

Consumer Protections Inquiry

30 January 2017

Sent by registered mail: Article id: 5176 8706 2011

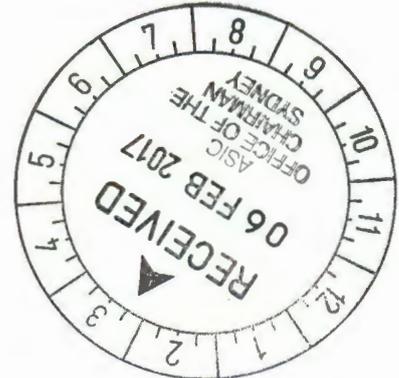
Attn: Greg Medcraft

ASIC

GPO Box 9827

Sydney, 2001

Dear Chairman



Re: Consumer Protection Inquiry

Reference is made to the **Consumer protection in the banking, insurance and financial sector** inquiry being conducted by the Senate **Economic Reference Committee**.

The Committee has asked for the victims of malfeasance in these sectors to lodge submissions providing details of their experience. This information will prove invaluable for framing the **Terms of Reference** for a Royal Commission into the banking and financial services sector.

A number of submissions will be lodged in relation to the plight of several hundred widows who are not being paid their survivorship pensions by a major Australian bank.

This is a test case for **The Rule of Law**.

This will not be the first time the plight of these widows has been brought to the attention of the Senate **Economics Reference Committee**.

The following **Questions on Notice** were put to **ASIC** by the Committee during the inquiry into the performance of **ASIC**.

The response provided to the Senate Committee attached to an email dated 8 May 2014 from Robert Rush from **ASIC** to Sean Turner from the Senate Committee contained multiple contraventions of the **Parliamentary Privileges Act 1987** {as well as **Section 13 of the Public Service Act 1999**}.

To prevent a re-occurrence of such unlawful conduct during this current inquiry the attached pro-forma response has been drafted to assist the Chairman.

Consumer Protections Inquiry

A copy of this pro-forma response will be included in a submission to the Senate Committee.

If the Chairman disagrees with any of the material provided in this pro-forma response, the Chairman should advise the Committee Secretary accordingly.

Silence will be considered as confirmation that the material provided in this pro-forma response is correct.

Questions on Notice

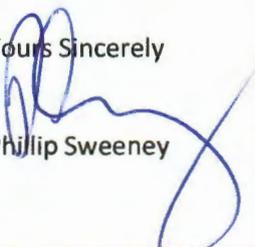
During the inquiry into the performance of **ASIC**, the Senate **Economics Reference Committee** put the following **Questions on Notice** to **ASIC**:

“The committee has received several submissions regarding the Provident Fund, an employee benefit fund (superannuation fund) that was established in 1913. The submissions claim that qualifying male officers are entitled to a pension for life and their widows are then entitled to a survivorship pension. The submissions allege that the original trust deed was fraudulently altered and the conditions of the original deed are not being complied with (ie the pensions are not being paid)

Questions

- How many complaints have ASIC received regarding the trust deed of the Provident Fund? When was the first complaint received?
- Could you outline ASIC's responsibilities in this area? Is ASIC the correct body for individuals with these types of concerns to contact?
- What investigation did ASIC undertake into these allegations? Did ASIC decide the complaints did not have merit, or did ASIC not investigate because the complaints did not meet the tests ASIC uses when assessing a matter?”

Yours Sincerely


Phillip Sweeney

Consumer Protections Inquiry

Pro Forma Response to Senate Committee

How many complaints have ASIC received regarding the trust deed of the Provident Fund? When was the first complaint received?

The first complaint was received in March 2009 when the assistance of **ASIC** was sought to force the purported corporate trustee, *{name redacted}*, to provide access to the original Trust Deed and all amending instruments executed on or before the 25 March 1985 when the Complainant entered into a contract of employment which included membership of this particular occupational pension scheme.

The compensation policy of the Coalition Government is based on the “**moral hazard**” argument where there is an expectation that fund members and beneficiaries will take an active interest in how their fund is being administered. Obtaining access to all the Deeds of the fund is the first step in ensuring that the fund is being administered lawfully and to ensure that the purported trustee of the fund has in fact been lawfully appointed to the office of trustee in accordance with the provisions of the fund.

The occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia was at one stage known as **The Provident Fund** until the name was changed to the **Elders IXL Superannuation Fund in 1982**.

The provisions of this occupational pension scheme were amended by the **Elder Smith & Co Limited Provident Funds Act 1963** (SA) which also confirms that a separate pension scheme was established for female staff several decades latter.

Since March 2009 **ASIC** has receives “*approximately 400 individual pieces of correspondence*” from a number of complainants and whistleblowers.

- **Could you outline ASIC’s responsibilities in this area? Is ASIC the correct body for individuals with these types of concerns to contact?**

The Parliament of Australia has provided **ASIC** with wide investigative powers pursuant to **Section 13** of the **ASIC Act 2001**.

Section 13(1) of the **ASIC Act 2001** provides:

General powers of investigation

(1) ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has reason to suspect that there may have been committed:

Consumer Protections Inquiry

- (a) a contravention of the corporations legislation (other than the excluded provisions); or
- (b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that:
- (i) concerns the management or affairs of a body corporate or managed investment scheme; or
 - (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.

ASIC has also been provided with extensive evidence gathering powers pursuant **Part 3** of the **ASIC Act 2001**.

ASIC has been provided with evidence that confirms that several **out-of-jurisdiction** purported corporate trustees have administered this particular occupational pension scheme since 20 December 1982. Prior to 20 December 1982 the scheme was administered by natural person trustees resident in South Australia so as to comply with the provisions of the **Trustee Act 1936** (SA).

ASIC has jurisdiction over the conduct of the Directors of all companies in Australia, including the Directors of corporate trustees.

A notable case where **ASIC** took action against the Director of a corporate trustee is the **Trio Capital Superannuation Fraud** where Shawn Richard was prosecuted by **ASIC** for contravening **Section 1014G** of the **Corporations Act 2001** (*Regina v Shawn Darrell Richard* [2011] NSWSC 866). This case involved the theft of the members' funds by Mr Richard.

Another noteworthy case is **Australian Securities & Investments Commission, in the matter of QLS Superannuation Pty Ltd v Parker** [2003] FCA 262 where a Director failed in his duty of care and diligence in relation to investments made by that Director.

Murphy J stated in **Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)** [2013] FCA 1342 at [537]:

The same was recognised in **Australian Securities and Investments Commission, In the Matter of QLS Superannuation Pty Ltd v Parker** [2003] FCA 262; (2003) 21 ACLC 888 at [114] (which concerned s 232(4) of the former Corporations Law). Drummond J said:

The content of the obligation imposed by this provision to exercise care and diligence is, as the section indicates, governed by the particular corporation's circumstances and how a reasonable person in the defendant's position in the particular corporation would conduct himself. I have described the nature of QLSS trustee business. QLSS was bound to comply with the statutory covenants in s 52(2) the Superannuation Industry (Supervision) Act in conducting its business as trustee of the LES Fund; Parker was bound by s 52(8) to exercise a reasonable degree of care and diligence for the purpose of ensuring that QLSS itself satisfied these statutory

Consumer Protections Inquiry

covenants. In consequence, the content of the fiduciary duties on Parker as a director required of him a higher standard of care and diligence in performing his duties, including his duty to bring loan proposals suitable for consideration by the Board before it, than is the nature of the fiduciary duty on a director of an ordinary trading company.

Murphy J continued at [541]:

The standard of care and caution expected of a corporate trustee must flow through to its directors. As Finn J said in *ASC v AS Nominees* at 517:

Where the trustee is itself a company the requirements of care and caution are in no way diminished. And here, unlike with companies in general, these requirements have a flow-on effect into the duties and liabilities of the directors of such a company. It was established early...that at least when, and to the extent that, directors of a trustee company are themselves “concerned in” the breaches of trust of their company, they are liable to the company according to the same standard of care and caution as is expected of the company itself.

(Citations omitted.) I respectfully agree.

Section 180 of the *Corporations Act 2001* has superseded s 232(4) of the former Corporations Law.

Section 181 can also be relevant where the Directors of a corporate trustee allow that trustee to commit a breach of trust.

The Victorian Court of Appeal stated in *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9 at [59]:

“The fiduciary duty owed by a director to a company is somewhat expanded when the company is a trustee company. This was explained by Robson J in *Re S & D International Pty Ltd* (No 4), (2010) ACSR 595 where his Honour stated at (p657); [283]:

“The basic common law duty of a director is that he or she must act bona fide in what he or she believes is in the best interests of the company as a whole. This duty is encompassed in s 181[of the *Corporations Act 2001* (Cth)]. In this instance, S&D acted as a trustee of the unit trust and the best interests of the company were clearly to act properly in accordance with the trust deed and in the interests of the unit trust. In other words to ensure that the trustee exercised its powers honestly and in the best interests of the beneficiaries of the trust.”

The Court of Appeal continued at [228]:

“I agree with the statement by Robson J of the duties of a director of a company that acts as a corporate trustee. In circumstances where a company is a corporate trustee, a director acting in the best interests of the company as a whole must act in good faith to ensure that the company

Consumer Protections Inquiry

administers the trust in accordance with the trust deed having regard to the rights and interests of the beneficiaries of the trust. The best interests of the company as a corporate trustee are to act properly in accordance with the trust deed in managing the business of the trust and in dealing with the assets and liabilities of the trust. A director of a corporate trustee must act in good faith to ensure that the company complies with its obligations as a trustee, and properly discharges the duties imposed on it by the trust deed and by trust law generally. It is not in the best interests of the company for it to act in breach of its duties of a trustee, for the company has assumed the responsibilities of that office and must see to it that they are fulfilled {See *Hurley v BGH Nominees Pty Ltd (No 2)* (1984) 37 SASR 499, 510 (Walters J); *Re S & D International Pty Ltd* (2010) ACSR 595, 657 [283] (Robson J); *Bell Group v Westpac* (2008) 39 WAR 1, 1194 [4619] (Owen J).}

The Court of Appeal making reference to the right of a fund member (ie beneficiary) to compel the proper administration by the corporate trustee of the trust stated at [229]:

“The director should act in good faith to ensure that there is no cause for legitimate complaint by a beneficiary about the administration of a trust for which the company is responsible.”

In relation to regulated superannuation funds, **ASIC** also has specific obligations to ensure that trustees make adequate disclosure of the Deeds and other prescribed “*fund documents*” and provide sufficient information to enable members to make informed decisions concerning their superannuation.

The specific obligations are found in **Section 1017C** of the **Corporations Act 2001** and related Regulations.

Persons who have a *beneficial interest* in the fund are referred to as “**concerned person**” and they are entitled to inspect and take a photocopy of the original Trust Deed that established the scheme as well as copies of any purported instruments that purport to amend the provisions of the original Trust Deed pursuant to **subsection 1017C(5)** of the **Corporations Act 2001**.

The Parliament of Australia has made it an indictable offence to wilfully conceal the Deeds of the regulated superannuation fund from any “**concerned person**”.

297B	Subsection 1017C(5)	100 penalty units or imprisonment for 2 years, or both.
------	-------------------------------------	---

Persons who have a right of access to the Deeds are prescribed by **subsection 1017C(9)**:

Definitions

(9) In this section:

“**concerned person**” :

Consumer Protections Inquiry

(a) in relation to a superannuation product—means a person who:

(i) is, or was within the preceding 12 months, a member of the superannuation entity;

or

(ii) is a beneficiary of the superannuation entity;

Therefore the widow of a deceased fund member who has an entitlement under the fund is a “**beneficiary**”, even though the widow was not a fund member.

