CHAPTER 1
INTRODUCTION

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1.1 CONTEXT

The Australian retirement income system is characterised by two main pillars or tiers: government pensions and superannuation. The old age pension was introduced in 1909 and remains an essential feature in the provision of income support for the elderly. Superannuation, as the second tier of income provision, is at the broadest level a form of savings that persons accumulate during their working lives to provide income on retirement. It is the regulation of this second pillar that is the focus of this thesis.

There are commercial, social and legal justifications for the exploration of this area of law. The commercial justification, at a macro level, stems from the sheer volume of superannuation assets. In Australia alone, despite the sector experiencing a decrease in assets under management of 1.7 per cent in the last quarter,1 over the last two decades such assets have grown from $32 billion to $507 billion.2 At a micro level, superannuation assets constitute a significant percentage of total private sector wealth. According to Commonwealth Treasury estimates, the share of superannuation in total private sector wealth has increased in the last two decades from 5 per cent to 15 per cent.3 This highlights that the rights to superannuation benefits are significant personal assets. Indeed for many individuals, apart from the residential home, it may well represent their largest asset.

The social justification concerns the ability of the retirement system to withstand current economic and demographic trends so as to make sufficient provision for persons in their retirement. Like most developed countries,4 primary among current trends is the rapid ageing of Australian society, exacerbated by the impact of the large size of the “baby boom” generation born between 1946 and 1964. Added to this is slow population growth and

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increasing life expectancy. Superannuation provision as the second tier is designed to respond to this demographic imperative.5

The legal justification is multifaceted. First, recent high profile collapses,6 combined with highly publicised negative investment returns, severely dented public confidence in the prudential regulation of Australia's financial sector.7 It is therefore an appropriate time to review the prudential strength of the legal foundations of superannuation regulation. Secondly, the importance of superannuation as a tier of retirement income policy is evidenced by the degree of legislative attention it has received. The regulation of superannuation is an extremely fluid area, subject of almost constant reform; reviews and reports are voluminous and typified by the current host of reforms recommended by the Superannuation Working Group and the Productivity Commission.8 The propensity for reform is replicated internationally, with the United Kingdom government currently considering extensive reforms to pensions regulation.9 Thirdly, superannuation law is a relatively new field for the judiciary, academics and lawyers. Comparatively, there is little academic writing in the field assessing the application of established legal principles in the contemporary context of superannuation.


8 See 5.

I.2 Historical Underpinnings

An overview of the historical development of superannuation funds unfolds a number of underlying themes and conflicts. Primary among these is the early capitalist development of superannuation and its subsequent "civilisation" by the labour movement. Concomitant with this development and later conflict is the development of the underlying legal bases of superannuation regulation.

As a tool for analysing the progress of capitalism, Clark postulated an organisational theory of capitalism. He divided the economic history of the United States into four distinct generations of capitalism:10

- The Age of the Entrepreneur: This first stage refers to the entrepreneur who launched large scale business operations in corporate form for the first time in history.

- The Age of the Professional Business Manager: This stage developed when the entrepreneurial function was split into ownership and control, with the professionalisation of the latter.

- The Age of the Portfolio Manager: The rise of this age resulted from a split of ownership into capital supplying and investment, with the professionalisation of the investment function.

- The Age of the Savings Planner: This split the supply of capital into the possession of beneficial claims and the decision to save, professionalising the latter. The signs of this age are that "decisions about whether and how much to save are increasingly being made by a group representative on behalf of a large number of group members, rather than by each individual whose present consumption is being deferred in favour of future consumption".11 Stage four capitalists12 include all participants and beneficiaries in employee benefit plans.

Christie argues that these four generations are referable to the Australian development of capitalism, briefly outlining progression through the first three stages as follows:13

"[S]tage one legislation – that is, legislation providing for limited liability trading companies – was enacted early in Australia, stage two legislation reached its maturity almost 50 years after its American equivalent. And with some exceptions, stage three institutions such as unit trusts, and finance companies remain subject to second stage legislation."

12 Clark defines "capitalists" to mean those who have a direct or indirect claim on capital income; Clark, "The Four Stages of Capitalism: Reflections on Investment Management Treatises" (1981) 94 Harv L Rev 561 at 565.
13 Christie, "The Union Official and the Age of Superannuation" (1988) 1 AJLL 208 at 211.
He asserted, in 1988, that the genesis of stage four capitalism occurred with the enactment of the *Occupational Superannuation Standards Act 1987 (Cth).* Taking this lead, this stage can now be seen to have reached a higher level of maturity, so much so that it could be aptly titled the "age of superannuation".

Clark argues that the four stages of financial capitalism are like generations. The stages overlap one another, and whilst each has its stage of rapid growth, none are dead and may continue indefinitely. Applying this analysis to superannuation, preceding generations must exhibit increasingly marked signs of superannuation development, ultimately culminating in the age of superannuation. To this end, the stages of capitalism provide a prism through which the historical development of superannuation can be viewed.

1.2.1 THE AGE OF THE ENTREPRENEUR

The age of the entrepreneur is that of the "fabled promoter-investor-manager who launched large-scale business organizations in corporate form for the first time in history." This period of economic expansion saw the beginnings of superannuation in private companies through the establishment of early versions of superannuation and welfare schemes. As early as 1842 the Bank of Australasia established one of the first superannuation funds in Australia. Thereafter the Bank of New South Wales, the New South Wales Civil Service, the Australian Mutual Provident Society and the Colonial Sugar Refining Company also created schemes. Yet these were limited instances and were by no means a common occurrence. The provision of superannuation schemes in the late 19th century was aimed at maintaining a privileged lifestyle for an exclusive group of high status white-collar salaried employees and their families. This dictated that the number of employees that fell within established superannuation funds constituted a very small percentage of the Australian workforce.

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14 Christie, "The Union Official and the Age of Superannuation" (1988) 1 AJLL 208 at 211.
16 Clark, "The Four Stages of Capitalism: Reflections on Investment Management Treatises" (1981) 94 Harv L Rev 561 at 562. Such an individual may also be termed the "bourgeois capitalist".
White-collar workers who were not members of employer initiated superannuation schemes and most wage earners relied upon the generosity of benevolent employers. Although superannuation had raised its head at this point in history, “retirement” was not an accepted concept, and an inability to work due to old age was considered a type of sickness. The most common form of employer provision for employees was an ex-gratia allowance for employees no longer able to cope with their duties. Employees would additionally make provision for later life when work was no longer possible through participation in friendly societies, life insurance and, to a more limited extent, trade unions.

This first stage saw the birth of trade unionism and ultimately the Australian Labor Party (“ALP”). Trade unions were not significant in this area for their development of welfare or superannuation schemes; they were organised for industrial purposes rather than for the purpose of providing mutual aid. However, analysis of the development of labourism is significant for the inherent class conflict it reveals. Capitalism sought to amass capital, whereas labourism directed its efforts at “civilising” capital so as to “mediate its worst

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20 An example of this attitude is displayed by Andrew Spink in his evidence at the Royal Commission on National Insurance, where he stated “...when a man reaches a stage of senility and is unable to work we give him sick pay just as if he were sick”: Commonwealth of Australia, Parliamentary Papers, Royal Commission on National Insurance, Minutes of Evidence, 1924-5, Qns 4490-91, in Green and Cromwell, Mutual Aid or Welfare State: Australia’s Friendly Societies (George Allen & Unwin, 1984), p 64.

21 Robertson and Samuels, Pension and Superannuation Funds: Their Formation and Administration Explained (Sir Issac Pittman & Sons, 1928), p v.

22 Many workers banded together to form friendly societies, through which welfare services were provided: Green and Cromwell, Mutual Aid or Welfare State: Australia’s Friendly Societies (George Allen & Unwin, 1984), pp viii, 45-71. Friendly societies were known for the organisation of medicines, sick pay, assisting those in difficulty, payment of funeral expenses, support for widows and orphans, and provision of social activities. They varied in structure ranging from informal groups funded by the “whip around” in the public house to well organised societies, with elaborate rules and benefits (p 31). The more structured and organised societies were funded by regular contributions from members in consideration for an agreed entitlement to benefits. Though retirement benefits were not offered, the focus upon welfare, sickness and disability bears similarities to the associated benefits often offered by contemporary superannuation schemes. During the 1890s superannuation schemes were under active consideration within Australian friendly societies (pp 65-66). Despite the attractiveness of the concept, the expense was prohibitive and member interest was consequently limited.

23 This era also saw the inception of the first life offices and mutual societies. The latter in particular were established for the purpose of “guarding against all contingencies of human life”: Gray, Life Insurance in Australia (McCarron Bird, 1977), p 31.

24 There are limited instances of trade unions providing benefits including superannuation for its members in this first stage. For example, the Amalgamated Society of Engineers provided benefits for illness, unemployment, funerals and superannuation. However, it was not a typical example of the craft unions as very few trade unions could afford such benefits: Patmore, Australian Labour History (Longman Cheshire, 1991), pp 56-57.

effects on the working class by mobilizing what they believed to be the neutral powers of the state". This conflict was significant as it formed the foundation for the development of a compulsory superannuation contribution system almost a century later in the 1980s.

1.2.2 The Age of the Professional Business Manager

The age of the professional business manager was "heralded by the separation of ownership and control in the modern corporation and by the introduction of laws regulating the securities industry". This stage witnessed an official recognition of the concept of retirement. In 1909 the Commonwealth Government introduced a means tested pension entitlement. In 1915 it introduced incentives for both employers and employees to participate in superannuation. In general terms, contributions were tax deductible, scheme investment income was tax exempt, and benefits were not viewed as income.

This new legislative arrangement, combined with increased taxation and the imposition of wage controls after World War II, encouraged many employers to utilise superannuation as an alternate method of offering employees extra benefits. The provision of superannuation benefits was also effective as a means of maintaining quality staff during the post-War economic boom.

This taxation scheme remained in place until the 1960s. During 1961 the Ligertwood Commonwealth Committee of Taxation found widespread abuse of superannuation tax concessions, particularly in relation to the exempt income status of superannuation fund

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27 Christie, "The Union Official and the Age of Superannuation" (1988) 1 AJLL 208 at 209.

28 Invalid and Old-Age Pensions Act 1908 (Cth) (repealed). Prior to this the possibility of adopting of a system of national superannuation had been investigated. The concept of national superannuation revolved around "a system of providing income for the retired and aged based on the principle of linking contributions to the payment of end benefits which reflect closely pretirement earnings and are provided free of any assessment of a person's private means": Commonwealth of Australia, Senate Standing Committee on Community Affairs, Income Support of the Retired and the Aged: An Agenda for Reform, 1988, at 122. However, this concept was rejected in favour of the means tested pension entitlement: at 109-110.

29 Income Tax Assessment Act 1915 (Cth) ss 11, 14, 18 (repealed).


As a result, the *Income Tax Assessment Act 1936* (Cth) was amended to require funds to satisfy a number of tests before exempt status was granted. Further control was exercised in 1964-5 when discretion for approval of tax exempt status was vested in the Commissioner of Taxation.33

Two further features of this period are relevant to the development of superannuation. *First*, trade unionism continued to grow through the establishment of a political party, the ALP, and the implementation of a system of compulsory arbitration. The system of arbitration, which required representation by recognised labour organisations (such as the Australian Council of Trade Unions ("ACTU")),34 had the effect of transforming the workplace and led to the development of the basic wage concept.35 The arbitration system developed as the key institution through which unions and employers bargained. It has been noted, to this end, that36

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32 The Ligertwood Committee concluded that the exempt income provision (*Income Tax Assessment Act 1936* (Cth) s 23(6)) was “being extensively exploited in a manner which was never contemplated when the legislation was introduced”. In particular, the committee’s concern focused on the following practices:

1. The practice of setting up a superannuation fund for the benefit of the directors of a private company in which each director had shares with special rights attached. In accordance with the power vested in the Articles of Association the directors would distribute the bulk of the company’s profits as dividends to the trustees of the superannuation fund who held such shares. As a result, the company was relieved of the undistributed income tax liability, the income of the superannuation fund was exempt, and then the income could be loaned back to the company with little or no interest. Any lump sum interest that the directors obtained on retirement was only taxed at 5 per cent.

2. The practice of setting up a director-controlled superannuation fund by a private company for the benefit of those employees who were shareholders and directors. The company could make interest-free loans to the fund, which in turn would invest the proceeds. The income of the fund was exempt, and eventually this income was paid to the directors in a lump sum incurring 5 per cent tax.

3. The practice by employers of making contributions to superannuation funds on behalf of seasonal workers, who upon leaving would forfeit the superannuation benefit. The forfeited monies were the spread amongst the remaining employees, frequently in a manner that “selected” persons received greater proportions.


33 McCallum, "The Three Historic Phases of Australian Superannuation" (1991) 142 *Superfunds* 35 at 38.


...the development of national standards which began at the turn of the century was refined and extended through major cases such as the national wages cases. These provided the mechanism through which national wages policy, and in recent years national industrial relations policy, was implemented.

Secondly, just prior to World War II group life insurance schemes became a popular method for the provision of life insurance benefits to groups of associated persons. Following the war, life insurance increasingly began to be effected through superannuation schemes.

1.2.3 THE AGE OF THE PORTFOLIO MANAGER

The professionalisation of the portfolio manager witnessed a clear transition in Australian capital markets from individual investor dominance to financial institutional dominance. Apart from a brief flirtation with the concept of national superannuation, the most prominent superannuation-related initiative of this era was the development of "The Accord".

In this third stage trade unions sought to improve the occupational superannuation benefits available to members. Even as late as the early 1980s superannuation coverage of Australian workers was arbitrary and inequitable. Superannuation benefits were generally

38 For evidence of this shift from individual investor dominance to institutional dominance see Wheelwright, Ownership and Control of Australian Companies (Law Book Company, 1975); Lawriwsky, Ownership and Control of Australian Corporations (University of Sydney, 1978). Lawriwsky notes that one of the most significant developments apparent from his research was the increase in the proportion of shares held by financial institutions. This trend represented a worldwide phenomenon, with American and United Kingdom studies also evidencing such growth: p 30. See also Commonwealth of Australia, Department of Treasury, Committee of Inquiry into the Australian Financial System, 1980, p 11; Hill and Ramsay, "Institutional Investment in Australia: Theory and Evidence" in Walker and Pisse (ed), Securities Regulation in Australia and New Zealand (OUP, 1994), p 297.
39 During the 1970s the issue of a National Superannuation Scheme was raised again. The Commonwealth Government (the then Whitlam Labor Government) appointed a National Superannuation Committee of Inquiry to investigate: (i) overseas and Australian proposals for national superannuation schemes; (ii) existing overseas national superannuation schemes; (iii) the relevance of the above proposals to Australia; and (iv) the financial, economic and social implications of such proposals. This investigation recommended the most comprehensive plan devised in Australia's history: that a National Superannuation Scheme provide pensions, death benefits, and other ancillary benefits (see Commonwealth of Australia, National Superannuation Committee of Inquiry, A National Superannuation Scheme for Australia, Final Report, 1976). However, these recommendations were rejected by Fraser (Liberal/National) Government in 1979: Department of Treasury, Press Release, "Superannuation", Statement by the Treasurer, the Hon John Howard, MP, No 68, 12 July 1979. See also Commonwealth of Australia, Senate Standing Committee on Community Affairs, Income Support of the Retired and the Aged: An Agenda for Reform, 1988, at 112.
limited to male salaried workers; females and blue-collar workers remained largely unprovided for. In 1974 only 32 per cent of the workforce was covered by superannuation schemes. In the period 1982-1984 this percentage rose to 45 per cent. However, due to the absence of portability rights in employer schemes, this figure is not representative of those who were able to access their benefits upon retirement; it was estimated that half of employees covered by superannuation would not have access to their superannuation benefits due to employment transfers and changes. Other concerns included the lack of coverage for women, part-time and casual workers, and the lack of adequate vesting rights under most employer-controlled schemes.

