

NAB Whistleblower Program

Royal Commission Submission #1

Introduction

Copies of evidence that will be lodged with a Royal Commission into the banks is also being lodged with the **NAB Whistleblower Program** so that **NAB** Internal Audit can review the evidence and provide an internal audit report to the **NAB Board**.

This will allow the **NAB** Chairman and Group CEO to be properly briefed when called to testify before a Royal Commissioner.

The focus of the Royal Commission submission will be on the failure of **NAB** to pay widows their death benefits in their time of need and distress since this is the simplest aspect of the case.

However there are other aspects that may also be incorporated into the submission to the Royal Commission. These other aspects will be included in material lodged with the **NAB Whistleblower Program**.

This first submission will cover how **NAB** and a party associated with **NAB** have failed to lodge prescribed documents with the Regulator – **APRA** as required by **Section 29L** of the ***Superannuation Industry (Supervision) Act 1993***.

This misconduct will be of interest to a Royal Commissioner since the UK **Financial Conduct Authority** (FCA) fined **NAB A\$38 million** in 2015 in relation to similar misconduct by **NAB** in the United Kingdom when an attempt was made to conceal documents and records from a UK Regulator.

The Concealed Documents

Following public concern as to the safety of the retirement “*nest eggs*”, the Parliament of Australia enacted the ***Superannuation Safety Amendment Act 2004*** which amended the provisions of the ***Superannuation Industry (Supervision) Act 1993 (SIS Act)*** to empower the Regulator – **APRA** to licence the trustees of large superannuation funds and to register the funds themselves.

The requirements for fund registration are set out in **Section 29L** of the ***SIS Act***.

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Among the documents required to be lodged with **APRA** for fund registration are:

- A copy of the original Trust Deed that established the superannuation scheme (trust);
- Copies of all amending instruments that purport to amend the terms of the scheme;
- Copies of all enactments that purport to amend the terms of the scheme of form part of the "governing rules" of the fund.

There are two funds involved in this matter:

- (i) An occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia for male staff and their "wives, widows and dependents"; and
- (ii) An occupational pension scheme established by a Trust Deed executed on the 17 December 1963 for female staff.

The Regulations of the 1913 Fund were amended by the **Elder Smith & Co Limited Provident Funds Act 1963** (SA). This enactment confirms that it is prohibited to pay benefits to female staff from the Trust Estate of the 1913 Fund. That is why a separate scheme was established to pay pensions to female staff.

To comply with **Section 29L** of the **SIS Act** copies of the original Trust Deeds of both of these schemes should have been lodged with **APRA** along with copies of all instruments that purported to amend the provisions of the original Trust Deeds.

An incoming trustee should not accept the office of trustee unless the outgoing trustee can hand over the original counterparts of the original Trust Deed that established the trust and the original counterparts of all instruments that purport to amend the provisions of the original Trust Deed.

Palmer J in **Chang v Tjong & Ors** [2009] NSWSC 122 stated at [45]:

"It is the duty of a trustee to ensure that beneficiaries are made aware of their rights: see In re Emmet's Estate (1881) 17 Ch D 142, at 149; Hawkesley v May [1956] 1 QB 304, at 322. A trustee can hardly comply with this duty unless he or she keeps the terms of the trust readily available so that they may be explained, or produced, to beneficiaries and made known to successor trustees: see Ford & Lee Principles of the Law of Trusts [9150]."

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However the earliest "**Deed**" lodged with **APRA** was dated 26 August 1986 and the set of purported "**Rules**" attached to this Deed purported to allow the payment of benefits from the Trust Estate of the 1913 Fund to former female staff, which the **Elder Smith & Co Limited Provident Funds Act 1963** (SA) has confirmed to be prohibited.

The lodgement of this document with **APRA** has been confirmed by documents obtained under the **Freedom of Information Act 1982**.

Freedom of Information Request

A Freedom of Information request was made to **APRA** pursuant to the **Freedom of Information Act 1982** seeking confirmation of the Deeds in the possession of **APRA** that should have been lodged as part of the fund registration process.

In response dated 21 March 2011, Mr Owen Brailsford from **APRA** confirmed that the Freedom of Information request was seeking copies of all version of the Trust Deed.

2. By letter dated 31 January 2011, **APRA** sought to clarify whether the Applicant was limiting his request to Trust Deeds from 2006 and earlier versions or seeking *any* version of the Trust Deed held by **APRA**.
3. By letter dated 1 February 2011 and received by **APRA** on 2 February 2011, the Applicant confirmed that he is seeking copies of all versions of the Trust Deed in the possession of **APRA**.