“ASIC notes that a large number of the complaints and FOI received in relation to the Fund relate to allegations of that the trustee has failed to comply with its disclosure obligations under section 1017C of the Act. Failure to comply with subsection 1917C(5) is itself a case of fraudulent behaviour”.

In this regard, the Reporters have alleged that the trust deed has been illegitimately altered since the Fund's inception in 1913 to the detriment of members' benefits. As a result of this conduct, the Reporters consider that changes to the trust deed were not legally effective, meaning that the trust deed which was used to calculate their payouts is not effective.

The relevant principles of law can be summarised as follows:

- (i) It is a fundamental duty of a trustee to obey the terms of the original Trust Deed that established to scheme;
- (ii) Persons who are objects of the trust (ie members and beneficiaries) have a right to inspect and copy this Trust Deed;
- (iii) If the original Trust Deed does not reserve an amending **power** then the provisions of the original Trust Deed can only be amended by a Court Order or by an Act of Parliament.
- (iv) Where an amending **power** has been reserved in the original Trust Deed the members of the fund have a right to require that the provisions of the original Trust Deed not be amended except in accordance with the amendment provisions contained in the original Trust Deed.

These principles have been confirmed by the Federal Court of Australia and by the High Court of Australia.

The Federal Court commenting on the rights of members of regulated superannuation funds in *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [1999] FCA 1455 stated at [41].

* the right to require the Trustee and the Principal Employer to administer the Fund in accordance with the rules;

Consumer Protections Inquiry

* the right to require that the provisions of the Original Trust Deed not be amended except in accordance with the amendment provisions contained in the Deed;

* an entitlement, subject to the matters referred to made below, to whatever benefits the rules provided on the death, retirement, resignation, retrenchment, disability or illness at the time such event occurred to the member;

The Determination of the Federal Court was affirmed by the High Court of Australia in ***Commissioner of Taxation v Commercial Nominees of Australia Limited*** [2001] HCA 33; (2001) 179 ALR 655.

The High Court noted at [26]:

It is not disputed that the amendments effected by cl 2 were within the power of amendment given by the original deed.

There is a ***Memorandum of Understanding*** between **ASIC** and the prudential regulator, **APRA**, and so both regulators will work together where serious allegations of misconduct have been made against trustees in the compulsory superannuation system {An example is the **Trio Capital Superannuation Fraud** case}.

It is important to note that the Superannuation Complaints Tribunal has limited statutory jurisdiction due to the doctrine of the ***Separation of Powers*** derived by the High Court from the ***Commonwealth of Australia Constitution Act***.

The Tribunal can only deal with complaints where the trustee has not contravened any law or governing rule of the fund, but has made a decision that can be impugned on the grounds that the decision was “*unfair or unreasonable*”.

A common example is where a trustee had decided not to release benefits early on a claim of permanent and total disability.

If a complaint has been lodged with the Tribunal alleging unlawful conduct by the trustee of the fund, the Tribunal should refer such a complaint to **ASIC** (and **APRA**) pursuant **Section 64** of the ***Superannuation (Resolution of Complaints) Act 1993***.

If the Tribunal were to deal with such a complaint the Tribunal would be acting ***ultra vires*** its statutory powers and any determination would not be legally binding.

What investigation did ASIC undertake into these allegations? Did ASIC decide the complaints did not have merit, or did ASIC not investigate because the complaints did not meet the tests ASIC uses when assessing a matter?”

Consumer Protections Inquiry

ASIC has been provided with copies of the following Deeds of Variation which amended the original Trust Deed executed on the 23 December 1913 in the State of South Australia.

- (i) Deed of Variation dated 18 January 1955
- (ii) Deed of Variation dated 20 November 1974

ASIC understands that copies of these Deeds of Variation have also been provided to the Committee Secretary on the 6 November 2016.

Both of these amending Deeds have been executed in accordance with the provisions of the amending power reserved in the original 1913 Trust Deed.

ASIC has been advised that both of these Deeds were criminally concealed from **APRA** during the fund registration process in 2006, however the Committee should deal directly with **APRA** in relation to these serious allegations.

These serious allegations include that **APRA** contravened the law by granting fund registration number **R 1004830** in contravention of **Section 29M** of the **Superannuation Industry (Supervision) Act 1993**.

The Deed of Variation dated 18 January 1955 improved the basic pension benefit provided to widows in the original 1913 Trust Deed, whereby a male fund member could elect to trade some of his pension benefit for a survivorship pension for his wife.

ASIC has been provided with a copy of the Minutes of Select Committee of the Legislative Council of South Australia dated 3 September 1963 which provides independent confirmation of the pension entitlement for widows. **ASIC** understands that a copy of these Minutes has also been provided to the Committee Secretary.

The Deed of Variation dated 20 November 1974 added **Regulation 30A** which provided an “*automatic*” survivorship pension.

This **Defined Benefit** pension scheme was closed to new members on the 30 November 1997 some years before a similar **Defined Benefit** pension scheme was close to new Senators and Members of Parliament in 2004.

ASIC is not in possession of any subsequent properly executed and duty stamped Deed of Variation that purports to repeal or delete **Regulation 30A**.

However **ASIC** does have possession of a purported “*Deed*” dated [26 August 1986](#) and an attached set of purported “*Rules*”.

Consumer Protections Inquiry

This document bears the signature of a former company director who pleaded guilty to one charge of failing to act honestly as an officer of the company between [April 1986](#), and [June 1990](#) before Justice Coldrey in the Supreme Court of Victoria.

Any such document is a “**red flag**” document requiring closer inspection.

An inspection of the *Testimonium* (signing page) confirms that this document has not been executed in accordance with the provisions of the original 1913 Trust Deed and therefore does not satisfy the requirements set out in *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [1999] FCA 1455 and *Commissioner of Taxation v Commercial Nominees of Australia Limited* [2001] HCA 33; (2001) 179 ALR 655.

One of the four major banks relies on the set of “**Rules**” attached to this fraudulent Deed as justification for not paying the widows their survivorship pensions.

ASIC has also been advised that the document dated 26 August 1986 was misrepresented to **APRA** as the “**Trust Deed**” of the scheme in 2006 during the fund registration process.

The Committee will need to deal directly with **APRA** to understand what action **APRA** proposes to take in relation to the dishonest conduct of a former trustee director of this fund who engaged in dishonest and criminal conduct by misrepresenting a fraudulent document as the “**Trust Deed**” of the fund.

Directors of corporate trustees of regulated superannuation funds have a statutory duty as well as a general law duty to act honestly in matters pertaining to the fund {**Section 52A** of the *Superannuation Industry (Supervision) Act 1993*}.

Burden of Proof

It is important that the Committee understands the importance of a ruling made by the High Court of Australia concerning the burden of proof in relation to disputes between members and beneficiaries of regulated superannuation funds and their trustee in a compulsory superannuation system.

It should not be necessary for members and beneficiaries to rely on their private rights and initiate expensive legal action in the Court System where they could be bankrupted over a legal technicality such as a poorly pleaded case even though they have been the victims of misconduct by the trustee of their fund including criminal misconduct.

The Victorian Court of Appeal in *Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238; (2012) 36 VR 618 following the ruling of the High Court of Australia in *Finch v Telstra Super Pty Ltd* [2010] HCA 36; (2010) 242 CLR 254 that the burden of proof does not lie with the widows to confirm their entitlement to a survivorship pension, rather the burden of proof lies with the incumbent trust to repudiate the widow’s claim by seeking **judicial advice** as again confirmed in the High Court of Australia

Consumer Protections Inquiry

in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66.

This is just another aspect of a trustee's general law and statutory law duty to act in the **best interests** of the fund members and beneficiaries.

The cost of seeking **judicial advice** is taken out of the fund and not out of the trustee's own pocket so there should be no reason as to why an honest trustee would refuse to seek **judicial advice** to resolve a *bona fide* dispute with the fund members and beneficiaries.

It is only a dishonest trustee who is acting in the trustee's own interest or the interests of third parties who would seek to use the legal system as a shield to hide unlawful or criminal conduct associated with the administration of a superannuation fund in a compulsory superannuation system.

It is especially problematic when a major bank seeks to exploit the legal system in such a manner and raised the question of whether the vertical integration of the major banks is in the *public interest*.

The Committee will need to discuss with **ASIC** what regulatory action **ASIC** proposes to take so as to protect the widows and to ensure that the widows have the protection of **The Rule of Law** and receive just compensation for the criminal conduct of white-collar criminals.

It should be very easy for the legal department of a major bank to seek **judicial advice** when there has been a long history of unlawful and criminal conduct by previous trustees of the fund.

By doing so the incumbent trustee is able to obtain the protection of the Court in relation to the matter for which **judicial advice** was sought.

An incumbent trustee does not owe any obligation to previous trustees and in fact should take proceedings against former trustees who have committed breaches of trust.

The Chairman, Deputy Chairman and other Commissioners will be happy to provide testimony to the Committee in relation the **Widows' Pension Case**.

The Chairman is mindful of **ASIC's** obligations pursuant the **Parliamentary Privileges Act 1987**.

Also it is the role of the agency head to discipline any Australian Public Service who has contravened the **APS Code of Conduct pursuant to Section 15** of the **Public Service Act 1999**.

Yours Sincerely

Greg Medcraft - Chairman **ASIC**

Cc Committee Secretary – Senate Economics Reference Committee (Economics.sen@aph.gov.au)

Consumer Protections Inquiry

Appendix A

Terms of Reference

The regulatory framework for the protection of consumers, including small businesses, in the banking, insurance and financial services sector (including Managed Investment Schemes), with particular reference to:

- a. any failures that are evident in the:
 - i. current laws and regulatory framework, and
 - ii. enforcement of the current laws and regulatory framework, including those arising from resourcing and administration;
 - b. the impact of misconduct in the sector on victims and on consumers;
 - c. the impact on consumer outcomes of:
 - i. executive and non-executive remuneration,
 - ii. incentive-based commission structures, and
 - iii. fee-for-no-service or recurring fee structures;
 - d. the culture and chain of responsibility in relation to misconduct within entities within the sector;
 - e. the availability and adequacy of:
 - i. redress and compensation to victims of misconduct, including options for a retrospective compensation scheme of last resort, and
 - ii. legal advice and representation for consumers and victims of misconduct, including their standing in the conduct of bankruptcy and insolvency processes;
 - f. the social impacts of consumer protection failures in the sector, including through increased reliance of victims on community and government services;
 - g. options to support the prioritisation of consumer protection and associated practices within the sector; and
 - h. any related matters.
-

30 January 2017

Sent pay registered mail- article id: 5176 8706 2011

12 Highland Way
Highton, 3216

Attn: Greg Medcraft

Chairman

ASIC

GPO Box 9827,
Sydney, 2001

Dear Mr Chairman

Re: Submissions to Parliamentary Inquiries

OFFICE OF THE WHISTLEBLOWER

Introduction

I again refer to the article on the front page of the *Australian Financial Review* on 3 January 2017 in which the Chairman is quoted on the topic of "**bank culture**" {ie tolerance for unethical and unlawful conduct by bank staff}.

Whistleblowing related to the major banks will be a feature of 2017 with a number of Parliamentary inquiries currently underway.

I refer to my letter dated 3 January 2017 {received 6 January 2017} and my letters dated 6, 9 and 11 January 2017 attached to which were three Whistleblower Disclosures listed in **Appendix A**.