Against a background, in the 1970s and 1980s, of low economic growth, high unemployment and inflation, and the election of the ALP to power, the ALP and the ACTU entered into "The Income and Prices Accord" ("Accord"). Under the Accord, the ALP agreed to full wage indexation provided the ACTU agreed not to seek wage increases additional to the Wage Principles specified. In terms of superannuation, the ALP and the ACTU agreed that an objective of social security policy was to "redress anomalies in the availability of occupational welfare such as superannuation benefits." The Accord,

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44 In 1984 Peetz concluded that while 78 per cent of male workers were covered, only 26-27 per cent female workers were similarly covered. Additionally, just over 10 per cent of part-time workers were covered by superannuation compared to 52 per cent of full-time workers: Peetz, *A Descriptive Examination of Superannuation Coverage by Industry and Occupation*, Wages and Incomes Policy Research paper No 3 prepared for the Commonwealth of Australia, Department of Employment and Incomes Policy Division, 1985, pp 1-2.


46 Peetz, *The Accord and Low Income Earners*, Wages and Incomes Policy Research Paper No 7 prepared for the Commonwealth of Australia, Department of Employment and Industrial Relations, 1985, p 2. By securing an agreement with the ACTU, the government set wages at a specified level so as to control inflation whilst aiming to increase employment demand.

and thus a centralised wage fixing system, was ratified by the Australian Conciliation and Arbitration Commission ("Commission") in 1983.48

In response to a sustained economic downturn and under pressure from the business sector, the then Treasurer, Mr Paul Keating, argued in the September 1985 National Wage Case that the Commission should not grant full wage indexation but discount wages for the inflationary effect of the devaluation in the dollar.49 This pressure severely tested the durability and flexibility of the Accord,50 which required wages to be increased in line with the CPI. However, the Accord was renegotiated and maintained in a new form. The ACTU agreed to discount wages by 2 per cent, with the government in turn agreeing: (a) to implement taxation cuts for employees to offset the wage discount; and (b) to progressively increase real wages by 3 per cent in the form of occupational superannuation. In this latter respect the Accord Mark II stated:51

This agreement not only maintains workers' living standards but also provides for a fundamental reform of retirement income arrangements in Australia. It will usher in an era in which an entitlement to occupational superannuation becomes the norm for the Australian workforce.

The Commission did not give full support to the ACTU wage claim in 1986, although it noted that the ACTU and the Commonwealth had pressed strongly in favour of employer contributions to superannuation schemes and that this should be distributed through National Wage Cases.52 Concerned with the implementation of the superannuation proposal,53 the Commission decided that it would not arbitrate to provide for

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48 The Commission ratified the Accord expecting that "it would lead to a more stable industrial environment and that it would provide the basis for a more rapid economic recovery that would occur in any alternative system": National Wage Case 1983 (1983) 4 IR 429 at 441.


53 The Commission pointed to difficulties regarding: (i) the selection of superannuation schemes when a number of unions were involved; (ii) the effect on employers; (iii) the content and supervision of the provisions of the necessary trust deeds; and (iv) effect on superannuation
superannuation as sought by the ACTU and the Commonwealth. Instead the Commission elected to monitor and regulate any agreements regarding superannuation, and to assist by conciliation to ensure that such agreements were implemented on an orderly and rational basis, and were properly phased-in in a manner consistent with the state of the economy.\[^{54}\] To this end, the Commission was prepared, provided certain conditions were met, to certify agreements or make consent awards in respect of employer contributions to superannuation.\[^{55}\]

This position was subsequently modified in March 1987 when the Commission indicated that it would be prepared to arbitrate in instances where negotiation and conciliation between employees and employers over superannuation were exhausted.\[^{56}\]

The effect of these developments was to require employers, who were subject to the arbitration system, to contribute a minimum of 3 per cent superannuation on behalf of employees. As a result, superannuation coverage for employees rose sharply; between 1984 and 1989 the percentage of the Australian workforce covered by superannuation increased from 39.5 per cent to 47 per cent.\[^{57}\] However, this coverage favoured union members. While, in 1988, 60 per cent of union employees were the beneficiaries of superannuation schemes, only 28 per cent of non-union employees were similarly covered.\[^{58}\] Notwithstanding this lack of uniform coverage, the Accord between ACTU and the ALP, and its progress through the arbitration system, laid the foundations for the modern system of occupational superannuation provision.

### 1.2.4 The Age of Superannuation

The fourth stage of capitalism is typified by group representatives making decisions as to whether, and how much, to save on behalf of the individual – the professionalisation of the entitlements when employees changed employment, union membership and industry. \[^{54}\] *National Wage Case June 1986* (1986) 14 IR 187 at 215.


In Australia, the advent of the occupational superannuation system is strong evidence of this characteristic. Superannuation contributions as a de facto pay increase imposed a "forced" system of saving for retirement. Moreover, the saving decision was transferred from individuals to group representatives: union representatives. This feature, combined with the introduction of accompanying legislation, the *Occupational Superannuation Standards Act 1987* (Cth) ("OSSA"), arguably symbolised the birth of this stage in Australia. In essence this legislation represented the first attempt to regulate the saving function. To this end, the OSSA package was directed to improving the vesting of benefits, preservation requirements and the security of funds, and to increasing member involvement in superannuation scheme operations. Concurrently, the Insurance and Superannuation Commissioner ("ISC") was established to supervise the non-revenue aspects of the superannuation.

Subsequent developments in the history of Australian superannuation denote a maturing of the age. Following an unsuccessful attempt in 1991 to increase award superannuation though the national wage case system, the Commonwealth Government, via the *Superannuation Guarantee Charge Act 1992* (Cth) and the *Superannuation Guarantee (Administration) Act 1992* (Cth), introduced the Superannuation Guarantee Scheme ("SG Scheme"). Transcending union boundaries, the SG Scheme required, and continues to require, all employers to provide a minimum level of superannuation support for all employees. The legislative oversight of this increased saving function was (and remains) the *Superannuation Industry (Superannuation) Act 1993* (Cth) ("SIS Act"), which mandates the use of the trust for this function coupled with additional prudential standards of conduct.

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60 Now repealed.
61 Christie, "The Union Official and the Age of Superannuation" (1988) 1 AJLL 208 at 211.
64 See *National Wage Case 1991* (1991) 36 IR 120.
65 See 2.2.4.1 and 4.2.1.1.
66 See Chapter 2.
The effect of this new regime was to officially transfer part of the savings function to the "group representative" system of Parliament, with additional superannuation provision remaining a function of employment relations. As a uniform system, it generated a significant increase in superannuation coverage; since its full introduction superannuation coverage has spread to just under 90 per cent of employees. This is also reflected in the growth of superannuation assets under management.

1.2.5 SYNTHESIS

An evolutionary analysis of superannuation through the prism of capitalism identifies three features that characterise the contemporary superannuation system. First, superannuation provision is the subject of regulation, both as to the quantum of saving and its prudential security. Secondly, building upon the historical provision for superannuation through the trust relationship, the regulatory regime has harnessed this private obligation to achieve its superannuation objectives. Finally, a legacy of the historical development of superannuation is its intrinsic link to the employment relationship. Not only is the employment relationship the vehicle through which compulsory superannuation contributions are sourced, but the early capitalist development of superannuation and its subsequent "civilisation" by the labour movement founded the contemporary superannuation tier of the retirement incomes policy.

1.3 THE NATURE OF THE SUPERANNUATION LAW

Superannuation law is not a single faceted law that governs superannuation. Rather, it is an umbrella that shades the intersection of various competing bodies of law that together govern the superannuation industry. The foregoing evolutionary outline of the historical development of superannuation highlights that superannuation schemes operate in a regulated environment, and that the provision of superannuation is intrinsically linked with the contractual employment relationship. Also, historically the provision of superannuation

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68 See 1.1.
has been effected through the vehicle of the trust. It is the bodies of law at the foundation of these features that interact together to provide a core basis of regulation.

This regulation attracts a trilogy of relationships. The first relationship is that of employer and employee. Because superannuation benefits are an integral part of the remuneration package of employees, some view them as deferred pay. Moreover, in the Australian context employers are compelled to make a minimum superannuation provision for employees. It is this relationship – the exchange of consideration for employment services – that triggers either directly or indirectly the creation of the superannuation trust. The second relationship is that between trustee and employee member. Legal title to contributions vest in the trustee, who in turn manages the trust fund for the purpose of providing superannuation and associated benefits to employee members. The final relationship is between the employer and trustee. At the most basic level, the employer will contribute on an ongoing basis to the fund. However, the level of employer interaction will vary with the nature of fund. In respect of employer-sponsored funds, the employer is usually responsible for initiating the scheme and, unlike the traditional settlor, has a continuing role. Not only will the employer contribute to the fund but is usually involved in scheme management via representation at trustee level. Depending upon jurisdictional regulation, the trustee may even be unilaterally responsible for fund management – that is, the employer may act as trustee. Where not the trustee, the trust instrument may nevertheless vest significant control in the employer by conferring powers over appointment and removal of trustees, amendment of the fund's governing rules, the distribution of surpluses, and the winding up of the fund. The nature of the scheme may also dictate that the employer is responsible for the solvency of the scheme, requiring any shortfall to be made good.

The foregoing serves to differentiate the superannuation trust from the conventional family trust, which is typified by a linear relationship between trustee and beneficiary. Like any interactionary relationship, the interaction between the three bodies of law, and the corresponding interaction between stakeholders, generates tension and conflict. It is the management of these interactions, tensions and conflicts with which this thesis is concerned.

69 See heading “Nature of Interest not Representative” in 4.2.2.1.
70 See 4.2.1.1.
1.4 Objectives

This thesis proposes a mechanism for improving the structured interaction of, and a basis for minimising conflict and tension between, the bodies of law underlying "superannuation law". The mechanism proposed for this purpose is the "superannuation relationship framework" ("SRF").

Madam Justice Gillese of the Ontario Court of Appeal argues that the real problem in the field of pensions/superannuation law is that it is an emerging field for which there is no framework for development.71 Her Honour adds that the "development of a coherent set of flexible principles and their meaningful application is a challenge that will span the next decade at least".72 In the conceptualisation of a "superannuation relationship framework" the first objective of this thesis is to take up Gillese J's challenge and contribute to the development of a "coherent set of flexible principles" by the development of a "superannuation relationship framework".

The proposed framework is premised upon a schema of priorities that orders the application of the various competing bodies of law. It is characterised by two features. At the heart of the framework is the concept of priority of the trust and the preference of trust principle. The elevation of trust principles is premised upon the attributes of the trust being the preferred vehicle for the delivery of the social objectives of superannuation. The general principles of trust law revolve around the nature of the trustee's office. The trustee holds legal title, not for his or her own interests, but for the exclusive benefit of the beneficiaries. This very structure - the separation of legal and equitable interests - engrains the protective attributes of the trust. In other words, the trustee is the protector of the assets constituting the fund, and is subject to the highest principles of corporate morality.

Though the attributes of the trust justify its preference, its principles should not be dogmatically applied. While the trust is the preferred vehicle, it may not be the perfect vehicle. As a result, preference for trust principle is bounded by the second feature of the SRF: structured flexibility. So as to mitigate against a rigid adherence to trust principle the framework identifies circumstances which permit or indeed necessitate the relegation or

modification of trust principle in favour of statutory intervention or the principles of contract law.

The second objective of this thesis is to demonstrate the practical utility of the SRF. The framework provides a standard against which current statutory provisions, new legislative initiatives and the reasoning of the judiciary can be analysed in areas where the interaction of the various bodies of law produces tension or conflict. Its application also extends to assessing the suitability of general trust principles in their application to superannuation issues.

1.5 Methodology and Structure

The objectives of this thesis are first pursued by examining the current regulation of superannuation in Australia by reference to the features identified above as characterising the Australian superannuation industry. Thus, the basic components of the SIS legislative regime are first addressed, whereupon attention turns to their impact upon the constituent elements of the trust relationship. The influence of the legislative regime on the interaction of the trust and the employment relationship is then considered.

In the chapter that follows this structure of analysis is applied to four comparator jurisdictions. The bodies of law at the foundation of this trilogy likewise interact together to provide a core basis of regulation in the international jurisdictions selected for this thesis, the United Kingdom, New Zealand, Ontario (Canada) and Hong Kong. Though the regulation in each jurisdiction is by no means identical and varies in nature and degree, the underlying similarities nevertheless allow a comparative analysis of the problems arising, and legislative solutions applied, in each jurisdiction. This analysis provides, in subsequent chapters, a counterpoint to assess the strengths and weaknesses of the Australian regime, as well as providing inspiration and fodder for reform.

On the basis of these foundations, Chapter 4, principally by a process of regulatory analysis, develops and justifies the SRF. In the two chapters that follow the framework is

73 See 1.3.
applied to issues arising from the two principal interactions underlying superannuation law: between trust and legislation, and between trust and the employment relationship.

In respect of the first of these, Chapter 5 focuses on the position of the trustee as the central responsible entity of the trust relationship. To this end, various elements of trusteeship and associated duties are examined to determine the extent to which the SIS Act has departed from general trust principles, and then if such departure is justified on the basis of the superannuation relationship framework. A prominent feature of the chapter is an assessment of the proposed reforms recommended by the Superannuation Working Group\(^7\) that are to be implemented in early 2004.

Chapter 6 then assesses, in the light of the SRF, whether the incidents of the employment relationship should affect the principles of law that give shape to and define the trust relationship. This is particularly an issue in the context of the interpretation and amendment of superannuation trust deeds, and the management of scheme surpluses. Attention is then turned to the appropriate role of the employer within the superannuation relationship and its interaction with the trustee.

### 1.6 Scope

As well as identifying the objectives of this thesis, the boundaries of those objectives must be defined. First, it is recognised that other bodies of law govern superannuation provision, notably, corporations law and taxation law. However, as the focus of this thesis is the prudential regulation of superannuation, its nucleus remains the interaction between trust law, statutes that are primarily directed at prudential regulation, and contract law. Consequently, except to the highlight the impact of corporations and taxation law upon this nucleus of prudential regulation, this thesis does not attempt a detailed explanation or discussion of these areas.

Secondly, in application of the SRF, there is no attempt to be exhaustive. The framework is not applied in respect of every tension or conflict arising in the law. Instead, its focus is

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upon those areas that are essential to the functioning of the trust relationship, that have been contentious and stimulated debate, or that are the subject of proposed reform. To these ends, the proper role of both the trustee and the employer is a pervasive theme.

Thirdly, apart from the context of this introduction and the application of a process of regulatory analysis, there is no attempt to undertake a detailed historical analysis. The concern of thesis is the security of current regulation. Thus only to the extent that historical factors shed light on the current system of regulation are they relevant.

Fourthly, the SIS Act generally governs "superannuation entities", a term that refers collectively to regulated superannuation funds, approved deposit funds ("ADF") and pooled superannuation trusts ("PST"). Though ADFs and PSTs are constituted as trusts, their respective functions are limited by their prescribed and approved purposes, and neither entity may accept employer or employee contributions. Given the restricted function of these entities, the focus of this thesis is upon the prudential standards prescribed in respect of the entity at the crux of the regulatory framework: the regulated superannuation fund. The SIS Act similarly applies to "self managed superannuation funds". Colloquially, these funds are the "Mum and Dad" superannuation funds that, as the title suggests, are self-managed. Their membership is statutorily limited to fewer than five persons. Though constituted as trusts, these funds are subject to less onerous standards than regulated superannuation funds. This thesis does not attempt to address these distinctions in regulation.

Finally, regulated superannuation funds may be either "employer-sponsored" or "public offer" funds. The specific definitions of these terms are outlined in Chapter 2. For the purpose of this introduction it is sufficient to note that the degree of employer interaction is what essentially distinguishes these two types of funds. Much of the ensuing discussion focuses on the impact of the employment relationship upon the regulation of the superannuation trust. This in and of itself directs the focus of this thesis to employer-sponsored funds. This is not to say that public offer funds have been excluded but rather that many of the issues that arise are more typically employer related.