That is the Applicant was seeking a copy of the original Trust Deed that established the trust plus copies of all instruments that purported to amend the terms of the original Trust Deed.

A Schedule of the documents released by **APRA** is shown in **Exhibit #1**.

If the purported Trustee had complied with **subsection 29L(2)(c)** of the **SIS Act** then **APRA** should have been able to release a copy of the original Trust Deed made on the 23 December 1913.

However the earliest dated document which is dated 19/08/1985 is referred to as "**Trust Deed rules**" and the next document dated 26/08/1986 is referred to as "**Trust Deed Amendments**". The purported "**Rules**" had been attached to a "**Deed**" dated 26 August 1986.

This confirms that **APRA** had not been provided with a copy of the Trust Deed that established the fund dated 23 December 1913, or a copy of the consolidation Deed of Variation dated 6 May 1958 that

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amended the pension benefit formula to improve benefits or a copy of the Deed of Variation dated 20 November 1974 that added a provision to provide pensions to widows of qualifying male officers.

Without a copy of the original Trust Deed that established the trust, **APRA** would not know if the terms of the trust allowed the terms of the trust to be amended and if so who held the **Power of Amendment** and what conditions had been imposed on the exercise of the **Power of Amendment**.

It is totally pointless to register a superannuation fund if **APRA** did not obtain a copy of the original Trust Deed as required by **subsection 29L(2)(c)** of the **SIS Act**.

Lest there be any doubt that **APRA** had failed to obtain a copy of the founding Trust Deed a second Freedom of Information request was made on 29 September 2012 seeking a copy of the founding Deed.

In a response dated 31 October 2012 by Mathew Fussell {**APRA** Ref: 12/002924} **APRA** confirmed that **APRA** did not have a copy of the original Trust Deed dated 23 December 1913.

This response also confirmed that **APRA** did not have copies of any Deeds of Variation executed before 30 April 1980, which included the consolidation Deed of Variation dated 6 May 1958 that was used as the reference Deed in the **Elder Smith & Co Limited Provident Funds Act 1963** (SA) which amended the terms of the Trust that was otherwise prevented by the **Power of Amendment** {**Regulation 50**}.

Additional evidence will be provided to a Royal Commission covering the application for the registration of the fund which includes:

- (i) A letter dated 16 March 2006 from Nicholas D J Brookes to Mr Julian Marks of **APRA** {**Exhibit #2**}; and
- (ii) A letter dated 29 March 2006 from Nicholas D J Brookes to David McNair of **APRA** {**Exhibit #3**}.

There is no evidence of any of the Deeds associated with the occupational pension scheme established for female staff in 1963 being provided to **APRA**.

CCSL Ltd engaged a subsidiary company of **NAB**, Plum Financial Services Ltd, to provide fund administration services. Another subsidiary company of **NAB**, PFS Nominees Pty Ltd then replaced CCSL Ltd as the Trustee of the 1913 Fund.

The **NAB** now has the legal obligation to pay the correct benefits to the correct beneficiaries of both of these occupational pension schemes. The **Power of Termination** reserved in the original Trust Deeds has not been exercised in accordance with its terms and the Trust Estates of both schemes are still impressed with the trusts of the schemes.

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Repeat of UK Misconduct

So here we have a replay of what happened in the United Kingdom. Documents that should have been provided to a Regulator, in this case under a statutory provision, were not provided and a document that bears the signature of someone who was once described on the front page of **The Canberra Times** as a “*self-confessed fraudster and liar*” was misrepresented to **APRA** as the “**Trust Deed**” of the 1913 Fund.

The “*self-confessed fraudster and liar*” is Ken Jarrett of former Finance Director of Elders IXL Ltd who served a term of imprisonment for dishonest conduct after three major investigations by the former **National Crime Authority (NCA)**.

The earliest “**Deed**” provided to **APRA** was the Deed dated 26 August 1986 that bears the signature of Ken Jarrett

So clearly the “*Jarrett Deed*” is a “**Red Flag**” document that requires further investigation by **NAB** internal Audit, given that **NAB** is now responsible for paying benefits from the Trust Estate of the 1913 Fund.

A copy of this Deed will be provided in a future submission along with other evidence that will be provided to a Royal Commission.

