

OUR INDUSTRY IS CHANGING. ARE WE?

“Rights and obligations in an evolving Retirement Funds environment”

PENSION LAWYERS



A S S O C I A T I O N

THE 2006 PENSION LAWYERS ASSOCIATION CONFERENCE

5 - 7 MARCH 2006

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Governance in Australia

- Trustee
 - solely responsible for fund operations
 - must be a corporation
 - must have equal representation on the board

- Sources of governance obligations
 - common law trust duties
 - governing rules of the fund
 - governing legislation
 - regulators' requirements

- Compulsory superannuation
 - virtually all employees entitled to 9% contribution

- Roles of the regulators
 - Australian Securities and Investments Commission (ASIC)
 - Corporations Act 2001
 - consumer protection
 - disclosure

 - Australian Prudential Regulatory Authority (APRA)
 - Superannuation Industry (Supervision) Act 2001 (SIS)
 - prudential regulator
 - all other fund operations

- Compulsory licensing
 - ASIC
 - if give “advice” must have an AFS licence
 - even if don’t give advice, prescriptive communication requirements for trustee
 - APRA
 - from 1 July 2006, must have RSE licence to act as trustee of any fund
 - APRA’s idea of prudential best practice
 - resulted in huge amalgamation of the industry

- APRA licensing requirements
 - risk management strategy
 - risk management plan
 - meet operating standards
 - fit and proper standards
 - conflicts of interest
 - outsourcing (delegation)
 - administrators
 - investment managers
 - resources

- Other relevant concepts
 - Actuary must report to APRA
 - Trustee must report all breaches of the law to APRA
 - SIS act prohibits trustee from detrimentally affecting a member's accrued benefits regardless of what the governing rules allow
 - Due diligence defense only available to trustee with respect to investment loss only if it formulates and follows a proper investment strategy for the fund

Conclusion

- Parliament has determined that protection of members is so important that it has given authority to the regulators to prescribe best practice for fund governance rather than leave it to trustees.
- Statutory enforcement powers means that the regulator does not have to wait for a member to be damaged before it takes action against the corporate trustee and its directors.
- All common law remedies remain available to members.