75 SIS Act s 10(i).
76 See 2.1.1.
77 For the definition of "regulated superannuation fund" see 2.1.1.
78 For the definition of "self managed superannuation fund" see 2.1.1.
79 See 2.1.1.
1.7 Terminological Note

As a matter of terminology, the Australian and New Zealand usage of the term "superannuation" is somewhat unique. In the remaining jurisdictions discussed, the corresponding term used for the provision of benefits upon retirement is "pensions". The distinction arises simply because of the prevalence in Australia and New Zealand of the payment of lump sum benefits as opposed to pension benefits. As a result, except where the discussion refers to public pension provision, such as old age pensions or universal pensions, the term pension is used as a synonym for the term superannuation.
CHAPTER 2

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Chapter 2: The Age of Superannuation

Introduction

A primary concern in Australia, like most developed countries, is the ability of the retirement system to withstand current economic and demographic trends so as to make sufficient provision for persons in their retirement. Primary among current trends is the rapid ageing of the Australian society, exacerbated by the impact of the large size of the "baby boom" generation born between 1946 and 1964. Added to this is slow population growth and increasing life expectancy. The framework within which the Commonwealth legislature must operate is characterised by two main pillars or tiers: government pensions and superannuation. The importance of the second pillar in the Australian economy is identifiable by the sheer volume of investment savings held by superannuation trusts. The magnitude of this investment combined with the number and size of superannuation funds, the extent of superannuation coverage within the workforce, and the sophistication and complexity of the regulatory regime has led, in Chapter 1, to the ascription of the epithet "age of superannuation" to the current economic generation. It is the current regulation of the pillar of superannuation in this, the age of superannuation, which is the subject of this Chapter.

An analysis of the evolutionary development of superannuation in Australia identifies three main features that characterise the regulation of the superannuation industry. First, superannuation schemes operate in a regulated environment. Secondly, the provision for superannuation is usually effected through the mechanism of a trust. Finally, a legacy of the historical development of superannuation within the bounds of the employment relationship is that the provision of superannuation is intrinsically linked with the contractual relationship of the employer and employee. Together, the interaction of these features underlies the phenomenon of superannuation. The objective of this Chapter is to deconstruct the regulatory web of superannuation through a discussion of each individual feature, highlighting their interaction and inter-dependence.
The Australian superannuation industry is regulated by multiple legislative enactments. The instruments of regulation can be broadly classified according to their objects: prudential regulation, funding of superannuation entities, and taxation. This thesis is primarily concerned with the prudential regulation of superannuation. However, the statutory prescriptions regarding funding and taxation are discussed where they impact upon and interact with those directed at prudential regulation.

The present system for the prudential regulation of superannuation schemes was introduced in 1993 by a series of legislative enactments collectively termed the “SIS Scheme”. Of the legislation introduced, the Superannuation Industry (Supervision) Act 1993 (Cth) (“SIS Act”), Superannuation Industry (Supervision) Regulations 1994 (Cth) (“SIS Regulations”) and the Superannuation (Resolution of Complaints) Act 1993 (Cth) are the most significant in terms of the governance of superannuation entities. During 1997 the Commonwealth legislature added the “RSA Scheme” to the portfolio of prudential instruments. Constituted by the Retirement Savings Accounts Act 1997 (Cth) (“RSA Act”) and the Retirement Savings Accounts Regulations 1997 (Cth) (“RSA Regulations”), the RSA Scheme applies specifically to Retirement Savings Accounts (“RSA”). Of the two schemes, the SIS Scheme is the most prominent in the prudential regulation of superannuation entities, the RSA Scheme being of ancillary importance due to the more limited nature of RSAs. A brief overview of the RSA Scheme follows a review of the regulatory features of the SIS Scheme. This section concludes with a discussion of the dispute resolution mechanism instituted by the Superannuation (Resolution of Complaints) Act 1993 (Cth).

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1 In 1993 the following seven Acts were introduced as the “SIS Scheme”: Superannuation (Financial Assistance Funding) Levy Act 1993 (Cth); Superannuation (Resolution of Complaints) Act 1993 (Cth); Superannuation (Rolled-Over Benefits) Levy Act 1993 (Cth); Superannuation Industry (Supervision) Act 1993 (Cth); Superannuation Industry (Supervision) Consequential Amendments Act 1993 (Cth); Superannuation Supervisory Levy Amendment Act 1993 (Cth); Occupational Superannuation Standards Amendment Act 1993 (Cth).

2 As to Retirement Savings Accounts see 2.1.2.
2.1.1 THE SIS ACT AND REGULATIONS

Overview, Objects and Regulatory Entities

In 1993 the Commonwealth legislature was concerned to strengthen the security of superannuation savings and protect the rights of superannuation fund members. These concerns were collectively addressed by the twofold objective of the SIS Act to make provision for the prudent management of superannuation entities, and to establish the Australian Prudential Regulation Authority ("APRA"), the Australian Securities and Investments Commission ("ASIC") and the Commissioner of Taxation as joint "regulators" of the industry. The prudent management of superannuation is achieved at two levels. First, superannuation funds regulated by the SIS Scheme must be constituted as a trust. All general law notions of trustee responsibilities and duties are therefore necessarily imported to govern the trustee-beneficiary relationship. Secondly, the SIS Scheme overlays additional standards of conduct that funds and trustees must observe.

The SIS Act and Regulations apply to "superannuation entities", which refers collectively to regulated superannuation funds, approved deposit funds ("ADF") and pooled superannuation trusts ("PST"). The former is the most significant for the purposes of the

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3 Explanatory Memorandum to the Superannuation Industry (Supervision) Bill 1993, p I.
4 SIS Act s 3. Prior to 1 July 1998 the Insurance and Superannuation Commission ("ISC") was solely responsible for the regulation of the superannuation industry. In response to the Commonwealth of Australia, Financial System Inquiry: Final Report, 1997 ("Wallis Inquiry"), the functions of the ISC were divided between two new entities, APRA and ASIC. The Wallis Inquiry was established to undertake a review of the financial system. It was charged with making recommendations on "the nature of the regulatory arrangements that will best ensure an efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness": at vii (Foreword). In terms of the superannuation and life insurance industries, it recommended that a single Commonwealth regulator, the Australian and Prudential Regulation Commission ("APRC", now APRA), be established for the prudential supervision of financial institutions (including superannuation): pp 42, 46 (recommendations nos 31, 41). It also recommended that a new regulator, the Corporations and Financial Services Commission ("CFSC", now ASIC), be established for the purpose of supervising market integrity and consumer protection of the financial system: p 31 (recommendation no 1).
5 SIS Act s 19.
6 In Australia, a regulated superannuation fund must have a trustee, thus requiring a trust structure: SIS Act s 19(2).
7 SIS Act s 10(i). Though ADFs and PSTs are constituted as trusts, their respective functions are limited by their prescribed and approved purposes (SIS Act s 10(i); see definitions of "approved deposit fund" and "pooled superannuation trust"). An ADF is essentially a rollover vehicle for the deposit of amounts from eligible termination payments, which are subsequently paid out as benefits (SIS Act s 10(i); see definition for "approved purposes"). PSTs are trusts in which the assets of other prescribed superannuation entities are placed for investment (SIS Regulations reg 1.04(9)). Neither entity may accept employer or employee contributions. Given the restricted function of these entities, the focus of this thesis is upon the prudential standards.
SIS Act; a superannuation fund is a "regulated superannuation fund" if it has a trustee, its trustee has lodged with APRA a written election to have the SIS Act apply to the fund, and its governing rules provide either that the trustee must be a corporation, or that the fund can offer only old-age pensions. This definition reflects the limited legislative power vested in the Commonwealth by the Constitution; the Commonwealth lacks direct power to regulate in respect of superannuation. Instead, it relied upon the old-age pensions and corporations powers. The purposes of a regulated superannuation fund are further limited by the "sole purpose test": a trustee of a regulated superannuation fund must ensure that the fund is maintained solely for one or more core purposes, which broadly include the provision of benefits on retirement and death.

A regulated superannuation fund may in turn be either an "employer-sponsored fund" or a "public offer superannuation fund". The distinction is important as different regulatory requirements can apply. An employer-sponsored fund is one in which an employer contributes to the fund for the benefit of a member who is an employee of either the employer or the employer's associate. Such a fund will be a "standard" employer-sponsored fund if the employer contributes pursuant to an arrangement between the employer and the trustee of the regulated superannuation fund concerned. A public offer superannuation fund is, at a very general level, a regulated superannuation fund where the nexus between the employer and the trustee is weaker. It is a regulated superannuation fund that either is not a standard employer-sponsored fund, or is a standard employer-sponsored fund with at least one member who is not a standard employer-sponsored member. A standard employer-sponsored fund can elect to be treated as a public offer prescribed in respect of the entity at the crux of the regulatory framework: the regulated superannuation fund. Yet it is also important to note that despite this focus, in that ADFs and PSTs are constituted as trusts, many arguments presented are nevertheless applicable to these entities.

8 A "superannuation fund" is a fund that is: (i) an indefinitely continuing fund and is a provident benefit, superannuation or retirement fund; or (ii) a public sector superannuation scheme: SIS Act s 10(1).
9 SIS Act s 19.
10 Constitution s 51(xxiii).
11 Constitution s 51(xx).
12 SIS Act s 62. See 2.2.2.
13 For the purpose of this definition an employer-sponsor may, in the event of the death of a member, also contribute for the benefit of the dependants of that member: SIS Act s 16(1).
14 SIS Act s 16(1), 16(3).
15 SIS Act s 16(2), 16(4).
16 SIS Act s 18(1).
fund, whereas a self managed superannuation fund\textsuperscript{17} is precluded from being categorised as a public offer fund.\textsuperscript{18}

**Prudential Requirements**

Three principles underlie the legislature's first objective of increasing prudential security, and the content of these principles reflect the nature of regulatory scheme adopted. The first principle is that the primary responsibility for the viability and prudent operation of superannuation funds rests with trustees.\textsuperscript{19} That trustees have maximum commercial autonomy in making investment decisions, subject to minimal prudential controls, is the second principle. As a final principle, the SIS Scheme seeks to increase - but not guarantee or underwrite - the safety of members' benefits.\textsuperscript{20} It was thought that "government guarantees could tempt trustees to take excessive investment risks on the basis that the members (or employer-sponsors) would reap the gains, while the Government picked up the losses."\textsuperscript{21} Ultimately, the investment performance of superannuation assets depends on the "wisdom of investment decisions."\textsuperscript{22}

The aforesaid principles are evident in the system of prudential regulation set out in the SIS scheme. The following table outlines the essential features of the SIS Scheme.

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\textsuperscript{17} A "self managed superannuation fund" is a superannuation fund that has fewer than 5 members and: (i) each trustee or director of the trustee (as the case may be) is a member of the fund; (ii) each member is a trustee or a director of the trustee (as the case may be); (iii) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives; and (iv) the trustee does not receive any remuneration for services performed as trustee: SIS Act s 17A. Such funds are subject to less onerous standards than regulated superannuation funds: see Leow and Murphy, *CCH Australian Master Superannuation Guide* (CCH, 2002-3), §§100-100.

\textsuperscript{18} SIS Act s 18(1)(a)(iii), 18(1)(aa), 18(2).

\textsuperscript{19} Commonwealth of Australia, *Parliamentary Debates*, House of Representatives 27 May 1993, at 1101 (Mr Johns, Parliamentary Secretary to the Treasurer) (Second Reading Speech).


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TABLE 2.1 – OVERVIEW OF THE SIS SCHEME

The SIS Act sets out various requirements in respect of the appointment and removal of trustees, investment managers and custodians. Trustees are subject to prescribed statutory duties in respect of their administration of trust funds, which supplement the general law duties.

Part 3 of the SIS Act sets out a system of prescribed operating standards applicable to the operation of superannuation entities. The standards are detailed in the SIS Regulations and cover issues in relation to: (a) the acceptance of contributions (Pt 7); (b) the protection of benefits (Pt 5); (c) the payment and cashing of benefits (Pt 6); (d) the keeping and retention of records (Pt 8); (e) the financial position, funding and solvency, and winding-up of funds (Pt 9); and (f) the disclosure of information to beneficiaries and the Regulator (Pt 2). These standards are enforceable by the regulators and sanctions may be imposed on trustees for their breaches.

Part 6 of the SIS Act prescribes requirements in respect of the content of the governing rules of superannuation entities. These include: (a) the implication of eight trustee covenants into the governing rules of each superannuation entity; (b) protection for the trustee in respect of his or her exercise of discretion and against direction from other persons; (c) rules precluding indemnification of the trustee from the assets of the entity and exceptions thereto; and (d) restrictions on the amendment of the governing rules.

Part 8 of the SIS Act sets out requirements as to the level of investment permitted in assets of related parties.

Part 16 of the SIS Act sets out requirements as to the appointment and conduct of actuaries and auditors. In addition to general audit or actuarial function, an actuary or auditor must inform the trustee if he or she forms the opinion that: (a) it is likely that a breach of the SIS Act or Regulations has occurred, is occurring, or may occur; or (b) the financial

23 See 2.2.3.1, 2.2.3.2, 2.2.3.3.
24 See 2.2.3.4.
25 The disclosure requirements must be considered in conjunction with those required by the Corporations Act 2001 (Cth) Pt 7.9. Prior to 11 March 2002 these requirements were set out in SIS Regulations regs 2.05-2.48C.
26 SIS Act s 51.
27 SIS Act s 52. See 2.2.3.4 and 5.3.
28 SIS Act s 59. See 6.4.3.
29 SIS Act s 58. See 6.4.3.
30 SIS Act ss 56-57.
31 SIS Act s 60. See 2.3.2 and 6.3.
32 SIS Act ss 69-85. See 2.2.4.2.
33 SIS Act ss 129(3), 130(2).
34 SIS Act s 129.
position of the entity may be, or may be about to become, unsatisfactory. The trustee must respond with a report indicating how the matter is being or will be addressed. Where the trustee does not comply with the above, or the actuary or auditor is dissatisfied with the action undertaken, the auditor or actuary is under a duty to inform the Regulator.

Compliance with the SIS Scheme is achieved by means of a penalty scheme. Certain provisions in the SIS Act are identified as “civil penalty provisions”, contravention of which exposes the relevant persons or entities to a civil penalty order and possible criminal sanctions. Contraventions of various provisions of the SIS Act are also identified as offences. The SIS Act creates two levels of offences: strict liability offences and fault-based offences. The principles of criminal responsibility that apply in respect of offences (both strict liability and fault-based) are contained in the Criminal Code Act 1995 (Cth).

There is also a practical incentive to comply; a complying superannuation fund qualifies for concessional taxation treatment under the Income Tax Assessment Act 1936 (Cth).

In addition to the SIS Act, the Corporations Act 2001 (Cth) has become increasingly important in respect of the governance of superannuation entities. Many provisions dealing with the disclosure requirements of regulated superannuation funds were transferred on 11

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35 SIS Act s 130.
36 SIS Act ss 129(9), 130(4).
37 SIS Act ss 129(6), 130(3).
38 For example, the failure of trustees to: (a) ensure that that a regulated superannuation fund is maintained in accordance with the sole purpose test (SIS Act s 62(1)); (b) comply with the restrictions on borrowings (ss 67(1), 95(1), 97(1)); (c) comply with the in-house asset rules (s 84(1)); (d) notify APRA of significant adverse events: s 106(1); and (e) ensure that investments are made at arm’s length (s 109(1)).
39 A civil penalty order constitutes a declaration that the person has contravened a civil penalty provision and may include a monetary penalty order: SIS Act s 196.
40 A person is guilty of a criminal offence if he or she contravenes a civil penalty provision knowingly, intentionally or recklessly: (a) dishonestly and intending to gain an advantage for any person; or (b) intending to deceive or defraud someone: SIS Act s 202. Such an offence is punishable by imprisonment.
41 See, for example, SIS Act ss 18(7B), 63(7), 63(10), 103(1), 104(2), 105(2).
42 See, for example, SIS Act ss 34(2), 66(4), 68(4), 101(2), 121(1).
43 SIS Act s 9A(1). See Australian Superannuation Law and Practice (CCH, Looseleaf), ¶94-605, ¶94-660, ¶94-670.
44 Income Tax Assessment Act 1936 (Cth) Pt IX (see Leow and Murphy, CCH Australian Master Superannuation Guide (CCH, 2002-3), Ch 7). A complying superannuation fund is a resident regulated superannuation fund the trustee of which has not contravened the SIS Act or Regulations: SIS Act s 42(1). If such a convention occurs, status as a complying superannuation fund will be maintained if the relevant entity does not fail the culpability test set out in s 42(1A).
March 2002 from the SIS Act to the Corporations Act as part of the new financial services regime. Superannuation entities may also be caught by the licensing aspects of the regime relating to the issuing of superannuation interests and the giving of financial advice. 45

Regulators

The SIS Act appoints the Australian Prudential Regulation Authority ("APRA"), Australian Securities and Investments Commission ("ASIC") and the Commissioner of Taxation ("the Commissioner") as the "regulators" of the industry. 46 The Reserve Bank of Australia ("RBA"), 47 and the Australia Competition and Consumer Commission ("ACCC") 48 are accorded ancillary roles in this respect. APRA is responsible for the prudential supervision of banks, life and general insurance companies, and superannuation funds, 49 whereas ASIC is responsible for monitoring and promoting market integrity and consumer protection in relation to the Australian financial system. 50 Specifically in relation to the regulation of the superannuation industry, the respective roles of ASIC and APRA reflect the purposes for which each body was established. APRA is responsible for the administration of the SIS legislative scheme except in respect of matters relating to monitoring and promoting market integrity and consumer protection. 51 The ATO is responsible for administration of superannuation-related tax laws and superannuation guarantee scheme matters. Moreover, as of 8 October 1999 responsibility for the

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46 SIS Act s 3.