When previous submissions have been lodged with Parliamentary Committees concerning the plight of several hundred widows who are not being paid their survivorship pensions by the **National Australia Bank**, **ASIC** officers have chosen to contravene both the **APS Code of Conduct** {Section 13 of the **Public Service Act 1999**} as well as the **Parliamentary Privileges Act 1987** by providing false and misleading testimony both oral and written to the Committees.

ASIC Whistleblower, James Wheeldon, testified before the Senate Economics Reference Committee in 2014 of the practice of **NAB Wealth** (MLC Ltd) of embedding its own lawyers into **ASIC** in order to obtain “*favourable regulatory outcomes*”.

This practice no doubt explains the conduct of **ASIC** officers before Parliamentary Committees with respect to matters related to the **National Australia Bank**.

In order to counter this corrupt practice, each Whistleblower Disclosure is matched with an excuse **ASIC** currently employs to protect its **Big End of Town** clients.

ASIC is a classic example of “*Regulatory Capture*”.

The eighth and ninth such **Matrix Disclosures** are attached to the letter.

It is **ASIC’s** position that widows living on the old age pension should initiate their own legal proceedings against the **National Australia Bank** in order to obtain their survivorship pensions in a compulsory superannuation system, when legal costs would run into the hundreds of thousands of dollars.

Alternatively the widows should waste their time by lodging complaints with the Superannuation Complaints Tribunal when the Tribunal has no jurisdiction to deal with complaints alleging fraudulent conduct by trustees.

The Position of the High Court of Australia

The High Court of Australia in **Finch v Telstra Super Pty Ltd** [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

“The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“the Supervision Act”) and regulations made under it, imposed quite rigorous regulatory standards.”

The Federal Court commenting on the rights of members of regulated superannuation funds in **Commissioner of Taxation v Commercial Nominees of Australia Ltd** [1999] FCA 1455 stated at [41].

* the right to require the Trustee and the Principal Employer to administer the Fund in accordance with the rules;

* the right to require that the provisions of the Original Trust Deed not be amended except in accordance with the amendment provisions contained in the Deed;

* an entitlement, subject to the matters referred to made below, to whatever benefits the rules provided on the death, retirement, resignation, retrenchment, disability or illness at the time such event occurred to the member;

The Determination of the Federal Court was affirmed by the High Court of Australia in ***Commissioner of Taxation v Commercial Nominees of Australia Limited*** [2001] HCA 33; (2001) 179 ALR 655.

The High Court noted at [26]:

It is not disputed that the amendments effected by cl 2 were within the power of amendment given by the original deed.

All Australians who are forced to be members of superannuation funds have a **legitimate expectation** that "***The Rule of Law***" will be applied to the administration of their superannuation fund in a compulsory superannuation system so as to protect their retirement "*nest eggs*".

These Australians also have a **legitimate expectation** that they will receive compensation as promised by the government of the day if they suffer a loss due to theft or fraudulent conduct by the trustee of their regulated superannuation fund.

The Coalition Government promises a minimum compensation rate of 90% of allowable losses.

The Rule of Law not only applies to the trustees of regulated superannuation funds but to the **Regulators** of those funds as well.

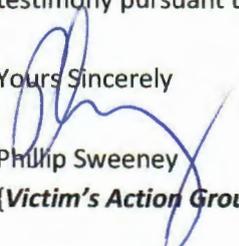
Might I ask the Chairman to forward the attached detailed Whistleblower Disclosure to the **Office of the Whistleblower**.

More detailed Whistleblower Disclosures will be provided in future correspondence.

Can the Head of the **Office of the Whistleblower**, Warren Day, please complete the attached *pro forma* response letters and send these to the Committee Secretaries if he has any commentary the attached Whistleblower Disclosures.

The Committees should be briefed on **ASIC's** position before there is an opportunity to provide oral testimony pursuant the **Parliamentary Privileges Act 1987**.

Yours Sincerely


Philip Sweeney
{**Victim's Action Group**}

Attachments:

- **Whistleblower Disclosure #1 - G** {17 Jan 17}
- **Whistleblower Disclosure #2 -B** {30 Jan 17}

Cc: Committee Secretaries

corporations.joint@aph.gov.au
economics.reps@aph.gov.au
economics.sen@aph.gov.au

Appendix A

Current Parliamentary Inquiries into the Financial Services Sector

Joint Parliamentary Committee on Corporations and Financial Services

- **Life Insurance Industry**
- **Whistleblower protections in the corporate, public and not-for-profit sectors**

House of Representatives Standing Committee on Economics

- **Review of the Big Four Banks**

Senate Economics Reference Committee

- **Consumer protection in the banking, insurance and finance sector**
- **Criminal, civil and administrative penalties for white collar crime**



ASIC

OFFICE OF THE WHISTLEBLOWER

ASIC Ref:	Lodgement Date: 30 Jan 2017
Financial Services Sector:	Regulated Superannuation Fund
Case Description:	Maladministration of two occupational pension schemes established in 1913 and 1963
Disclosure Description:	A responsible officer of subsidiary company of NAB Wealth (MLC Ltd) , PFS Nominees Pty Ltd, has made a false and misleading statement as to the transfer of the membership of some fund members to the Plum Superannuation Fund
Whistleblower Disclosure Ref:	Disclosure #2 - B
Whistleblower id:	PSC-2016
Public Interest Matter:	Yes
Allegations against Major Bank:	Yes
ASIC Excuses Ref:	Excuse B – “Insufficient Evidence”

Executive Summary

- Evidence has been obtained and provided to **ASIC** that confirms that several hundred widows are entitled to be paid a death benefit in the form of a survivorship pension by the **National Australia Bank**;
- However a subsidiary company of the **National Australia Bank** became a party to an agreement whose purpose was to “*leave the widows behind*” and negate their legal entitlements to a survivorship pension;
- A representation was made in a letter date 1 October 2014 to the effect that some fund members had been transferred without their consent to a sub-plan of the **Plum Superannuation Fund** with effect from 20 January 2014;
- No evidence has been forthcoming that would support that a legally valid “*successor fund transfer*” occurred on the 20 January 2014 as represented to some fund members.
- The default position is that PFS Nominees Pty Ltd simply replaced CCSL Ltd as the purported corporate trustee of the occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia;
- Even though there was a transfer of the Trust Estate of the 1913 pension scheme on the 20 January 2014 the trust property is traceable into the Trust Estate of the **Plum Superannuation Fund**”; and
- If there was no legally valid “*successor fund transfer*” then there has been a contravention of **Section 12 DB** of the **ASIC Act 2001** as well as a contravention of **Subsection 1041H(vi)** of the **Corporations Act 2001**.

Note: This document may be lodged in evidence in a future royal commission into the banking and financial sector

Background

This disclosure relates to the maladministration of a defined benefit occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia, whose existence and authorised purpose has been confirmed by the *Elder Smith & Co Limited Provident Funds Act 1963* (SA) to be the provisions of “*pensions and benefits*” to certain “*male officers and their wives, widows and dependents*”.

This defined benefit scheme was closed to new members on 30 November 1997. Evidence has been provided to **ASIC** to confirm the closure date.

A separate contributory occupations pension scheme for female staff was established in 1963 as confirmed by the *Elder's Trustee & Executor Co Ltd Provident Funds Act 1971* (SA).

The original sponsoring Employer was the company then called Elder Smith & Co Ltd {ACN 007 869 294}. Elder Smith & Co Limited was acquired by Elder Smith Goldsbrough Mort Ltd {ACN 007 620 886} in 1963.

National Australia Bank Involvement

On the 20 January 2014 a subsidiary company of MLC Ltd (*NAB Wealth*), PFS Nominees Pty Ltd, gained control of the Trust Estate (the Fund) of the occupational pension scheme established in 1913 as confirmed by the audited accounts for the 1 July 2013 to 20 January 2014.

The default position, until there is evidence to prove otherwise, is that PFS Nominees Pty Ltd merely replaced the previous trustee, CCSL Ltd, as the incumbent trustee of the occupational pension scheme established in 1913 and PFS Nominees Pty Ltd must obey the provisions of the original Trust Deed executed on the 23 December 1913 in the State of South Australia plus subsequent lawful amending Deeds.

Some members received a letter dated 1 October 2014 some nine months after PFS Nominees Pty Ltd gained control of the Trust Estate of the 1913 Fund in which the following representations was made:

Over the past few months you have received information regarding changes to your superannuation arrangements. To summarise, the AusBev Superannuation Fund has moved from being a corporate standalone fund to a sub-plan of the Plum Superannuation Fund. Plum Financial Services Limited (Plum) continues to administer the Plan but the Trustee has changed. These new arrangements took effect on 20 January 2014

This letter confirmed that there had been a change in trustee, however some two years later no evidence has been forthcoming that would confirm that legally valid “**successor fund transfer**” ever took place on 20 January 2014. That is evidence that would confirm the representation of:

“The AusBev Superannuation Fund has moved from being a corporate standalone fund to a sub-fund of the Plum Superannuation Fund”.

The intended audience of a communication is important in determining if that communication is to be imagined on the grounds that the communication is false and misleading.

The superannuation scheme more recently known as the AusBev Superannuation Fund was established by a Trust Deed executed on the 23 December 1913 in the State of South Australia.

The **Elder Smith & Co Limited Provident Funds Act 1963** (SA) confirms that persons who have a *beneficial interest* in this superannuation scheme are certain current and former male employees of the company then known as Elder Smith & Co Limited and subsidiary companies as well as certain current male employees of any “*successor company*”. The first “*successor company*” being Elder Smith Goldsbrough Mort Ltd.

The wives, widows and dependents also have a *beneficial interest* in this scheme.

Therefore any correspondence from the trustees or trustee administering this scheme should have been sent to persons with a *beneficial interest* in the scheme.

However the representation above was only made to current employees (“**active members**”) and members of the retained benefits division.

Trust Law Basics

To determine whether a bona fide “**successor fund transfer**” has occurred it is necessary to understand the concept of a trust and some trust law basics.

A definition of a “*trust*” provided in The Law of Trusts by Thomas and Hudson is:

“The essence of a trust is the imposition of an equitable obligation on a person(s) who is the legal owner of property (a Trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognised by equity in the property. The Trustee is said to “hold the property on trust” for the beneficiary. There are four significant elements

to the trust; that it is equitable, that it provides the beneficiary with rights in property, that it imposes obligations on the trustee, and those obligations are fiduciary in nature”.

Under a strict trust there are two owners of the trust estate; the Trustees hold the common law title to the assets of the trust, whilst the beneficiaries hold an “equitable” title to the same assets under a branch of law known as “equity”.

Lord Browne-Wilkinson stated in relation to “strict” trusts:

“Once a trust is established, as from the date of its establishing the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property... other than a purchaser for value of the legal interest without notice.”

Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 at 705.

The trustees must be in a position to know with certainty, in favour of whom benefits must be distributed; and in the event of some error of default on the part of the trustees, the Court must know, with certainty, how it should execute the trusts, or what remedy, if any, it ought to make available to whom.

