THE EVOLUTION
OF THE
REGULATION
GOVERNING SUPERANNUATION FUNDS
SINCE 1936

by

Josephine Cleary

A thesis submitted to the Bond University Faculty of Law
in fulfilment of the requirements for
the Degree of
Doctor of Philosophy.

October 2010

Gold Coast
Australia
This thesis is submitted to Bond University in fulfilment of the requirements for the Degree of Doctor of Philosophy.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution.

Signature: ________________________ Date: 25 October 2010
I would like to acknowledge my gratitude to my supervisor, Professor Duncan Bentley, Pro Vice Chancellor, Curtin University, Perth, Western Australia, for his continuous support and guidance.

I would also like to acknowledge Emma Atherton and Lynne Schneller of TaxLine, Taxation Institute of Australia for their patience and perseverance in finding impossible references.

Last but certainly not least, I thank my husband, Owen, for his encouragement and support.

Josephine Cleary

Gold Coast October 2010
CONTENTS

Abstract ........................................................................................................ vii
Legislation ................................................................................................... ix
Reports ......................................................................................................... xi
Cases ........................................................................................................... xiii
Tables .......................................................................................................... xix
List of abbreviations ................................................................................... xxi

CHAPTER 1  INTRODUCTION 1

1.1 Background .......................................................................................... 1
1.2 Demographic and projected economic analysis .................................... 4
1.3 Government’s reaction and strategy ...................................................... 9
  1.3.1 Voluntary superannuation contributions ......................................... 10
  1.3.2 National Superannuation Scheme .................................................... 11
  1.3.3 Compulsory superannuation contributions .................................... 13
  1.3.4 ‘Simplifying Super’ ......................................................................... 19
1.4 Government’s reaction and regulation .................................................. 21
1.5 Hypothesis ........................................................................................... 26
1.6 Methodology ......................................................................................... 26
1.7 Structure ............................................................................................... 29
1.8 Limitations ............................................................................................ 31
1.9 Conclusion ............................................................................................ 32

CHAPTER 2  A SUPERANNUATION FUND 35

2.1 Background .......................................................................................... 35
2.2 The definition for the ITAA ................................................................. 39
2.3 The definition for the OSSA ................................................................. 41
2.4 The definition for the SISA .................................................................. 43
2.5 Conclusion ............................................................................................ 46

CHAPTER 3  TAXATION OF SUPERANNUATION FUNDS 49

3.1 Background .......................................................................................... 49
3.2 Income tax legislation .......................................................................... 51
  3.2.1 The first period – exempt from income tax .................................... 55
CONTENTS

3.2.1.1 Exceptions to exemption ................................. 60
3.2.1.2 Tax avoidance schemes ................................. 60
3.2.2 The second period – superannuation funds taxed .................. 62
3.2.2.1 Contribution surcharge .................................. 70
3.3 Additional requirements for exemption/tax concession .............. 71
3.3.1 30/20 rule......................................................... 71
3.3.2 In-house assets rule ........................................... 76
3.3.3 ‘Special Income’................................................ 79
3.4 Conclusion .................................................................. 88

CHAPTER 4 REGULATION - SUPERANNUATION FUNDS FOR EMPLOYEES 91

4.1 Background ................................................................. 92
4.2 Section 23(j)(i) Superannuation Funds .................................. 96
  4.2.1 Challenges of s 23(j)(i) by the Commissioner ..................... 96
    4.2.1.1 Was a fund established? .................................... 98
    4.2.1.2 Was a fund established for employees? .................... 103
    4.2.1.3 Was a fund ‘being applied for’ employees? ............... 112
  4.2.2 Inadequacies of s 23(j)(i) established by Court .................. 114
  4.2.3 Inadequacies of s 23(j)(i) identified by Government .......... 116
4.3 Section 23F Superannuation Funds ..................................... 120
  4.3.1 Background ............................................................ 121
  4.3.2 Requirements for exemption ....................................... 125
  4.3.3 Challenges of application of s 23F by the Commissioner .......... 130
    4.3.3.1 Established for employees .................................. 131
    4.3.3.2 Maintained solely for employees ........................... 133
    4.3.3.3 Benefits to be fully secured ................................. 138
    4.3.3.4 The Commissioner’s discretion ............................ 145
  4.3.4 Advice by the Commissioner ...................................... 146
    4.3.4.1 Notice in writing ............................................ 147
    4.3.4.2 The Commissioner’s general discretionary power .......... 148
    4.3.4.3 Annual contributions ....................................... 151
  4.3.5 Inadequacies ............................................................ 152
    4.3.5.1 Inadequacies established by the Commissioner .......... 153
4.4 Section 23(jaa) Superannuation Funds .................................. 156
4.5 Conclusion .................................................................... 158
CHAPTER 5  REGULATION - OTHER SUPERANNUATION FUNDS  161