47 The RBA is generally responsible for monetary policy and the maintenance of overall financial system stability. In terms of the superannuation industry, the RBA has discretion to provide emergency liquidity support: APRA/RBA, Memorandum of Understanding between the Reserve Bank of Australia and the Australian Prudential Regulation Authority, 1998.

48 The ACCC has general responsibility for competition pursuant to the Trade Practices Act 1974 (Cth). In respect of the superannuation industry, the ACCC has responsibility where acquisition of companies and assets in the financial system may substantially lessen competition in a market: APRA/ASIC, Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, 1998.

49 Australian Prudential Regulation Authority Act 1998 (Cth) s 8(c).

50 Australian Securities and Investments Commission Act 2001 (Cth) s 12A(2)–12A(4).

51 In respect of the co-operation and co-ordination of regulation between APRA and ASIC, see APRA/ASIC, Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, 1998. For the specific allocation of responsibility in respect of the SIS Act see SIS Act s 6.
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governance of self managed superannuation funds was transferred from APRA to the ATO.\footnote{For the meaning of "self managed superannuation fund" see SIS Act s 17A.}

The SIS Act confers upon the main regulators supervisory and enforcement powers. Examples of these powers include:

- **Exemptions and Modifications**: The Regulator has power to grant exemptions from, and make modifications to, specified provisions of the SIS Act and SIS Regulations.\footnote{APRA/ATO, Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Taxation Office, 1999. For the specific allocation of responsibility to the ATO in respect of the SIS Act see SIS Act s 6.}

- **Monitoring and Investigation**: The Regulators have been granted wide information gathering and investigating powers. In respect of monitoring, trustees must produce prescribed information to the Regulator\footnote{SIS Act s 326. In respect of modifiable provisions the Regulator may either exempt, conditionally or otherwise, a particular person (class of persons, superannuation entity or class of superannuation entities) from compliance with the relevant provisions or declare that the relevant provision is to have effect as if it were modified as specified in the declaration: SIS Act ss 326-336.} and may be required to produce specified information on request.\footnote{Trustees of regulated superannuation funds, approved deposit funds and pooled superannuation trusts are required to lodge an annual return each year of income: SIS Act s 36. Furthermore, trustees of superannuation entities established after 1 December 1993 must within seven days of establishment lodge with APRA the prescribed information: s 254(2). The prescribed information includes: (a) general fund details, such as the name, address, contact person, date established and type of fund constituted; and (b) details of the trustee and any directors: SIS Regulations regs 11.04-11.06.} Regarding the investigation of entities, both APRA and ASIC may initiate an investigation of a superannuation entity, upon notice to the trustee, if it appears to the Regulator that: (a) the SIS Act or Regulations have been contravened; (b) the financial position of the superannuation is unsatisfactory; or (c) the trustee of a regulated superannuation fund or an ADF has refused to give effect to a determination of the Superannuation Complaints Tribunal.\footnote{The Regulator may, by written notice, require the trustee to produce specified information or the production of reports or books relating to the affairs of the superannuation entity: SIS Act s 255. Access to premises for the purpose of accessing and copying such books is also granted provided the occupier consents: s 256.} In addition, wide powers are conferred for the purpose of conducting the investigation, including power to: enter premises for the collection of information,\footnote{SIS Act s 263.} require the production of information,\footnote{SIS Act s 268.} require the assistance of relevant persons\footnote{SIS Act s 269.} and, in the prescribed circumstances, freeze the assets of the

\footnote{SIS Act s 270.}
superannuation entity.\textsuperscript{61} Finally, APRA may require the trustee of a superannuation entity to appoint an individual or committee to investigate the financial position of the entity and make a report on that investigation.\textsuperscript{62}

- **Suspension and Removal of Trustees:** APRA may suspend or remove the trustee of a superannuation entity in the prescribed circumstances.\textsuperscript{63}

- **Sanctions:** APRA has the power to make an application to the court for a civil penalty order.\textsuperscript{64} As an alternative to enforcement action, APRA may accept enforceable undertakings from trustees.\textsuperscript{65} Moreover, it can issue a notice stating that a regulated superannuation fund is not a complying superannuation fund.\textsuperscript{66}

### 2.1.2 The RSA Act and Regulations

Provision for superannuation may, as from 1 July 1997 pursuant to the *Retirement Savings Accounts Act* 1997 (Cth), also be effected through a non-trust structure via what is termed a Retirement Savings Account ("RSA"). RSAs may be offered by certain financial institutions and life insurance companies, and are directed principally to providing benefits upon retirement or death. The RSA Scheme is broadly similar in many aspects to the SIS Scheme, particularly in respect of:

- the powers conferred upon the Regulators;
- the benefit protection standards;
- the payment standards (which includes the preservation requirements);
- the reporting and information requirements placed upon RSA Providers;
- the duties placed upon auditors and actuaries; and
- the civil and criminal penalty system.

Duties are also placed upon RSA providers and employers, but their extent reflects the fundamental difference between the SIS and the RSA schemes. Whilst the SIS Scheme is premised upon the trust, the RSA Scheme is essentially built upon contractual relations of

\textsuperscript{61} If it appears that the conduct engaged in by the trustee or investment manager is likely to adversely affect the values of the beneficiaries' interests, the Regulator may give a written direction to the trustee or investment manager to provide the specified information and/or freeze the assets of the entity: SIS Act \$ 264.

\textsuperscript{62} SIS Act \$ 257.

\textsuperscript{63} SIS Act \$ 133. See 2.2.3.3.

\textsuperscript{64} SIS Act \$ 197. See Table 2.1 above.

\textsuperscript{65} SIS Act \$ 262A.

\textsuperscript{66} SIS Act \$ 42.
the RSA Provider and RSA Holder. Consequently, the provisions that reinforce and cement the trust relationship in the SIS scheme are absent from the RSA Scheme.67

A further variance between the schemes is that RSAs are capital guaranteed and therefore likely to reflect modest returns. RSAs are designed to appeal to those with small amounts of superannuation. For account balances in excess of $10,000, RSA providers are required to advise account holders of alternative "balanced portfolio" products generating potentially higher returns, although there is no restriction on RSA balances exceeding $10,000.

2.1.3 THE SUPERANNUATION COMPLAINTS TRIBUNAL

The Superannuation (Resolution of Complaints) Act 1993 ("the Act") establishes the Superannuation Complaints Tribunal ("SCT"). The object of the SCT is to provide a mechanism for the conciliation of complaints and, where this is not successful, the review of the decision or conduct to which the complaints relate. Complaints can be heard by the SCT in relation to the decision and conduct of trustees, insurers or RSA providers.68 In providing a mechanism for the review of trustees' decisions, the complaints resolution scheme overcomes the general law principle that the exercise of a trustee's discretion cannot be reviewed except where a power is exercised irresponsibly, wantonly or capriciously.69 There are 15 specific grounds of complaint listed in the Act, all of which are based upon the relevant decision or conduct being unfair or unreasonable. For example, s 14 provides that if the trustee of a fund has made a decision (whether before or after the commencement of the Act) in relation to a particular member (or former member) of a regulated superannuation fund, a person may make a complaint to the SCT that the decision is or was unfair or unreasonable.

For the purpose of reviewing a decision of a trustee the SCT has all the powers, obligations and discretions that are conferred on the trustee,70 meaning that the SCT effectively

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67 See the heading "Supplementing the Contract Model - The RSA Scheme" in 4.2.2.2.
68 The term "decision" is given a wide meaning and includes the failure to make a decision: Superannuation (Resolution of Complaints) Act 1993 (Cth) s 4. An example is a decision relating to the payment of a benefit or some other matter affecting the member or beneficiary. The term "conduct" includes acts, omissions and representations: s 3(2).
69 See 6.5.
70 Superannuation (Resolution of Complaints) Act 1993 (Cth) s 37(1)(a).
stands in the trustee's shoes. In making the determination the SCT must:

- affirm the decision;
- remit the matter to which the decision relates to the trustee, insurer or other decision maker for reconsideration in accordance with the directions of the SCT;
- vary the decision; or
- set aside the decision and substitute a decision.

A spate of Federal Court cases questioned the jurisdiction of the SCT. In both *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* and *Breckler v Leshem* the Full Federal Court struck down the power of the SCT to review the decisions of trustees on the basis that the Act purported to confer part of the judicial power of the Commonwealth on the SCT. However, on appeal the High Court in *Attorney-General v Breckler* confirmed the jurisdiction of the SCT as constitutional.

### 2.2 Superannuation and Trusts

#### 2.2.1 Generally

Excepting RSAs, the provision of superannuation benefits is effected through the structure of a trust. The trust structure is seen to provide security, with the added benefit of administration by a trustee who, as a fiduciary, is required to exercise his or her duties for the benefit of the beneficiaries. A trust may be defined as "an obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of another person (the beneficiary) or for the advancement of certain purposes". This definition emphasises the core

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71 *Superannuation (Resolution of Complaints) Act 1993 (Cth) s 37(3).*
73 (unreported, FC(FCA), Lockhart, Heerey and Sundberg JJ, 12 February 1998).
74 Specifically the *Superannuation (Resolution of Complaints) Act 1993 (Cth) s 37.*
75 (1999) 197 CLR 83 at 110-111 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, at 128-134 per Kirby J.
76 See SIS Act s 19(a).
characteristic of the trust relationship: duality of ownership. The legal title to the *property* of the trust is vested in the *trustee*. The *property* is administered in accordance with the trust instrument and general law for the benefit of the *beneficiaries*, who have an equitable interest.

Being in the form of a trust, a superannuation fund has all the necessary attributes of a trust: a trustee, trust property and beneficiaries. Superannuation trusts are express trusts, the trust being constituted by a trust deed. Pursuant to the SIS Act, a superannuation entity must be set up as an indefinitely continuing fund.78 To this end, the rule against perpetuities does not apply.79 The SIS Act does not exclude the operation of the general law in relation to superannuation funds; the general law applies to trustees of superannuation funds unless expressly excluded by a relevant Act or by the provisions of the trust deed. Thus the general law of trusts provides a foundation of regulation, the legislative scheme adding an additional layer of regulation to support, and increase the protection afforded by, the pre-existing general law requirements.

The following examines the each constituent element of the trust relationship in light of both general law and SIS requirements.

### 2.2.2 **The Provisions of a Superannuation Trust Deed**

The terms of a trust instrument are a reflection of the intention of the creator of the trust (termed the “settlor”). Except for the irreducible core of obligations fundamental to the concept of a trust,80 fiduciary and general law duties of trustees can be excluded, diluted or supplemented by the trust instrument. Typically, trust instruments will include provisions that govern the:

- appointment and removal of trustees;
- rights, duties and powers of trustees, including trustees' duties in respect of the trust property, and trustees' rights in respect of indemnification and remuneration;
- respective interests and rights of the beneficiaries; and
- winding up of the trust.

In this context, the SIS Act requires that a regulated superannuation fund be established.
for the core purpose of providing benefits either upon the retirement of the member or upon the member's death where death occurs prior to retirement.\textsuperscript{81} Regulated superannuation funds are permitted to be held for various ancillary purposes, including the provision of benefits upon termination of a member's employment and upon death where death occurs after retirement.\textsuperscript{82} The SIS Act automatically implies trustee covenants into the governing rules of superannuation.\textsuperscript{83} Moreover, the governing rules cannot, with limited exceptions, allow the trustee to be subject to direction by a third party,\textsuperscript{84} allow third parties to exercise a discretion without the consent of the trustee,\textsuperscript{85} or allow amendments having the effect of reducing the accrued benefits of members.\textsuperscript{86} Nor can the governing rules permit amendments that have the effect of taking the superannuation fund outside the constitutional limits of the Commonwealth.\textsuperscript{87}

\section*{2.2.3 Trustees}

\subsection*{2.2.3.1 Capacity}

At general law a person or entity capable at law of holding property in his or her own right has the capacity to hold the office of trustee.\textsuperscript{88} This principle is circumscribed by the SIS Act, which prohibits "disqualified persons" from acting as a trustee of a superannuation entity. The specifics of this prohibition are detailed in Chapter 5,\textsuperscript{89} however, broadly it prohibits persons acting as trustee who have shown themselves to be dishonest or incapable of managing their financial affairs or who have committed sufficiently serious breaches of the SIS Act. A company will be similarly disqualified if any of its directors or other managers are individuals who are disqualified persons, or if it is in receivership, official management or liquidation.\textsuperscript{90} Additionally, disqualified

\begin{footnotesize}
\begin{enumerate}
\item SIS Act s 62(1)(a).
\item SIS Act s 62(1)(b).
\item See 2.2.3.4.
\item SIS Act s 58. See 6.4.3.
\item SIS Act s 59. See 6.4.3.
\item See 2.3.2 and 6.3.
\item SIS Act s 60(2).
\item \textit{Halsbury's Laws of Australia}, vol 27, TRUSTS, [430-300].
\item See 5.1.1.
\item SIS Act ss 120(2), 121(1).
\end{enumerate}
\end{footnotesize}
persons are prohibited from being responsible officers91 of a trustee.92 However, APRA may, on the application of an individual who is a disqualified person, waive that disqualification.93

In the context of public offer superannuation funds, approved deposit funds and pooled superannuation trusts, the legislature in conjunction with APRA has created an additional barrier to trusteeship. Trustees of such funds must be approved and continually comply with any conditions that accompany approval.94 An application for approval will be granted provided APRA is satisfied that the applicant can be relied on to perform its trustee duties and can satisfy the prescribed capital requirements.95

2.2.3.2 CONSTITUTION

The wide-ranging freedom at general law of the settlor to constitute the trustee as he or she sees fit is circumscribed in the superannuation context by the requirement of employee representation. In that "one of the most important ways in which members are able to participate in the management and protection of their retirement savings is through representation on the board of trustees",96 the SIS Act requires that the trustees of standard employer-sponsored funds comply with the equal representation rules.97 These require that a group of two or more trustees, or the board of a corporate trustee, be constituted by equal numbers of employer and member representatives.98 A member representative is any person who is nominated by either the members of the

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91 "Responsible officer", in relation to a body corporate, means a director, secretary or executive officer of that body corporate: SIS Act s 10(1).

92 SIS Act s 121(2).

93 As to the form of this application, and the circumstances in which it can be made, see SIS Act s 126B. See also Re AA and Australian Prudential Regulation Authority (2002) 66 ALD 443; Re VX99B v Australian Prudential Regulation Authority (2003) 71 ALD 483.

94 SIS Act s 21(2). The Commonwealth Government has recently released the Superannuation Safety Amendment Bill 2003 in exposure draft form. It contemplates replacing the approved trustee regime with a universal licensing regime: see 5.1.3.

95 SIS Act s 26(1). The significance of requiring the trustees of public offer entities to be approved is that: first, a fund cannot be an approved deposit fund unless it is maintained by an approved trustee; and secondly, a public offer entity cannot offer superannuation interests unless the trustee is an approved trustee: SIS Act s 21(2). The details for the approval requirements and process are discussed at 5.1.2.


97 SIS Act s 89. Various equal representation rules apply depending upon: (a) the size of the fund; and (b) whether or not the fund is a public offer superannuation fund: see SIS Act ss 92, 93.

98 SIS Act s 89(1).

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fund or a trade union or other organisation that represents the interests of those members.99 There is no statutory requirement that the representative also be a member of the fund, although the governing rules of the fund may limit persons eligible to stand for representation.

