

2015: Super Forever...



Case Update

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2015: Super Forever...



Re Bundaberg Sugar Superannuation Pty Ltd (QSC)

Re Dion Investments Pty Ltd (NSWCA)

Queensland LG Super v SCT (FCCA)

IBM v Dalgleish (EWHC)

[CBA v Barker (HCA)]

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Re Bundaberg Sugar Superannuation Pty Ltd



Trustee Act 1973 (Qld) s 96

Negative 'net earnings' and 'net earnings rate'?

Unrealised gains and losses?

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Net Earnings

"the amount of the earnings of the Plan after deducting administrative and other costs as are attributable to the amount of contributions received by the Plan and after allowing for the averaging of the earnings of the Plan at the absolute discretion of the Trustees to take into account possible or actual periodic fluctuations in those earnings"

Net Earnings Rate

"the rate determined from the Net Earnings"

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Amount	Negative Net Earnings Rate
Surcharge liability accumulation account <i>“accumulated with interest” at NER</i>	✓ Reduction required
Deferred benefits <i>“accumulated with compound interest” at NER</i>	✓ Reduction required
Early withdrawal benefit – contributions <i>“compound interest additions” at NER</i>	× No reduction
Interest on delayed benefits <i>Discretion to “add” to benefit – linked to NER</i>	× No reduction

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Vision Super Pty Ltd v Poulter

"Given the features of the Deed to which I have referred, I do not accept the applicant's argument that, in a superannuation context, the word 'interest' should be read as a reference to investment returns or earnings which may be either positive or negative." (Young J)

Re Bundaberg Sugar Superannuation Pty Ltd

"The applicant also refers to Vision Super Pty Ltd v Poulter and Re: VBN and Australian Prudential Regulation Authority and submits that they should be treated as distinguishable from the present case. I agree, but do not consider that it is necessary to expand on that conclusion for present purposes." (Jackson J)



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‘Net Earnings’ ordinarily includes negative earnings

“interest” can sometimes reduce an amount

Context is everything

Applying to court can be helpful... (sometimes)

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Re Dion Investments Pty Ltd

Trustee Act 1925 (NSW) s 81

Trustee wanted to “modernise” trust deed:

- accounting, allocation and streaming provisions
- insert comprehensive amendment power



Can the court give a trustee power to amend a trust deed under section 81?



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Section 81 elements

1. "sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or **transaction**"
2. "in the management or administration of any property vested in trustees".
3. "expedient" in the opinion of the Court.
4. The trustee must not have the power to effect the dealing.

An amendment to the terms of a trust is not itself a 'transaction'

Previous cases rest on an "unsound foundation"



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Under section 81, a court cannot give a trustee power to amend the trust deed / terms of the trust

The court can only give the trustee powers...



...if there is a “transaction” or other dealing...



... and the rest of section 81 is satisfied.

Re Dion Investments:

- ✓ accounting, allocation and streaming powers
- ✗ comprehensive amendment power

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Any power given under section 81 will “reshape” the terms of the trust...

*“The substantive power that the court gives comes into existence by virtue of the court's order. **It does not have its source in the terms of the trust. There is no addition to the content of the trust instrument.** That content is supplemented and overridden 'as though' some addition has been made to it. **The terms of the trust are reshaped accordingly.** ... the court's order should directly confer (and be the **sole and direct source of**) the powers which **then supplement and, as necessary, override the content of the trust as necessary.**”* (Barrett JA at [96])

... but there are limits to the powers that can be given.

*“And, of course, the only specific powers that can be conferred in that direct way are **those that fall within the section 81(1) description concerned with management and administration of trust property.**”* (Barrett JA at [97])

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When you don't have the power to make a particular amendment

Can you reframe the amendment as a power within section 81 (or its counterparts) and ask the court for that power?