5.1  Self-employed Persons Superannuation Funds  163
     5.1.1  Requirements for exemption from tax  165
     5.1.2  Advice by the Commissioner  167
     5.1.3  Challenges by the Commissioner  169
     5.1.4  Inadequacies established by the Government  169
     5.1.5  Alternatives  169

5.2  Section 79 Superannuation Funds  170
     5.2.1  Requirements for tax relief  172
     5.2.2  Clarification by the Commissioner  174
     5.2.3  Challenges by the Commissioner  176
     5.2.4  Comment  177

5.3  Section 23FB Superannuation Funds  177
     5.3.1  Requirements for exemption from tax  179

5.4  Life Assurance Company Superannuation Funds  180
     5.4.1  Requirements for exemption from tax  183
     5.4.2  Comments  184

5.5  Non-resident Superannuation Funds  185
     5.5.1  Requirements for exemption from tax  187
     5.5.2  Comments  188

5.6  Approved Deposit Funds  189
     5.6.1  Requirements for exemption from tax  191
     5.6.2  Comments  193

5.7  Conclusion  194

CHAPTER 6  OCCUPATIONAL SUPERANNUATION STANDARDS ACT 1987  197

6.1  Background  198

6.2  Reports to the Federal Government  205
     6.2.1  The Ligertwood Report  207
     6.2.2  The Asprey Report  208
     6.2.3  The Hancock Report  211
     6.2.4  The Campbell Report  220
            6.2.4.1  Prudential protection  221
            6.2.4.2  Other protection  224
     6.2.5  The Task Force Report  230
            6.2.5.1  Vesting and preservation  232
            6.2.5.2  Security of superannuation benefits  237
            6.2.5.3  Demand for annuities  242

6.3  Federal Government’s response  245
CONTENTS

6.4 Prudential supervision ................................................................. 248
6.5 Requirement for tax relief ............................................................. 250
  6.5.1 The first period ................................................................. 250
  6.5.2 The second period .............................................................. 253
6.6 OSSA and OSSR ................................................................. 253
6.7 Protection of members’ benefits ................................................... 257
  6.7.1 Establish and preserve members’ benefits .................................. 259
    6.7.1.1 Vesting ................................................................. 260
    6.7.1.2 Restricting vesting .................................................. 263
    6.7.1.3 Preservation .......................................................... 264
    6.7.1.4 Portability ............................................................. 266
    6.7.1.5 Time for paying benefits ............................................. 267
    6.7.1.6 Application of benefits forgone ..................................... 269
    6.7.1.7 Limiting the reduction of accrued benefits ......................... 270
    6.7.1.8 Liens on benefits .................................................... 270
  6.7.2 Security of members’ benefits ................................................ 273
    6.7.2.1 Restricted lending .................................................... 274
    6.7.2.2 Restricted borrowing ................................................ 274
    6.7.2.3 Arm’s length investments and in-house assets ..................... 276
    6.7.2.4 Restricted acquisition of assets from members .................... 280
  6.7.3 Trustees and composition of board .......................................... 281
    6.7.3.1 ‘Large funds’ ....................................................... 283
    6.7.3.2 ‘Small funds’ ...................................................... 284
  6.7.4 Review and regulate records .................................................. 285
    6.7.4.1 Audit ................................................................. 285
    6.7.4.2 Actuarial investigation .............................................. 287
  6.7.5 Report and disclose information ............................................. 290
    6.7.5.1 Reporting to the ISC ............................................... 290
    6.7.5.2 Reporting to members .............................................. 291
    6.7.5.3 Prospectus requirements ........................................... 295
6.8 Decisions, review and challenges ................................................. 297
  6.8.1 The trustee ........................................................................ 297
    6.8.1.1 Sole purpose ......................................................... 298
    6.8.1.2 Investment standards ............................................... 298
    6.8.1.3 Special circumstances discretion .................................... 300
  6.8.2 Trustee in Bankruptcy .......................................................... 303
6.9 Conclusion ............................................................................. 304
CONTENTS

