Constitutional Aspects of Stronger Super

27 February 2014

The Stronger Super reforms introduced requirements relating to "MySuper" products, with two notable and controversial intended effects: to increase competitive pressure on the fees charged to members by superannuation trustees, and to prevent fees relating to "conflicted remuneration" being passed on to MySuper members. This paper examines whether and how these effects might be said to constitute an acquisition of property without the provision of just terms, in contravention of s.51(xxxi) of the Constitution.

The author thanks Stephen Free, of Eleven Wentworth Chambers, for assistance with an earlier version of this article.

Jeremy Kirk SC
Barrister
Eleven Wentworth Chambers, Sydney
P: + 61 2 9223 9477
kirk@wentworthchambers.com.au

1. To suggest that the Australian superannuation sector is highly regulated by the Commonwealth is not a statement likely to promote controversy. A significant, and increasing, degree of federal regulation has been present for some decades now. Every so often – and especially when important new legislative reforms are introduced – it can be useful to step back and consider whether the Commonwealth has power to enact the measures in question.

2. The "Stronger Super" reforms, which commenced last year, introduced requirements relating to "MySuper" products. The measures seek to effect significant structural alterations within the superannuation sector. They are reforms which merit consideration of constitutional issues. In particular, it is worth considering whether and how those reforms are consistent with the constitutional guarantee that the Commonwealth shall not legislate for the acquisition of property without ensuring the provision of just terms.

3. That is what this paper seeks to do. It is structured as follows:

   a) The constitutional context;

   b) The Stronger Super Reforms;

   c) The validity of the potential restrictive effects on trustee fee income;

   d) The validity of restrictions on payment of commissions.

A. THE CONSTITUTIONAL CONTEXT

4. The Commonwealth Parliament has wide but not unlimited powers. Those powers are found primarily in s.51 of the Constitution. They do not include, in terms, any power over "superannuation" or "trusts". The Commonwealth has relied on a range of its available powers to regulate the superannuation sector. Two are of particular significance: its power to impose "taxation" in s.51(ii), and its power over "foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth" in s.51(xx).

5. The taxation power is the main foundation of the superannuation guarantee charge system. The validity of that type of use of power was upheld in *Northern Suburbs*

General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555, with respect to a training guarantee levy. The validity of the superannuation guarantee charge system itself was upheld by the High Court recently in *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97. It is interesting to note in passing that the Americans have caught up with this type of idea. The federal taxation power was the basis of the US Supreme Court majority upholding, 5-4, the key "individual mandate" requirement in the "Obamacare" package (the mandate penalised relevant persons who had not taken out health insurance): *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012).

6. Much of the regulation of superannuation trustees in Australia is founded on the corporations power. That power was construed very broadly by a majority of the High Court in the *Work Choices Case* (2006) 229 CLR 1. The core statement of the scope of that power is found at [178]:

> the power … extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business

7. The Commonwealth thus has power to regulate all activities, functions, relationship and business of corporate superannuation trustees (so long as they are foreign, "trading" or "financial corporations). For corporate superannuation trustees, therefore, the Commonwealth can be regarded as having a general power of regulation.

8. The Commonwealth also has a power, under s.51(xxiii) of the Constitution, to make laws with respect to "invalid and old age pensions". The extent to which that power extends directly to regulate requirements for, and provision of, private superannuation has not yet been addressed by the High Court. However, in the *Roy Morgan* litigation is it noteworthy that the Full Federal Court, which included Keane CJ (as he then was), held that that power did extend to support provisions in the *Superannuation Guarantee (Administration) Act 1992* (Cth): *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448 at [98]-[110]. It was not necessary for the High Court to consider that issue in the appeal.

9. The Commonwealth's powers – broad as they are – are subject to any applicable overriding constitutional guarantees or limitations. There are not many of these to be found in the Australian Constitution. There is one of potential significance, however, in s.51(xxxi).

10. Section 51(xxxi) of the Constitution grants the Commonwealth Parliament power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". The provision is regarded as serving a double purpose. As it was put in *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J:

> "It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State affected with a protection against governmental interferences with his proprietary rights without just recompense."

11. Reflecting this latter operation as a restriction on power, s.51(xxxi) is construed as restricting the operation of the other heads of power granted to the Commonwealth Parliament, such that in general any acquisition of property effected by Commonwealth legislation is taken to be subject to the limitation. It has come to be regarded as an important constitutional guarantee. The guarantee has not been given a narrow construction. The questions of validity which arise are – as for other constitutional guarantees – determined as matters of substance, not form.

