investments and the Australian Age Pension' presentation to 13th Colloquium of Superannuation Researchers, UNSW, 2005.

Implications on the choice of regulatory instruments

Characterising members as 'investors' also exerts a strong influence on the regulatory instruments that are appropriate. The model was most clearly articulated in CLERP 6,

> 'Regulation is aimed at ensuring that retail investors:
>
> - Are provided with adequate information to make informed investment decisions …
> - Understand their obligations and the risks involved …
> - Have confidence in the standard and qualifications [of advisers and dealers]; and
> - Are provided with appropriate avenues of redress in the event of fraud or negligence by financial intermediaries'[56]

Disclosure thus becomes an important element of the regulatory mix, as does licensing of 'product' providers. Less attention was paid in the superannuation context to the need for avenues of redress. [57]

Disclosure is aimed at improving transparency. Few today would argue that transparency in the context of a superannuation fund is not a good thing. The concerns expressed as recently as 1965 in *Re Londonderry's Settlement* [58] about the impact on family harmony of exposing the decisions of trustees to scrutiny seem more relevant to the novels of Trollope and Austen than to the operation of a modern financial institution such as a superannuation fund. [59] However relying on disclosure has some unique consequences in the superannuation context.[60]

The first is that disclosure relies on members being capable of using the information they are provided to make appropriate decisions. It is troubling therefore that there is widespread acceptance of the proposition that many superannuation fund members are ill-equipped to make the decisions expected of them. [61] It is even more troubling that this belief is supported by an accumulating body of empirical research demonstrating that superannuation fund members do in

56 CLERP 6, above at n 42, 27 – 28.

57 The Superannuation Complaints Tribunal has provided avenues of redress for individual superannuation fund members in respect of certain grievances (primarily those related to decisions of the trustee) since 1994. See Carol Foley, 'The Role of the Superannaution Complaints Tribunal' in Susan Kneebone, (ed) *Administrative law and the rule of law: still part of the same package?*, (Australian Institute of Administrative Law, Canberra, 1998) Members also have access to the remedial provisions of *SIS* and the *Corporations Act*.

58 [1965] Ch 918, per Harman LJ, 931 and Salmon LJ, 937.

59 For further discussion, see below in Part 3.

60 The discussion here does not directly address the problems identified by Gallery and Gallery in a series of papers concerning the quality and relevance of the financial information actually provided in superannuation fund disclosures. Unless those shortcomings are deemed unavoidable, they stem from poor implementation of the regulatory policy rather than shortcomings of disclosure as a regulatory instrument *per se*. See for instance, Gerry Gallery and Natalie Gallery, 'Inadequacies and Inconsistencies in Superannuation Fund Financial Disclosure: The Need for a Principles-Based Approach', (2003), *Australian Economic Review*, 36(1), 89.

61 See for instance FINSIA, *Saving the Future: Can the under-40s afford to grow old? Public Opinion Research*, (2006) and Australian Government Office for Women, *Aspects of Retirement for Older Women* (AGP, Canberra, 2006). On superannuation more generally, see Diana Beal and Sarath Delpatchitra 'Community Understanding of Superannuation', 2004 *Agenda* 11(2), 127.

fact make poor choices in regards the disposition of their superannuation funds assets. [62]

Ironically, the Wallis Committee recognised this problem. It noted,

> 'In a market economy, consumers are assumed, for the most part, to be the best judges of their own interests. In such cases, disclosure requirements play an important role in assisting consumers to make informed judgments. However, disclosure is not always sufficient. For many financial products, consumers lack (and cannot efficiently obtain) the knowledge, experience or judgment required to make informed decisions …' [63]

Remarkably, it did not address this market failing, beyond recognising that in many cases third parties or, as a last resort, the government would provide assistance.

Some argue that poor decision-making on the part of superannuation fund members reflects inadequate financial literacy and that a program of education could address this problem.[64] There is no doubt that some education is likely to improve the general level of financial decision-making. However it would be naïve to assume financial literacy programmes can solve the problem entirely. For a start, there is there is a problem around what constitutes financial literacy: what sorts of knowledge and skills does a person need to be able to participate in the decision processes implied in the regulatory regime, and how does the acquisition of that knowledge and those skills fit into the financial literacy 'curriculum'? [65] More fundamentally, there are both psychologists [66] and experienced market practitioners [67] who argue that members' decisions reflect 'irrational' biases innate to human decision-making and cannot therefore be 'educated' away.