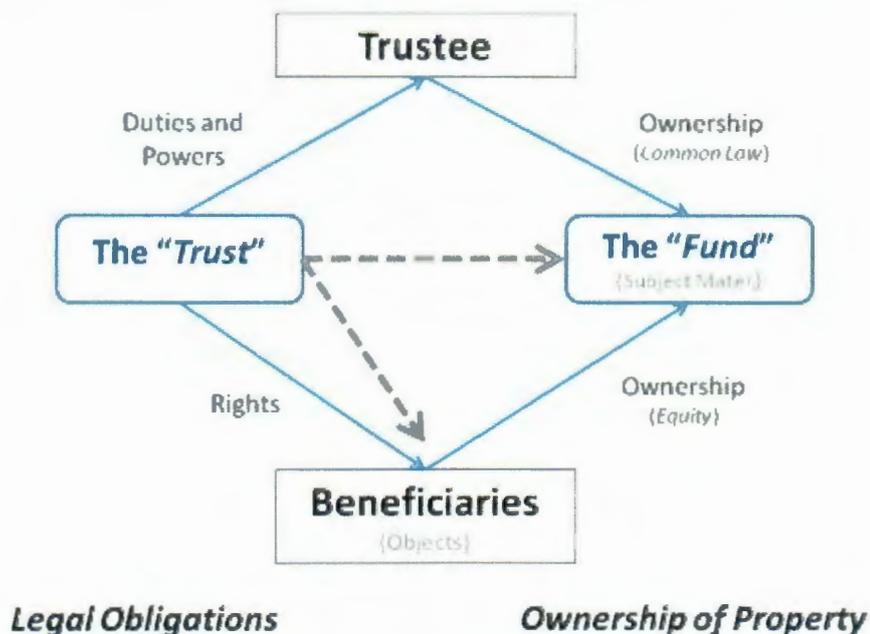
“The principle can be concisely stated by saying that in order to be valid, a trust must be one which the Court can control and execute”

IRC v Broadway Cottage’s Trust [1955] Ch. 20 at 30, per Jenkins L.J.

A “beneficiary”, in ordinary language, is a person for whose benefit a trust is to be administered and who is entitled to enforce the trust according to its terms.

Kafataris v The Deputy Commissioner of Taxation [2008] FCA 1454 at [42]

The Elements of a Strict Trust



Most superannuation schemes are established by the execution of a Trust Deed {although some schemes are established by statute}.

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. Any subsequent Deed that purports to amend the provisions of the founding Trust Deed is properly called an amending Deed or a Deed of Variation.

In the case of an employer sponsored superannuation scheme, a power of appointment will be conferred on the employer to appoint certain employees as "*objects*" of the superannuation trust (ie the employees become "*members*" of the superannuation fund).

Once such an appointment has been made the fund member has important legal rights. Those rights cannot be easily abrogated.

Therefore it will take more than a notification in a letter to alter or transfer those rights to another superannuation scheme, especially if the member is member of a Defined Benefit superannuation scheme, where members do not have individual investment accounts with a current account balance.

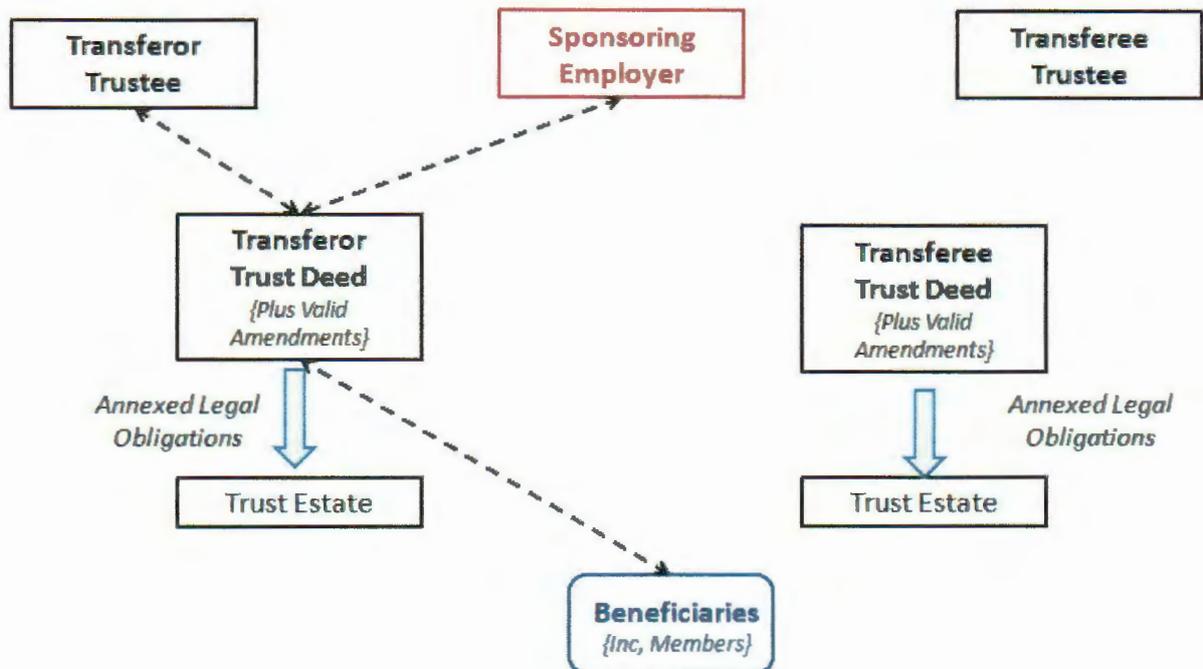
The situation before any purported "*successor fund transfer*" can be illustrated in the following diagram.

The key elements of a trust are shown in this diagram:

- (i) The trustee;
- (ii) The Trust Property (Trust Estate)
- (iii) The legal obligations annexed to the Trust Property
- (iv) The beneficiaries.

In the case of a Defined Benefit superannuation fund the sponsoring employer also has a contractual obligation to ensure the solvency of the fund and therefore has a contractual obligation to the trustee.

Before a Bona Fide “Successor Fund Transfer”

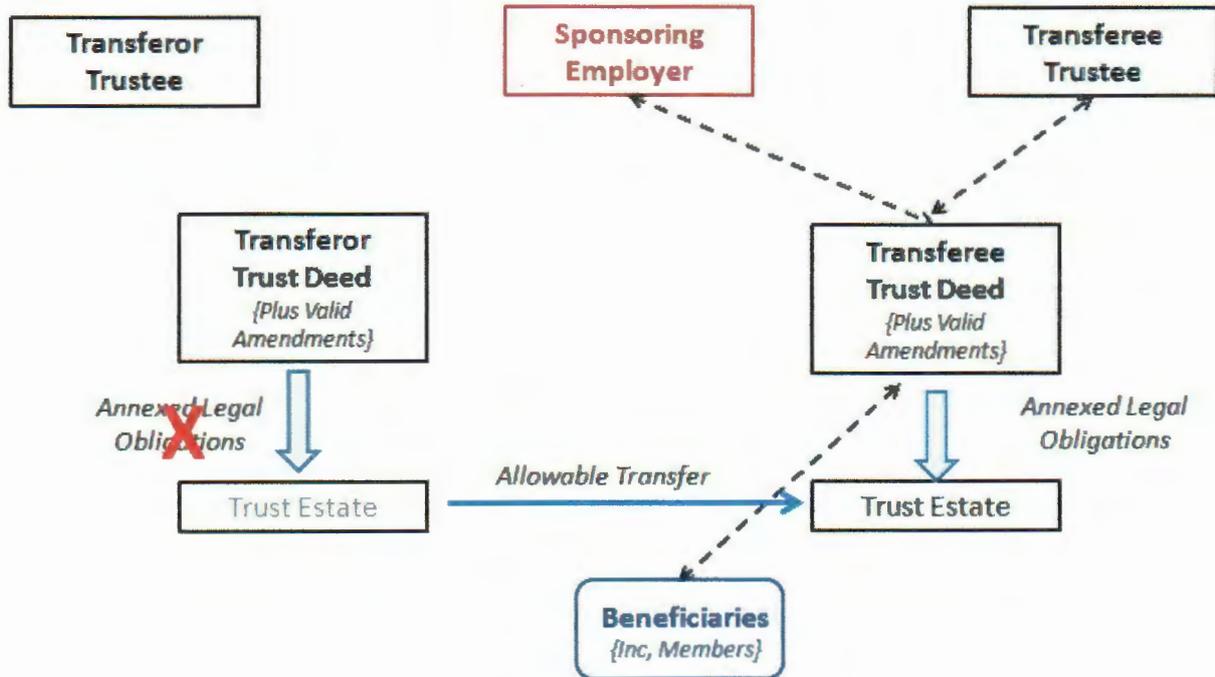


The beneficiaries (which includes fund members) have important legal rights, including the right to inspect and copy the founding Trust Deed and any subsequent amending instruments.

The Trust Deeds of superannuation schemes will generally include protective provisions to prevent the trustee or trustees from dealing with trust property in an unauthorised manner and transferring trust property to third parties or even the sponsoring employer.

If a bona fide “*successor fund transfer*” is to take place, then the legal rights and obligations in the above diagram must be broken and re-established as illustrated in the following diagram.

After a Bona Fide “Successor Fund Transfer”



If the following principle can be applied to the “*Transferor Fund*”, then it must also be able to be applied to the “*Transferee Fund*”.

“The principle can be concisely stated by saying that in order to be valid, a trust must be one which the Court can control and execute”

IRC v Broadway Cottage’s Trust [1955] Ch. 20 at 30, per Jenkins L.J.

A number of steps must be undertaken to allow the breaking and re-establishment of these rights and legal obligations.

Steps for the Transferor Fund

If the Trust Deed that establishes a trust does not reserve a **Power of Revocation {Power of Termination}** then the trust is irrevocable {Refer to *Paul v Paul* (1882) 20 CH D 742; *Mallot v Wilson* {1903} 2 Ch 494}.

In *Bose v Bose* [2013] NSWSC 327 Einstein J quoted from Barrett J's judgement in *Re Gaydon* [2001] NSWSC 473 at [29] as follows:

"...the Court cannot dissolve a trust in the same way that it would dissolve, for example, a partnership. It is the duty of the Court to uphold and protect trusts, not to destroy them, although where the terms of the trust envisage, in certain circumstances, realisation of property, winding up of the trust's affairs and final payments to beneficiaries, the Court will, naturally enough, give effect to those 'winding-up' provisions."

Therefore the first step for the trustee of the Transferor Fund is to inspect the original Trust Deed to ensure that a **Power of Termination** was reserved.

Generally a **Power of Termination** will provide for the remaining assets of the scheme to be distributed as a cash benefit to the members and beneficiaries of the scheme if the **Power of Termination** is exercised according to its terms {Note: If a **Power of Revocation** is reserved and exercised then the residual assets of the Trust Estate return to the Settlor}.

If the **Power of Termination** is exercised according to its terms then the legal obligations annexed to the trust property are terminated and the scheme comes to an end by winding up the Trust Estate (Fund).

If it is proposed to transfer the Trust Estate to another scheme and then terminating the original legal obligations, then the **Power of Termination** will need to be amended to allow for an alternative method of winding up the original scheme.

However there may be fetters imposed on the **Power of Amendment** that may prohibit such an amendment, such as allowing the transfer of trust property to third parties.

If this is the case then a Court Order or an Act of Parliament will be required to amend the **Power of Termination**.

If the trustee were to transfer trust property in breach of trust, then the trustee would become liable to replace the trust property out of the trustees own pocket unless excused by the Court.

Once the **Power of Termination** has been lawfully amended to allow a "**successor fund transfer**" as an alternative means of winding up the original scheme then the **Power of Termination** can be exercised according to its terms.

Steps for the Transferee Fund

If there is a transfer of members from one accumulation fund to another accumulation fund there may be no need for the trustee of the transferee fund to amend the provisions of that scheme (ie the "**governing rules**" of that scheme).

In an accumulation fund {**Defined Contribution** fund} each member has an individual investment account with a current account balance.

Transferring such an individual account is generally straight forward and would not require an amendment to the provisions of the provisions of the Trust Deed of the transferee fund.