NAB Response in Preparation for a Royal Commission

NAB should now lodge a copy of the following documents with the Regulator – **APRA** so that these important documents are no longer concealed from **APRA**:

- (i) A copy of the original Trust Deed executed on the 23 December 1913 in the State of South Australia that established the occupational pension scheme for male staff;
- (ii) Copies of all purported amending instruments that purports to amend the provisions of the 1913 Trust Deed;
- (iii) A copy of the original Trust Deed executed on the 17 December 1963 in the State of South Australia that established the occupational pension scheme for female staff;
- (iv) Copies of all purported amending instruments that purports to amend the provisions of the 1963 Trust Deed; and
- (v) A copy of the *Elder Smith & Co Limited provident Funds Act 1963* (SA) that amended the provisions of the 1913 Trust Deed.

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- (vi) A copy of any instrument that purported to record the exercise the **Power of Termination** reserved in the original Trust Deeds of these two occupational pension schemes

If **NAB** does not lodge copies of these documents with **APRA**, and continues to conceal these documents in breach of statutory requirements then what explanation will the **NAB** Chairman or Group CEO be able to provide a Royal Commissioner for the continued concealment of these documents?

Would a Royal Commissioner conclude that such misconduct is systemic within **NAB**?

The original documents must be retained for at least 5 years even if the schemes have actually been wound-up.

Example Royal Commissioner Question

Royal Commissioner:

"Dr Henry (or Mr Thorburn) in 2015 the UK **Financial Conduct Authority** (FCA) fined the **NAB** a record A\$38 million over an attempt to conceal documents and records from a UK Regulator.

Evidence has been provided to the Royal Commission of similar alleged misconduct with respect to an Australian Regulator. It is clearly a concern for the Commission if such misconduct is of a systemic nature, since the integrity of any regulatory system relies on correct information being provided by regulated parties to the regulatory agency either as required by statute or when requested by the agency.

Can you please provide the Commission with details of what attempts have been made by **NAB** to comply with the statutory requirements of **Section 29L** of the **Superannuation Industry (Supervision) Act 1993** so that **Australian Prudential Regulation Authority (APRA)** has copies of all relevant Deeds of an occupational pension scheme established in 1913 and the Deeds of another scheme established in 1963?

These pension schemes were established to provide retirement and retrenchment benefits to former employees and their dependents of the company once known as Elders IXL Ltd.

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Definitions

Definition of “Trust Deed”

The *Australian Law Dictionary* {Oxford University Press} defines “*trust deed*” as follows:

“The instrument (a deed of settlement) establishing a trust. The deed must have four essential elements of a trust (trustee, beneficiary, the trust property, and some obligation annexed to the property) along with the three certainties (intention, subject matter, object). An express trust must be established in writing by a DEED (signed, sealed and delivered) by a settlor, who settles an amount of money or other property on the trust and establishes the terms on which the trustee holds the trust property”

There is only one “*Trust Deed*” properly so called for any trust and that is the founding Trust Deed that establishes the trust.

Definition of “Governing Rules”

In superannuation trusts, the words “*governing rules*” are used for the “*terms of the trust*”. The governing rules are not a single document but a set of documents that includes:

- The founding Trust Deed that established the trust
- Any subsequent Deed of Variation that amended the terms of the trust
- Any order or direction from the court in relation to the trust
- Any Act of Parliament specific to the trust
- The relevant State Trustee Act
- Relevant Commonwealth legislation

A consolidation Deed of Variation does not render the founding Trust Deed obsolete. The founding Trust Deed and Deeds of Variation that have been consolidated must be retained by the trustee so that a court would be able to determine a “*true construction*” of the terms of the trust.

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Butterworths Australian Legal Dictionary defines “governing rules” as follows:

“In relation to superannuation fund, approved deposit fund or a unit trust, any trust instrument, other document or legislation, or combination of these, governing the establishment and operation of the fund or unit trust.

Appendix A

Executing the Trust

Evershed MR stated in *Re Downshire Settled Estates* [1953] Ch 218:

“One thing is, we think clear: just as the court has always insisted on the due and proper observance by trustees of the terms of their trusts, so also will its own orders depart as little as possible from the strict letter of the trust instrument.”

Lord Simonds L.C. stated in *Chapman v Chapman* [1954] UKHL 1; [1954] AC 429 :

“It is the function of the court to execute the trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and if they do wrong, to penalize them”

The President of the Supreme Court of the United Kingdom, Neuberger J stated in *Besttrustees v Stuart* [2001] PLR 283, [2001] Pens LR 283, [2001] EWHC 549 (Ch), [2001] OPLR 341:

“I bear in mind that a pension scheme is likely to continue for a substantial period of time and that those most affected by them and entitled to protection from the trustees, the employer and indeed the Court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the Court to be very careful before it permits a departure from the plain wording and plain requirements of the trust deed.”