The apparent 'irrationality' may also reflect institutional factors, including problems in the incentive structure of the industry. Consider, for a moment, the

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62 Evidence of sub-rational decision-making in pension plans can be found in Shlomo Benartzi and Richard Thaler, "Naïve Diversification Strategies in Defined Contribution Savings Plans". [2001] *The American Economic Review,* 79; Shlomo Benartzi, S. and Richard Thaler, "How Much is Investor Autonomy Worth?", [2002] *Journal of Finance* 1593. In Australia, see John Evans, and King Tan, 'Drivers of Investment Choice: Some Evidence From Australian Superannuation Participants', [2006] *Jassa*, issue 4, 18; Marilyn Clark-Murphy and Paul Gerrans, 'Apparently contradictory superannuation choices among younger fund members: a misunderstanding of risk?' (2004) 23 *Economic Papers* 101. But cf Tim Fry, Richard Heaney and Warren McKeown, 'Will investors change their superannuation fund given the choice?' (2007) 47 *Accounting and Finance* 267 which suggests that investor inertia can be attributed to high loss aversion rather than irrationality.

63 Wallis above at n 42, 192.

64 See for instance Kerry Brown, Gerry Gallery, and Natalie Gallery, 'Informed superannuation choice: constraints and policy resolutions' (2002) 32 *Economic Analysis & Policy* 71. Also Robert Clark, et al 'Retirement plans and saving decisions : the role of information and education', (2006) 5(1) *Pensions Economics and Finance*, 45; Maria Teresa Garcia, 'Individual responsibility for the adequacy of retirement income' (2005) *Pensions – An International Journal,* Vol. 11, 3, 192.

65 The Australian government-sponsored Financial Literacy Foundation has identified superannuation as one of nine topic areas relevant to personal financial literacy, but there is an interdependence across the topics which mean that mastery of the superannuation section also requires mastery of other areas, such as investment and saving. The Foundation's consumer website can be found at www.understandingmoney.gov.au

66 Most notably, recent Nobel Laureate, Daniel Kahneman. See for instance Daniel Kahneman 'Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice', 2002 *Nobel Prize Lecture*, available at http://nobelprize.org/nobel_prizes/economics/laureates/2002/kahnemann-lecture.pdf, accessed at 29.02.2008.

67 See for instance Arun Abey and Andrew Ford, *How much is enough?*, (A&B, Sydney, 2007) and the research cited therein.

life-cycle of a superannuation fund member. Making relatively uncontroversial assumptions about the pattern of their contributions and of investment returns,[68] each contribution will make approximately the same contribution to the terminal value of their superannuation balance on retirement. Getting it right early matters. However research shows that younger members are typically less engaged in making decisions concerning the disposition of their superannuation entitlements, partly because retirement is perceived to be a distant issue and partly because their accumulated balance is comparatively small. [69]. Moreover, education can be expected to have less impact when the subject matter is believed to be irrelevant. Direct intervention in the form of personal financial advice might be more effective, but advice is typically only realistically available towards the end of the life-cycle, at a point where the accumulated balance has reached a quantum such that the commission earned by an adviser is attractive. Ideally, mechanisms would exist to ensure the advice was available at the start of the life-cycle, where it could be expected to have greatest impact on the investment strategy pursued over the life of the member. The structure and operation of today's industry mitigate against this. It is perhaps not surprising that addressing this problem was one of the key recommendations of the Parliamentary Joint Committee's on Corporations and Financial Services report into superannuation in 2007.[70]

However, there is an even more fundamental problem with relying on disclosure in the superannuation context. Investors are expected to judge for themselves whether they understand the information being disclosed to them. If they don't understand the information, they can choose not to invest. However 'not investing' is not an option for the majority of superannuation fund members. For them, some level of superannuation contribution is compulsory. If, as seems to be the case, the failure of disclosure is systemic [71](though undoubtedly more severe in some cases than others), the absence of this crucial 'safety' valve is very serious.

Finally, there is no distinction between the regulatory treatment given to different financial products. As the Parliamentary Joint Committee noted,

> 'Finding a one-size-fits-all model that could be practically used by product issuers offering a diverse array of financial products could potentially create more problems than it solves.'[72]

It is also not obvious that the same treatment should be accorded even within the superannuation arena. Should for instance the same reliance be placed on disclosure for those 'products' designed for discretionary superannuation

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68 Simplistically, that salary growth and net investment returns (after fees and taxes) are paced at similar levels over the life of the member, allowing for the impact of the greater volatility of investment returns on compounding. Note this is equivalent to saying that the future value of all contributions is approximately equal under the simple assumptions outlined.

69 Finsia, above at n 61.

70 Parliamentary Joint Committee on Corporations and Financial Services, *The structure and operation of the superannuation industry*, 2007

71 The Parliamentary Joint Committee report came to the damning conclusion that,

> 'it [is] widely acknowledged through the inquiry that product disclosure statements (PDS) are often not suitable for general consumption … Although they may be legally compliant, PDS' that are long, complex, difficult to compare and have key information lacking prominence, do not serve the purpose of communicating effectively with consumers. The public is overwhelmingly put off by such material and anecdotal evidence conveyed to the committee suggested that they ordinarily do not read it.'