12. Warnings have been given at times about seeking to disaggregate the various concepts involved in s.51(xxxi): eg *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J. That said, it is useful to understand that there are three core notions at the heart of the provision: that the law affects something that can be described as "property"; that there has been an "acquisition" of property (which involves both a taking from someone and a giving to someone else); and the question of whether "just terms" have been provided.

13. The notion of "property" in the provision has been construed broadly. It has been said to encompass "innominate and anomalous interests": (*Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349), and "every species of valuable right and interest including ... choses in action": *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290; *Victoria v Commonwealth* (1996) 187 CLR 416 at 559.

14. As for the notion of "acquisition", this need not be involve a transfer of property to the Commonwealth itself; the guarantee applies to federal laws providing for acquisitions of property even if that property is acquired by some third party: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

15. In order for an "acquisition" to occur, there must, at the least, be a transfer of some identifiable or measurable benefit or advantage from one person to another, and further that what has been acquired by the acquirer is "an interest in property, however slight or insubstantial it may be": *Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 145 per Mason J, referred to with approval in the *JT International SA v Commonwealth of Australia* (2012) 86 ALJR 1297 ("*Plain Packaging Case*") at [42], [169], [196], [278], [304], [365]. The question is whether the law in its practical operation takes from one person and gives to another what can be described as the "substance of a proprietary interest" or "the reality of proprietorship": see, respectively, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 633-635.

16. Although the High Court has taken a broad approach to the constitutional guarantee in a number of ways, it has also sought to constrain the effects of the guarantee in other ways. As Dixon CJ stated in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372, the limitation in s.51(xxxi) is not to be applied in "a too sweeping and undiscriminating way". I have always found the following passage by Brennan J in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, at 180, useful in explaining why that is so. After examining why the exercise of some powers in some instances is incongruous with a requirement to provide just terms, such as to fall outside of the reach of the guarantee, his Honour stated that:

> If it were otherwise, the guarantee of just terms would impair by implication the Parliament's capacity to enact laws effective to fulfil the purposes for which its several legislative powers are conferred. It would be erroneous so to construe grants of legislative power as to fetter their exercise by implying that s.51(xxxi) precluded the enactment of laws under other heads of power where the laws involved an acquisition of property without just terms, even though laws of that kind are appropriate and adapted to the execution of those powers in the public interest.

> It would be erroneous to elevate the constitutional guarantee of just terms to a level which would so fetter other legislative powers as to reduce the capacity of the Parliament to exercise them effectively.

17. Two imperatives in this area exist in tension: protecting the rights of individuals from unjustly being deprived of property without compensation, whilst not unduly limiting the proper scope of governmental action. The difficulties of reconciling these imperatives in different types of cases has led to a number of formulations as to when s.51(xxxi) will not require the provision of just terms even in circumstances where there could arguably be seen to be an acquisition of property. As Crennan J stated in *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [357], "[l]imits upon the scope of s.51(xxxi) have been recognised in numerous cases, in different ways". The High Court has warned about treating these limits as distinct exceptions: *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at [49]. However, the following ideas can be identified – in a non-exhaustive and overlapping manner – as having been significant in recent times:

a) It is necessary to pay close attention to the nature of the property rights in question. Property may be affected without any property rights being *taken*. Furthermore, some type of property rights are inherently susceptible to variation – that is, they are perceived to have an express or implicit qualification along the lines of "but these rights are capable of being altered or removed by further legislative change". For such rights, any later such alteration or removal takes no property right away.

b) It is also necessary to pay close attention to whether and what has been acquired by someone. It may generally be presumed that the community, or some part of it, will gain some benefit from the enactment of legislation. Were too broad a view taken of the notion of transferring some "identifiable or measurable benefit or advantage", then that would encompass a great many laws. The High Court has restricted this by requiring that what is acquired be proprietary in nature (ie not merely that property was taken), and, perhaps, implicitly, that it be acquired by some identifiable person/entity group of persons or entities, and not in a generic way for the benefit of the community generally.

c) For some exercises of power, it is simply incongruous to say that just terms are required. For example, a law taking away property as a penalty for infringement

of a law, or as taxation, is not regarded in general as attracting a requirement to provide just terms.

18. It will be apparent that the ideas raise issues of evaluation and degree, and some uncertainty and unpredictability necessarily results. The first two of these issues are of significance here, and are discussed further below.