2.2.3.3 APPOINTMENT AND REMOVAL

At general law the appointment and removal of trustees is usually effected under a power conferred by the trust instrument. In the absence of a power of appointment, the trustee legislation makes provision for the circumstances in which an appointment of a trustee can be made as well as the persons entitled to make the appointment.100 The court also has both an inherent and statutory jurisdiction to appoint and remove trustees. Pursuant to its general supervisory jurisdiction to ensure the proper execution of trusts the court may appoint trustees,101 and remove trustees where it is satisfied that removal is necessary for the welfare of the beneficiaries.102 Additionally, the trustee legislation in most jurisdictions confers jurisdiction upon the court to appoint a new trustee either in substitution for, or in addition to, any existing trustees on the grounds of expediency.103

Although the SIS Act does not depart from this position, it adds to the general law in two main ways. First, a duty is cast on trustees of employer-sponsored funds, to which the equal representation rules apply, to establish procedures for appointing the member representatives, and for ensuring that member representatives so appointed can, with certain exceptions,104 only be removed by the same procedure as that by which they were appointed.105 Secondly, powers of approval, suspension and removal of trustees are

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100 Trustee Act 1925 (ACT) s 6; Trustee Act 1925 (NSW) s 6; Trustee Act 1893 (NT) s 11; Trusts Act 1973 (Qld) s 12; Trustee Act 1936 (SA) s 14; Trustee Act 1898 (Tas) s 13; Trustee Act 1958 (Vic) s 41; Trustees Act 1962 (WA) s 7.
101 Sinnott v Hockin (1882) 8 VLR (E) 295 at 210 per Molesworth J; Letterstedt v Broers (1884) 9 App Cas 371 at 386 per Lord Blackburn.
102 Miller v Cameron (1936) 54 CLR 572 at 580-581 per Dixon J.
103 Trustee Act 1925 (NSW) s 70; Trustee Act 1893 (NT) s 27; Trusts Act 1973 (Qld) s 80; Trustee Act 1898 (Tas) s 32; Trustee Act 1958 (Vic) s 48; Trustees Act 1962 (WA) s 77.
104 Exceptions include death, mental or physical incapacity, retirement and termination of employment.
105 SIS Act s 107(2). The same requirements apply in respect of additional independent directors and trustees if the standard employer-sponsored fund relies on s 89(2) in order to comply with the basic equal representation rules: s 108.
statutorily conferred on APRA. In respect of powers of approval, all public offer entities\textsuperscript{106} must have trustees approved by APRA ("approved trustees").\textsuperscript{107} The significance of requiring the trustees of public offer entities to be approved is that a fund cannot be an approved deposit fund unless it is maintained by an approved trustee, and a public offer entity cannot offer superannuation interests unless the trustee is an approved trustee.\textsuperscript{108}

APRA may suspend or remove a trustee of a superannuation entity if:\textsuperscript{109}

- the trustee is a disqualified person;\textsuperscript{110}
- in the opinion of APRA conduct has, is, or is proposed to be, engaged in by the trustee that may result in the financial position of the entity or of any other superannuation entity becoming unsatisfactory; or
- APRA revokes the trustee's approval on one of the statutorily prescribed grounds.\textsuperscript{111}

Upon the suspension of a trustee, APRA must appoint an acting trustee for the period of the suspension, or in respect of removal, until the vacancy is filled.\textsuperscript{112}

2.2.3.4 DUTIES OF SUPERANNUATION FUND TRUSTEES

The interaction between the general law of trusts and the SIS Scheme is most evident in the context of the duties of trustees. At both general law and within the context of superannuation, a trustee upon acceptance of office becomes subject to the duties pertaining to that office. Duties are imperative by nature, that is, they compel or prohibit a trustee from acting in a certain way. Trustees' powers, on the other hand, are facultative, enabling a trustee to act in a particular way.\textsuperscript{113}

\textsuperscript{106} The phrase "public offer entities" refers to public offer superannuation funds, approved deposit funds (but not excluded approved deposit funds) and pooled superannuation trusts: SIS Act s 10(1).

\textsuperscript{107} SIS Act s 21(2).

\textsuperscript{108} SIS Act s 133.

\textsuperscript{109} SIS Act s 133.

\textsuperscript{110} As to disqualified persons see 2.2.3.1 and 5.1.1.

\textsuperscript{111} See SIS Act s 28.

\textsuperscript{112} SIS Act s 134. This confers a very broad power on APRA. Once an acting trustee has been appointed the SIS Act vests a further power upon APRA to formulate a scheme for winding-up the superannuation entity: s 142(1). There are no limitations placed on APRA in respect of the decision to wind-up the fund provided the requirements for suspension or removal have been complied with.

\textsuperscript{113} Dal Pont and Chalmers, \textit{Equity and Trusts in Australia and New Zealand} (2nd ed, LBC Information Services, 2000), p 617.
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The main duties imposed upon trustees by the general law are as follows:

- **Fiduciary Duties:**
  - **Duty to Act in the Best Interest of Beneficiaries:** The trustee-beneficiary relationship is fiduciary in nature, thus prohibiting a trustee from placing himself or herself in a position of conflict vis-à-vis the trust or making an unauthorised profit from his or her position.114
  - **Duty to Acquaint and Obey:** Trustees must act in the best interests of beneficiaries and so, subject to the qualification that trustees must obey the law, the interests of the beneficiaries are paramount. This principle may even require the trustee to act dishonourably (though not illegally) if the interests of the beneficiaries require it.115
  - **Duty to Invest:** Trustees must obtain and acquaint themselves with all documents concerning the trust.116 Moreover, it is a fundamental duty that trustees must obey the terms of the trust instrument.117 The rationale for these duties is to ensure that effect is given to the intention of the settlor as expressed in the trust instrument. As such, the trust instrument has been described as the “trustee’s ‘charter’ by which he or she must be constantly guarded”.118 A departure from the trust instrument constitutes a breach of trust unless the departure: (a) has been sanctioned by beneficiaries, acting together, who are all of full age and capacity and who have full knowledge of the relevant facts and the legal consequences of consent;119 (b) is to avoid an illegality that would otherwise occur as a result of obedience; (c) is allowed or compelled by the operation of a statute or court order; or (d) is sanctioned by the court pursuant to its inherent jurisdiction or statutory provisions.120

Trustees must invest trust monies even when there is no direction in the trust instrument to do so.121 In the performance of this duty trustees are guided by the terms of the trust instrument, and in the absence of any such terms, are statutorily permitted to invest in any form of investment.122 The duty of trustees to act in the best interests of the

114 *Breen v Williams* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ.
115 *Cowan v Scargill* [1985] 1 Ch 270 at 286-287 per Megarry VC. See 6.5.
116 *Hallowes v Lloyd* (1888) 38 Ch D 686 at 691 per Kekewich J.
117 *Plimsoll v Drake* (1999) 4 Tas R 334 at 339 per Zeeman J.
119 *Re Paulin’s Settlement Trusts* [1961] 3 All ER 713 at 729-730 per Wilberforce J; *Holder v Holder* [1968] Ch 353 at 394 per Harman LJ; *Spillson v George* (1992) 26 NSWLR 666 at 670 per Handley JA.
121 *Adamson v Reid* (1880) 6 VLR (B) 164 at 167 per Molesworth J.
122 *Trustee Act* 1925 (ACT) s 14; *Trustee Act* 1925 (NSW) s 14; *Trustee Act* 1893 (NT) s 5; *Trusts Act* 1973 (Qld) s 20, *Trustee Act* 1936 (SA) s 6; *Trustee Act* 1898 (Tas) s 6; *Trustee Act* 1958 (Vic) s 5; *Trustees Act* 1962 (WA) s 17.
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beneficiaries impacts upon the duty of investment in that "the best interests of the beneficiaries is normally their best financial interests." As a consequence, and barring contrary provision in the trust instrument and exceptional circumstances, trustees must invest the trust funds "so as to yield the best return for the beneficiaries judged in relation to the risks of the investments in question."

A necessary incident of a trustee's obligation to hold and deal with trust property for the benefit of the beneficiaries is the obligation to account to the beneficiaries for the stewardship of the property. This obligation requires trustees to keep proper accounts and allow inspection of them by the beneficiaries. Moreover, the account must be timely, faithful, accurate and usually supported by documentary evidence.

Trustees are personally responsible for the administration of the trust. The duty to administer personally is constituted by the following three duties:

(a) Duty Not to Fetter the Exercise of Discretion

A trustee must not bind himself or herself as to the manner in which discretion conferred by the trust instrument will be exercised. Trustees are personally responsible for ensuring that their discretion is not exercised by "considerations other than...[their] own conscientious judgment at that future time regarding what is in the beneficiaries' best interests."

(b) Duty Not to Delegate

As a general rule a trustee must not delegate his or her duties or powers. This rule applies not only in the context of

123 Cowan v Scargill [1985] 1 Ch 270 at 287 per Megarry VC.
124 Cowan v Scargill [1985] 1 Ch 270 at 287 per Megarry VC.
125 Re Simersall (1992) 108 ALR 375 at 380 per Gummow J.
126 Re Simersall (1992) 108 ALR 375 at 380 per Gummow J.
127 Strauss v Wykes [1916] VLR 200 at 204 per Madden CJ; Re Craig (1952) 52 SR (NSW) 265 at 267 per Roper J.
128 Re Stephenson's Settled Estates (1906) 6 SR (NSW) 420 at 424-425 per Street J; Re Brockbank (decd) [1948] Ch 206 at 209 per Vaisey J; Walker v Willis [1969] VR 778 at 782 per Lush J.
129 Halsbury's Laws of Australia, vol 27, TRUSTS, [430-4185].
130 McMillan v McMillan (1890) 17 VLR 33 at 38 per Hodges J; Re Mulligan (decd) [1998] 1 NZLR 481 at 502 per Panckhurst J.
131 Re Mulligan (decd) [1998] 1 NZLR 481 at 502 per Panckhurst J.
133 Luke v South Kensington Hotel Company (1879) 11 Ch D 121 at 125-126 per Jessel MR; Dawson v Dawson [1945] VLR 99 at 103 per O'Bryan J; Pelham v Pelham [1955] SASR 53 at 57 per Mayo J; Sky v Body (1970) 92 WN (NSW) 934 at 935-936 per Street J.
134 Estate of William Juff (No 1) (1973) 7 SASR 508 at 513 per Jacobs J.
strangers to the trust but also in respect of co-trustees. Each trustee is personally and separately responsible to ensure that the terms of the trust deed are carried out, and so a trustee must not defer to the wishes of another trustee (or a beneficiary or third party) in the absence of proper reasons for doing so. A trustee may delegate his or her duties or powers where expressly provided by the terms of the trust deed or in accordance with the circumstances prescribed by statute.

(c) Duty to Act Unanimously

Subject to the terms of the trust instrument, trustees of private non-charitable trusts must agree unanimously to any course of action. "Where the administration of the trust is vested in co-trustees, they all form...one collective trustee and therefore must execute the duties of the office in their joint capacity."

Trustees must act with strict impartiality and endeavour to maintain a balance between the interests of capital and income beneficiaries. This requires trustees to act fairly in making decisions that may have different consequences for different classes of beneficiaries.

In the pursuance of his or her duties the standard expected of a trustee by equity is that he or she will take as much care of the business of the trust as an ordinary prudent business person would take with his or her own affairs. Prudence is a flexible standard that changes with economic thinking and understanding; what a prudent person should do at any particular point in time depends upon the economic and financial conditions of that time. The conduct of a trustee is not to be viewed with the wisdom of hindsight – "one must be careful not to endow the prudent trustee with prophetic wisdom."

In adopting the trust structure the Commonwealth Government sought to clarify, reinforce and add to the general law duties of trustees. To this end, s 52 of the SIS Act implies into the governing rules of all superannuation entities eight essential trustee covenants that cannot be excluded or modified by the constituent documents. These covenants are as follows:

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135 Re Mitchell (dec'd) [1955] VLR 120 at 123 per Dean J; Re Zimpel (dec'd) [1963] WAR 171 at 174 per Jackson SP; Re Mulligan (dec'd) [1998] 1 NZLR 481 at 501 per Panckhurst J.

136 See 5.3.3.

137 Nestle v National Westminster Bank plc [1993] 1 WLR 1260 at 1268 per Dillon LJ; Re Mulligan (dec'd) [1998] 1 NZLR 481 at 500 per Panckhurst J.

138 Nestle v National Westminster Bank plc [1993] 1 WLR 1260 at 1269 per Dillon LJ.

139 SIS Act s 52(a).

140 SIS Act s 52(b).
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(a) to act honestly in all matters concerning the entity;

(b) to exercise, in relation to all matters affecting the entity, 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;

(c) to ensure that the trustee's duties and power are performed and exercised in the best interests of the beneficiaries;

(d) to keep the money and other assets of the entity separate from any money and assets, respectively: (i) that are held by the trustee personally; or (ii) that are money or assets, as the case may be, or a standard employer-sponsor or an associate of a standard employer-sponsor, of the entity:

(e) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;

(f) to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following: (i) the risk involved in making, holding and realising, and the likely return from, the entity's investments having regard to it objectives and its expected cash flow requirements; (ii) the composition of the entity's investments as a whole including the extent to which the investments are diverse or involve the entity in being exposed to risks from inadequate diversification; (iii) the liquidity of the entity's investments having regard to its expected cash flow requirements; and (iv) the ability of the entity to discharge its existing and prospective liabilities;

(g) if there are any reserves of the entity - to formulate and to give effect to a strategy for their prudential management, consistent with the entity's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due; and

(h) to allow a beneficiary access to any prescribed information or any prescribed documents.

Prima facie the covenants reflect a trustee's general law duties not to place himself or herself in a position of conflict vis-a-vis the trust, not to make a profit from the position of the trustee, to act in the best interest of the beneficiaries, to invest the property of the trust, and to account to the beneficiaries. However, it cannot be said that each duty corresponds exactly with its general law counterpart. The extent to which the covenants depart from general trust law principles and the significance of any such departure is addressed in Chapter 5.\(^\text{141}\)

The SIS Act also imposes on trustees the following duties:

- to comply with the sole purpose test;\(^\text{142}\)
- to establish arrangements for dealing with inquiries and complaints of beneficiaries;\(^\text{143}\)

\(^{141}\) See 5.3.

\(^{142}\) SIS Act s 62. See 2.2.2.
• to ensure contracts with investment managers contain adequate provision to enable the trustees to require the provision of information regarding investments;\(^4^4\)
• to keep minutes and records of trustee meetings and decisions;\(^4^5\)
• to keep records of any changes in trustees;\(^4^6\)
• to keep reports and accounting records for at least 10 years;\(^4^7\)
• to notify APRA of the occurrence of any events that will have a significant adverse effect on the financial position of the entity;\(^4^8\)
• to establish procedures for appointing member representatives, independent trustees or independent members of the board of directors of corporate trustees;\(^4^9\)
• to invest money of the superannuation entity on an arm's length basis;\(^5^0\)
• to prepare prescribed accounts and statements annually;\(^5^1\)
• to make arrangements for the auditing of the accounts by an approved auditor.\(^5^2\)

### 2.2.4 Trust Property

The trust property of a superannuation trust will be defined by the relevant trust deed, which in turn may be influenced by the relevant statutory regime. A typical provision may define the property of a superannuation fund to consist of:

all moneys and other property held by the Trustee from time to time which have: (a) been paid to the fund by way of contributions; (b) been transferred to the Fund from other Retirement Benefit Arrangements;\(^5^3\) (c) accrued to the Fund by way of investment earnings (including net income, profits and capital accumulation); (d) received by the Trustee in connection with any relevant Policy;\(^5^4\) (e) been otherwise acquired by the Trustee for the purposes of the Fund.

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\(^{143}\) SIS Act s 101. See the heading “Rights of Beneficiaries” at 2.2.5.

\(^{144}\) SIS Act s 102.

\(^{145}\) SIS Act s 103.

\(^{146}\) SIS Act s 104.

\(^{147}\) SIS Act ss 105, 111.

\(^{148}\) SIS Act s 106.

\(^{149}\) SIS Act ss 107, 108.

\(^{150}\) SIS Act s 109.

\(^{151}\) SIS Act s 112.

\(^{152}\) SIS Act s 113.

\(^{153}\) “Retirement Benefit Arrangements” means a superannuation, pension, annuity or similar fund or plan.

\(^{154}\) “Policy” means a superannuation policy or any other insurance policy or policies effect by the Trustee in relation to some, part or all of the benefits to be provided from the Fund.
The following outlines each aspect of trust property: contributions, the duty to invest, and the preservation of benefits.