Parliamentary Joint Committee ibid, 6.119 - 6.120.

72 Parliamentary Joint Committee ibid, 6.143

investment and the 'products' used to accommodate the compulsory contributions required under the superannuation guarantee levy? It seems, for instance, more acceptable to characterise the member as an 'investor' in the first instance than it is in the second.

This is not to be critical of the PDS regime as means of achieving adequate disclosure. There was considerable criticism of the prospectus regime it replaced.[73] It would be hard to find fault with ASIC's 'Good Disclosure Principles'. Instead of providing formal rules of inclusion, definition, presentation or exclusion, ASIC requires that information be presented in a clear, concise and effective manner and that it be timely, relevant and complete, promote product understanding and comparison, highlight important information and have regard to consumer's needs.[74] This approach gives trustees considerable scope to assess the needs of their members and to tailor the content and form of their PDS appropriately.

Rather the argument here has to do with the over-reliance on disclosure as a regulatory instrument in the superannuation context. Analysis of the effectiveness of the FSR reforms has tended to focus on the content of the disclosure, and on whether it has been cost-effective. [75] Less attention has been placed on whether the regime has been effective in reducing the risk to the consumer. Unfortunately the empirical research described above, and also anecdotal evidence arising from the failures of Fincorp, Westpoint and Australian Capital Reserve, suggests that it has not been wholly effective.[76]

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73 Kingsford Smith, above at n 45.

74 ASIC, *Regulatory Guide 168: Disclosure: Product Disclosure Statements (and other disclosure obligations)*, (2007).

75 Pearson, above at n 7, 124. See for instance Michael Adams, Angus Young and Marina Nehme, 'Preliminary review of over-regulation in Australian financial services', (2006) 20 *Australian Journal of Corporate Law* 1; Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January, Ch.5.

76 In some cases this has been because artful structuring of the investments (eg as promissory notes in the case of Westpoint, debentures in the case of Fincorp) allowed the PDS disclosure regime to be bypassed. In others, it appears there were deficiencies in the information originally disclosed in prospectuses (e.g. Australian Capital Reserve). Statement by Tony D'Aloisio, Chairman of ASIC to the Senate Standing Committee on Economics, 30 May 2007, available at http://www.asic.gov.au, accessed at 29.02.2008. ASIC has recently moved to address these examples in *Regulatory Guide 69: Debentures—improving disclosure for retail investors*, October 2007, but this does not address the broader problem.

3. The Public Model

There can be little doubt about the existence of a contest between the Traditional and Investor models. There is however an open question whether the Public Model has earned a place in this contest, or whether it remains peripheral and of little relevance to the broader question of characterising the superannuation fund member.

The public nature of superannuation

The past twenty years have seen superannuation assume an ever greater 'public' nature. Within ten years most retirees will derive a material part of their post-retirement income from their superannuation 'nest egg',[77] a major 'privatisation' of the welfare system in Australia.

The public nature of superannuation comes not just from its breadth and size. The 'compulsory' nature of superannuation is important also, and in a number of ways. It distinguishes the Australian system from others, such as the US and UK, where coverage may be widespread but is not mandated universally by government. Further, it consolidates the argument that superannuation fund members are not volunteers, and deserve different treatment to that traditionally accorded beneficiaries under trust law. It also influences the intensity of focus expected by Parliament of its appointed regulators, such as APRA and ASIC. [78] As the Wallis Committee noted,

> 'compulsory contributions and tax assistance for superannuation ... arguably combine to imply that government should provide greater regulatory assurance in relation to superannuation than would normally apply for market linked investments'[79]

The member as 'citizen'

With superannuation's public nature comes the prospect of a set of principles quite distinct from those present in private law. Accountability and transparency become key concerns, as does the somewhat fluid notion, 'natural justice'. That these principles should guide the activities of regulatory agencies such as the SCT, APRA and ASIC is uncontroversial. What is more interesting is when these principles threaten to affect the actions and rights of the private individuals involved in superannuation funds; the trustees and members.

It is sometimes argued that superannuation fund trustees bear significant responsibility for the administration of what is (or at least until recently was) a public activity and hence have, collectively, been delegated a role of a public nature. [80] Ought they not also, in a normative sense, therefore be subject to the principles that govern public officials? Does this is turn, give members a different set of rights than would otherwise accrue under traditional trust law? Although there are tentative suggestions of this in the literature and in the legislation, it would be fair to say that the courts have so far been unimpressed by the argument.

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77 Commonwealth of Australia, *Intergenerational Report 2007*, Chart C6, available at www.treasury.gov.au/igr, accessed at 29.02.2008.

78 Minister's Introduction in *Options for Improving the Safety of Superannuation*; Issues Paper, 2001, iii, and *Options for Improving the Safety of Superannuation; Background Issues*, 2001, 2.