However, some amendments may be required if life insurance provisions are different, as an example.

If the members to be transferred without their consent are members of a **Defined Benefit** Fund, the provisions of the transferee fund will generally need to be amended since benefits are paid from a common asset pool in accordance with the formulae contained in the “*governing rules*” of the transferor fund.

If the *governing rules* are not properly amended then the trustee of the transferee fund would commit a breach of trust for which the trustee would be personally liable for paying benefits not covered by the *governing rules* of that scheme.

The need to properly amend the *governing rules* of the transferor fund in the case of a transfer of Defined Benefit members was confirmed by Bathurst J in the New South Wales Court of Appeal in ***Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck*** [2016] NSWCA 218.

Peter Beck had been a member of the staff superannuation fund of the Colonial Mutual Life Assurance Society Limited and his membership had been transferred to the staff fund of the Commonwealth Bank after the Commonwealth Bank had acquired Colonial Mutual.

A valuable pension provision (Clause A11.3) had been deleted from the governing rules of the Colonial Mutual Fund before the “*successor fund transfer*” to the Commonwealth Bank fund.

The trial judge rules that the trustee of the Colonial Mutual Fund has been negligent in deleting the pension provision.

However no claim of negligence was made against the trustee of the Commonwealth Bank scheme for not properly checking the amendments made to the Colonial Mutual Fund before executing an amendment to the provisions of the Commonwealth Bank scheme to cover the new fund members from the Colonial Mutual Fund.

Once the amendments have been made the trustee of the Commonwealth Bank scheme had a duty to obey these amendments and would have committed a breach of trust by not doing so.

Bathurst CJ stated at [155]:

“The fact that the new fund did not confer equivalent benefits may give rise to a claim against the trustee but it does not deem the new fund to contain provisions which it does not in fact have.”

Bathurst CJ stated at [155]:

“It follows that there was no basis for imposing on the trustees of those funds an obligation in the terms of cl A11.3. Indeed, in providing such a benefit contrary to the terms of the trust administered by them, they would be acting in breach of those trusts.”

Since no allegation of negligence by the trustee of the Commonwealth Bank scheme had been made in the pleadings, the Court of Appeal ruled that the trustee of the Commonwealth Bank scheme had no obligation to pay the pension benefit. That is a purported “*successor fund transfer*” does not “*automatically*” provide equivalent rights and benefits when members are transferred from one scheme to another.

APRA has released a **Prudential Practice Guide – SPG 227 – Successor Fund Transfers and Wind-ups** (Nov 2016)

In the section ***Planning and carrying out an SFT*** APRA provides the following guidance:

33. Key matters to consider early in the planning process might include:

- a) whether the governing rules of either or both the transferring or receiving RSE require amendment to enable the SFT to occur;

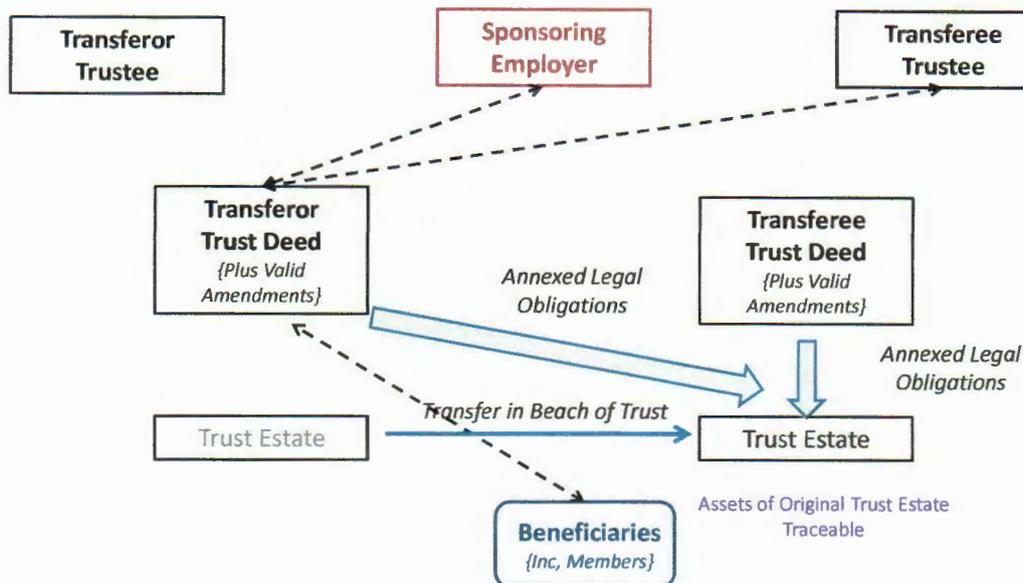
In the case of a Defined Benefit fund there is an additional step since the sponsoring employer has a contractual obligation to ensure the solvency of the fund.

The trustee of the transferee fund will need to enter into an agreement with the sponsoring employer to ensure that the sponsoring employer will ensure the solvency of the new sub-fund established by an amendment to the provisions of the transferee fund.

Failure to Complete Proper Steps

What are the implications if the proper steps are not taken to complete a bona fide “*successor fund transfer*”?

After a Bogus “Successor Fund Transfer”



Simply transferring assets from one account entity to another does not bring about a bona fide “successor fund transfer”.

Lord Millett in the House of Lords in **Foskett v McKeown** [2000] 3 All ER 97 held at [120]:

“A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but its traceable proceeds also, and his interest binds everyone who takes the property or its traceable proceeds also except a bona fide purchaser for value without notice.

If the legal obligations annexed to the trust property of the original trust have not been lawfully terminated by the exercise of the of the **Power of Termination** reserved in the founding Trust Deed of the original trust then these same legal obligations remain annexed to the trust property when this trust is transferred to a third party even if the third party happens to be a trustee of another scheme.

Applying these Principles

As mentioned above some members of the occupational pension scheme established in 1913 received a letter dated 1 October 2014 some nine months after PFS Nominees Pty Ltd gained control of the Trust Estate of the 1913 Fund in which the following representations was made:

Over the past few months you have received information regarding changes to your superannuation arrangements. To summarise, the AusBev Superannuation Fund has moved from being a corporate standalone fund to a sub-plan of the Plum Superannuation Fund. Plum Financial Services Limited (Plum) continues to administer the Plan but the Trustee has changed. These new arrangements took effect on 20 January 2014.

If this representation is not false and misleading, then the trustees of the transferor fund and the transferee fund would need to have completed the steps outlined above.

A “*successor fund transfer*” does not just happen because a representation of a transfer of fund membership is made in a letter sent to some fund members.

Transferrer Fund Question #1

Was a *Power of Termination* reserved in the founding Trust Deed executed on the 23 December 1913?

Yes – A *Power of Termination* was reserved in **Regulation 33** in the founding Trust Deed executed on 23 December 1913.

Transferrer Fund Question #2

On whom was the *Power of Termination* conferred?

The *Power of Termination* is a power that was jointly conferred of the Directors of Elder Smith & Co Limited and the Trustees of the fund.

The *Elder Smith & Co Limited Provident Funds Act 1963* (SA) amended the provisions of the scheme so that the Directors of any “*successor company*” would hold the *Power of Termination* jointly with the trustees of the fund. The first “*successor company*” was Elder Smith Goldsbrough Mort Limited.

Transferrer Fund Question #3

What conditions were attached to the exercise of the *Power of Termination*?

Regulation 33 provided:

“...if for any cause it shall at any time hereafter be unanimously decided in writing by the Board of Directors and the Trustees that the scheme embodied by this Deed is impracticable or that it is inexpedient to carry out the scheme...the Fund shall be realised and distributed ..”

The provisions of the **Power of Termination** were amended by an amending Deed executed on the 17 September 1973 to prioritise the manner in which the assets of the fund were to be distributed in the event that the **Power of Termination** was exercised.

No mention is made of transferring the Trust Estate to another fund as an alternative means of winding-up the scheme.

Note: In the event the event that the **Power of Termination** was exercise, the wind-up accounts prepared by the fund’s accountants should include a statement along the following lines:

The occupational pension scheme established by the Trust Deed executed on the 23 December 1913, currently know as _____, has been wound-up under the instructions of the Board of Directors of _____ and the Trustees as confirmed by the instrument in writing signed by all parties on _____.

Transferrer Fund Question #4

Could the amending power reserved in the original Trust Deed be exercised to amend the **Power of Termination** to allow the trustees to transfer the Trust Estate to another fund as an alternative method of winding up the scheme?

The answer to this question is provided by another Act of the Parliament of South Australia.

The **Elder’s Trustee and Executor Co Limited Provident Funds Act 1971(SA)** {Appendix A} was enacted to allow the “**successor fund transfer**” of two related occupational pension schemes.

The sponsoring employer of the scheme for male staff established in 1913 also established a scheme for the male staff of another company that had been set up by these directors – the Elder’s Trustee and Executor Co Ltd.

A Trust Deed establishing an occupational pensions scheme for the male staff of Elder’s Trustee and Executor Co Ltd was executed on 14 September 1921.

A separate scheme for female staff was established by a Trust Deed executed on 30 October 1947.

The provisions of both schemes were very similar including the *Power of Termination* and the *Power of Amendment*.

Reference is made to the fetter on the *Power of Amendment* {Regulation 50}:

AND WHEREAS Regulation 50 of the Regulations governing the trustee company's Fund empowers the making of certain alterations to the said Regulations as in the said Regulation 50 more particularly set forth but any alteration to the said Regulations which would authorize the application or use of any part of the Fund for the provision of benefits or pensions for any persons other than male persons on the staff of the trustee company who are contributors to the trustee company's Fund and the wives widows and dependants of such persons is prohibited:

The preamble to the enactment notes that there is no provision in the regulations governing the fund that would empower the trustees to transfer the moneys or other assets to the trustees of another fund.

AND WHEREAS there is no provision in the regulations governing the trustee company's Fund enabling the trustees thereof to pay or transfer moneys or other assets held by them as part of the Fund to the trustees of another fund and the Board of Directors of the trustee company and the trustees of the trustee company's Fund desire that the said regulations be amended so as to allow the trustees to transfer the moneys investments and other assets held by them as part of the trustee company's Fund to the trustees of the parent company's Fund to be held by those trustees as part of the last-mentioned Fund upon all the present members of the trustee company's Fund being admitted as members of the parent company's Fund as from the respective dates of their admission as members of the trustee company's Fund and upon the trustees of the parent company's Fund assuming responsibility for the payment out of the parent company's Fund of all pensions benefits and other moneys (if any) due and payable pursuant to the regulations of the trustee company's Fund to any former member of that Fund who has retired or to the widow or dependants or personal representatives of a former member who has died:

Therefore it was necessary for this enactment to amend the provisions of both pension schemes to allow the "*successor fund transfers*" to proceed without the trustees committing a breach of trust.

The *Elder's Trustee and Executor Co Limited Provident Funds Act 1971* (SA) amended the **Power of Termination – Regulation 54** {"*Winding Up of Fund*"} of the scheme for male staff {**Appendix B**} and made a similar amendment to the **Power of Termination** of the separate scheme for female staff.

Following the amendment to the **Power of Termination**, the Directors and trustees could then exercise the **Power of Termination** to transfer the assets of both funds without committing a breach of trust for which the trustees would be personally liable.

IMPORTANT: In 1971 the trustees could not seek a Court Order from the Supreme Court of South Australia to amend the **Power of Termination**. It was not until **Section 59C** was inserted into the *Trustee Act 1936* (SA) in 1980 which provided the Supreme Court of South Australia with much broader powers to amend the terms of a trust that an alternative method was available. From 21 August 1980 trustees could seek a Court Order to amend the provisions of trusts established in South Australia instead of requiring an Act of Parliament.