7.7 Bankruptcy Act -----------------------------------------------367
7.8 Conclusion -----------------------------------------------------370

CHAPTER 8 CONCLUSION 373

REFERENCES 385
ABSTRACT

By Federation, the community’s attitude towards the aged poor was changing. Politicians accepted that support for the aged was a collective responsibility for the whole community. The aged pension was introduced. A function of the Federal Government is to raise sufficient revenue from the private sector to cover expenditure with an equitable and efficient allocation of the tax burden. Payment of the pensions to the aged forms part of the Federal Government’s expenditure.

The basis for the Federal Government’s retirement policy arose because the analysis of the demographics and economic projections indicated that the social security system could not support retirees indefinitely. The Federal Government had to take a proactive role in planning and developing strategies for providing retirement income for the population.

This thesis analyses the evolution of the regulation of the legislation framework from 1936. It involves reviewing the effectiveness of providing tax incentives to encourage people to save. It analyses the evolution of the regulation of superannuation funds needed to protect members’ benefits, make trustees accountable for their responsibilities and minimise, if not prevent abuse of the superannuation system. The evolution can be seen to be three phases, all connected with circumstances that required the Federal Government’s attention. Firstly, there were the measures to encourage people to save for their retirement. Secondly, there was the protection of members’ benefits. This occurred with the introduction of the Occupational Superannuation Standards Act (‘OSSA’) that replaced the regulation by the Income Tax Assessment Act. Thirdly, there was making trustees accountable for their responsibilities. This occurred with the introduction of the Superannuation Industry (Supervisions) Act 1993 (‘SISA’), which replaced the OSSA.
The thesis shows that the evolved legislation framework allows the Regulators to control the quality and competency of trustees, the disclosure of information making members fully informed about their retirement savings and impose penalties and make the trustees accountable for their responsibilities.

It proves the hypothesis. The legislation regulating superannuation funds has evolved to encourage people to save for their own retirement in line with the Federal Government’s policy. It makes trustees of superannuation funds accountable for their responsibilities so that members’ benefits will be available when required. By the introduction of a penalty regime, it minimises abuse of the superannuation system.

Gold Coast, October 2010

Josephine Cleary
Bond University, Faculty of Law
LEGISLATION

Acts Interpretation Act 1901
Administrative Appeals Tribunal Act 1975
Administrative Decisions (Judicial Review) Act
Australian Bankruptcy Act 1966
Australian Prudential Authority Act 1998
Banking Act 1959
Companies (Applications of Laws) Act 1981
Conciliation and Arbitration Act 1904
Commonwealth of Australia Constitution Act 1900
Companies Code Act 1981
Companies (Application of Laws) Act 1981
Corporations Act 1989
Corporations Act 2001
Crimes Act 1914
Criminal Code Act 1995
Crimes (Taxation Offences) Act 1980
Financial Corporations Act 1974
Financial Sector (Collection of Data) Act 2001
Income Tax Assessment Act 1915
Income Tax Assessment Act 1936
Income Tax Assessment Act 1997
Income Tax Act 1936
Income Tax (Companies and Superannuation Funds) Act 1976
Income Tax Rates Act 1986
Invalid and Old Age Pensions Act 1908
Life Insurance Act 1945
Occupational Superannuation Standards Act 1987
Superannuation Contributions Tax (Assessment and Collection) Act 1997
Superannuation Guarantee (Administration) Act 1992
Superannuation Industry (Supervision) Act 1993
Surcharge Contributions Tax Imposition Act 1997
LEGISLATION