79 Wallis, above at n 41, 193.

80 They are thus an interesting example of what Professor Black has termed 'de-centred' regulation. Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation', (2002) 2 *Journal of Corporate Law Studies* 253.

The following sections highlight four areas in which the public nature of superannuation can be seen in superannuation law.

The impact of administrative law on a member's access to information

Administrative law emphasises procedural fairness in decision-making by public entities as a way to promote the accountability of those entities. There is no equivalent requirement in trust law. [81] Nor can superannuation's statutory regime supply the deficiency. Indeed the impetus in trust law for holding trustees accountable for their decisions, absent mala fides, is weak indeed. This weakness belies the public nature of superannuation. Professor Kingsford Smith has put the proposition well,

> 'the superannuation trust has a significant public nature despite its legal form … Should fund trustees remain unaccountable and unsupervised in the exercise of discretions … when superannuation has become a privatised version of some aspects of social security?'[82]

A number of commentators have seen an appeal to administrative law principles as a way around the restrictive approach of trust law. [83] Administrative law has a similar focus on the exercise of discretion by an individual (or body). Not surprisingly therefore, there are a great many parallels. Like trust law, administrative law proscribes acting for an improper purpose,[84] acting otherwise than in good faith [85] and acting under dictation.[86] However administrative law has two other broad themes that are attractive to those who would seek to employ it in a superannuation trust context. Procedural fairness,[87] sometimes summarised as 'natural justice', is a priority of administrative law. So too is the requirement of 'reasonableness'.[88] Trust law has traditionally been wary of both of these themes.

Turning first to procedural fairness, it is important to note that though the lay meaning of the term 'procedural fairness' is potentially quite wide-ranging, the sense in which it is used in administrative law in Australia is not. It refers primarily to the operation of two rules; the 'hearing' rule and the 'bias' rule.[89] The requirement that a decision-maker provide a person who will be affected by the decision an opportunity to be heard prior to the decision being taken is quite

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81 *Vidovic v Email Superannuation* (1995) unreported decision of the Supreme Court of NSW, (BC9504297)

82 Above at n 27, 434. Cf Senate Select Committee on Superannuation and Financial Services, *Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services, First Report*, (Senate Printing Unit, Canberra, 2001), where the Senate Select Committee concluded that,

> 'in most cases, there are already sufficient mechanisms in place for fund members to hold trustees accountable for their actions.'

at 3.61.

83 Kingsford Smith, D., above at n 27; Sir Robert Walker, above at n 18, 131. Indeed some commentators have even returned the favour, couching the duties of public officials as akin to 'trusteeship'. See for instance, Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224, 228.

84 *Thompson v Randwick Municipal Council* (1950) 81 CLR 87; *Westminster Corporation v London and NW Railway Co* [1905] AC 426, 430.

85 *Sydney Municipal Council v Campbell* [1925] AC 338

86 *R v Stepney Corp* [1902] 1 KB 317

87 *Kiao v West* (1985) 159 CLR 550

88 *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 K.B. 223

89 Mark Aronson, Bruce Dyer and Mathew Groves, *Judicial Review of Administrative Action*, 3rd edn, (Lawbook Co., Sydney 2004) at 370.

foreign to traditional trust law. [90] A trustee can solicit and receive input from beneficiaries but there is no obligation to do so, absent a provision in the trust instrument to that effect. All that a member can expect is that the trustee will give real and genuine consideration to the matter,[91] which may in some cases require the trustee to seek information from the member. The 'bias' rule is even more problematic for superannuation trustees. As Sir Robert Walker has pointed out,[92] conflicts of interest are endemic in superannuation trusts. Indeed as a later section highlights, the statutory requirement for 'equal representation' actually creates conflicts in Australia in many cases.

The requirement for 'reasonableness' in administrative law is often linked to Lord Greene MR's statement in *Associated Provincial Picture Houses v Wednesbury* [93] that:

> 'The court is entitled to investigate … whether [the decision-maker] has taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to have taken into account … [or has] come to a conclusion so unreasonable that no reasonable [person] could have come to it.'[94]

Courts in the UK, have expressly endorsed this bi-furcated principle (often termed the *Wednesbury principles*) in the pension context [95] and in trust law generally. [96]

The situation is not so clear in Australia. The courts in Australia have adhered to the grounds identified in *Karger v Paul* [97] for judicial review of a trustee's exercise of discretion: if the trustee failed to act in good faith, acted for an ulterior purpose or failed to give real and genuine consideration to the matter. [98] The court may also intervene if, the trustee having disclosed reasons, those reasons are not sound.[99] The courts, reluctantly it seems at times, have also recognised the ability of settlors to include provisions in the trust instruments that expressly limit or preclude the provision of information to members. [100]

What then of the *Wednesbury* principles? In *Maciejewski v Telstra Super,*[101] Windeyer J held that the decision of a trustee could be reviewed if the trustee could be shown to have come

> 'to a conclusion which no reasonable person could have come to on the material which was before it' [102]

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90 *Karger v Paul* [1984] VR 161.