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Appendix B

Extract from Explanatory Memorandum – Superannuation Safety Amendment Bill 2003

One of the objectives of the Bill was to:

“ enable **APRA** to take a more pro-active and preventative supervisory approach which is more responsive to the risk of trustees”

Another objective was to:

“The new framework is designed to reduce the risk of loss to superannuation members from a superannuation fund failure. Members would benefit from expected improvements in the quality of trustees and fund management. Members would also have better access to information about their fund, with increased transparency and reporting to members providing a better signal of the relative risks associated with their entity. This will increase the accountability of trustees and assist early detection of problems. Members will also have greater confidence that their retirement savings are being managed in a manner consistent with best practice.”

A licensed trustee must register with APRA any entities that the trustee intends to operate under its class of licence.

The Government also proposes to introduce other amendments beyond trustee licensing to improve the safety of superannuation, including mandating the provision of information by auditors and actuaries to the Regulator at the same time such information must be provided to the trustee, and requiring other amendments specific to the safety of defined benefit funds.

Background

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3.1 The superannuation industry has continued its considerable growth, with total superannuation assets rising from \$231 billion in assets in September 1995, to over \$517 billion in assets in December 2002, over 250,000 superannuation entities (which includes superannuation funds, approved deposit funds and pooled superannuation trusts) and over 88 per cent of workers covered. Superannuation is the second largest household asset after the family home. Maintaining public confidence in the superannuation system is critical to ensuring that private saving for retirement continues to play a key role as part of the Government's policy to address the long-term consequences of the ageing population.

3.2 In October 2001, in response to public concerns about the prudential framework governing superannuation, the Government established the Superannuation Working Group (SWG) to undertake industry consultation on the proposals contained in the Issues Paper 'Options for Improving the Safety of Superannuation'. The SWG received over 50 submissions, held two rounds of public consultations, released a background paper and draft recommendations, and reported to the Government with recommendations for change on 28 March 2002.

.....

3.8 Superannuation operates through a trust structure - trustees must act in the best interests of beneficiaries, and must comply with trustee duties derived from equity, the trust instrument and governing rules, the SIS Act and other legislation. Trustees have primary responsibility for ensuring that superannuation savings are prudently invested and managed, fund members are given adequate information on which to base member investment choice decisions, and are kept informed of the nature and performance of the fund's investments.

.....

3.14 Recent experience has also highlighted that there is a substantial gap between the community's expectations about what prudential supervision should achieve and APRA's capacity to deliver on those expectations.

3.15 The level of past loss as a result of fraudulent conduct or theft has been low. Since the inception of the SIS Act in 1993, the Government has paid out approximately \$33 million in grants of financial assistance under Part 23 of the Act for losses resulting from fraud or theft. This represents less than 0.00006 per cent of current superannuation assets. However, past experience is not always a good predictor of future behaviour. There is also no data on how poor management has diminished member benefits, for example through poor investment decisions.

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Exhibit # 1

Schedule of Documents

Freedom of Information

Mr Phillip Sweeney - Trust Deed documents and associated transmittal letters

	Description of document	Date	Release/ Non- release	Reason
DOCUMENTS TO BE RELEASED				
1	Letter from CCSL to Bradley Johnstone of APRA and attachments	25/06/10	Release	
1.1	Trust Deed rules	19/08/1985	Release	
1.2	Trust Deed Amendments	26/08/1986	Release	
1.3	Trust Deed Amendments	15/12/1989	Release	
2	Email from Dianne Behringer of CCSL to David McNair of APRA and attachments	06/04/06	Release	
2.1	Foster's Trust Deed	29/03/06	Release	
3	Letter from CCSL to Julian Marks of APRA with attachments	16/03/06	Release	
3.1	Deed of Amendment	05/10/01	Release	
3.2	Deed of Amendment	08/10/01	Release	
3.3	Deed of Amendment	20/05/03	Release	
3.4	Deed of Amendment	06/11/03	Release	
3.5	Deed of Amendment	31/05/05	Release	
3.6	Deed of Amendment	08/03/06	Release	

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Exhibit # 2



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16 March 2006

Mr Julian Marks
Manager - South West Region
Australian Prudential Regulation Authority
2 Lonsdale Street,
Melbourne VIC 3000



Dear Mr Marks

Re: Application for Registration of Superannuation Entity

Attached is an application for Corporate Combined Superannuation Pty Limited ("CCSL") to be appointed as Trustee of the Foster's Group Superannuation Fund ("the Fund"). The Fund has been in existence for some time (the Deed has been in existence since 1913) and CCSL is replacing the existing Trustee (Foster's Group Superannuation Limited).