B. THE STRONGER SUPER REFORMS

19. The Stronger Super reforms were introduced, in substance, by the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* ("***First Amending Act***") and the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* ("***Second Amending Act***"; together the "***Amending Acts***"). Connected with that was the introduction of *Prudential Standard 410: My Super Transition* ("**PS 410**"). The Amending Acts introduced changes to the *Superannuation Industry (Supervision) Act 1993* ("***SIS Act***"), contained mainly within Part 2C of that Act.

20. The *Amending Acts* introduced a series of measures to promote a new type of superannuation product (ie a particular class of beneficial interest in a regulated superannuation fund) known as "MySuper". The *Amending Acts* introduced an application process whereby the trustee of a regulated superannuation fund could, from 1 July 2013, apply to APRA for authority to offer a MySuper Product. The main requirements for authorisation are specified in s.29T of the *SIS Act*.

21. The core characteristics of a MySuper product are set out in s.29TC of the *SIS Act*. They include that assets attributed to that class of beneficial interest are invested in accordance with a single investment strategy, and that members are entitled to access the same options, benefits and facilities. Importantly, s.29V limits the types of fees that may be charged in relation to the product. The only permissible fees are those for administration, investment, buy-sell spreads, switching, exiting, undertaking certain activities, providing advice, or for insurance. There are more specific restrictions imposed with respect to these various categories of fees: eg s.29VA.

22. The imposition of these restrictions on the fees chargeable by trustees seeks to implement one of the apparent key goals of the legislative reforms (only partially manifest in the objects section in s.29R): to standardise the types of fees charged,

and to make them more transparent, and in this way to increase competition and consumer choice, putting downwards competitive pressure on fees.

23. The *Amending Acts* do not compel the trustees of regulated superannuation funds to offer MySuper Products or apply for authorisation to offer such products. However, there are strong practical incentives for funds to obtain such authorisation.

24. The MySuper reforms are primarily directed to the situation where a member of a superannuation fund has made no specific election about the investment option to be applied. Whatever the exact proportion, it seems clear that vast numbers of employees do not make an active choice about the fund and/or the particular investment option they wish to be applied in that fund. In the absence of an election by the employee, superannuation guarantee contributions are ordinarily made to funds chosen by the employer and applied to default investment options within the fund. MySuper products are intended to become the new form of default membership of superannuation funds for those members who do not request to have particular investment options applied.

25. This goal is sought to be achieved through more than one legislative means:

a) Unless there is an authorised MySuper Product available within a fund, from 1 January 2014 an employer was no longer able to make superannuation guarantee contributions in respect of an employee who is member of the fund, except where the employee has specifically nominated a superannuation fund to which contributions are to be made: s.32C of the *Superannuation Guarantee (Administration) Act 1992*. As a matter of practical necessity, funds which wish to remain in the business of providing superannuation to employees involving compulsory superannuation guarantee contributions thus need to offer an authorised MySuper Product (or have arrangements with related funds offering such a product).

b) In order to apply for authorisation to provide a MySuper product under the process introduced by the *Amending Acts*, a trustee is required to make a number of elections. Relevantly, pursuant to s.29SAA, the trustee will be required to indicate in writing that, if authority to provide a MySuper product is given it will, within a certain time, attribute to the MySuper product each amount that is an accrued default amount for a member of the fund who is eligible to hold

the MySuper product, unless the member directs the trustee in writing to attribute the amount to another MySuper product or an investment option within a choice product in the fund. A new RSE licence condition will apply to trustees who are granted authority to offer a MySuper product; pursuant to s.29E(6B), the condition will require that the trustee give effect to elections made in accordance with s.29SAA (and the same applies to the election in s.29SAC, discussed below). The election process therefore has the consequence that if the trustee of a fund applies for authorisation to provide a MySuper product, it must at the same time undertake to transfer all of the members of its fund in respect of whom it holds accrued default amounts to the MySuper product. An "accrued default amount", as defined in s.20B of the *SIS Act*, is the amount held in a fund for a member who has not given the trustee of the fund a direction as to the member's preferred investment option, or where the member has directed the trustee to hold the member's benefit in the default investment option of the fund.

c) If a trustee has not applied for authorisation to offer a MySuper product before 1 July 2017, the trustee will be obliged to take action under the prudential standards in relation to any accrued default amount that it holds: s.388 of the *SIS Act*. PS 410 relevantly requires that in such circumstances the trustee will be required to adopt and apply a transition plan which involves transferring such accrued default amounts to another superannuation fund that is authorised to offer a MySuper product.