### 2.2.4.1 Contributions

The contributions that must or may be made to a superannuation fund will be defined by the trust deed, the employment contract, an industrial award and/or statute. Superannuation funds operate within the context of a compulsory regime termed the Superannuation Guarantee Scheme. This scheme was introduced in 1992, with the enactment of the *Superannuation Guarantee Charge Act 1992* (Cth) and the *Superannuation Guarantee (Administration) Act 1992* (Cth), pursuant to which all employers must provide a prescribed minimum level of superannuation support for each employee. Employers who fail to provide the prescribed minimum level of support are liable to pay a superannuation guarantee charge equivalent to the amount of the shortfall, an interest component and an administrative charge. The shortfall component is redistributed to a complying superannuation fund or complying approved deposit fund for the benefit of those employees in respect of whom the charge was paid.

A regulated superannuation fund can only accept contributions in accordance with the SIS Regulations. Contributions fall within three categories: mandated, non-mandated and eligible spouse contributions. "Mandated contributions" are superannuation guarantee contributions, shortfall components arising therefrom, and award contributions made by or on behalf of an employee in satisfaction of the employer's obligation under an industrial agreement or award. "Non-mandated contributions" are contributions made in respect of a member that are not mandated, where the member has been engaged in employment for a prescribed time, has ceased employment because of ill health, or is on authorised leave. "Eligible spouse contributions" are contributions made to a complying superannuation fund by a taxpayer to obtain

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157 SIS Regulations reg 7.04.

158 SIS Regulations reg 5.01.

159 SIS Regulations reg 7.04.
superannuation benefits for her or his spouse (or the spouse's dependants) in the event of the spouse's death.\footnote{Income Tax Assessment Act 1936 (Cth) s 159TC.}

Industrial awards almost invariably define the contributions payable by an employer in respect of employees. The amount of any such contributions may be counted as part of the employer's superannuation guarantee obligation.

2.2.4.2 DUTY TO INVEST

In that the very purpose of a superannuation trust is to confer financial benefits on beneficiaries on the happening of prescribed events, "[t]he investment power and duties of trustees lie at the very heart of this purpose, because they are concerned with the management of the trust property in the trustee's hands."\footnote{Lord Nicholls of Birkenhead, “Trustees and their Broader Community: Where Duty, Morality and Ethics Converge” (1996) 70 ALJ 205 at 207.} As outlined previously, section 52(2)(f) of the SIS Act requires trustees of superannuation entities to develop and implement an investment strategy. In that the strategy must have regard to the risk of investments in the context of the entity's investments as a whole, the SIS regime can be seen to be encouraging the adoption of modern portfolio theory in the investment of trust funds.\footnote{See 5.3.4.}

Whilst the SIS scheme reinforces the general law duty to invest, it nonetheless restricts trustees from: (a) lending money of the fund or giving financial assistance from the fund to members or relatives of members; \footnote{SIS Act s 65.} (b) acquiring certain assets from a related party\footnote{“Related party” includes, inter alia, members, relatives of members, employer-sponsors and associated entities: see SIS Act ss 10(1), 70B, 70C, 70D.} to the fund; \footnote{SIS Act s 66.} (c) borrowing money; \footnote{SIS Act s 67.} (d) entering into transactions that are not at arm's length; \footnote{SIS Act s 109(1).} and (e) holding more that five per cent of in-house assets. \footnote{SIS Act s 83. Subject to the prescribed exceptions, an “in-house asset” of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between the trustee of the fund and a related party of the fund: s 71(1). See Halsbury's Laws of Australia, vol 24, SUPERANNUATION, [400-295].}
2.2.4.3 Preservation of Benefits

The provisions of a superannuation trust deed will define the availability of benefits to members. The deed will commonly provide that benefits are available on retirement, death, sickness, injury, termination of employment or financial hardship. The SIS Act specifies minimum preservation standards to be observed by trustees of regulated superannuation funds and approved deposit funds. It categorises benefits into three classes: preserved; restricted non-preserved; and unrestricted non-preserved. Access to preserved and restricted non-preserved benefits is available only if a member has satisfied a condition of release. Conditions of release include retirement, death, permanent and temporary incapacity, severe financial hardship and compassion. Unrestricted non-preserved benefits may be cashed at any time. As from 1 July 1999 all contributions made on behalf of a member and all fund earnings must be preserved.

2.2.5 Beneficiaries

The remaining constituent element of a trust to be considered is the beneficiary. To be a valid trust, it must satisfy the beneficiary principle: the trust must be in favour of definite beneficiaries, ascertained or capable of ascertainment.

Nature of Interest Held

The form of the particular trust determines the beneficiaries' interest in the trust property. In respect of a fixed trust, the beneficiary has an equitable interest in the property of the trust. Conversely, the beneficiary of a discretionary trust has a mere expectancy that will convert to an equitable interest if the trustee exercises his or her discretion in the beneficiary's favour.

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169 See SIS Regulations Pt 6.
170 See SIS Regulations regs 6.02-6.17.
171 SIS Regulations regs 6.18(i), 6.19(i).
172 SIS Regulations Sch 1.
173 SIS Regulations reg 6.20.
174 As to the pre-1 July 1999 position see Australian Superannuation Law and Practice (CCH, Looseleaf), ¶3050 et seq.
175 Morice v Bishop of Durham (1804) 9 Ves 399 at 404-405; 32 ER 656 at 658 per Sir William Grant MR.
176 Gartside v Inland Revenue Commissioners [1968] AC 553 at 607 per Lord Reid.
The nature of a beneficiary’s right in a superannuation trust has been judicially characterised as no more than an expectancy, O’Loughlin J in Re Coram stating:97

Historically, a superannuation fund was a form of trust that an employer established for the benefit of employees. A common form of benefit was a lump sum payment that was payable to the employee (or his dependants) upon the event of his retirement or earlier death; another well known benefit was a pension plan. Conceptually however, the employee was only intended to benefit upon retirement; thus he would not necessarily receive any part of the amount allocated to the credit of his account if there was an early resignation or dismissal. The emphasis on the benefit maturing upon retirement also emphasised that until retirement the member’s rights to or interests in any benefit were inchoate and would not crystallise until retirement (or earlier death). Even though the benefits afforded through superannuation funds have improved materially through the years – in particular it is common place for some reduced benefit to vest upon premature retirement and for provisions to cover illness and injury – the inchoate nature of the member’s rights or interests have remained unaltered. Until the happening of a prescribed event that will crystallise his right into an actual entitlement, a member of a superannuation fund is neither the legal nor the beneficial owner of the amount that stands to the credit of his account from time to time...[Hence] the present right of a member of a superannuation fund is no more than an expectancy.

In that benefits from a regulated superannuation fund cannot be paid until a condition of release is satisfied, superannuation benefits remain in the nature of an expectancy in the context of the SIS Scheme. Notwithstanding this, the SIS Act and Regulations confer two levels of protection upon superannuation benefits held within a regulated superannuation fund. First, trustees of such funds must comply with the “minimum benefit standards” thereby requiring that a prescribed level of minimum benefits be held in respect of each member until the benefits are cashed, rolled over or transferred in accordance with the SIS Regulations.178 Essentially, the benefits prescribed are those arising from member contributions and employer contributions. Secondly, any amendment to the governing rules that adversely alters a beneficiary’s right or claim to, or the amount of, accrued benefits is prohibited.179

Rights of Beneficiaries

Beneficiaries180 of superannuation funds are entitled to rights subsisting both at general law and under the SIS Act. The general law confers upon all beneficiaries two basic rights.

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178 See SIS Regulations regs 5.04-5.08.

179 SIS Act s 31; SIS Regulations reg 13.16.

180 In this context the term “beneficiary” is used to refer to both: (a) members of the superannuation fund; and (b) other persons who fall within the category of a beneficiary. An example of the latter is dependants of a member who may (usually at the trustee’s discretion) receive a benefit on the member’s death.
Chapter 2: The Age of Superannuation

First, beneficiaries have a right to ensure that the trust is managed in accordance with the trust instrument and any duties at general law. For this reason, beneficiaries have standing to institute proceedings to compel a trustee to perform his or her duties and to prevent a breach of trust. Secondly, trustees are under a duty to account to beneficiaries, which dictates that beneficiaries are entitled to information regarding the trust property and its management. This right to information is limited in three respects: it applies only in respect of trust documents; it does not encompass information the settlor has decreed should remain confidential; and a trustee is under no obligation to explain the reasons for the exercise of discretion. The trust instrument may further restrict beneficiaries' right to information. The SIS Act and Regulations adds to these general law rights, conferring the right to:

- prescribed information;
- member representation at a trustee level;
- access to an internal complaint and inquiry system; and
- protection of benefits in accordance with the minimum benefit standards and member-protection standards.

Prior to March 2002 the SIS Regulations Pt 2 detailed extensive information standards in respect of prospective members and existing members. These disclosure requirements were transferred to the Corporations Act 2001 (Cth) as part of the new financial services regime. See Leow and Murphy, CCH Australian Master Superannuation Guide (CCH, 2002-3), §3-290, Ch 4; Australian Superannuation Law and Practice (CCH, Looseleaf), §12-100 et seq.

SIS Act s 101. At a fund administration level, trustees of regulated superannuation funds and approved deposit funds have a duty to ensure that arrangements are in force pursuant to which beneficiaries and associated persons have the right to make a prescribed complaint or inquiry, and that within 90 days the complaint be properly considered and dealt with. Prescribed complaints and inquiries include complaints and inquiries regarding the operation or arrangement of the fund in relation to the complainant, and regarding death benefits.

The purpose of the minimum benefit standards is to maintain a prescribed level of minimum benefits in respect of each member until the benefits are cashed, rolled over or transferred in accordance with the SIS Regulations. Essentially, the benefits that a fund must maintain are those arising from member contributions and employer contributions (either made pursuant to an award or in fulfilment of SG Scheme obligations): see SIS Regulations regs 5.04-5.08.

The purpose of member protection standards is to prevent the erosion of benefits through fees and charges: see SIS Regulations regs 5.12-5.18.
Chapter 2: The Age of Superannuation

2.3 SUPERANNUATION, TRUST AND THE EMPLOYMENT RELATIONSHIP

The nexus between superannuation, trust and the employment relationship is a legacy of the historical development of superannuation in Australia. Chapter 1 briefly detailed the movement of superannuation from an ex-gratia payment by employers to a de facto wage increase granted by the 1986 National Wage Case. It was from this springboard that the SG Scheme, implementing a system of compulsory superannuation contributions by employers on behalf of employees, arose. Superannuation is now considered an integral part of the remuneration package of employees.

The foundation for the relationship between employer and employee is the contract of employment. The contract of employment may be written or oral, and is subject to the general principles of contract law. In essence an employment contract is a legally binding promise by the employee to render services to the employer in exchange for valuable consideration (and vice versa). Valuable consideration for this purpose can include contributions to superannuation schemes. That superannuation contributions have become a constituent element of the remuneration package for employees in Australia has been undoubtedly influenced and propelled by the introduction of the SG Scheme.

In the context of superannuation, the terms of the contract of employment generally provide for:

- the right for an employee to be a member of the employer's superannuation scheme (if such a scheme exists); and
- the amount of contributions to be paid and the right to deduct such contributions or proportion of the total contribution from the employee's salary or wages.

Significantly, the right to be paid a superannuation benefit arises not under the contract but is the subject of the trust. Rights in respect of the payment of contributions are

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190 National Wage Case June 1986 (1986) 14 IR 187. See 1.2.3.


192 See 2.2.4.1.
enforceable as against the employer, whereas rights to superannuation and associated benefits are enforceable as against the trustee.¹⁹³

This commercial environment within which superannuation funds arise distinguishes superannuation trusts from the conventional form of trust, the family trust. Traditionally, beneficiaries as objects of the settlor's bounty were almost invariably volunteers. In the commercial scenario of the superannuation trust, the emphasis is on the bargained nature of the relationship rather than that of gift and the concomitant fact that beneficiaries have given valuable consideration for their interest.¹⁹⁴ Moreover, unlike the traditional settlor, the employer has a continuing role. At a basic level, the employer contributes on an ongoing basis and is usually involved in scheme management via representation at a trustee level. Further employer involvement may be contemplated by the terms of the scheme. In what is termed a "pure balance of cost scheme" the trust instrument casts responsibility for the solvency of the scheme, and thus the risk of investment, on the employer. In addition, the trust instrument will often vest significant powers, and in turn significant control, in the employer. Examples include the power to amend the scheme (or at the very least, a power to consent to any amendment), the power to augment benefits, and the power to wind up the scheme.

Judicial recognition of these contractual considerations within the context of the general law of trusts has led some commentators to argue, despite some judicial comment to the contrary,¹⁹⁵ that a distinctive set of trust principles are applicable to superannuation trusts.¹⁹⁶ To this end, the tension between the interaction of the employment contract with the trust relationship is most evident in respect of: (a) construction of trust instruments; (b) amendment of trust deeds; (c) the employer's implied duty of good faith; (d) the distribution of surpluses; (e) conflicts of interest; and (f) the duty of impartiality. With the exception of the latter two points, these issues are discussed in detail in Chapter 6. The following briefly sketches the pertinent issues and tensions that arise.

¹⁹⁴ Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587 at 1609 per Warner J; Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 at 605 per Browne-Wilkinson VC.
¹⁹⁵ See, for example, Wilson v Law Debenture Trust Corp plc [1995] 2 All ER 337 at 345.
2.3.1 CONSTRUCTION OF TRUST INSTRUMENTS

The usual example of a judicial willingness to consider the underlying employment relationship is the courts' approach to the construction of trust documents. In a leading case in this area, *Mettoy Pension Trustees Ltd v Evans*,197 Warner J considered that “the court's approach to the construction of documents in relation to a pension scheme should be practical and purposive, rather than detached and literal”. In addition, the constituent documents should be construed within the context of their “matrix of fact”.198 This means that because superannuation funds are established against the background of employment, they must be interpreted against that background.199 Moreover, in construing superannuation fund documents the court must have regard to the fact that the beneficiaries are not volunteers – their rights have contractual and commercial origins and are derived from the contract of employment – meaning that the benefits provided have been earned by service under those contracts. The court must also have regard to the statutory regulation of superannuation and the common industry practices in the field of superannuation.200

2.3.2 AMENDMENT OF TRUST DEEDS

The power to amend a trust deed is most commonly found in the trust instrument, generally conferred on either the trustee or the principal employer-sponsor of the fund. Where the power to amend is conferred on the trustee, a power of consent is commonly conferred upon the employer (and vice versa). Where conferred on the trustee, it must be exercised in good faith. Specifically, the trustee must not deviate from the terms of the trust, must exercise the power in the best financial interests of the beneficiaries,201 and must comply with any legislative restrictions.

The issue that commonly arises in this context is whether or not the trustee can have regard to the interests of the employer in exercising a power of amendment. Take, for example, the situation where an employer seeks the trustee's consent to an amendment the

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197 [1990] 1 WLR 1587 at 1610.
198 [1990] 1 WLR 1587 at 1610.
199 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 at 605 per Browne-Wilkinson VC.
201 *Cowan v Scargill* [1985] 1 Ch 270 at 287 per Megarry VC; *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144 at 159 per Beach J.
effect of which is to redistribute a surplus (or part of it) back to the employer. Pressure may be placed upon the trustee to comply with the employer's request. The general law response is to only permit the trustee to have regard to the interests of a third party, in the case the employer, where this is in the best interests of the beneficiaries. Therefore, unless the trust deed contemplates a repatriation of surplus back to the employer, the trustee must assess the proposed repatriation with the view of acting in the best financial interests of the beneficiaries. However, even in this latter context it may nevertheless be argued that trustee regard to the continued financial viability and solvency of the employer is in the best financial interests of the beneficiaries.

Where the power to amend is conferred upon the employer, the further issue of whether or not the employer is required to have regard to the interests of the beneficiaries arises. This tension has been addressed to some extent by the SIS Act, which provides that the governing rules must not permit the rules to be amended unless the trustee consents to the amendment. Moreover, a beneficiary's right or claim to accrued benefits (or to the amount of such benefits) must not be adversely affected by an amendment (unless the beneficiary or Regulator gives a prescribed consent to the proposed amendment).