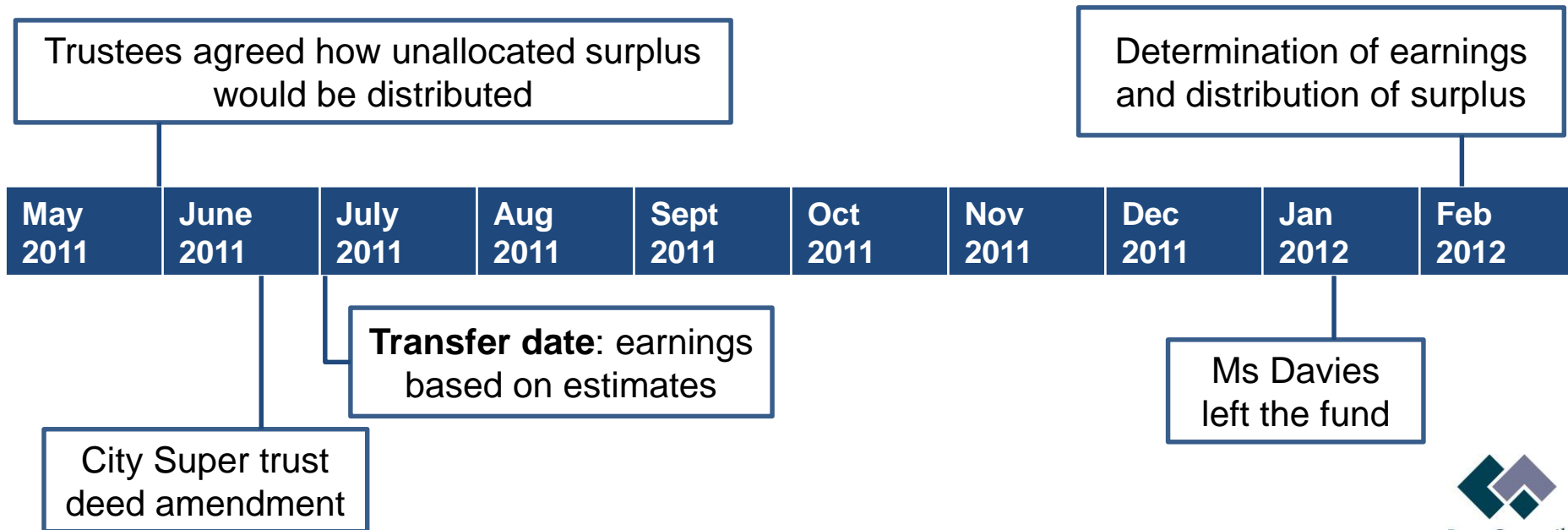
Can you use a 'variation of trust' section?

(Victorian, Western Australian, South Australian and Queensland Trustee Acts)

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Queensland LG Super v SCT



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SCT decided that the LG Super Board's decision not to include Ms Davies in the group of former City Super members who received the distribution was **not fair and reasonable**

SCT findings	Judge Burnett
LG Super Board's agreement with the City Super trustee was an unlawful fetter on its discretion	Not an unlawful fetter. Even if it was, surplus was a discrete trust and LG Super Board was required to execute the terms
Both trustees had contravened section 1017B of the Corporations Act	SCT denied the trustee procedural fairness by considering and relying on section 1017B

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IBM v Dalglish

Part of a series of litigation related to the IBM pension plans

Warren J of EWHC delivered judgment of over 400 pages

IBM seeking declaratory relief in relation to “Project Waltz”

- Trustee and representative beneficiaries were ‘defendants’
- Trustee was neutral – had given effect to changes subject to court approval

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1. Project Ocean

- Changes to contribution rates
- Funding agreement guaranteeing contributions until March 2014

Court decisions
on rectification

Court decision
on Project Waltz

2005 2006 2007 2008 2009 2010 2011 2012 2013 2014

2. Project Soto

- Cash contribution
- DB members choice:
 - DB with 2/3 salary linkage
 - Enhanced DC with full salary linkage

3. Project Waltz

- 'Exclusion power' used to end DB accrual
- New restrictive and less attractive early retirement policy
- Short 'early retirement window' to apply under existing policy

Breach of the
Imperial Tobacco duty



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Warren J on the *Imperial* duty:

- *Imperial* duty and implied term of trust and confidence should not be merged
- But "*the justification and rationale for the duty was the parallel employment law duty*"
- 5 principles, including that employer can act in its own interest subject to considering the reasonable expectations of members

"it could in some circumstances be irrational or perverse for the employer to give precedence to its own financial interests rather than to the reasonable expectations of members although in other cases (e.g. radically changed financial and economic conditions) it may be entirely reasonable, on any view, to depart from those expectations"

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Members had certain reasonable expectations about future benefit accrual and the early retirement policy...

Project Ocean would put the Plans "on a firm footing for the future"

"IBM cannot offer any such guarantee that it will not make changes to its pension plans in the future"

"Although IBM is unwilling to give a commitment to the Trustee that there will be no further changes ... it has told the Trustee that it views the [Project Soto] changes as long term and has no plans for further change"

Project Ocean proposals were "with the intention of securing the sustainability of our defined benefit pension schemes"

.....departing from these expectations was not justified, despite the GFC and pressure from IBM HQ

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<ul style="list-style-type: none">• ‘net earnings’• ‘interest’ at the ‘net earnings rate’	<ul style="list-style-type: none">• Amendments outside trustee’s power• Section 81 of Trustee Act (NSW) and equivalent	<ul style="list-style-type: none">• Fettering discretions	<ul style="list-style-type: none">• English perspective on employer’s duty of trust and confidence in pensions