Example of Seeking a Court Order

An example of a trustee seeking a Court Order to empower the trustee to undertake as "*successor fund transfer*" is provided in *Westpac Securities Administration Ltd v Cooper* [2016] SASC 122.

The Honourable Justice Blue noted:

"The plaintiff seeks variation of the trust deed to confer on the trustee a power to transfer members' benefits in the trust to a successor fund without members' consent. Clause 11.3 of the trust deed gives to the trustee power to transfer a member to a successor fund without the person's consent if the member's employer changes the superannuation fund to which it makes contributions. Clause 11.2 is ambiguous whether it confers any additional power to transfer members' benefits without their consent."

Step 1 for the Transferor Trustee

Therefore before the trustees (or trustee) could transfer the assets of the Trust Estate of the 1913 pension scheme to another fund the trustees (or trustee) would need to obtain either:

- (I) An enactment of the Parliament of South Australia (*now no longer required*), or
- (II) A Court Order similar to that obtained by the trustee of the Westpac Mastertrust.

Once the **Power of Termination** {**Regulation 52**} had been amended to allow the transfer of the Trust Estate to another fund, then the next step could be completed.

Step 2 for the Transferor Trustee

The amended **Power of Termination** {**Regulation 52**} could then be exercised according to its terms. The first “**successor company**” was Elder Smith Goldsbrough Mort Ltd was acquired by **SABMiller plc** in 2011 {Renamed as Foster’s Group Limited} and so **SABMiller plc** was the sponsoring employer on the 20 January 2014 when the 1913 occupational pension scheme was purportedly wound-up.

Therefore one would expect the following note to the accounts to appear in the audited accounts of this fund for the period 1 July 2013 to 20 January 2014.

“Under the instructions of the Directors of SABMiller Plc and the trustees of the scheme the **Power of Termination** was exercised on 20 January 2014 with all the Directors of SABMiller plc and all of the trustees (or the trustee) signing an instrument in writing confirming the intention to wind-up this scheme.”

Step 1 for the Transferee Trustee

In a **Defined Benefit** fund the benefit is determined from a formula contained in the **governing rules** of the fund {assuming the governing rules have been lawfully amended}.

Therefore before the trustee of the transferee fund can lawfully pay a **Defined Benefit** to new members transferred from another fund, the terms of the Transferee Fund must be amended by the execution of an amending Deed which will incorporate the same provisions into the governing rules of the Transferee Fund for this particular class of beneficiaries.

Therefore an amending Deed for the **Plum Superannuation Fund** should have been executed on or about 20 January 2014 to incorporate the legal obligations contained in the 1813 Trust Deed and subsequent lawful amendments into provisions of the **Plum Superannuation Fund**.

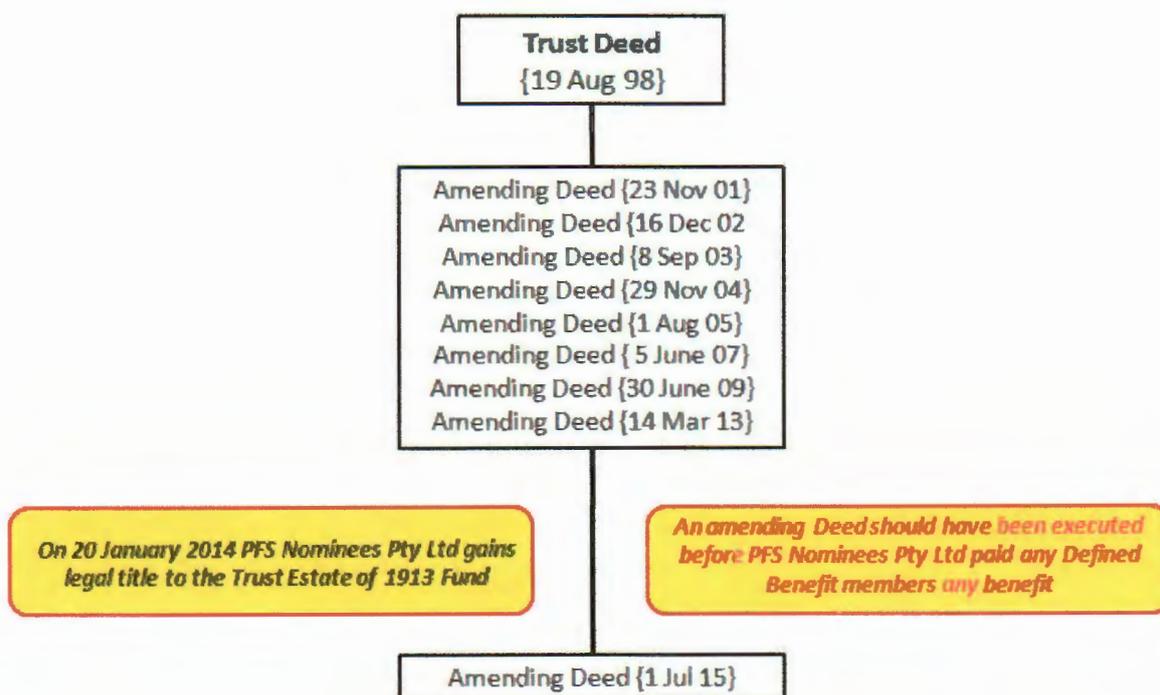
This is a requirement as confirmed by the New South Wales Court of Appeal in **Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck** [2016] NSWCA 218.

It is a fundamental principle of trust law that a trustee can only obey the terms of the trust.

Therefore the trustee of the **Plum Superannuation Fund** cannot lawfully pay benefits to the members of a Transferor Fund until such time as the provisions have of the **Plum Superannuation Fund** have been amended to incorporate “*equivalent benefits*” into the terms of that superannuation trust.

The following diagram lists the amending Deed executed for the **Plum Superannuation Fund** and none were executed on or around 20 January 2014.

Plum Superannuation Fund



Step 2 for the Transferee Trustee

Where members of a **Defined Benefit** Fund are transferred to another fund, the new trustee must execute a contract with the sponsoring employer to ensure that sponsoring employer will ensure the solvency of the fund and continue to make periodic employer contributions as advised by the new fund actuary.

A trustee who fails to take this step will have acted negligently and exposes fund members to a situation where there may be insufficient fund assets to cover benefit payments when they fall due.

ASIC's Powers to Obtain Evidence

The Parliament of Australia has provided **ASIC** with extensive evidence gathering powers pursuant to **Part 3** of the **ASIC Act 2001**.

Part 64 of the **ASIC Act 2001** provides that a person must not provide false or misleading information to **ASIC** when **ASIC** is seeking evidence or attending a hearing.

Part 67(1)(a) of the **ASIC Act 2001** provides:

(1) Where **ASIC** is investigating, or is about to investigate, a matter, a person must not:

(a) in any case—engage in conduct that results in the concealment, destruction, mutilation or alteration of a book relating to that matter;

Penalty: 200 penalty units or imprisonment for 5 years, or both.

The following is an extract from the opening statement of **ASIC** Chairman, Greg Medcraft, at a Senate Estimates hearing on 25 February 2015.

ASIC's response to recent NAB Wealth media coverage

The mention of NAB Wealth takes me to my final topic – **ASIC's** response to recent NAB Wealth media coverage.

ASIC is already expanding its work in response to the weekend's media coverage.

We have started our information gathering from NAB Wealth using our formal legal powers. And the bank has been cooperative. I received a call from Andrew Thorburn last night assuring **ASIC** that we will get the cooperation we need from NAB.

ASIC has also initiated discussions with NAB Wealth about reviewing remediation provided to financial advice clients.

I do not propose to comment further as these processes are at an early stage, but I wish to reassure the Committee that we have acted as soon as possible to ensure we can consider all allegations and issues raised.

ASIC therefore has adequate powers to obtain evidence to confirm whether a legally valid “*successor fund transfer*” did in fact take place.

Powers of Trustees

Powers are conferred on trustee by:

- The trust instrument
- Statute
- The Court

A power can only be validly exercise by a trustee of the trustee has been lawfully appointed to the office of trustee.

A trustee who has not been lawfully appointed to the office of trustee is known as a ***trustee de son tort***.

A ***trustee de son tort*** is unable to validly exercise any powers, including a ***Power of Amendment*** or a ***Power of Termination***.

{Refer to ***Meier v Dorzan Pty Limited & Anor*** [2010] NSWSC 664 and ***Jasmine Trustees Limited and Ors v Wells and Hind & Anor*** [2007] EWHC 1585; [2007] All ER (D) 112 (Jan); [2008] Ch 194}

This means that the purported corporate trustee, CCSL Ltd, was unable to validly exercise the joint ***Power of Termination*** along with the Directors of the successor sponsoring employer.

“*Fraud on a Power*”

Also even if ASIC could table such a document before a Parliamentary Committee, such a purported instrument of termination would be impugned under the equitable doctrine of a “***Fraud on a Power***”.

Rich J in ***Metropolitan Gas Company v Federal Commissioner of Taxation*** [1932] HCA 58; (1932) 47 CLR 621stated:

“The Commissioner appears to have apprehended that under this clause the directors might, with the approval of the trustees, abrogate the substantive right of a contributor or a class of contributors. This view is founded upon an erroneous interpretation of the provision which, in point of law, confers no such power (*Hole v. Garnsey* (1930) A.C., at p. 500). It is not the purpose of the provision to enable the destruction of any substantive right to pensions, and an exercise such as is apprehended would be not unlike a fraud on a power (*Vatcher v. Paull* (1915) A.C. 372, at p. 378.)”

Superannuation Funds Must be Administered Lawfully

The High Court of Australian in *Finch v Telstra Super Pty Ltd* [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

“The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“the Supervision Act”) and regulations made under it, imposed quite rigorous regulatory standards.”

Summary

The legal obligations annexed to the trust fund by the 1913 Trust Deed and valid amending Deeds have not been terminated in accordance with the provisions of the **Power of Termination** reserved in the 1913 Trust Deed.

Even if an instrument of termination could be produced bearing the signatures of the Directors of the “**successor company**” and which was also executed by the Transferor Trustee, this document would not be legally valid since the Transferor Trustee, CCSL Ltd, was an out-of-jurisdiction corporate trustee who had not been lawfully appointed to the office of trustee.

That is CCSL Ltd was a *trustee de son tort*.

Furthermore the provisions of the **Plum Superannuation Fund** were not amended on or around 20 January 2014 to establish any new legal obligations for the members purportedly transferred.

The whole arrangement was a complete deception.

Therefore there has been a contravention of **Section 12DB** of the *ASIC Act 2001* as well as a contravention of **subsection 1041H(vi)** of the *Corporations Act 2001*.

The legal obligations annexed to the trust fund by the 1913 Trust Deed and valid amending Deeds continue to exist and there has simply been a replacement of the purported trustee.

There has been no legally valid “**successor fund transfer**”.

Conclusion

If the **Office of the Whistleblower** has any concerns as to the validity of the evidence referenced by this Whistleblower Disclosure, can the Head of the **Office of the Whistleblower**, Warren Day, please advise the Committee Secretaries of the following Parliamentary Committees:

- Parliamentary Joint Committee on Corporations and Financial Services;
- Senate Economics Reference Committee; and
- House of Representatives Standing Committee on

{Refer to the attached pro forma Committee advice letter}.

Otherwise if any of these committees ask **ASIC** Officers why hundreds of widows are being denied their survivorship pensions by the **National Australia Bank**, these **ASIC** Officers cannot testify that there has been a “**successor fund transfer**” that has abrogated the rights of the widows.