91 *Partridge v Equity Trustees Executors and Agency Co* (1947) 75 CLR 149; *Karger v Paul*, above at n 89.

92 Walker, above at n 18.

93 *Associated Provincial Picture Houses,* above at n 87.

94 *Associated Provincial Picture Houses,* above at n 87, per Lord Greene MR, 234.

95 *Edge v Pensions Ombudsman* [1999] 4 All ER 546.

96 *Sieff v Fox* [2005] EWHC1312.

97 Above at n 89.

98 *Telstra Super*, above at n 27; *Asea Brown Boveri Superannuation v Asea Brown Boveri* [1999] 1 VR 144.

99 *Rapa v Patience* (1985), unreported decision of the Supreme Court of NSW, BC8500888.

100 *Tierney v King* [1983] 2 Qd R 580; *Hartigan Nominees v Rydge* (1992) 29 NSWLR 405, per Sheller JA, 446.

101 *Maciejewski v Telstra Super Pty Ltd (No 2)* [1999] NSWSC 341

102 ibid, . But cf, Meagher and Gummow who argue that unreasonableness may provide evidence of *mala fides* or a failure to exercise the discretion but is not of itself grounds for interference by a court. Rodderick Meagher and William Gummow, *Jacobs Law of Trusts*, (6th edn, Butterworths, Sydney, 1997), 1616.

This position appears now to be well accepted.[103] However in *Telstra Super v Flegeltaub*, Batt JA expressly distinguished what might be termed the 'manifestly unreasonable' ground from the 'Hastings-Bass' element of Lord Greene's formulation. He said,

> 'I would reserve for another day the question whether the decision of a trustee of a superannuation fund … can be challenged on any grounds other than those stated in *Karger v Paul*, such as failure to direct itself correctly in law over and above addressing itself to the correct question, failure to take into account all relevant factors and taking into account an irrelevant factor. Such grounds smack very much of administrative law. That is an area of law far removed from the law of trusts.'[104]

This reservation was echoed by Barrett J, speaking at the 2006 version of this conference. He professed the view that,

> 'any attempt to introduce Hastings-Bass thinking into this arena would … be to inject an entirely foreign and chaotic influence'[105]

It seems, then, that in Australia there remains a gap between the trust law and administrative law grounds for review of a decision-maker's exercise of discretion.

The position at general law would matter less if the statutory regime supplied mechanisms for achieving the same ends. Unfortunately (for those who would seek administrative law-style accountabilities) the statutory regime does not require procedural fairness nor 'reasonableness', at least not directly.

Whilst not requiring procedural fairness *per se*, *SIS* does provide for an enhanced level of transparency over that required by trust law generally. As noted in the previous section, the regulatory regime requires that superannuation fund members (and would-be members) receive certain prescribed information relating to their fund. However disclosure of this type is a one-way communication. Decisions about how much and when to disclose are subject to the regulatory requirements, but much discretion is left in the hands of the trustee. Worryingly, the regulatory framework contains inconsistencies and lacunae that commentators have suggested

> 'presents scope for trustees to manipulate disclosures, thus potentially misleading fund members and adversely affecting their decisions' [106]

One way for a member to address any perceived deficiencies in the information they have received is to pose questions of the trustee. Under *SIS*, members can expect answers to questions they have about the fund and their interests therein. Section 52(2)(h) of *SIS*, as amplified by reg 4.01 of the *SIS Regulations*, invokes s1017C of the *Corporations Act* 2001. Section 1017C provides that a concerned person (defined to include a member) has the right to request and then receive

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103 See for instance *Sayseng v Kellogg Superannuation* [2003] NSWSC 945 per Bryson J at [62]; *Telstra Super*, above at n 27, 284; *Asea Brown Boveri*, above at n 97. Also *re HIH Superannuation*, above at n 39, citing the High Court of Australia in *Attorney-General v Breckler* (1999) 197 CLR 83, which itself had cited *Clerical Administrative and Related Employees Superannuation* v *Bishop* (unreported, FCA (Northrop J), 31 July 1997) and *Wilkinson v Clerical Administrative and Related Employees Superannuation* (1997) 7 FCR 469.

104 *Telstra Super v Flegeltaub*, above at n 27 at 285.

105 Justice Barrett, 'The Rule in Hastings-Bass', presentation to *Superannuation 2006* (Law Council of Australia, Melbourne, 23 February 2006). Available at www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_barrett230206, accessed at 29.02.2008. Also Pamela McAlister, 'The Rule in Hastings-Bass – revisited' (2006) 18 *Australian Superannuation Law Bulletin* 52, 55.