In support of the application we attach:

- (a) Controls Matrix as discussed with Mr David McNair of your office. The Controls Matrix documents how CCSL proposes to meet its various legislative and contractual obligations as the new Trustee.
- (b) The Trust Deed for the Fund plus Amendments. Please note that the last Amendment has not been executed to date but is expected to be before CCSL becomes Trustee. Also as the copies attached are taken from soft copies they do not all have a completed signatory page. CCSL will request hard copies of the missing signatory pages and lodge them with APRA.
- (c) An executed Deed of Appointment appointing CCSL as Trustee of the Fund.
- (d) A document detailing the Investment Strategy of the Fund as required under Part B2 of the Registration Application Guideline issued by the Australian Prudential Regulatory Authority.
- (e) A copy of the Risk Management Plan for the Fund.

If you have any questions in relation to these documents please contact Mr Terry Dalziel on 0414 600 250.

Yours sincerely

Nicholas D J Brookes
Chief Executive Officer

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Exhibit # 3



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29 March 2006

Mr David McNair
Australian Prudential Regulation Authority
Specialised Institutions Division
South West Region
Level 21 (Casselden Place)
2 Lonsdale St
Melbourne VIC 3000

Dear Mr McNair,

Formal Registration of Foster's Group Superannuation Fund ("FGSF").

I refer to your email to Mr T Dalziel on 28 March 2006 in relation to the Registration of Foster's Group Superannuation Fund under CCSL's RSE License L000755. Our comments to the points raised in your email follow:

Signed Executed Amendments to the Trust Deed

Copies of the signed and executed pages of the Deeds that were outstanding at the time of lodgement of the Application for Registration as Trustee are attached:

- Amendment dated 31 May 2005
- Amendment dated 8 October 2001
- Amendment dated 5 October 2001
- Trust Deed dated 3 October 2000 → Pages 1 to 3 (Page 3 signatories)

Executed Trustee Appointment Agreement

You have stated that the Trustee Appointment Agreement has not been executed by the former Trustee, Foster's Group Superannuation Limited, and you have requested either a Deed of Retirement from the former Trustee or that the former Trustee execute the Trustee Appointment Agreement.

Clause 1.3.1 of the Trust Deed states the Trustee ceases to hold office if the Trustee is removed by the Principal Employer. The Principal Employer also has the power to appoint a replacement Trustee. Accordingly, the Trustee Appointment Agreement has been signed by the employer Foster's Group Limited. The legal adviser to the existing trustee has confirmed this approach with the existing Trustee.

Equal representation requirements for non public offer funds – EPO License Requirements - Modification request to SIS

A written request for exemption from compliance with subsection 93(4) is contained in a separate letter to yourself.

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Relief from disclosure of License Numbers - Modification request to SIS

We have considered s29MB of SIS which requires the Trustee to cite licence and registration numbers on relevant fund documentation. CCSL has processes in place that will ensure all documentation will include license and registration numbers after CCSL is appointed Trustee. However, to ensure there is no possibility of a breach in this area, by separate letter to APRA, we request that APRA grant relief from disclosure of license and registration numbers pursuant to 29MB(2) of SIS. *original sent to SIS at 30/3/06*

Australian Financial Services License (ASFL)

We attach a copy of CCSL's Australian Financial Services License ("ASFL") *to be reviewed* } *KEEP!*

Registering FGSE

I confirm that we will lodge with APRA on 3 April 2006 a Registration Application, dated 3 April 2006 and signed by two Directors together with any outstanding documentation (if any). *will send further link to CCSL*

Outstanding Police Check

I have been in contact with the UK authorities, who have confirmed that after a period of 10 years, any criminal offence if committed would no longer show on record. I confirm that I have not committed any criminal offences in my lifetime. I have not lived in the UK since 1988 and have lived in Australia for the last 13 years. I continue to request official documentation from the UK authorities.

RSE License Variation

I confirm your conversation with Terry Dalziel that you advise CCSL will not need to lodge a RSE License Variation under s29F(2)(a) SIS Act. *correct*

Yours sincerely

Nicholas Brookes
Chief Executive Officer.