

## □ SUPERANNUATION

## Deregistering a superannuation trustee company

Superannuation licensing, coupled with the introduction of superannuation choice, has seen a dramatic decline in the number of superannuation funds. Most notable has been the decline of corporate funds, many of which have transferred members and assets of the corporate fund to a successor fund.

Now that the frantic successor fund transfer activity has ceased (at least temporarily) there are hundreds of trustee companies which are no longer "carrying on a business". So can such trustee companies be deregistered?

## Corporations Act

Section 610AA (2) of the *Corporations Act 2001* (Cth) sets out the circumstances in which deregistration of a company can be made (the circumstances include, for example, the company is not carrying on a business, the company has no outstanding liabilities and the company is not a party to legal proceedings).

If the trustee company does not have reason to believe that it will become a party to legal proceedings, the fact that a person may subsequently have a claim against the trustee company does not of itself disqualify it from being deregistered.

In this regard, section 601AG of the *Corporations Act* allows a person with an insurable claim to recover directly from the insurer of a deregistered company. Section 601AG provides:

*A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:*

- a. *the company had a liability to the person; and*
- b. *the insurance contract covered that liability immediately before deregistration.*

Therefore, from a *Corporations Act* perspective, there is no impediment to a trustee company being deregistered (subject to the pre-requisites of deregistration under section 601AA being met). However, are there any other impediments?

## Successor fund transfer deed

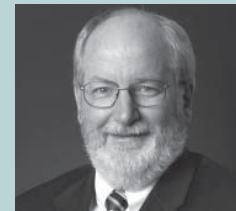
Invariably under a successor fund transfer deed (SFT Deed), the trustee company would have given warranties to the new trustee about maintaining and effecting a professional indemnity insurance policy (usually for a period between 3 years and 7 years – known as the indemnity period). Coupled with this obligation, the trustee company typically gives an undertaking that it will "diligently pursue all of its rights under the policy before claiming against the new trustee" (under the indemnity provided by the new trustee to the trustee company in the SFT Deed).

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## introduction



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**Welcome** to the latest issue of our *Financial Services Law Bulletin*.

In March we reported on the progress of the exposure draft for the Anti-Money Laundering and Counter-Terrorism Financing Bill, which was released on 16 December 2005. The Bill sets out the federal government's response to the Financial Action Task Force's 40 recommendations on anti-money laundering and nine special counter-terrorism financing recommendations. A revised exposure draft of the Bill was released by Senator Chris Ellison on 28 June 2006. It consists of a response to extensive consultation and industry concern demonstrated through more than 120 public submissions. The revised Bill has been described by the Attorney General's Department as "a flexible risk-based framework allowing businesses to identify, manage and mitigate money laundering and terrorism financing risks".

The revised Bill applies to the financial services providers listed in the revised Bill. This does not include general insurance. It is unclear whether this is because later legislation will capture general insurance or it will be exempt from the regime. In any event, the revised Bill remains extremely relevant to life insurers, superannuation entities and banking institutions.

A summary of the changes can be found at [www.ag.gov.au/aml](http://www.ag.gov.au/aml)

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The trustee company's obligations under the SFT Deed (as noted above) are clearly premised on the trustee's continued existence. This being the case, how can the trustee company be deregistered while it has a continuing obligation to maintain the policy? A possible solution is discussed below.

## Possible solution

The deregistration of the trustee company could occur if:

a. the owner of the policy is a separate company to the trustee (for example,

- a related body corporate ("third party company");
- b. the trustee company (and its directors) are listed as "insureds" under the policy;
  - c. the policy is effected and maintained by the third party company for the indemnity period; and
  - d. the trustee company, the new trustee and the third party company enter into a deed (Tripartite Deed) under which the new trustee permits the trustee company to be deregistered, subject to the third party company

maintaining the policy for the indemnity period. The Tripartite Deed should also be expressed to prevail over the SFT Deed to the event of any inconsistency.

Of course, the step in (d) above would not be required if the SFT Deed contemplated the trustee company being deregistered during the indemnity period (but typically they do not).

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## □ CORPORATIONS LAW

# Sons of Gwalia heads for High Court

**The *Sons of Gwalia v Margaretic* litigation, a case which has attracted intense market interest, will have its full High Court appeal heard in Adelaide on 7–8 August 2006.**

Briefly, an investor, Mr Margaretic, acquired shares in Sons of Gwalia on market in August 2004, just a few weeks prior to Sons of Gwalia entering administration. The investor sued the administrator to recover his investment loss on a theory that Sons of Gwalia failed to inform the market of its true financial position.

