Trustee Duties and Legal Responsibilities Update – Roundtable Discussion 1

Michael Chaaya
Partner, Corrs Chambers Westgarth
Duties of trustees and directors

• Distinction between trustee and director
• Duties arise from many sources and considerable overlap exists:
  – Legislation
  – Regulatory
  – General Law (common law & equity)
Duties of trustees and directors

Legislation – Superannuation Industry (Superannuation) Act 1993 ("SIS Act")

• The covenants in s52 of the SIS Act by each trustee:
  – to act honestly in all matters concerning the fund (s52(2)(a));
  – to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide (s52(2)(b));
  – to ensure that the trustee’s duties and powers are performed and exercised in the best interests of the beneficiaries (s52(2)(c));
  – to keep the assets of the fund separate from its own assets (s52(2)(d));
  – not do anything that would hinder the trustee in properly performing or exercising the trustee’s functions and powers (s52(2)(e));
  – to formulate and give effect to an investment strategy (s52(2)(f));
  – to formulate and give effect to a strategy for the management of reserves (s52(2)(g)); and
  – to allow a beneficiary access to any prescribed information or document (s52)(h)).
Duties of trustees and directors

• Note s52(8) – a covenant by a corporate trustee referred to in s52(2) also operates as a covenant by each of the directors to exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the s52(2) covenants.
Duties of trustees and directors

Legislation – Corporations Act 2001

• Duties under Chapter 2D of the Corporations Act require directors:
  – to act with skill, care and diligence (s180(1));
  – to act in good faith in the best interests of the company (s181(1)(a));
  – to act for a proper purpose (s181(1)(b));
  – to act honestly (s184(1)(b));
Duties of trustees and directors

– not to improperly use the position of director:
  • to gain an advantage for themselves or someone else; or
  • cause detriment to the company (s182(1));
– not to improperly use information:
  • to gain an advantage for themselves or someone else; or
  • cause detriment to the company (s183(1))
– to avoid conflicts of interest, including:
  • making necessary disclosures (s191(1) and s192(1));
  • abstaining from voting on a matter where necessary (ss194 and 195); and
– to prevent insolvent trading (s588G).
Duties of trustees and directors

Regulatory

• RSE licence – SIS Act imposes obligations on RSE licensees:
  – must have a risk management strategy (“RMS”) and must comply with that RMS (s 29E(1)(c));
  – must comply with the risk management plan (“RMP”) (s 29E(1)(e)); and
  – breach reporting to APRA.

• AFS licence (“AFSL”) – Corporations Act imposes obligations on AFSL holders:
  – obligation to have in place suitable arrangements for the management of conflicts (s 912(1)(aa)); and
  – breach reporting to ASIC.
Duties of trustees and directors

Common Law

- The common law duties of a director include:
  - duty to exercise reasonable care and skill;
  - duty to act in good faith, in the best interests of the company, and for a proper purpose;
  - duty of care (tort duty); and
  - duty not to make an unconsented gain from the role.
Duties of trustees and directors

- The equitable duties of a trustee are varied and include:
  - duty to become thoroughly conversant with the trust deed;
  - duty to adhere strictly to the terms of the trust deed;
  - duty to act with total impartiality in dealing with beneficiaries;
  - duty to ensure, to the best of the trustee’s ability, the economic well-being of the trust by securing possession of the trust property, preserving the assets of the trust fund and investing the trust assets appropriately;

- Trustee and beneficiary is a recognised class of fiduciary relationship

- Fiduciary relationships give rise to two proscriptive obligations:
  - a fiduciary may not have a conflicting personal interest or conflicting duty owed to a third party (the “no conflict rule”); and
  - a fiduciary may not profit from its fiduciary position without the beneficiary’s consent (the “no profit rule”).
Stronger Super: New Dawn for Trustee Governance

• 29 May 2009 - Government commissioned the Super System Review led by Cooper (Cooper Review)
• 30 June 2010 - Review’s final report handed to Government
• 16 December 2010 - Government’s response to Review (Stronger Super)
• Stronger Super covers:
  — MySuper
  — SuperStream
  — Governance
  — SMSFs
Stronger Super: New Dawn for Trustee Governance

• Recommendation 2.1
  – Amend SIS Act to create new office of trustee director and record all duties of that office in one place

• Government supports this in principle and will consider whether this will achieve a more accountable and efficient trustee governance regime

• Refer to handout and abstract for AIST Research Hub paper
Stronger Super: New Dawn for Trustee Governance

- Will the duties necessarily be in one place? What about regulators, the general law duties and matters under state/territory trustee legislation?
- Query whether prescriptive duties in regulatory regime will sit comfortably with general law prospective duties?
- Is the position of super so unique?
- Alphabet soup of recommendations. Will they:
  - promote better decisions?
  - encourage greater accountability?
  - reduce unintended operational and investment risks?
- How do we ensure better regulation rather than just more regulation?
- Do we risk hammering out new regulatory regime which neglects supervision failures?
Reform Newsflash


• Note questions raised:
  – Should a trustee have any obligation to consider whether a spouse contribution request is being made as a result of coercion?
  – Should a “claw-back” provision be introduced so victims of domestic violence can recover benefits they’ve been coerced to transfer?
  – Should SIS be amended to provide a specific “compassionate ground” to enable the early release of benefits to a victim of domestic violence?
Trustee Duties and Legal Responsibilities Update – Roundtable Discussion 1

Michael Chaaya
Partner
Corrs Chambers Westgarth