106 Gerry Gallery and Natalie Gallery, 'Accounting impediments to better superannuation fund governance' (2006) 12(2) *Accounting, Accountability & Performance* 33, 33.

such information as might reasonably be required to understand the main features and investments of the superannuation fund and to make an informed judgment about the management, financial condition and investment performance of the superannuation fund of which they are a member, as well as their personal benefit entitlements. This provision is fortified by s101 of *SIS* which requires trustees to have a procedure in place to ensure any complaints or enquiries are 'properly considered' within 90 days.

The problem is that reg 4.02 of the *SIS Regulations* notes that internal working documents of the trustee are not included in the definition of the information that must be provided. The practical effect of that limitation is that members have little opportunity to seek information not contained in the standard disclosures. Indeed this exception would seem to be even narrower that that subsisting at general law, where the class of documents not available to beneficiaries is limited to those which might disclose the trustees' reasoning. [107] A brooding silence is thus almost guaranteed except where there is a material event to act as a catalyst, justifying recourse to the courts or the SCT, such as a contested disability claim [108] or an industrial dispute.[109]

Statutory Interpretation – re VBN

The second illustration of the influence of administrative law principles on superannuation appears in a decision of the Administrative Appeals Tribunal, *re VBN and APRA.*[110] The Tribunal in that case sought to interpret the provisions of *SIS* (specifically s52(2)(c)) in the light of administrative law principles. The Tribunal saw the administrative law context of s52(2)(c) as severing the connection between s52(2)(c) and its trust law antecedents, identifying ambiguity in the phrasing used by the Treasurer in introducing the Bill to justify this approach. [111] Several authors have voiced concern with this finding [112] and, with respect, the ambiguities identified by the Tribunal are capable of more obvious interpretations. The Tribunal's decision has not yet been considered by the courts, but it does contrast the courts' approach in cases such as *Invensys v Austrac Investments,*[113] *Australian Securities Commission v AS Nominees* [114] and *Knudsen v Kara Kar*,[115] in which no administrative law gloss was placed on the interpretation of the provisions.

That said, the idea that the interpretation of relevant statutory provisions might be influenced by considerations from administrative law is an interesting one. It would receive support from the 'purposive' approach to statutory interpretation required by Section 15AA of the *Acts Interpretation Act 1901*, but only if the proposition is accepted that superannuation fund trustees are performing quasi-public role. It is also an analogue to the judicial recognition accorded to th

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107 *Re Londonderry's Settlement*, above at n 58. In the superannuation context specifically, see *Crowe v SERF* (2003), unreported decision of the Supreme Court of Victoria, (BC200305005).

108 See for instance *Vidovic v Email Superannuation*, above at n 81.

109 See for instance *Crowe v SERF*, above at n 107.

110 [2006] AATA 710.

111 Ibid, para. 323.

112 See for instance Ellen Liondis, 'Errors, breaches and covenants – common threads from the s52(2) cases', (2007) 18(7) *Australian Superannuation Law Bulletin* 81; Zein El Hassan and Phillip Turner, 'APRA and the AXA Staff Plan Directors',(2006) 18(4)&(5) *Australian Superannuation Law Bulletin* 46. Cf. Noel Davis, *The Law of Superannuation in Australia*, (Butterworths, Sydney, 2005), 81,060.

113 (2006) 198 FLR 302

114 (1995) 133 ALR 1, 61.

115 (2000) Unreported decision of the Supreme Court of NSW (BC20004170).

employment relation in establishing the matrix of fact relevant to the construction of terms in the trust instrument.

"Equal representation" on trustee boards

The third area in which members' rights might be said to be different as a result of the public nature of the superannuation fund relates to the composition and operation of the board of trustees. Under Part 9 of *SIS*, members are entitled to expect equal employee/employer representation on most superannuation fund trustee boards.[116] This is potentially a very important feature of the governance structure of a superannuation fund. One needs look no further that *Cowan v Scargill* [117] for a vivid illustration of the frictions and pressures at play inside a trustee board composed of different 'factions'.

It goes almost without saying that beneficiaries of a trust ordinarily have only very limited ability to influence the identity (or membership, if a board) of the trustee of their fund unless provided for in the trust instrument. Absent some wrongdoing on the part of the trustee, the courts have been reluctant to accede to beneficiaries' requests to have a trustee removed. [118] Beneficiaries appear to have no grounds at all at general law to nominate a person or persons to be trustee of their fund. Trustee elections in the superannuation fund context are thus quite anomalous.