The investor successfully argued – and his argument has withstood appeal to the Full Federal Court – that he was suing as a complainant under section 52 of the Trade Practices Act and not in his capacity as a member of Sons of Gwalia. Long settled law and section 563A of the Corporations Act hold that claims brought by a member of a company in their capacity as a member, against a company in administration, are postponed behind all other claims and debts.

These rules of law underpin conventional market wisdom and practice that

shareholders rank behind creditors in a winding up. The case threatens to overturn this long held view in relation to shareholders who acquire their shares by purchase and can prove the elements of section 52 of the Trade Practices Act.

Both the trial and appeal decisions contain highly technical analysis of the distinction between subscribers and purchasers of shares and what features go to characterise an action brought in one's capacity as a member. The historical rationale for the rule in section 563A is to be found in the doctrine of maintenance of capital and ancient C19 cases such as *Houldsworth* and *Trevor v Whitworth*.

In an almost sophistic distinction all four judges to date have been able to satisfy themselves that, even though the investor was a shareholder and the relational basis of his action was that of a shareholder, because he was able successfully to claim he was misled as a purchaser, he did not bring his action in a shareholder (i.e. member) capacity. That there was no dealing between Sons of Gwalia and the investor in relation to the acquisition of the shares, as there is in the case of a subscriber, was also significant.

Commentators have expressed concerns over the outcome of the case to date. One is a fear that company administrators will

have to admit shareholder claims, thus reducing returns to other unsecured creditors. A second concern is the chilling effect the decision will have on the corporate bond market and the willingness of bondholders to lend unsecured or "secured" only by negative pledge. Bond finance, typically from US investors, is particularly significant in Australia's mining industry.

While these concerns are premature they are real. Shareholders must still be able to prove reliance: that there is a causal link between the alleged misconduct and the loss. The case highlights the pervasive tentacles of section 52, again in the area of corporations law.

It is rare that the High Court accepts an appeal on a point of corporations law. We will report back on the outcome of the High Court appeal.

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## □ NEWS IN BRIEF

## Superannuation

- **Unlicensed super trustees to continue wind downs:** All super trustees that have not applied for registrable super entity (RSE) licences need to finalise their wind down after 30 June provided they enter into undertakings with APRA. APRA has accepted undertakings from 155 trustees. Acting trustees will not be appointed pending the wind down. APRA has issued 307 RSE licences.
- **Lawlex Newsfeed 12/7 RSE licence process complete:** APRA has announced that it has completed the transition to the new trustee licensing system for Australia's superannuation industry. APRA noted that it has approved 307 trustee companies for the Registrable Superannuation Entity (RSE) licence. APRA stated that the "superannuation industry is now licensed and prudentially regulated in a similar way to banking and general and life insurance" (APRA media release, 4 July 2006).
- **Anti-money laundering:** On 13 July 2006, Senator Chris Ellison released a revised exposure draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill and draft Rules. Notably, the identification procedures will not apply to accepting superannuation contributions where a person has not reached his or her preservation age. Identification will be required when an interest in a superannuation fund is being cashed out, rolled over or transferred.
- **Successor fund transfers:** The ATO issued a Tax Ruling TR 2006/4 on 28 June 2006 in relation to whether a capital gains tax exemption (which requires that the beneficiaries and terms of both trusts be the same) applies when assets of one trust are transferred to another trust. It generally concludes that the exemption does not apply to successor fund transfers. (Note: a separate capital gains tax exemption applied between the 1 July 2004 and 30 June 2006 during the RSE licensing transition period.)
- **Compulsory cashing:** On 29 June 2006, APRA issued Superannuation Industry (Supervision) Modification Declaration No.3 of 2006 which removes the obligation on superannuation trustees (between 10 May 2006 and 30 June 2007) to compulsorily cash the benefits of a member who is over the age of 65 and does not meet the relevant work tests.
- **Outsourcing:** On 29 June 2006, APRA issued Superannuation Industry (Supervision) Modification Declaration No.2 of 2006 which exempts an RSE licensee from the obligation to comply with SIS regulation 4.16(6) in a material outsourcing agreement with a custodian in respect of a delegation by the custodian to a sub custodian (providing certain conditions are met).
- **Trustee liability insurance:** On 30 June 2006, APRA issued an "Information Paper" on trustee liability insurance. The paper sets out APRA's expectations of trustees in relation to their insurance arrangements, which is relevant to determining whether the trustee meets the adequacy of resources operating standard.
- **Exit statement relief:** On 30 June 2006, ASIC issued a Class Order [CO 06/538] which provides relief from enhanced disclosures in exit statements given on or after 1 July 2006, in cases where members exit the fund on or before 30 June 2006 as part of the fund's winding up.
- **Simplifying super:** Treasury has issued six fact sheets relating to changes being proposed by the government to simplify and streamline the superannuation system. The fact sheets relate to taxation of benefits paid from an untaxed scheme, concessional contributions, post-tax contributions, tax on benefits for people aged less than 60, transition to retirement and superannuation pensions.
- **Fee disclosure:** On 5 July 2006, ASIC updated its guide on "Enhanced fee disclosure regulations". The updated guide incorporates answers to five new questions (questions C1 to C5) on periodic statements and provides guidance on disclosure of GST, stamp duty, and income tax and grouping of transactions.
- The Treasurer has released the transitional provisions for the \$150,000 annual cap on post-tax contributions proposed in "A plan to simplify and streamline superannuation". For details see Treasurer's press release 058.
- APRA released FAQ 1.7 which deals with the circumstances in which APRA will "consider alternative arrangements for the holding of real property or other assets for RSE licensees of public offer funds, who rely on the appointment of a custodian to meet their capital requirements". See APRA's website for details.
- Under Class order 06/330, ASIC extended its interim relief for superannuation trustees in relation to the PDS requirements of section 1012IA of the Corporations Act, by pushing back the commencement of the requirements to 30 June 2007. This section requires a PDS from a trustee of a superannuation fund to members and prospective members about certain financial products that may be acquired through an investment strategy selected by a member or prospective member. For further details of the disclosure requirements under this section and ASIC policy on this topic, see ASIC information release 06.22.
- APRA released an Information Paper to give guidance to superannuation trustees in taking out liability insurance. The paper is entitled "Trustee liability insurance" and can be accessed on the APRA website. For further details see APRA media release 06.33.