Trustee Act 1925 (New South Wales) Act
Trustee Companies Act 1964 (New South Wales)
Trustee Act 1958 (Victoria)
Trustee Companies Act 1964 (Victoria)
Trusts Act 1973-1981 (Qld)
Trustee Companies Act 1968 - 1984 (Qld)
Trustee Act 1936 - 1984 (South Australia)
Trustee Act 1962 - 1978 (Western Australia)
Trustee Act 1898 (Tasmania)
Trustee Companies Act 1953 (Tasmania)
Trustee Ordinance 1957 (Australian Capital Territory)
Trustee Companies Ordinance 1947 (Australian Capital Territory)
Uniform Companies Act 1961


Commonwealth Committee on Taxation (1950-1954)


Royal Commission on Taxation (1932-1934)

Senate Select Committee, Parliament of the Commonwealth of Australia, *Safeguarding Super, the Regulation of Superannuation* (1992)


Senate Select Committee, Parliament of the Commonwealth of Australia, Super Regs I (1994)

Senate Select Committee, Parliament of the Commonwealth of Australia, Super Regs II (1994)


Superannuation Working Group, *Options for Improving the Safety of Superannuation* (2001)


Treasury, Reform of the Taxation of Superannuation (1988)
CASES

Court

Abrahams v FC of T (1944) 70 CLR 23
APRA v Holloway 00 ESL 16
APRA v Holloway 00 ESL 9
Associated Provident Funds Pty Ltd v FC of T (1966) 14 ATD 333
A & S Ruffy Pty Ltd v FC of T (1958) 11 ATD 452
Australian Securities and Investments Commission v Manito Pty Ltd [2005] FCA 386
Australian Trade Commission v WA Meat Exports Pty Ltd (1987) 75 ALR 287
Australian Prudential Regulation Authority v Derstepanian [2005] FCA 1121
Bayton Cleaning Company Pty Limited v FC of T 91 ATC 4076
Barnsdall v Federal Commissioner of Taxation (1988) 81 ALR 173
Benson v Cook (2003) 214 CLR 370
Caboche v Ramsay (1993-4) 119 ALR 215
Cameron Brae Pty Ltd v FC of T (2007) ATC 4936
Compton v Commissioner of Taxation of the Commonwealth (1966) 14 ATD 157
Compton v Federal Commissioner of Taxation (1966) 14 ATD 295
Compania de Tabacos v Collector De Filipinas 275 US 87 (1927)
Danmark Pty Ltd v FC of T (1944) 7 ATD 333
Driclad Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia (1966) 121 CLR 45
Dwyer v Ross (1992) 34 FCR 463
Duke of Portland v Topham (1864) 11 HLC 32
Elliot v APRA 04 ELS 09
Federal Commissioner of Taxation v Wade, (1951) 84 CLR 105 √
Fairfax v FC of T [1965] 14 ATD 135
FC of T v Roche 91 ATC 5024
FC of T v The Northern Timber and Hardware Company Proprietary Limited (1960) 103 CLR 650
FC of T v Westgarth (1950) 4 ATIR 429
FC of T v Wade (1951) 9 ATD 337
Granby Pty Ltd v Federal Commissioner of Taxation (1995) 129 ALR 503
Hutton v West Cork Railway Co 23 Ch D 654
In re Lee, Behrens & C. Ltd, (1932) 2 Ch 46
Invensys Australian Superannuation Fund Pty Ltd v Austrac Investments Ltd [2006] VSC 112
IRC v Duke of Westminster [1936] AC 1
ISC v Hiscock as trustee for Osborne Fruit Drinks Superannuation Fund 95 ATC 4575
Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners [1932] All ER Rep 971
Kernahan v ACN 003 134 475 Pty Ltd [2010] NSWSC 51
Lee v Lee’s Air Farming Ltd (1960) 3 WLR 758
Lincoln Mills (Aust) Ltd v Gough (1964) VR 193
Lee v Lee’s Air Farming Ltd (1961) AC 12
Mahoney v FC of T (1965) 39 ALJR 62
Mahoney v FC of T (1967) 14 ATD 519
Metropolitan Gas Co v Federal Commissioner of Taxation, (1932) 47 CLR 621
Normandy v Ind. Coope & Co Ltd (1908) 1 Ch 84
Partridge v The Equity Trustees Executors and Agency Co Ltd (1947) 75 CLR 149
Raynor Contractors Pty Ltd v FC of T ATC 4259
Reid v FC of T (1947) 73 CLR 282
Re Bond; Ex parte Ramsay (1993) 25 ATR 61
Re Lee, Behrens & Co Ltd (1932) 2 Ch 46
Re QX971 and Australian Prudential Regulation Authority 99 ESL 1
Re Trustees of C & M Baldwin Pension Fund and the ISC, 92 ATC 2063
Re Whiteley, Whiteley v learoyd (1886), 33 Ch. D. 347
Re Williams [1897] 2 Ch 12
Rollason v Commissioner of Taxation (1966) 121 CLR 45
Scott v FC of T (1966) 40 ALJR 265
Tefonu Pty Ltd v ISC 93 ATC 4727
**CASES**