26. A further notable and relevant aspect of the reforms introduced by the *Amending Acts* is that the trustee will effectively be prohibited from using the fees charged to members holding a MySuper product to pay what is referred to as "conflicted remuneration". It is sufficient for current purposes to note that "conflicted remuneration" includes a fee charged by a trustee and used directly or indirectly to pay a commission to a financial adviser: s.29SAC(2) of the *SIS Act* and Part 7.7A of the *Corporations Act 2001*. Pursuant to s.29SAC, the trustee elects not to charge any MySuper member a fee in relation to the MySuper product all or part of which relates directly or indirectly to costs incurred by the trustee or trustees of the fund in paying conflicted remuneration to a financial services licensee or a representative of a financial services licensee, or paying an amount to a third party knowing that it relates to conflicted remunerations paid to such a person.

27. These two core aspects of the Stronger Super reforms – ie the legal/practical requirement to transfer default amounts to MySuper products, and the prohibition on charging fees for conflicted remuneration – have been the subject of controversy in the superannuation sector. Both involve significant structural changes to the operation of the sector. Both may impact upon accrued legal rights: the former may have the effect of reducing fee income in trustees; the latter may detrimentally affect trustees and/or those previously receiving conflicted remuneration. Some public debate has thus occurred as to whether there is any conflict between these aspects of the scheme and the constitutional guarantee in s.51(xxxi). I will address each aspect in turn.

28. Before doing so, it is appropriate to note that s.349B(1) of the *SIS Act* provides that the Act "does not apply to the extent (if any) that its operation would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the *Constitution*) from a person otherwise than on just terms (within the meaning of that paragraph)" (see also s.4 of the *Second Amending Act*). The practical effect of this provision is spelt out further in the remainder of the section. It might be suggested that this provision indicates that the Commonwealth had some fear it may be held to have contravened the guarantee. Yet little significance should be given to its presence. The effect of a contravention of the guarantee is invalidity, potentially of the whole of the legislation (or the amending legislation) in question. That can be very disruptive. For that reason, it is quite common for the Commonwealth to include some kind of mechanism to seek to limit or avoid the damage if any contravention is established: see eg *Wurridjal* (2009) 237 CLR 309 at [304]. The presence of such a mechanism here does not necessarily suggest that the Commonwealth had some particular doubt.

C. RIGHTS TO FEE INCOME

29. The terms on which regulated super funds operate are commonly set out in trust deeds, and sometimes in associated contracts, which reflect the requirements of the laws governing superannuation, including the *SIS Act* and the *Superannuation Industry (Supervision) Regulations 1993* ("***SIS Regulations***"). The trustees of funds and other related entities are entitled to charge fees to members in accordance with the rules of the fund, the governing trust deeds, and any applicable statutory requirements. These rights arise mainly pursuant to the general law, albeit in a context highly regulated by statute. I note that the rights involved may not strictly be

contractual, in particular as against default fund members, but they are sufficiently similar for constitutional law purposes that it is appropriate and convenient to treat them as contractual rights, and that is how I will describe them.

30. Assuming that the apparent intent of the Stronger Super reforms are achieved, the fees chargeable in respect of MySuper products are likely to be less than those previously charged for other products. As discussed above, that intended aim is sought to be achieved through the limitations on fees provided for in s.29V and associated provisions, together with the resulting competitive and commercial pressures. That said, it is relevant to note that the scheme does not appear to impose any legal cap on what trustees can charge on MySuper products by way of, at least, administration fees or investment fees.

31. In order for the *Amending Acts* to contravene the prohibition in s.51(xxxi) of the *Constitution*, they must be capable of being characterised as laws with respect to the acquisition of property. An appropriate starting point is to ask whether the amendments do in fact affect "property" in any way. Only once the "property" in question has been properly identified is it possible to move to the next step of asking whether the law affects that property in such a way as to effect an "acquisition" of that property.

32. As discussed above, the term "property" as used in s.51(xxxi) of the Constitution has been given a broad construction. Consistently with this, in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, at 172, Mason CJ stated that "a contractual right, amounting a chose in action, is 'property' for the purposes of s.51(xxxi)". In *Australian Tape Manufacturers* (1993) 176 CLR 480, at 509, four members of the Court held that "property" must be construed as extending to money and the right to receive a payment of money. Their Honours referred in the same passage to the description of "property" in *Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21, per Knox CJ and Starke J, as encompassing choses in action. The concept of "property" in s.51(xxxi) thus appears broad enough to capture the right of a trustee to charge or recover fees under superannuation policies.