There are hundreds of widows who should now be receiving a survivorship pension and they are entitled to compensation for not receiving these pensions in a compulsory superannuation system.

Schedule of Evidence

Selected Evidence provided to ASIC and Parliamentary Committee Secretaries on 6 November 2016

- Deed of Variation dated 18 January 1955 **[Criminally concealed from APRA]**
- Deed of Variation dated 20 November 1974 which adds **Regulation 30A. [Criminally concealed from APRA]**
- Extract from Minutes of Select Committee of the Legislative Council of South Australia dated 3 September 1963.
- Letter from **ASIC** dated 5 August 2016 {ASIC Ref: 26191/16} confirming that **ASIC** does not have possession of any Deed of Variation that purports to repeal or deleted **Regulation 30A**.

Appendix A



ANNO DUODECIMO

ELIZABETHAE II REGINAE

A.D. 1963

No. 58 of 1963

An Act to amend the Regulations governing the Provident Fund and the Conditions and Rules governing the Women's Provident Fund of Elder Smith & Co. Limited and to extend the powers of the Trustees thereof respectively and for other purposes.

[Assented to 5th December, 1963.]

http://www.austlii.edu.au/au/legis/sa/num_act/esclpfa58o1963424/



ANNO VICESIMO

ELIZABETHAE II REGINAE

A.D. 1971

No. 28 of 1971

An Act to amend the Regulations governing Elder's Trustee Provident Fund originally established by Deed dated the fourteenth day of September 1921, to amend the Deed dated the thirtieth day of October 1947 setting out the provisions governing Elder's Trustee Women's Provident Fund both of which Deeds are more specifically referred to in the preamble hereto, to extend the powers of the Trustees of each of those Funds and for other purposes.

[Assented to 22nd April, 1971.]

http://www.austlii.edu.au/au/legis/sa/num_act/etaeclpfa28o1971662/

Appendix B

Amendment to the provisions of the scheme to provide pensions and benefits for male staff of Elder's Trustee and Executors Co Ltd:

3. The following regulation is enacted and inserted in the regulations after Regulation 54 under the heading "WINDING UP OF FUND":

Enactment of regulation 54a of the regulations—

54A. Notwithstanding anything elsewhere in these Regulations contained the Trustees may with the approval of the Board arrange with the Board of Directors of Elder Smith Goldsbrough Mort Limited (hereinafter referred to as "the parent company") and the trustees of The Provident Fund (hereinafter called "the parent company's Fund") established *inter alia* for providing pensions and other benefits for male persons on the staff of the parent company or of an associated company (as defined in the regulations governing the parent company's Fund) upon their retirement or for their dependants in the event of their death that all male persons who shall have been admitted as contributors to the Fund and who are still in the service of the company shall be admitted as members of or contributors to the parent company's Fund as from the respective dates of their admission as contributors to the Fund that the trustees of the parent company's Fund shall assume responsibility for the payment out of the parent company's Fund of all pensions, benefits and other moneys (if any) then due or payable pursuant to these regulations to any officer who shall have retired or to the widow or dependants or personal representatives of any deceased officer which pensions, benefits or moneys shall not have been fully paid or satisfied and that all moneys, investments and other assets held by the Trustees or to which they are entitled shall be paid or transferred to the trustees of the parent company's Fund to be held by them as part of that Fund. If such an arrangement shall be made then upon all male persons still in the service of the company who shall have been admitted as contributors to the Fund being admitted as contributors to the parent company's Fund as from their respective dates of admission as contributors to the Fund and upon the trustees of the parent company's Fund assuming responsibility to the satisfaction of the Trustees for payment out of that Fund of all pensions benefits and other moneys (if any) then due or payable as hereinbefore mentioned and upon all moneys, investments and other assets held by the Trustees or to which they are entitled being paid or transferred to the trustees of the parent company's Fund to be held by them as part of that Fund the Fund shall be wound up.

Provision for transfer of assets of the Fund to another fund.

Appendix C

AUSBEV SUPERANNUATION FUND

NOTES TO AND FORMING PART OF THE FINANCIAL STATEMENTS FOR THE PERIOD ENDED 20 JANUARY 2014

Note 1. Reporting Entity

AusBev Superannuation Fund (the "Fund"), ABN 60 171 679 448, is a superannuation fund domiciled in Australia.

The Fund is a defined benefit fund and was established under a Trust Deed dated 23 December 1913, as amended, to provide superannuation benefits for employees and its related companies. However, the vast majority of member benefits are accumulation accounts.

The Trustee of the Fund is CCSL Limited (the "Trustee"), ABN 51 104 967 964. One of the objectives of the Trustee is to ensure that the benefit entitlements of members and other beneficiaries are appropriately funded by the time they become payable.

As at 20 January 2014, the Fund was wound up under the instructions of the Trustee. As a result, existing members' benefits, assets and liabilities were transferred to the successor fund, Plum Superannuation Fund. The successor fund has entered in to a deed of indemnity to pay the outstanding liabilities of the Fund.

Due to the wind up, the financial statements of the Fund are for the period 1 July 2013 to 20 January 2014. The comparative amounts disclosed in the financial statements and related notes are for the full year, 1 July 2012 to 30 June 2013.

As the Fund has been wound up, these will be the final financial statements of the Fund.

Appendix B

Current Parliamentary Inquiries into the Financial Services Sector

Joint Parliamentary Committee on Corporations and Financial Services

- Life Insurance Industry
- Whistleblower protections in the corporate, public and not-for-profit sectors

House of Representatives Standing Committee on Economics

- Review of the Big Four Banks

Senate Economics Reference Committee

- Consumer protection in the banking, insurance and finance sector
- Criminal, civil and administrative penalties for white collar crime

Pro Forma ASIC Response

Date:

economics.sen@aph.gov.au
economics.reps@aph.gov.au
corporations.joint@aph.gov.au

Dear Committee Secretaries

Re: Pensions for Widows

I can confirm that **ASIC** is in possession of copies of two duly stamped amending instruments that recite the founding Trust Deed dated 23 December 1913:

- (i) Amending Deed dated 18 January 1955
- (ii) Amending Deed dated 20 November 1974

The founding Trust Deed established an occupational pension scheme for the male staff of the company then known as Elder Smith & Co Ltd.

In 1963 Elder Smith & Co Limited was acquired by Elder Smith Goldsbrough Mort Ltd.

ASIC has been provided with evidence confirming that the **defined benefit** division was closed to new members on 30 November 1997.

The amending Deed dated 20 November 1974 adds **Regulation 29** to the provisions of the pension scheme.

Regulation 29 provides an “*automatic*” death benefit to the widows of qualifying male officers of the sponsoring employer and subsidiary companies. The death benefit takes the form of a survivorship pension.

I can confirm that **ASIC** is not in possession of any subsequent properly executed and duty stamped amending Deed that purports to repeal or delete **Regulation 29**.

ASIC is also aware that no evidence is available that would substantiate that a legally valid “*successor fund transfer*” ever took place on 20 January 2014 as represented in a letter dated 1 October 2014 that was sent to some fund members. In fact the available evidence confirms that no such transfer took place.

However the **Office of the Whistleblower** has formed a view that the widows should not be paid this survivorship pension for the following reason(s):

ASIC is aware that it is policy of the Coalition Government to provide at least 90% compensation to the members and beneficiaries of regulated superannuation fund who suffer a loss due to theft or fraudulent conduct by the trustee of their fund.

Compensation is paid from an industry funded scheme pursuant to the *Superannuation (Financial Assistance Funding) Levy Act 1993*.

However **Office of the Whistleblower** has formed a view that the widows should not be paid any compensation at all for the following reason(s):

Yours Faithfully

Warren Day

OFFICE OF THE WHISTLEBLOWER - ASIC



ASIC

OFFICE OF THE WHISTLEBLOWER

ASIC Ref:	Lodgement Date: 17 Jan 2017
Financial Services Sector:	Regulated Superannuation Fund
Case Description:	Maladministration of two occupational pension schemes established in 1913 and 1963
Disclosure Description:	NAB Wealth (MLC Ltd) has not been paying pensions to the widows of former employees of Elders IXL Ltd and subsidiary companies since 20 January 2014.
Whistleblower Disclosure Ref:	Disclosure #1 - G
Whistleblower id:	PSC-2016
Public Interest Matter:	Yes
Allegations against Major Bank:	Yes
ASIC Excuses Ref:	Excuse G – Falsely claim that the Superannuation Complaints Tribunal has Jurisdiction

Executive Summary

- Evidence has been obtained and provided to **ASIC** that confirms that several hundred widows are entitled to be paid a death benefit in the form of a survivorship pension by the **National Australia Bank**;
- Copies of two group death policy documents have been provided to **ASIC**;
- The second group death benefit policy document dated 20 November 1974 supersedes the first dated 18 January 1955;
- Supporting evidence has been source from the Parliament of South Australia;
- The **Superannuation Complaints Tribunal (SCT)** has limited jurisdiction and cannot deal with complaints alleging a breach of trust by the trustee of a regulated superannuation fund;
- If the **Office of the Whistleblower** is of the view that the **SCT** does have jurisdiction to deal with the *Plight of the Widows* then the whistleblower disclosures and related evidence can be referred to the **SCT** pursuant **Clause 7** of the **Memorandum of Understanding** that exists between **ASIC** and the **SCT**.

Note: This document may be lodged in evidence in a future royal commission into the banking and financial sector

Background

This disclosure relates to the maladministration of a defined benefit occupational pension scheme established by a Trust Deed executed on the 23 December 1913 in the State of South Australia, whose existence and authorised purpose has been confirmed by the *Elder Smith & Co Limited Provident Funds Act 1963* (SA) to be the provisions of “*pensions and benefits*” to certain “*male officers and their wives, widows and dependents*”.

This defined benefit scheme was closed to new members on 30 November 1997. Evidence has been provided to **ASIC** to confirm the closure date.

A separate contributory occupations pension scheme for female staff was established in 1963 as confirmed by the *Elder's Trustee & Executor Co Ltd Provident Funds Act 1971* (SA).

The original sponsoring Employer was the company then called Elder Smith & Co Ltd {ACN 007 869 294}. Elder Smith & Co Limited was acquired by Elder Smith Goldsbrough Mort Ltd {ACN 007 620 886} in 1963.

National Australia Bank Involvement

On the 20 January 2014 a subsidiary company of MLC Ltd (**NAB Wealth**), PFS Nominees Pty Ltd, gained control of the Trust Estate (the Fund) of the occupational pension scheme established in 1913 as confirmed by the audited accounts for the 1 July 2013 to 20 January 2014.

The default position, until there is evidence to prove otherwise, is that PFS Nominees Pty Ltd merely replaced the previous trustee, CCSL Ltd, as the incumbent trustee of the occupational pension scheme established in 1913 and PFS Nominees Pty Ltd must obey the provisions of the original Trust Deed executed on the 23 December 1913 in the State of South Australia plus subsequent lawful amending Deeds.

Some members received a letter dated 1 October 2014 some nine months after PFS Nominees Pty Ltd gained control of the Trust Estate of the 1913 Fund in which the following representations was made:

Over the past few months you have received information regarding changes to your superannuation arrangements. To summarise, the AusBev Superannuation Fund has moved from being a corporate standalone fund to a sub-plan of the Plum Superannuation Fund. Plum Financial Services Limited (Plum) continues to administer the Plan but the Trustee has changed. These new arrangements took effect on 20 January 2014

This letter confirmed that there had been a change in trustee, however some two years later no evidence has been forthcoming that would confirm that legally valid “*successor fund transfer*” ever took place on 20 January 2014.