2.3.3 THE EMPLOYER'S IMPLIED OBLIGATION OF GOOD FAITH

Any power, such as the power of amendment (or power to consent to an amendment), conferred on the employer by the superannuation trust deed must be exercised in accordance with an implied obligation of good faith. In every contract of employment there is an implied term "that employers will not, without reasonable cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." In a prominent example of

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202 Cowan v Scargill [1985] 1 Ch 270 at 286-287 per Megarry VC; Lock v Westpac Banking Corporation (1991) 25 NSWLR 593 at 609 per Waddell CJ.

203 Where the trust instrument contemplates that the employer may receive a distribution of surplus, the employer is a beneficiary of the trust. Consequently, the trustee must then have regard to the interests of the employer pursuant to the general principle that the trustee must act in the best interests of the beneficiaries.

204 See 6.5.

205 See 6.4.

206 SIS Act s 60. See also SIS Regulations reg 4.01 for the exceptions to this requirement for employer-sponsored funds. See 6.3.2 and 6.4.3.

207 SIS Act s 31; SIS Regulations reg 13.16. See 6.3.2.

208 Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 297 at 606 per Browne-Wilkinson VC. See 6.4.2.
the influence of the employment contract on general principles of trust law, Browne-Wilkinson VC in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* held that this contractual obligation applies as much to the exercise of an employer's rights and powers under a pension scheme as it does in the general employment context. The obligation requires the employer to exercise its rights with a view to the efficient running of the scheme, not for the collateral purpose of forcing members to give up their existing rights. Though this implied obligation is not presumed to be fiduciary in character, it may be so interpreted if it exhibits the requisite fiduciary hallmarks.

**2.3.4 Surpluses**

A recurring and somewhat contentious issue in the context of superannuation trusts is the distribution and ownership of surplus. A surplus is generated when the assets of a fund exceed its liabilities. Issues relating to surpluses most commonly arise in the context of a defined benefit fund. In such funds the benefits available to members are calculated by reference to a formula that is generally based upon a member's years of service and final salary. Given the contribution rate necessary to fund end benefits is actuarially determined by reference to factors such as future investment earnings, salary increase and the frequency of benefit payments, it is impossible in practice to perfectly predict the required rate. The issue of surplus can be considered either upon the termination of fund (in which case the surplus is "realised"), or during the life of fund (an "actuarial surplus").

- **Realised Surplus:** Where a surplus arises upon the termination a superannuation fund, the trust deed will commonly direct the trustee as to the distribution of surplus. If so, the trustee must strictly comply with the terms of the deed and any statutory restrictions. If the trust deed is silent on the point, the trustee may resolve to amend the deed so as to allow a repatriation of the surplus to either the

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210 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 297 at 607.


214 See, for example, *BHLSPF Pty Ltd v Brash's Pty Ltd* [2001] VSC 512.
members or the employer(s). Where such action is not feasible, the surplus will either become the subject of a resulting trust, under which the undisposed beneficial interest will result back to the provider(s) of the funds, or pass to the Crown as ownerless goods ("bona vacantia").

- **Actuarial surplus:** Where the fund is a continuing one, an actuarial surplus may be said to arise. Such a surplus is "purely notional" in that it is not realised. An actuarial surplus may be reduced by any one or more of the following methods:
  - the reduction or suspension of contributions;
  - the augmentation of member benefits;
  - the creation of reserves;
  - a merger of funds or transferring members out of the fund;
  - or a refund to employers. The availability of any such method is governed by the terms of the trust instrument and any statutory restrictions.

In respect of both types of surplus, employers and members have argued that contractual notions of ownership buttress their claim for part, if not all, of the surplus on hand. In the context of a defined benefit scheme, employers argue that what is promised is a defined benefit; once that benefit is secured, because the employer usually bears the risk of any underfunding, any surplus should be available either to reduce contributions or to provide a refund. The employer, it is argued, has contributed in excess of what is required and so the excess should be returned to the employer in one form or another. On the other hand, employees, as members of the scheme, contend that superannuation contributions are part of the remuneration received for their employment services. As such, any surplus funded from "their" contributions forms part of the remuneration for their services, and so should accrue for their benefit. Any refund to the employer or reduction of contributions due to be paid into the scheme represents a devaluation of their deferred pay.

**Impact of the SIS Act**

In respect of the repatriation of surplus to employers, the SIS Act prohibits a payment from an employer-sponsored fund to an employer-sponsor unless the prescribed procedures

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215 *Australian Superannuation Law and Practice* (CCH, Looseleaf) §21-185.
216 *Davis v Richards & Wallington Industries Ltd* [1991] 2 All ER 563; *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399. See 6.2.3.
217 *Re Imperial Foods Pension Scheme* [1986] 2 All ER 802 at 812 per Walton J.
218 See 6.2.2.
220 See 6.2.1.
are followed.\textsuperscript{223} Expressly required is that the trust instrument permit return of surplus to the employer-sponsor.

\section*{2.3.5 Conflicts of Interest}

It is a fundamental principle governing the trustee-beneficiary relationship that a trustee must not place herself or himself in a position of conflict between duty and interest.\textsuperscript{224} Application of this principle in the superannuation context has raised certain difficulties. It is not uncommon for superannuation trust deeds to require that the board of trustees consist of both employer representatives and employee representatives,\textsuperscript{225} and in Australia equal representation of employer and employee representatives is statutorily mandated.\textsuperscript{226} The very nature of the constitution of trustee boards therefore creates the potential for conflict. For example, if the trust deed further contemplates the exercise of a power to enhance the benefits of the members, this places the member trustees in a position of conflict. Their duty to the beneficiaries of the fund conflicts with their personal interest.\textsuperscript{227} A strict application of the no-conflict rule would result in either the member trustees stepping down, or the forfeiture of any benefit as a result of the exercise of a power that has the result of benefiting the member trustees.\textsuperscript{228}

In recognition of both the commercial realities of superannuation trusts and need for efficient and competent administration,\textsuperscript{229} the judiciary has adopted a flexible approach to the issue. In \textit{Edge v Pensions Ombudsman}\textsuperscript{230} the trustees of the fund, consisting of nine employers, nine employees and two pensioners, amended the trust deed in order to reduce a substantial surplus, with the effect of conferring additional pension benefits on members in service (but not pensioners) and reducing contributions. The Pensions Ombudsman held that the member trustees at the date of the decision were in a position of conflict and as

\begin{itemize}
\item \textsuperscript{223} The prescribed procedures are set out in SIS Act s 117. See 6.2.4.
\item \textsuperscript{224} See 2.2.3.4.
\item \textsuperscript{225} See Schuller and Hyman, "Trust Law and Trustees: Employee Representation in Pension Schemes" (1983) 12 Indus L Rev 83.
\item \textsuperscript{226} SIS Act s 89. See 2.2.3.2.
\item \textsuperscript{227} See Potter and Garelli, "Scheme Trustees and Conflicts of Interest" (1994) 25(1) Super Benefits 26.
\item \textsuperscript{228} \textit{Re Drexel Burnham Lambert UK Pension Plan} [1995] 1 WLR 32 at 40 per Lindsay J.
\item \textsuperscript{229} \textit{Re Drexel Burnham Lambert UK Pension Plan} [1995] 1 WLR 32 at 41 per Lindsay J; \textit{Edge v Pensions Ombudsman} [1998] 3 WLR 466 at 492 per Sir Richard Scott VC.
\item \textsuperscript{230} [1998] 3 WLR 466.
\end{itemize}
such could not themselves become entitled to the increased benefits. Sir Richard Scott VC upheld the appeal against the Ombudsman’s determination, ruling that the conflict rule does not apply if the trustee has not placed herself or himself in the position of conflict. His Lordship made the following observations in this context: 231

The member trustees are placed by the rules themselves in the position of conflict between interest and duty ... The rules require the body of trustees to include employee members. The rules contemplate that, as trustees, the employee members will from time to time have to exercise discretions in which their duty and interest may conflict. In these circumstances there is, in my judgment, no rule of equity that requires them to account for the benefits that an entirely proper exercise of discretionary powers may produce for them.

In the Australian context the validity of this argument is further supported by the statutory requirement imposed on employer-sponsored funds to comply with the equal representation rules. 232

2.3.6 Duty of Impartiality

As a general principle, trustees must act impartially as between the beneficiaries, so as not to act in such a way as to favour one class of beneficiaries at the expense of another. 233 However, in the context of superannuation trusts, in Edge v Pensions Ombudsman 234 Sir Richard Scott VC stated that in relation to the exercise of a discretionary power to choose which beneficiaries, or what classes of beneficiaries, should be the recipients of trust benefits, it is “meaningless to speak of a duty on trustees to act impartially”. Subject to the general law requirement that trustees must not exercise powers irresponsibly, wantonly or capriciously, 235 trustees of superannuation funds are entitled to be partial – to exclude

231 [1998] 3 WLR 466 at 491 (affd [1999] 4 All ER 546). His Lordship further commented that the same conclusion could be reached upon construction of the trust document. Where the trust deed contemplates member trustees and confers powers to fix contributions and augment benefits, a provision to retain any benefit from the exercise of such powers must necessarily “be implied in order that the rules should have ordinary business efficacy”: at 491. Cf British Coal Corp v British Coal Staff Superannuation Scheme Trustees Ltd [1995] 1 All ER 912 at 925-936. For commentary see Woodbury, “Exercises of Discretion of Trustee: Edge v Pensions Ombudsman” (1998) 29(1) Super Benefits 11; Maclean, “Superannuation Fund Trustees and Conflicts of Interest”, presented at Superannuation 1999: Mardi Gras of Information, Sydney, February 1999, Law Council of Australia.


233 See 2.2.3.4.

234 [1998] 3 WLR 466 at 486 (affd [1999] 4 All ER 546). It is important, however, to distinguish the exercise of a discretionary power to choose beneficiaries from the exercise of an investment power. In respect of the latter, the duty of impartiality is still applicable: see Cowan v Scargill [1985] 1 Ch 270 at 286-287 per Megarry VC.

beneficiaries from particular benefits and prefer others.

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**Conclusion**

The interaction of the general law of trusts with statutory enactments and the principles of contract law underscores the tripartite foundation of superannuation law in Australia. This in turn sheds light on the nature of the relationship between stakeholders. More than a single line relationship between trustee and beneficiary, there exists an ongoing relationship between employer and trustee as well as employer and member. As with any interaction, there is apt to be tension, and at times outright conflict. In the context of outlining the current regulation of superannuation in Australia, this Chapter has drawn out those areas in which statute or contract law have in some way impacted upon the general principles of trust law. The tensions that underlie these interactions can be conveniently framed as questions. If the trust is chosen, why should statutory enactment impinge upon the general law of trusts, restricting the freedom of the general law and modifying existing doctrine? Should the contract of employment be permitted to modify established trust doctrine? In the context of the underlying relationships, what is nature of the relationship between employer and trustee, and should the trustee have regard to the employer's desires and wishes? What's more, should the employer in the exercise of its powers have regard to the interests of the beneficiaries?

These very same tensions exist, to a greater or lesser degree, in the other common law jurisdictions discussed in Chapter 3 of this thesis. What follows in Chapter 4 is the development of a framework of analysis for prioritising and structuring the interaction of these foundational bodies of law, and ultimately the interaction between trustee, beneficiary and employer. In Chapters 5 and 6 the questions raised by this Chapter are explored in light of the proposed framework of analysis.
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**Conclusion**
Introduction

The issues and challenges inherent in the regulation of superannuation in Australia are also apparent in other jurisdictions. The objective of this Chapter is to give an insight into four other jurisdictions: the United Kingdom, Canada, New Zealand and Hong Kong. The choice of these jurisdictions is premised upon three commonalities. First, a challenge experienced by each country is the ability of the retirement income system to withstand current economic and demographic trends so as to make sufficient provision for persons in their retirement. Primary among current trends is the rapid ageing of society that is exacerbated by the impact of the large size of the "baby boom" generation born between 1946 and 1964. Added to this is slow population growth and increasing life expectancy.

Secondly, Australia, Canada, New Zealand and Hong Kong, as former British colonies, have inherited the common law and equity (collectively the "general law") as their foundational system of law. It follows that the basic legal rights and duties of all superannuation/pensions industry participants flow from an equivalent source. Moreover, the separate development of these rights and duties in one jurisdiction is relevant and persuasive across all other jurisdictions.

Finally, and most importantly, the features identified in Chapter 2 as characterising the Australian regulation of the superannuation industry likewise characterise each of the nominated jurisdictions. In review, the relevant features are that: the superannuation/pensions industry operates in a regulated environment; the provision for superannuation/pensions upon retirement is usually effected through the mechanism of a trust; and a legacy of the historical development of superannuation/pensions is that its provision is intrinsically linked with the employment relationship.

Though it cannot be said that the regimes are identical, the underlying similarities allow a comparative analysis of the problems and legislative solutions applied in each jurisdiction. This analysis is beneficial as it provides in chapters that follow a counterpoint to assess the strengths and weaknesses of the Australian regime, as well as providing inspiration and fodder for reform.

For the purpose of contextual integrity, the framework for the national retirement income policy of each jurisdiction, and the function of superannuation/pensions schemes within that framework, are first outlined. The methodology adopted for the examination of the
Australian superannuation regulatory system in Chapter 2 is utilised for the remainder of this Chapter. As such, each respective superannuation/pensions regime is examined by reference to the three features identified above in this introduction. The basic components of each legislative regime are first addressed, whereupon attention turns to the impact of each legislative regime upon the constituent elements of the trust relationship. To complete the trilogy, the influence of each legislative regime on the interaction of the trust with the employment relationship is considered. To the extent that the general law principles outlined in Chapter 2 respectively apply they will not be repeated in the discussion of each jurisdiction.

A feature common to all nominated jurisdictions is that, in addition to making provision for retirement through a formalised income saving structure such as a superannuation or pensions trust, many individuals rely also upon private investment and savings. Such investment saving is not generally considered a formal tier or pillar of retirement income systems and, for this reason, except to note the existence of such investment and save for this introduction, further discussion is not pursued.

### 3.1 UNITED KINGDOM

Three pillars of income support constitute the retirement income system in the United Kingdom: social insurance; social assistance; and private pensions.

**Social Insurance**

Two state contributory pensions form the basis of the social insurance system. The first is a basic state pension; a compulsory contributory pay-as-you-go system funded by the payment of National Insurance contributions by all employees and self-employed persons. The benefit provided is a flat-rated pension to all who attain the pensionable age and have met the minimum contribution requirements. The second is an additional pension paid under the State Second Pension ("SzP"). Replacing the former State Earnings Related

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Pension Scheme ("SERPS") in April 2002, S2P is a compulsory contributory pay-as-you-go system: employees pay additional National Insurance contributions to fund an additional pension linked to inflation adjusted average earnings. However, to bolster the benefits paid to low income earners it is anticipated that in approximately five years S2P will become a flat-rated pension. As with the SERPS system, employers can contract-out of S2P into an occupational or personal pension scheme.

Social Assistance

Retirement income support for low income earners is further provided through the social assistance system. An old persons pension is available to persons over 80 years of age where their total pension income is below a prescribed level. An old age means tested income support pension is also available for pensioners whose private pension income is inadequate. This benefit "provides the final income floor for pensioners with low pension entitlements and little or no other income or assets".

Private Pensions

The term "private pensions" encompasses benefits that flow from three types of pension schemes: occupational pension schemes; stakeholder pension schemes; and personal pension schemes. Occupational pension schemes are schemes set up and contributed to by an employer (or group of employers) for the purpose of providing pension benefits to...
employees upon retirement. The establishment of a scheme is entirely voluntary and is encouraged via taxation incentives.

Stakeholder pension schemes were introduced in 1999 to provide employees unable to join an occupational pension scheme with access to a private pension scheme. Such schemes may be constituted by trust or contract, but must comply with the prescribed requirements, be registered with the Occupational Pensions Regulatory Authority, and provide money purchase benefits. Unless exempt, an employer is under a statutory duty to ensure that all employees have access to a stakeholder pension scheme. This does not require that the employer contribute to the scheme but that the employer designates a stakeholder pension scheme for employees and provides a payroll deduction facility for employee contributions.