33. It can be argued that such rights are restricted, in practical terms, by the Stronger Super scheme. As four members of the High Court stated in *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [21], "contraction in what otherwise would be the

measure of liability in respect of a cause of action or other 'right', may constitute an 'acquisition' of property for the purposes of s.51(xxxi)".

34. Before taking analysis any further, however, it is important to draw a distinction between current existing, and future potential, rights. There is no relevant constitutional protection of rights to income relating to future amounts which might, in the absence of the *Amending Acts*, have been invested in current superannuation funds (ie which are not MySuper products) by existing or new members. Such members still have the option of remaining or becoming members of such "choice products", by specific election. It is only if they do not that they will be directed by default to a MySuper product. As a matter of substance, the effect of the amended law is that there is a deemed legislative preference in favour of a MySuper product in the absence of some express choice to the contrary by the member concerned. Even without the amendments, there was no guarantee that members would contribute further funds over time towards such funds, or that new members would join those funds.

35. In this context, the effect of the *Amending Acts* on the potential rights of trustees in respect of funds yet to be invested cannot persuasively be said to involve any acquisition of "property". No doubt the *Amending Acts* deprive these entities of the expectation they otherwise had that people would continue to invest their superannuation on the existing terms. Yet there "is no acquisition of property involved in the modification or extinguishment of a right or interest that has not yet accrued": *Victoria v Commonwealth* (1996) 187 CLR 416 at 559. The constitutional guarantee does not give protection "to the general commercial and economic position occupied by traders": *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 270; see *Plain Packaging Case* (2012) 86 ALJR 1297 at [47], [167] and [357], and note also [306]. This limitation on the operation of the constitutional guarantee with respect to future rights is important. Were such a limitation not accepted, the Commonwealth would be prevented from changing the law with prospective effect.

36. Turning then to funds held at (say) the time of commencement of the reforms, it is convenient to focus on the property which exists in the form of a trustee's right to charge fees in respect of the benefits of existing members. Having accepted that this might be described as "property" for constitutional purposes, the next question that arises is whether the *Amending Acts* effect a form of "acquisition" of that

property because, in the scenario governed by s.388 and PS 410, the amendments compel a trustee to transfer accrued default amounts to other funds, with the consequence that the trustee loses the ability to charge fees in respect of those amounts.

37. The appropriate focus in this regard is on the ultimate legal compulsion which is contained in s.388 of the *SIS Act* (which requires the transfer of accrued default funds to a MySuper product at 1 July 2017), rather than the application and election process. That is so because that compulsion involves a mandatory legal effect on existing rights, and thus one avoids having to consider the possible significance of the election process. As a matter of substance, and having regard to the scenario governed by s.388, one can view the statutory amendments as either requiring trustees to offer a new product with certain characteristics and to which default customers must be transferred, and/or as requiring in effect the re-shaping of products the trustees do offer so as to meet certain new standards. On either view, s.388 effects a legally compulsory change in the legal relations between the trustee and members of the fund.

38. Where amounts are transferred or products restructured in this way, the trustee will be restricted in its ability to charge fees in respect of such amounts. The result may be in practice that it loses its ability to charge fees. In this respect, the trustee could be said to have lost the practical benefit, in whole or part, of accrued rights to charge fees under the trust deed and the superannuation policies. However, it does not follow that there has been an "acquisition" of that property or of anything identifiable as proprietary in nature.

39. Before considering whether any "acquisition" is effected by the *Amending Act*, it is necessary to note a significant feature of the regulatory regime governing superannuation funds. Irrespective of the *Amending Act*, members of a regulated superannuation fund have a statutory right to transfer their superannuation benefits to another fund. The right to "rollover" superannuation benefits in this way is provided in reg 6.33 of the *SIS Regulation*.

40. Moreover, superannuation trusts themselves commonly provide for members to withdraw their balance and transfer to other funds.

41. The existence of these pre-existing statutory and private law rights has a significant bearing upon the constitutional analysis of the *Amending Acts* with respect to these issues. It can be said that the *Amending Acts* do no more than establish a default statutory position equivalent, in substance, to an exercise of the right which members of funds already have to transfer their benefits to another fund. The statutory default position is itself subject to being overridden by a specific choice by the member that he or she wishes to remain with their existing fund or transfer to a third option. In effect, therefore, the statutory scheme is equivalent to the Commonwealth stepping into the shoes of relevant consumers and deeming them to have made a particular investment choice, unless those consumers make a positive choice to the contrary.