The right to elect at least some members of the trustee board must be seen as right peculiar to members of a superannuation fund. How is it justified? Tongue-in-cheek, it carries echoes of the 'no tax without representation' principle attributed to Bostonians in the era of the Boston Tea Party. More prosaically, it echoes the industrial democracy inherent in shareholder voting rights (which of course go further than the right to elect directors). The comments of the then Treasurer, the Honourable John Dawkins MP, in introducing the Bill to parliament actually hints at this

> 'The disclosure of adequate and appropriate information to members is a critical element in the prudential arrangements if members *are to be in a position to exercise influence over the direction their fund takes'*[119] *(italics added)*

Such influence contrasts markedly with the other paradigmatic investment vehicle, the unit trust, in which there is typically no provision for trustee elections. [120]

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116 The exceptions are public offer funds, small superannuation funds (between 4 and 50 members) and certain public sector schemes. Public offer superannuation funds are required to have either equal representation or an independent trustee; s93 *SIS*. Small superannuation schemes can choose amongst a range of options similar in effect to equal representation; s92 *SIS*.

117 Above at n 22.

118 See Meagher and Gummow, above at n 101, 15.84-85, and cases cited therein.

119 Commonwealth of Australia, *Strengthening Super Security* (1992, AGP, Canberra), 13. It is only a short step from this statement to the 'dignitary theory of Tribe and others which sees due process as an end in itself, arguing that

> 'individuals are deprived of the conditions requisite for continued moral agency when they are denied the opportunity to participate in those decisions which affect them'

Carol Harlow and Richard Rawlings, *Law and Administration*, (2nd edn, Butterworths, 1977), 498. In fact, as Paatsch and Smith conclude, it was more likely a political accommodation required to secure employer and union support for OSSA Bill, than a deliberate attempt to embed democracy into superannuation fund governance, Paatsch and Smith, above at n 30.

120 Note, though, the deeds of most unit trusts do provide for removal of the trustee by a majority vote of the unitholders. The precise extent of the majority required may vary by trust.

It is also worth noting that the rhetoric of "representation" is antithetical to traditional notions of board membership. As Street J laid down in *Bennetts v Board of Fire Commissioners of NSW*[121]

> "It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being representative of a particular group or a particular body. Once a group has elected a member of the board he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise."[122]

Like other boards of trustees, trustees of superannuation funds are expected to act unanimously, unless otherwise specified in the trust instrument.[123] Such unanimity may prove hard to achieve if trustees perceive themselves to be representatives of some cohort of the population of members. The duty trustees bear to act impartially means that they are also expected to act in the best interests of the membership as a whole, and not in the interests of some cohort or faction. However, as Lord Browne-Wilkinson has pointed out, this situation is confounded in the case of superannuation and pension funds by the likelihood that the individuals may themselves be members of the fund, and thus 'impossibly' conflicted.[124] Vinelott J has described the existence of such a conflict as 'outrageous'[125] but a more pragmatic approach is reflected in the decision of Blackett-Ord J in *Doyle v Manchester Evening News,*

> 'It is accepted that there is intended to be a division of representation between management and managed, so that the trustee as a body hears both sides … and it is necessary for the trustees to accept that their interests as managers or members, and their duties as trustees, may sometimes conflict, and for them to try consciously to adopt an objective attitude. If they do their best in this direction, that is all the Deed requires'[126]

It seems likely, then, that the courts will take cognisance of the context in which the trustees' duties arise and, in particular, the statutory requirement for equal representation. In any case, a similar result could be achieved by the alternative route of noting that the settlor can be presumed to have acceded to the existence of a conflict in specifying the rules which govern the trustee board's composition.[127]

The design of the regulatory regime itself.

The idea that, de facto, trustees exercise delegated responsibility for the regulation of superannuation gains some support from the way in which *SIS* seeks to

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121 (1967) 87 WN (NSW) 307.

122 Ibid at 311. See also *Cowan v Scargill* above at n 22.

123 *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121; *Re Billington* [1949] St R Qd 102; *Cock & Howden (Trustee of Cock) v Smith* (1909) 9 CLR 773. As noted by Barrett J, in this they differ from the boards of company directors, above at n 104.

124 Lord Browne-Wilkinson, 'Equity and its Relevance to Superannuation Today', presentation to Superannuation 1992 (Law Council of Australia), also (1992) 4 TLI 119. See also Traves, above at n 23; Walker, above at n 18, 133.

125 *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees*, [1994] OPLR 51 at 62. It is possible that the indignant tone of this description was merely mirroring the phrase used by the editors of the report of a case to which he was referred by counsel, *Re William Makin & Son Ltd* [1992] PLR 177.

126 [1989] PLR 47, cited in Traves, above at n 23, 218.