_Trevison (Trustee of Forli Pty Ltd Superannuation Fund v FC of T) (1991) 4416_ 91 ATC

_Trustees, Executors and Agency Co Ltd v Federal Commissioner of Taxation_ (1917), 23 CLR 576

_Trustee for the Estate of the late AW Furse No 5 Will Trust v FC of T_ (1990) 21 ATR 1123

_Vatcher v Paull_ [1915] AC 372

_VBU & APRA_ 07 ESL 03

_University of Birmingham v FC of T, Epson College v FC of T_ (1938) 5 ATD 63

_Waddington v O’Callaghan_ (1931) 16 TC 187

_Walstern Pty Ltd v FC of T_ (2003) 54 ATR 423

_Winchcombe Carson Ltd v Commissioner of Taxation (N.S.W.)_ (1938) 5 ATD 69

**Board of Review and Administrative Appeals Tribunal Decisions**

_Case D25_ (1953) 4 TBRD

_Case D47_ (1953) 4 TBRD

_Case F22_ (1955) 6 TBRD

_Case L15_ (1960) 11 TBRD

_Case N18_ (1963) 13 TBRD

_Case A11_ 69 ATC 53

_Case A15_ 69 ATC 89

_Case A38_ 69 ATC 225

_Case A39_ 69 ATC 227

_Case A40_ 69 ATC 229

_Case A41_ 69 ATC 233

_Case A57_ 69 ATC 420

_Case A69_ 69 ATC 385

_Case B15_ 70 ATC 61

_Case B40_ 70 ATC 202

_Case C49_ 71 ATC 225

_Case E56_ 73 ATC 442

_Case G10_ 75 ATC 33

_Case K8_ 78 ATC 87
CASES

Case L13 79 ATC 72
Case L55 79 ATC 404
Case T53 86 ATC 416
Case T70 86 ATC 1029
Case U23 87 ATC 190
Case U79 87 ATC 465
Case U139 87 ATC 803
Case U167 87 ATC 959
Case U174 87 ATC 998
Case U227 87 ATC 1265
Case W82 89 ATC 722
Case W100 89 ATC 813
Case W109 89 ATC 859
Case X16 90 ATC 180
Case X60 90 ATC 438
Case X62 90 ATC 468
Case X70 90 ATC 537
Case Y55 91 ATC 474
Case Z27 92 ATC 255
Case 25/93 93 ATC 314
Case 5/94 94 ATC 130
Case 17/94 94 ATC 198
Case 33/94 94 ATC 306
Case 47/94 94 ATC 417
Case 54/94 94 ATC 472
Case 56/94 94 ATC 484
Case 4/95 95 ATC 119
Case 11/95 95 ATC 173
Case 14/95 95 ATC 189
Case 43/95 95 ATC 394
Case 23/96 96 ATC 278
Case 28/96 96 ATC 327
Case 71/96 96 ATC 635
Case 73/96 96 ATC 653
CASES