42. In this context, a relatively strong argument can be made that although the *Amending Acts* have the effect of interfering with the existing right of trustees to charge fees, this does not involve any "acquisition" of property. It is true that members whose funds have been transferred pursuant to the arrangements compelled by s.388 may be said to have obtained a practical, identifiable benefit, in the form of a (likely) reduced exposure to fees in respect of their superannuation benefits. However, there are difficulties in arguing that this would involve the acquisition by such persons of anything in the nature of a proprietary right, even of a slight or insubstantial character. It may be possible to characterise a law which relieves a person from a contractual obligation to which the person is otherwise subject as involving an acquisition of something in the nature of a proprietary right by that person. Laws which have the effect of contracting a person's liability have been held to involve an acquisition on this basis: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [15], [56], [81]-[83], [128]; *Smith v ANL Ltd* (2000) 204 CLR 493 at [7], [20]-[23], [89]-[91]; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [21]. But this is not the effect of the *Amending Acts*. Members of regulated superannuation funds already have statutory and (generally) private rights to withdraw from the fund and transfer their superannuation benefits to another fund. The *Amending Act* reforms do no more than establish a default statutory position equivalent in substance to an exercise of that existing right.

43. The existing right on the part of members to transfer from one regulated superannuation fund to another also has a bearing on identification the nature of the "property" which exists in the form of a trustee's right to charge fees in respect of a

member's benefit. Regardless of the *Amending Acts*, that right must be understood as being contingent upon the member not making a request to transfer out of the fund. Properly understood, it can be argued that the right to charge a fee under a trust deed for the management of a member's benefit is only a right to charge a fee for so long as the member chooses to keep his or her benefit with the fund.

44. There is a further, overlapping but distinct constitutional difficulty with a claim that this aspect of the scheme contravenes s.51(xxxi). The High Court has held that a law which does no more than effect a modification of a kind that is intrinsic to property of this kind is not a law that is properly characterised as a law "with respect to the acquisition of property". In other words, if the property rights in question are subject to some inherent legal contingency or limitation, and the contingency/limitation comes to be exercised, then it cannot be said that any property right has been taken. That is so because the property rights in question were always subject to that possibility eventuating.

45. The principle extends to a situation where a contract between parties creates rights of property with respect to a subject matter that is by its nature subject to regulation by legislation. Such contracts have what has been described as suffering a "congenital infirmity" for constitutional purposes, in the sense that "parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them": see *Commonwealth v WMC Resources* Ltd (1998) 194 CLR 1 at [203] per Gummow J. Such property is to be contrasted with proprietary interests which "partake … of the familiar features of stable and valuable property interests long recognised by the common law": *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [253].

46. This principle was applied in *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 to upheld the validity of variations made to a statutory workers compensation scheme, to the detriment of injured workers with accrued rights to claim. The "rights to compensation under that statute were of a nature which rendered them liable to variation by a provision such as that made" (at [30]). The rights at issue were statutory, not general law, rights, but the plurality expressly disavowed any suggestion that all statutory rights are inherently susceptible to variation in the relevant sense (see at [24]). And issues of degree may arise – there can be a difference between variation and abolition (see at [31]).

47. Here, an argument can be made that the existing contractual rights between trustees and members of regulated superannuation funds are apt to be characterised in these terms. It is true that the rights in question are strictly private law rights, not creatures of statute. However, superannuation in Australia is highly regulated. The substantial economic activity in that sector can be argued to be, to a significant degree, a product of federal legislation, both in relation to the superannuation guarantee, and also with respect to the favourable tax treatment afforded to superannuation. The historical context in which the rights in question arose was a material factor in the Court's decision in *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at [50]-[53]. Moreover, regulation here has changed on a regular basis.

48. In this context, there is a significant chance that the courts would view the *Amending Acts* reforms effecting trustees' accrued rights to income as amounting to a further adjustment in the regulation of this industry and in the respective rights of trustees and fund members. Of course, there are counter-arguments that can be made. And it could not be thought that all rights relating to superannuation are inherently capable of significant restriction, simply because of the highly regulated nature of the sector. Nevertheless, taking account of the relatively limited nature of the effects of the changes implemented by the *Amending Acts*, and the legal context in which those changes operate, there is a real chance that the amendments would be found to lack the character of a law with respect to the acquisition of property for the purposes of s.51(xxxi).