127 *Sargeant v National Westminster Bank* (1990) 61 P & CR 518.

operate. The trustee is very firmly placed in the frame as the primary actor in the regulatory regime. [128] However *SIS* is very careful about the ways in which it influences the decisions of trustees. Take the derivation of an investment strategy for the fund as an example. The regulatory regime does not dictate the form the strategy will take. Section 52(2)(f) does however provide a set of criteria (a regard for risk, return, liquidity and diversification, and so on) to be applied by trustees in making that decision. Similarly s 52(2)(g) imposes a criterion on the formulation of a reserving policy but does not say what that policy must be. The approach of setting criteria for decision-makers is redolent of administrative law (and to a lesser extent statutory trust law).[129]

In other areas *SIS* is more prescriptive. So for instance Part 12 of *SIS* imposes a set of very specific duties including a duty to keep minutes and records,[130] to keep reports[131] and to notify regulatory bodies of changes in the fund's circumstances.[132] These duties seem motivated by a desire on the part of legislature to facilitate regulatory review of the actions of their 'delegate' should the need arise. These provisions complement the licensing regime for trustees imposed by the *FSR Act*.

Other prescriptive duties are designed to ensure funds have minimum governance standards. These include complaints resolution procedures,[133] board composition,[134] and the nature of contractual arrangements with agents, such as investment managers. [135] Again this focus on process, rather than substance, is characteristic of both administrative and trust law. However its prescriptive nature is foreign to trust law, where, as noted above, the settlor typically enjoys substantial scope to specify these procedures.

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128 See for instance *Strengthening Super Security*, above at n 119.

129 This is usefully contrasted with the PDS content requirements of Pt 7.9 Div 2 *Corporations Act*. In that context, the regulator has mixed qualitative guidelines with specific items to be included; ASIC, above at n 74.

130 Section 103.

131 Section 105.

132 Sections 106 and 106A.

133 For instance Section 101.

134 Sections 107 and 108. Also *SIS* Part 9.

135 For instance ss116, 124, 125.

Concluding comments

Writing before *SIS*, *FSR* and Fund Choice, back in what today seems like the dark ages, Paatsch and Smith commented that

> '[The] change in the raison d'etre for superannuation has resulted in a legislative and regulatory regime which is complex, inequitable and precarious from the point of view of beneficiaries of superannuation schemes'[136]

The reforms of the past fifteen years have gone some way to addressing the perceived inequities and the precariousness of the system. That they should have done so at the expense of even greater complexity was perhaps inevitable. What was not inevitable was that the reforms should exacerbate the patchwork appearance of the superannuation regulatory scheme because of the profoundly different way in which the key stakeholder, the member, was characterised.

One result is a situation in which the member could be excused a crisis of identity. There is a pronounced dissonance between the protective, paternalistic rhetoric of "trust", "trustee" and "beneficiary" and the individualistic, self-sufficiency of "product" and "consumer". And neither reflect the Orwellian dehumanisation inherent in the term "responsible entity".

These differences are of more than semantic interest. They fundamentally affect the types and levels of protections available to members. For instance, disclosure, the lynch-pin in the Investor Model, is of less relevance in the Traditional Model because paternalism renders self-reliance by members less important. Similarly, procedural fairness, a central feature of the Public Model, barely features in the Investor Model in which members themselves determine both which fund they will join and the investment strategy their contributions will pursue within that fund.

These illustrations should not be taken to imply that they are the only area where the characterisation matters. The responsibilities of trustees in respect of member investment choice, an issue raised by both APRA and, more recently, the Joint Committee, [137] is another area. So too is the provision of individual financial advice to members and the overall trend towards 'corporatisation' of superannuation fund governance following the advent of Fund Choice.

Nor should the observations in this paper be taken to suggest that any of the characterisations of superannuation fund members, whether as beneficiaries, employees, citizens, consumers or investors, is correct. They each have strengths and weaknesses. Crucially, though, each has contributions to make. It is important, then, that we do not allow any of them to eclipse the others as we seek to find a balance that safeguards the legitimate expectations of all participants in the system.

The analysis in this paper suggests that the legislative programme of the past ten years has done much to procure such an eclipse. The Investor Model appears to be ascendant. Ironically, it is increasingly clear that the Wallis Committee's approach has now seen the 'tail wagging the dog'. The assets of superannuation funds dwarf those of ordinary collective investments and yet it is hard to escape the conclusion that the regulatory regime emerging from the Wallis Committee and CLERP process was designed for the benefit of the ordinary collective investment vehicles and the markets in which they operate, rather than the superannuation system. As a result, the superannuation regime is at risk of losing some of the valuable protections present in the Traditional and Public Models. Whether this is

136 Paatsch and Smith, above at n 30, 131.

137 Joint Committee, above at n 87.

appropriate is a fundamental public policy decision. To return to the observation of Professor Pearson with which this paper started,

> 'If regulation is about collective goals and a moral community … then the conversations in the regulatory system should involve more than technical discussions about the cost, length or even utility of disclosure documentation and other compliance obligations.' [138]

138 Gail Pearson, above at n 7.