{Note: The implications of this representation if no legally valid “*successor fund transfer*” took place will be covered in a future Whistleblower Disclosure}

The Plight of the Widows

Reference is made to the **Whistleblower Matrix Disclosure #1- B** {2 January 2017} and evidence provided to the **Office of the Whistleblower** of the failure of a subsidiary company of the **National Australia Bank (NAB)** to pay survivorship pensions to widows {Refer to **Schedule of Evidence** below}.

Reference is made to the **Whistleblower Matrix Disclosure #1#7 - C** {6 January 2017} where the legal principles associated with the **Plight of the Widows** was provided to **ASIC**.

Reference is made to the **Whistleblower Matrix Disclosure #1#8 - G** {11 January 2017} where the jurisdiction of the **Superannuation Complaints Tribunal (SCT)** was misrepresented to the Senate Economics Reference Committee during the Senate inquiry into the performance of **ASIC**.

Reference is made to **Clause 7** of the **Memorandum of Understanding** between the **Superannuation Complaints Tribunal (SCT)** and **ASIC** which provides:

7. Referrals to the SCT

- 7.1 Complaints within the jurisdiction of the SCT may be referred by ASIC to the SCT (by the Financial Complaints Referral Centre (FCRC) or otherwise) in accordance with operating procedures agreed between the parties.

If the **Office of the Whistleblower** is of the view that the plight of the widows is a “*personal*” complaint that falls within the jurisdiction of the **SCT** {**Appendix C**}, then this ‘*complaint*’ can be referred to the **SCT** by the **Financial Complaints Referral Centre (FCRC)**.

The complaint types listed in **Appendix C** relate to problems facing individual fund members or a small number of beneficiaries, such as the dependents of a deceased fund member.

None of the complaint types listed in **Appendix C** alleges illegal conduct by trustees (ie the contravention of “any law or governing rule”) which involves all (or a large number) of the members or beneficiaries of the fund as victims of the illegal conduct.

ASIC's Financial Complaints Referral Centre can be contacted on 1800 780 885.

No reference was made of the **Memorandum of Understanding, Financial Complaints Referral Centre** or of **Clause 7** in **ASIC's** written testimony to the Senate Economics Reference Committee or why **ASIC** had not made any such referral where the victims of the alleged wrongdoing are widows with limited financial means.

Superannuation Funds Must be Administered Lawfully

The High Court of Australian in ***Finch v Telstra Super Pty Ltd*** [2010] HCA 36; (2010) 242 CLR 254 ruled at [35]:

“The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“the Supervision Act”) and regulations made under it, imposed quite rigorous regulatory standards.”

The High Court {*Finch*} and the Victorian Court of Appeal {*Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238; (2012) 36 VR 618} have also confirmed that when disputes arise between the trustees of regulated superannuation funds and the trustees of those funds, the onus of proof lies with the trustee and not the members and beneficiaries.

The Trustee has a duty to apply the trust assets in accordance with the Trust Deed. In performing that duty, it is required to inform itself properly of the relevant facts {*Finch at [30]*}.

The High Court {*Finch*} also noted at [33]:

“For some people, superannuation is their greatest asset apart from their houses; for others it is even more valuable.”

Conclusion

If the **Office of the Whistleblower** believes that ***Whistleblower Disclosure #1- B*** {2 January 2017} is able to be dealt with by the **Superannuation Complaints Tribunal (SCT)** , can the Head of the **Office of the**

Whistleblower, Warren Day, please advise the Committee Secretaries of the following Parliamentary Committees:

- Parliamentary Joint Committee on Corporations and Financial Services;
- Senate Economics Reference Committee; and
- House of Representatives Standing Committee on

{Refer to the attached pro forma Committee advice letter}.

There are hundreds of widows who should now be receiving a survivorship pension and they are entitled to compensation for not receiving these pensions in a compulsory superannuation system.

Schedule of Evidence

Selected Evidence provided to ASIC and Parliamentary Committee Secretaries on 6 November 2016

- Deed of Variation dated 18 January 1955 **[Criminally concealed from APRA]**
- Deed of Variation dated 20 November 1974 which adds **Regulation 30A. [Criminally concealed from APRA]**
- Extract from Minutes of Select Committee of the Legislative Council of South Australia dated 3 September 1963.
- Letter from **ASIC** dated 5 August 2016 {ASIC Ref: 26191/16} confirming that **ASIC** does not have possession of any Deed of Variation that purports to repeal or deleted **Regulation 30A**.

Extract from Minutes of Evidence for the Select Committee of the Legislative Council of South Australia – 3 September 1963

The Hon. G. O'H Giles M.L.C. stated the following in the Minutes of Evidence for the Select Committee on the *Elder Smith & Co Ltd Provident Funds Bill 1963* on 3 September 1963 following a question from the Attorney-General, the Hon Colin Rowe M.L.C.:

“ The present fund – that is, Elder’s Provident Fund – was established 50 years ago. It is one of the oldest Provident Funds in Australia. It is a pension fund, and not a Provident Fund in the lump sum sense. It provides pensions after 15 years of service. It provides death benefits, equal to three years’ salary, immediately after entry to the fund. The fund is designed to provide an attraction to people to join the company’s service, an encouragement to them to remain, and security for those officers who belong to the company and the fund”.

Mr Giles continues:

“ At present, there are 1,099 members of the fund and 106 pensioners, including two widowed pensioners. The only reason why there are only two widowed pensioners is that until comparatively recently the fund only provided a pension during the life of the officer after retirement. However, that was altered some little time ago to enable them to opt to have a survivorship pension in favour of their wife if they so wished. The fund has assets of £2,838,000”.

Appendix B

Current Parliamentary Inquiries into the Financial Services Sector

Joint Parliamentary Committee on Corporations and Financial Services

- Life Insurance Industry
- Whistleblower protections in the corporate, public and not-for-profit sectors

House of Representatives Standing Committee on Economics

- Review of the Big Four Banks

Senate Economics Reference Committee

- Consumer protection in the banking, insurance and finance sector
- Criminal, civil and administrative penalties for white collar crime

Appendix C

The Types of Complaint that come within the Jurisdiction of the SCT

{SCT Annual Report 2015-2016}

EXAMPLES OF COMPLAINTS:

- » A belief that a death benefit was paid or may be paid to the wrong person or people
- » An unreasonable delay in a payment
- » A miscalculation of a benefit, payment, or commutation
- » A refusal to approve a claim for a disability benefit
- » Misrepresentation about the terms and conditions of a life or annuity policy
- » Errors in annual statements
- » Error in information provided by a superannuation provider to the ATO for the purposes of the superannuation surcharge, member contributions statements or increased contributions tax on high income earners
- » A refusal by an insurer to approve a claim for a disability benefit where the insurance premium is paid from the RSA.
- » A superannuation provider's conduct in administering the splitting of a superannuation payment between spouses in accordance with a binding agreement or Family Court Order under the family law legislation.

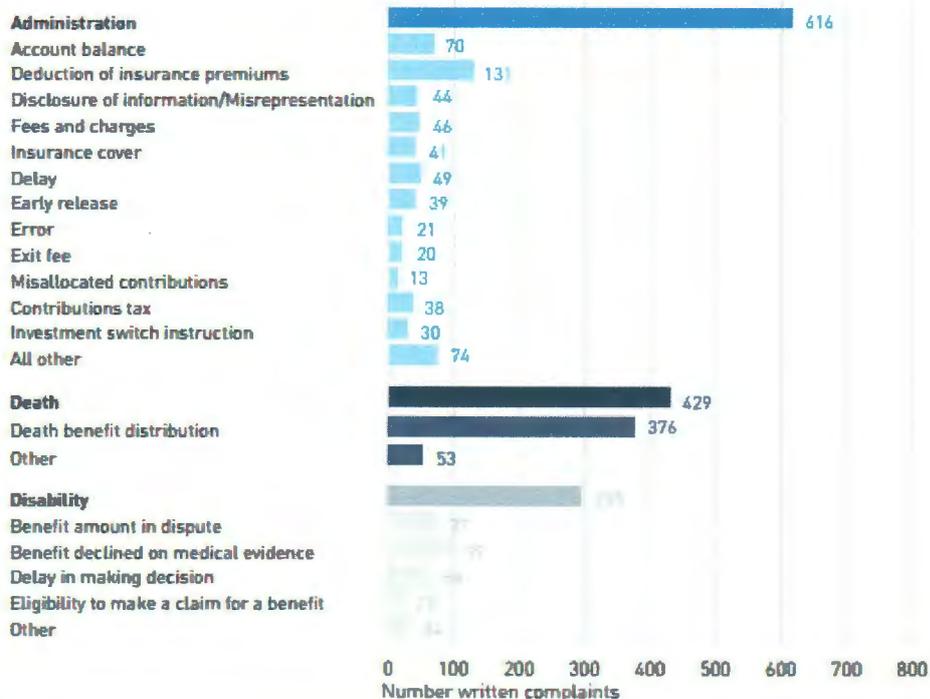
Note: "*Miscalculation of a benefit*" relates to a mistake in calculating the benefit of one particular member and not a failure to pay all fund members their correct entitlements (ie a Breach of Trust) - for example, the employer may have provided incorrect salary data to the trustee for the purpose of calculating the benefit of that fund member.

Nature of complaints

Of the 1,340 complaints received within jurisdiction, most continued to fall into three major categories: administration, death and disability.

The following chart shows the nature of written complaints for the period within jurisdiction (1,340).

Figure 3.3
Nature of complaints



1,340
Total written complaints
2015-16.

Total complaints within jurisdiction 2015-16.

616
Administration

429
Death

295
Disability

Note: There are no alleged contraventions of the law in this list

Appendix D

Pro Forma ASIC Response

Date:

economics.sen@aph.gov.au
economics.reps@aph.gov.au
corporations.joint@aph.gov.au

Dear Committee Secretaries

Re: Pensions for Widows

I can confirm that **ASIC** is in possession of copies of two duly stamped amending instruments that recite the founding Trust Deed dated 23 December 1913:

- (i) Amending Deed dated 18 January 1955
- (ii) Amending Deed dated 20 November 1974

The founding Trust Deed established an occupational pension scheme for the male staff of the company then known as Elder Smith & Co Ltd.

In 1963 Elder Smith & Co Limited was acquired by Elder Smith Goldsbrough Mort Ltd.

ASIC has been provided with evidence confirming that the *defined benefit* division was closed to new members on 30 November 1997.

The amending Deed dated 20 November 1974 adds **Regulation 29** to the provisions of the pension scheme.

Regulation 29 provides an “*automatic*” death benefit to the widows of qualifying male officers of the sponsoring employer and subsidiary companies. The death benefit takes the form of a survivorship pension.

I can confirm that **ASIC** is not in possession of any subsequent properly executed and duly stamped amending Deed that purports to repeal or delete **Regulation 29**.

The **Superannuation Complaints Tribunal (SCT)** does have jurisdiction to deal with some types of complaints concerning regulated superannuation funds and some “*decisions*” made by trustees.

Where such complaints have been lodged with **ASIC**, **ASIC** is able to refer such complaints to the **SCT** in accordance the **Memorandum of Understanding** between the **SCT** and **ASIC**.

The **Office of the Whistleblower** has formed a view that **Whistleblower Disclosure #1 –B** {2 January 2017} should or should not be referred to the **SCT** for the following reason(s):

Yours Faithfully

Warren Day

OFFICE OF THE WHISTLEBLOWER - ASIC