49. In summary, then, there are significant hurdles to arguing that the restrictions on trustees' right to fee income effected by the new statutory scheme would contravene the constitutional guarantee in s.51(xxxi), because it can be argued that:

a) with respect to future rights that might have arisen from future customers, the guarantee does not relevantly apply;

b) as to pre-existing rights, there is no acquisition of any relevant property as:

   i. no relevant property rights are taken by anyone – rather, pre-existing rights are being exercised;

   ii. the rights in question may be regarded as ones of a kind which are inherently susceptible to such variations.

D. ADVISER COMMISSIONS

50. In considering the impact of the *Amending Acts* on the payment of commissions, it is necessary to distinguish between a number of scenarios and categories of payments.

51. To begin with, a distinction must be drawn between existing obligations to pay commissions in respect of current fund members, and obligations which might arise in the future in respect of new members. The effect of the *Amending Acts* on the latter category of obligations cannot persuasively be said to involve any acquisition of property within the meaning of s.51(xxxi). If advisers and trustees continue to enter into commission arrangements in the future, subject to the constraints imposed by the *Amending Acts*, then no complaint can be made that the *Amending Acts* operate to acquire rights in respect of those arrangements. The "acquisitions" with which s.51(xxxi) of the Constitution is concerned are those that are compulsory, not voluntary: *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235; *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 270. Again, s.51(xxxi) does not constrain the regulation of rights which have not yet accrued: *Victoria v Commonwealth* (1996) 187 CLR 416 at 559.

52. As to the effect of the *Amending Acts* on existing rights in respect of the payment of commissions, no doubt there is a range of consequences. The obligation of the trustee of a fund to pay an adviser a commission in respect of a member of the fund will be governed by the terms of the contract between the trustee and the adviser. Two permutations may be relatively common with respect to such obligations:

    a) the obligation of the trustee to pay the adviser a commission may cease if and when the member in question transfers to another fund or to another product/portfolio within the fund;

    b) alternatively, the trustee may have an ongoing obligation to pay the commission notwithstanding that the member has transferred to another (MySuper) product offered by the same trustee, or perhaps even to another fund.

53. In the former situation, the changes effected by the *Amending Acts* in relation to the payment of commissions to advisers are not likely to be regarded as involving an acquisition of property. If the member in question makes an election to stay in the existing choice product, then there will be no effect. If the member is transferred, by

operation of the scheme, to a new MySuper product in the fund or another fund then, as far as the trustee of the fund is concerned, the change in affairs brought about by the *Amending Acts* will mean that there is no obligation to pay a commission to the adviser. As for the adviser, the change in affairs will precipitate a change in legal relations in the sense that the adviser will no longer be entitled to a commission by virtue of the member's transfer out of the fund. However, that is an eventuality that must have been contemplated by the adviser's contract with the trustee, by virtue of the fact that members of funds are entitled to rollover their superannuation under the *SIS Regulation* and, in any case, there was always the possibility that the member would choose to leave the fund. All that has happened is that the risk that was always present in the adviser's contract has come home. Although the rollover will occur in this scenario by virtue of the *Amending Acts* rather than a specific choice by the member, it does not follow that the law effects an acquisition of property.

54. In the second scenario, the trustee of a fund may find itself in the position that it has an ongoing contractual obligation to pay an adviser in respect of a member, in circumstances where it has lost the ability to charge that member a fee from which it can pay the commission, because the member has left the fund, or because the trustee has become subject to ss.29SAC and 29E(6B) of the *SIS Act* as amended and thus cannot charge the MySuper member a fee in relation to the MySuper product, all or part of which relates directly or indirectly to costs incurred by a trustee in paying conflicted remuneration.

55. Again, there are reasonably strong arguments available that this alteration in the rights of the trustee does not amount to an acquisition of property for the purposes of s.51(xxxi), although here the issue is likely to be closer to the permissible line than either the first scenario, or the issues considered above with respect to the adverse effects on a trustee's income.

56. If the member has gone to another fund of another trustee, the change in the position of the trustee is a risk which the trustee must be taken to have accepted under its contract with the adviser. Given the public and private law rollover rights of members of superannuation funds, there was already a risk that a trustee may have a liability to pay a commission to an adviser in respect of a person who was no longer a member of the fund. The *Amending Acts* trigger a transfer of membership in circumstances where such a transfer could have happened at any time at the election of the member. The fact that the situation has been brought about by virtue

of legislation rather than the actions of a member does not mean that the legislation takes from the trustee something in the nature of a property right.

57. If the member remains within the fund, but moves over to a MySuper product, the question is whether the restriction imposed by ss.29SAC and 29E(6B) of the *SIS Act* has an impact on trustees amounting to an acquisition of property.