## □ NEWS IN BRIEF (continued)

- APRA has made Modification Declaration No. 2 of 2006, which alters regulation 4.16 of Superannuation Industry (Supervision) Regulations 1994. The change gives “temporary relief from the superannuation outsourcing standard for agreements between superannuation trustees and custodians where the custodian uses the services of sub-custodians”. It applies between 1 July 2006 and 30 June 2007. Source: APRA website, news item “Compulsory cashing provisions and Outsourcing”, 30/06/2006.

### Financial Services

- APRA has released its revised prudential standards and guidance notes in relation to the adoption of International Financial Reporting Standards by authorised deposit-taking institutions (ADIs). They apply to all ADIs from 1 July 2006. Similar changes are intended for general insurers once current consultations end on the “Stage 2” reforms. For more detail and the revised documents see APRA media release 06.30. APRA has also finalised the reporting standards, forms and instructions for ADIs, which can be found on the APRA website.
- ASX has announced, as a result of consultations, that it will keep its two month deadline for reporting of full year and interim financial results by listed entities. For further information see ASX website, and its media release at [www.asx.com.au/about/pdf/mr20060608\\_reporting\\_deadlines.pdf](http://www.asx.com.au/about/pdf/mr20060608_reporting_deadlines.pdf)
- ASX has released its latest schedule of listing fees in June 2006. For the schedule, see the ASX website.
- ASIC (under Class Order 06/495) has extended transitional compensation arrangements in relation to section 912B of the Corporations Act until 31 December 2006. This section deals with compensation arrangements of AFSL holders that “provide financial services to retail clients”. For details

of the transitional arrangements see ASIC Information Release 06-21, and Class Order 06/495.

- ASIC has announced Class Order relief that “simplifies” some of the disclosure requirements of issuers of deposit products. For details see ASIC Information Release 06.20.
- ASIC has released an updated guide for product issuers to assist in compliance with the enhanced fee disclosure regulations (Corporations Amendment Regulations 2005 (No. 1)). It responds to frequent questions that have been raised in relation to compliance. For details see ASIC media release 6-23.

### General insurance

- ASIC has extended the relief period for issuers of general insurance products from dollar disclosure requirements to 31 March 2007. Also extended was the period in which actuaries are not required to hold an AFSL, to 31 December 2006. For details see ASIC information release 06.19.

### Miscellaneous

- The Corporate and Markets Advisory Committee released its report “Corporate duties below board level”, in which it makes recommendations to amend certain provisions of the Corporations Act to give wider application of duties “below board level”. For further information and the report itself see CAMAC media release at [www.camac.gov.au](http://www.camac.gov.au)
- The Corporations (Fees) Amendment Regulations 2006 (No.1) 2006 has reduced the cost registration of some company types from 1 July 2006. For details see ASIC’s website at [www.asic.gov.au](http://www.asic.gov.au)

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