N/2000 v APRA 02 ELS 01 [2001] AATA 979
Auton v APRA 05 ELS 01 [2005] AATA 32
Preuss v APRA 05 ESL 08 [2005] AATA 784
VBN v APRA 06 ESL 07 [2006] AATA
XPMX v FC of T 08 ESL 10 [2008] AATA 981
VCA v APRA 08 ESL 04 [2008] AATA 580
Gardener and APRA [2009] AATA 990
Case QT85/667 and the Commissioner of Taxation
Case QT85/1074 and Commissioner of Taxation
# List of Tables

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Australian population projected to 2101</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table 2</td>
<td>Percentage of total population 65 years of age and over</td>
<td>6</td>
</tr>
<tr>
<td>Table 3</td>
<td>Median age of Australian population in years</td>
<td>7</td>
</tr>
<tr>
<td>Table 4</td>
<td>Persons receiving the pension</td>
<td>8</td>
</tr>
<tr>
<td>Table 5</td>
<td>Dependency ratios</td>
<td>8</td>
</tr>
<tr>
<td>Table 6</td>
<td>Superannuation coverage in Australia</td>
<td>16</td>
</tr>
<tr>
<td>Table 7</td>
<td>Total superannuation assets</td>
<td>17</td>
</tr>
<tr>
<td>Table 8</td>
<td>Number of self managed superannuation funds compared with Other Funds</td>
<td>18</td>
</tr>
<tr>
<td>Table 9</td>
<td>Assets of self managed superannuation funds compared with assets of Other Funds</td>
<td>19</td>
</tr>
<tr>
<td>Table 10</td>
<td>Information to be given to members</td>
<td>295</td>
</tr>
<tr>
<td>Table 11</td>
<td>Penalties under SISA</td>
<td>334</td>
</tr>
</tbody>
</table>
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>AATA</td>
<td><em>Administrative Appeals Tribunal Act 1975</em></td>
</tr>
<tr>
<td>ASFA</td>
<td>Association of Superannuation Funds of Australia</td>
</tr>
<tr>
<td>APRA</td>
<td>Australian Prudential Regulation Authority</td>
</tr>
<tr>
<td>APRC</td>
<td>Australian Prudential Regulation Commission</td>
</tr>
<tr>
<td>ASIC</td>
<td>Australian Security and Investments Commission</td>
</tr>
<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
</tr>
<tr>
<td>CA</td>
<td><em>Corporations Act 2001</em></td>
</tr>
<tr>
<td>ITAA</td>
<td><em>Income Tax Assessment Act 1936</em></td>
</tr>
<tr>
<td>ITAA 97</td>
<td><em>Income Tax Assessment Act 1997</em></td>
</tr>
<tr>
<td>ISC</td>
<td>Insurance and Superannuation Commission</td>
</tr>
<tr>
<td>SISA</td>
<td><em>Superannuation Industry (Supervision) Act 1993</em></td>
</tr>
<tr>
<td>SISR 1994</td>
<td>Superannuation Industry (Supervision) Regulations 1994</td>
</tr>
<tr>
<td>OSSA</td>
<td><em>Occupational Superannuation Standards Act 1987</em></td>
</tr>
<tr>
<td>OSSR</td>
<td><em>Occupational Superannuation Standards Regulations</em></td>
</tr>
<tr>
<td>TAA</td>
<td><em>Taxation Administration Act 1953</em></td>
</tr>
<tr>
<td>RSE</td>
<td>Registrable superannuation entities</td>
</tr>
<tr>
<td>SSC</td>
<td>Senate Select Committee</td>
</tr>
<tr>
<td>SGAA</td>
<td><em>Superannuation Guarantee (Administration) Act 1992</em></td>
</tr>
<tr>
<td>SRCA</td>
<td><em>Superannuation (Resolution of Complaints) Act 1993</em></td>
</tr>
<tr>
<td>SWG</td>
<td>Superannuation Working Group</td>
</tr>
<tr>
<td>TA</td>
<td>Taxpayer Alerts</td>
</tr>
</tbody>
</table>