58. In analysing this situation, it is important to identify the legal and practical effect of the provisions introduced by the *Amending Acts*. Those provisions do not prohibit trustees from paying trailing commissions to financial advisers. They do not, therefore, purport to extinguish such rights as exist between advisers and trustees.

59. The extent to which the amendments preclude trustees from recouping from the overall administration of their funds the costs of paying trailing commissions appears a matter capable of argument. The election in s.29SAC, which must be complied with pursuant to s.29E(6B), precludes a trustee from charging "any MySuper member a fee in relation to the MySuper product, all or part of which relates directly or indirectly to costs incurred by a trustee … in paying conflicted remuneration" (see s.29SAC(1)(a))". Despite the apparent breadth of this restriction, in practical terms that does not necessarily mean that in no sense and in no circumstances can the fees be passed on to MySuper members.

60. As noted, the statutory scheme does not remove any existing obligation to pay such fees to advisers. The money for those payments must come from some assets or revenue of the trustee. It is possible that the MySuper product is the only product offered by the trustee. In any event, in calculating what revenue and profit a trustee wishes to achieve on a MySuper product (in particular through its administration and investment fees) a trustee could reasonably be expected to take account of all of its costs and expenses in running its business, whether or not directly attributable to the product in question. For example, it would take account of its leasehold/property costs, its employment costs, what government taxes/fees it has to pay, and generally how much money it needs to make to stay in business and keep its shareholders happy. It would also, of course, take account of what fee it can achieve in the marketplace in light of competitive pressures.

61. If it does all this, in circumstances where it is required to bear ongoing fees to pay trailing commissions, it is questionable how it could be said to have contravened the

promise in s.29SAC(1) so long as there is no attributable attempt to link the commissions payable with respect to people who are now MySuper members on the one hand, and the profits sought to be achieved from those members on the other. Of course, the determination of whether there is such a link would depend upon the particular circumstances of the fund. However, given that in general fees are required to be applied equally to all members of a MySuper product (s.29VA), and given that typically some members of the product would not be ones in respect of whom commission was payable, there is an inherent restriction in the scheme on establishing such links. In any case, it follows that it appears to be too broad a proposition to state that trustees do not have the right to recover the cost of commissions from funds under administration.

62. All that being so, it may still be said that in the scenario under discussion the trustee has lost a contractual right or liberty to seek recompense from its members in some relatively direct manner. This results from a choice (or at least a statutory default which is equivalent in substance to a choice) by the customer, albeit it is a new type of choice not perhaps previously foreseen, in that it is a choice to go into a new government-induced commission-free product.

63. Questions of "substance and of degree" arise when considering the operation of s.51(xxxi): *Smith v ANL* (2000) 204 CLR 493 at [22] per Gaudron and Gummow JJ; see also *Waterhouse v Minister for Arts* (1993) 43 FCR 175 at 183-5 per Black CJ and Gummow J. It is difficult to argue that the degree to which the rights of trustees are affected would be regarded as sufficiently significant to amount to an acquisition of property within the terms of s. 51(xxxi). As just explained, the legislation does not appear to preclude trustees passing on the cost of such trailing commissions to its customers overall, it just limits the manner in which this may be done. Moreover, to the extent the issue arises at all, it does so as a result of the trustee having accepted a risk of having to continue to pay commissions despite transfers between products, which it could have contracted against.

64. Further, taking account of the limited nature of the restriction, this would again likely be characterised as an issue on which the rights of trustees were inherently susceptible to variation, for much the same reasons as explained above in relation to the potential effect on trustees' income.

65. In summary, then, there are difficulties in arguing that there has been any acquisition of property within the meaning of s.51(xxxi) with respect to the Stronger Super provisions restricting the passing on of conflicted remuneration, for the following reasons:

a) With respect to future rights relating to future possible customers, the guarantee does not relevantly apply.

b) With respect to existing customers, where the contractual arrangements are such that the adviser's right to commission ends, that is merely the coming home of a risk that was already present in the property rights. Whether viewed from the perspective of the adviser or the trustee, it is not likely that there is an acquisition of property in the s.51(xxxi) sense.

c) Where the contractual arrangements are such that the trustee is liable to continue paying advisers commission even though the customer has transferred to a MySuper product, it can be argued that there is no acquisition of property because:

    i. the legal rights of the trustee are not detrimentally affected to a sufficiently material extent;

    ii. in any case, this effect can be characterised as an issue on which the trustees' rights were inherently susceptible to variation.