A personal pension scheme likewise provides for the payment of pension benefits on retirement or death. However, the distinguishing feature is that their provision is privately organised rather than through the employment relationship. This is evident from the

6 Pension Schemes Act 1993 (UK) s 1.
7 Stakeholder pension schemes were implemented by the Welfare Reform and Pensions Act 1999 (UK).
9 The establishment of stakeholder pension schemes by way of contract is limited to pension providers (for example, Banks and Building Societies) that are authorised to act as stakeholder managers for financial services purposes: Stakeholder Pension Schemes Regulations 2000 SI 2000/1403 (UK) reg 2; Income and Corporation Taxes Act 1988 (UK) s 632. See further Greenstreet, "Stakeholder Pensions", presented at Beyond Occupational Pension Schemes Seminar, London, 25 June 2002, Association of Pension Lawyers (http://www.apl.org.uk).
10 Welfare Reform and Pensions Act 1999 (UK) s 2. A money purchase plan is the same as a defined contribution plan. Such plans are funded by a fixed rate of contributions, usually a percentage of salary. All contributions, together with a rate of investment earnings, are credited to a notional account in respect of each member. The end benefit received is the amount standing to the credit of the member in his or her notional account.
11 An employer is exempt from this requirement if he or she: (i) employs fewer than 5 persons; (ii) offers an occupational pension scheme that is open to all staff within a period of 12 months from the date of beginning work; or (iii) offers access to a personal pension scheme that meets the prescribed conditions: Welfare Reform and Pensions Act 1999 (UK) s 3.
12 Welfare Reform and Pensions Act 1999 (UK) s 3(2).
statutory definition of the term "personal pension scheme": any scheme or arrangement where retirement or death benefits payable are "to or in respect of earners...who have made arrangements with the trustees or manager of the scheme for them to become members of it".14

Three systems of regulation operate in respect of the occupational, stakeholder and personal pension schemes. For the purpose of this comparative analysis, occupational pension schemes bear the closest resemblance to regulated superannuation schemes in Australia. For this reason the legislative scheme governing occupational pension schemes is addressed to the exclusion of stakeholder and personal pension schemes.

3.1.1 The United Kingdom Legislative Scheme

Occupational pension schemes in the United Kingdom are principally regulated by the Pension Schemes Act 1993 (UK) ("PSA") and the Pensions Act 1995 (UK) ("Pensions Act"). In that employers may (in respect of their employees) contract-out of the S2P/SERPS system in favour of the provision of benefits via an occupational pension scheme ("scheme"), the PSA prescribes the requirements that must be met for certification of contracted-out schemes and in respect of members' rights in such schemes. Also prescribed are: (i) protection for the accrued benefits of members who leave employment prior to the pensionable age; (ii) annual increases of pensions in payment; and (iii) the disclosure of the information to members.

The Pensions Act has increasingly become the core legislation of the United Kingdom regime.15 It governs the powers and duties of the regulator, powers and duties of trustees, the funding of schemes, scheme modification, bankruptcy, the winding-up of schemes and dispute resolution.

Although the decision by an employer to make provision for his or her employees' retirement or death through a scheme is entirely voluntary, significant taxation concessions are provided as an incentive. Availability of such concessions is premised upon the scheme being "exempt-approved". To become an "exempt-approved" scheme, its constituent documents must comply with the requirements set out in the Income and Corporation Taxes Act 1988 (UK) ("ICTA"). It follows that the provisions of the ICTA are also significant in terms of the governance of occupational pension schemes.

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14 Pension Schemes Act 1993 (UK) s 1 (emphasis supplied).
15 Ellison, Pensions Law and Practice (Sweet & Maxwell, Looseleaf), at ¶1.056.
The Occupational Pensions Regulatory Authority ("OPRA") is constituted as the prudential regulator. For this purpose various powers are conferred upon OPRA, including the power to:

- prohibit a person from being a trustee in the prescribed circumstances;\(^1\)
- suspend a person from being a trustee in the prescribed circumstances;\(^2\)
- appoint a trustee in circumstances where an existing trustee is either prohibited or disqualified\(^3\) from acting as a trustee;\(^4\)
- wind-up a scheme in circumstances where it is satisfied that the scheme (or part thereof) ought be replaced, is no longer required, or that winding-up is necessary in order to protect the interests of members;\(^5\)
- apply to court for an injunction to prevent the possible misuse or misappropriation of schemes assets;\(^6\)
- apply to court for a restitution order requiring assets to be returned to the relevant scheme where the provisions relating to employer-related investment have been breached or where there has been an unlawful return of scheme assets to the employer;\(^7\)
- investigate the affairs of a scheme by: (i) requiring the production of information from a trustee, manager, professional adviser or employer in respect of the scheme;\(^8\) and (ii) entering premises liable for inspection at any reasonable time to inquire into whether the scheme has complied with the regulatory provisions.\(^9\)

The powers of OPRA are buttressed by a civil and criminal penalty regime. Without the necessity of applying to court, OPRA has the power upon breach of the Pensions Act to impose a civil penalty upon trustees, the directors of trustees, employers and their

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\(^1\) Pensions Act 1995 (UK) s 3. Examples of the prescribed circumstances include where: (i) the person, as trustee, has been in serious or persistent breach of any of his or her duties; and (ii) where a director of a trustee is prohibited from being a trustee: s 3.

\(^2\) Pensions Act 1995 (UK) s 4. Examples of the prescribed circumstances include where: (i) consideration of a prohibition order is pending; (ii) a petition has been presented for an order that the trustee is bankrupt or, where the trustee is a company, that it should be wound up; and (iii) proceedings have been instituted against the trustee for an offence involving dishonesty or deception: s 4.

\(^3\) As to circumstances where persons are disqualified from being trustees see Pensions Act 1995 (UK) s 29 and 31.2.

\(^4\) Pensions Act 1995 (UK) s 7.

\(^5\) Pensions Act 1995 (UK) s 11.


\(^7\) Pensions Act 1995 (UK) s 14.

\(^8\) Pensions Act 1995 (UK) s 98.

\(^9\) Pensions Act 1995 (UK) s 99. As to premises that are "liable for inspection" see s 99(3).
advisers. Moreover, OPRA can instigate criminal proceedings where breaches of the Pensions Act carry a criminal penalty, and refer cases to other prosecuting authorities.

Decisions made by OPRA are expressed by the Pensions Act to be final. However, where an application for review is made within 28 days, OPRA must review trustee prohibition or disqualification orders, and prescribed civil penalty orders. Any question of law arising from OPRA’s determination may be referred to a court by either OPRA or a person aggrieved by the determination.

To the extent that the Department of Inland Revenue ("Inland Revenue") governs the conferral of "exempt-approved" status, it is also a regulator of the occupational pension schemes industry. The requirements for approval are set out in the ICTA. Inland Revenue has the power, subject to the prescribed requirements, to approve a scheme or revoke its approval during its operation. In either case the taxation advantages of being an "exempt-approved" scheme will be lost.

The legislative regime provides an external avenue of dispute resolution via the Pensions Ombudsman. Essentially the role of the Pensions Ombudsman is to investigate complaints and make determinations regarding matters relating to maladministration and disputes over matters of fact and law. For example, a beneficiary may allege that he or she has sustained injustice as a consequence of misadministration by any person responsible for the management of the scheme. A further example is a dispute over a matter of law (most commonly the interpretation of scheme rules) between a trustee of the scheme and an actual or potential beneficiary (or another trustee of the scheme).

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28 Pensions Act 1995 (UK) s 96(a).
30 See 3.1.2.1.
31 Pension Schemes Act 1993 (UK) s 146(1)(a).
33 Pension Schemes Act 1993 (UK) s 146(1)(c).
34 Pension Schemes Act 1993 (UK) s 146(1)(d).
The Pensions Ombudsman is not permitted to investigate a complaint in circumstances where a scheme’s internal dispute resolution procedure has not been used or where court proceedings have been issued (and not discontinued). Once the Pensions Ombudsman has investigated the complaint and made a determination, a copy of the determination with reasons must be sent to both the complainant and the person responsible for the management of the relevant scheme. The determination is binding on those persons, although, an appeal may be made to the High Court on a point of law.

3.1.2 Occupational Pension Schemes and Trusts

Since the enactment of the Finance Act 1921 (UK) occupational pension schemes (“schemes”) in the United Kingdom have been required to be constituted as a trust. Although the definition of “occupational pension scheme” in the PSA contemplates that a scheme may take effect other than as a trust (presumably by way of contract), an incident of the taxation regime is that schemes will invariably be constituted as trusts. As stated in the immediately preceding section, taxation concessions are only available to “exempt-approved” schemes. Inland Revenue will “approve” a scheme if the requirements set out in Chapter 1 of the ICTA are met. An “approved” scheme will be an “exempt-approved”

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36 Pension Schemes Act 1993 (UK) s 146(6)(a).
37 As to the investigation procedures see Pension Schemes Act 1993 (UK) ss 149-150; Brown, “Pensions Disputes – Pensions Regulation in England and Wales”, presented at Eighth International Conference of the International Pension & Employee Benefits Lawyers Association, Bordeaux (France), June 2001, IPEBLA, at ¶4.3.
38 Pension Schemes Act 1993 (UK) s 151(1).
39 Pension Schemes Act 1993 (UK) s 151(3). In respect of the Pensions Ombudsman’s jurisdiction it was held in Edge v Pensions Ombudsman [1999] 4 All ER 546 that the Ombudsman should not entertain a complaint or a dispute of fact or law in circumstances where those persons whose proprietary interests would be adversely affected by his determination had not had a fair opportunity to make representations in defence of their interests: at 576-588 per Chadwick LJ (EWCA).
40 Pension Schemes Act 1993 (UK) s 151(4).
41 See Arthur, Pensions and Trusteeship (Sweet & Maxwell, 1999), at ¶8.4.1.
42 “Occupational pension scheme” is defined to mean “any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more description or categories of employment so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category”: Pension Schemes Act 1993 (UK) s 1. This definition applies also to the Pensions Act: Pensions Act 1995 (UK) s 176.
43 See specifically Income and Corporation Taxes Act 1988 (UK) s 590.
scheme if it is established as an irrevocable trust. The significance of being an “exempt-approved” scheme as opposed to an “approved” scheme is that the scheme is exempt from taxation on scheme income from investments or deposits, and any sum paid by an employer as a contribution is deductible.

The interaction of trust principles with the legislative regime therefore forms the foundation of the occupational pension scheme system. The following outlines the legislative impact on the constituent features of the trust relationship.

3.1.2.1 Scheme Documentation

The process for obtaining status as an “exempt-approved” scheme influences the content of a scheme’s constituent documents. The ICTA specifies two paths for the conferral of “approved” status. Inland Revenue must grant approval if the scheme satisfies the prescribed conditions, namely that:

- the scheme is bona fide established for the sole purpose of providing prescribed benefits in respect of the service of an employee and that those benefits be paid only to prescribed persons;
- the scheme is established in connection with some trade or undertaking carried on in the UK;
- the scheme is recognised by both the employer and the employees and the employer contributes to the scheme;
- a resident will be responsible for the discharge of the duties imposed on the administrator (being usually the trustee of the scheme); and
- in no circumstances can an amount be paid by way of repayment of an employee’s contributions under the scheme.

In addition, the scheme must satisfy conditions in respect of benefits payable, including the types of benefits provided, the age at which benefits are payable, the amount of benefits and the persons to whom benefits may be paid.

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44 If the scheme is not established as an irrevocable trust the Board can, having regard to special circumstances, direct that the scheme is nevertheless an “exempt-approved” scheme: Income and Corporation Taxes Act 1988 (UK) s 592(1).
46 Income and Corporation Taxes Act 1988 (UK) s 592(4).
48 As to the prescribed benefits see Income and Corporation Taxes Act 1988 (UK) s 590(3) and 3.1.2.4.
49 The prescribed persons are: (i) the employee or a scheme member’s ex spouse; (ii) a widow, widower, child or dependant of the employee or of a scheme member’s ex spouse; or (iii) the personal representatives of the employee or of a scheme member’s ex-spouse: Income and Corporation Taxes Act 1988 (UK) s 590(2)(aa).
50 Income and Corporation Taxes Act 1988 (UK) s 590(2). See 3.1.2.4.
Alternatively, Inland Revenue may at its discretion "approve" a scheme notwithstanding that the prescribed conditions referred to above are not satisfied.\footnote{Income and Corporation Taxes Act 1988 (UK) s 591.} Guidance as to the manner in which Inland Revenue will exercise its discretion and the matters that must be provided for in scheme documentation is provided by the way of an extensive Practice Note.\footnote{United Kingdom, Inland Revenue, Occupational Pension Schemes Practice Notes "On the Approval of Occupational Pension Schemes", IR12, 2001.}

A scheme will additionally be conferred status as an "exempt-approved" scheme (as opposed to an "approved" scheme) if the scheme is constituted as an irrevocable trust.\footnote{Income and Corporation Taxes Act 1988 (UK) s 592.}

Although the term "irrevocable trust" has not been statutorily defined for the purposes of the ICTA, Inland Revenue considers that a trust will be irrevocable if "the assets...[are] set aside to provide relevant benefits for employees or ex spouses and must be held by a trustee or trustees on trusts that ensure that, apart from any surplus...or where reimbursement is appropriate, they are not available to the employer".\footnote{United Kingdom, Inland Revenue, Occupational Pension Schemes Practice Notes "On the Approval of Occupational Pension Schemes", IR12, 2001, at ¶2.3.}

The extent to which the provisions of the ICTA and the details of Inland Revenue's Practice Note impact upon scheme rules in respect of specific matters (for example, contributions, benefits and surplus) are addressed below, where relevant.

3.1.2.2 TRUSTEES

Capacity and Constitution

The general law notion that a person or entity capable at law of holding property in his or her own right has the capacity to hold the office of trustee is circumscribed by the Pensions Act, which disqualifies prescribed persons from acting as a trustee. In a manner similar to the "disqualified person" concept applicable in the Australian regime,\footnote{See 2.2.3.1.} persons are disqualified if they have been convicted of an offence involving dishonesty, are bankrupt, have entered into an arrangement with creditors or are subject to a
prescribed disqualification order.\footnote{Pensions Act 1995 (UK) s 29(1). The orders prescribed are those disqualification orders made under the Company Directors Disqualification Act 1986 (UK) or the Insolvency Act 1986 (UK) s 429(2)(b); Pensions Act 1995 (UK) s 29(1)(d).} If the trustee is a company, it will likewise be disqualified from acting as a trustee if a director would be disqualified from so acting.\footnote{Pensions Act 1995 (UK) s 29(1)(c).}

The \textit{Pensions Act} also impacts on the constitution of the trustee. An initiative arising from the recommendations of the Goode committee\footnote{United Kingdom, Pension Law Review Committee, \textit{Pension Law Reform: The Report of the Pension Law Review Committee}, Cm 2341-1, 1993, at § 4.1.9.} is the requirement that members, unless having otherwise approved trustee arrangements,\footnote{Pensions Act 1995 (UK) s 17.} nominate: (i) at least two trustees if the scheme has more than 100 members; and (ii) at least one-third of the total trustees.\footnote{Pensions Act 1995 (UK) s 16(6).} If the trustee is a company, the same requirements apply in relation to the number of member-nominated directors.\footnote{Pensions Act 1995 (UK) s 18(6).}

\textbf{Duties}

Unlike Australia and Hong Kong,\footnote{For the position in Australia and Hong Kong see 2.2.3.4 and 3.4.2.2 respectively.} no attempt has been made to codify or statutorily replicate the general law duties applicable to trustees. Instead the \textit{Pensions Act} and the PSA add to the duties imposed on trustees by the general law. A selection of these duties appears in Table 3.1.

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
A selection of the duties of trustees prescribed by the \textit{Pensions Act} include the duty to: \\
\hline
\hspace{1cm} \bullet \hspace{1cm} prepare arrangements for the election of member-nominated trustees and directors (s 16(1)). \\
\hspace{1cm} \bullet \hspace{1cm} prepare a statement of the principles governing decisions about investments for the purposes of the scheme and exercise the power of investment in accordance with this statement (ss 35, 36). \\
\hspace{1cm} \bullet \hspace{1cm} obtain and consider the advice in respect of both the preparation of the above statement of investment principles and the selection of investments (ss 35(5), 36(8)). \\
\hspace{1cm} \bullet \hspace{1cm} comply with prescribed requirements before making payments to employers out of scheme assets (s 37(8)). \\
\hspace{1cm} \bullet \hspace{1cm} ensure that the scheme complies with the prescribed employer-related investment restrictions (s 40). \\
\hspace{1cm} \bullet \hspace{1cm} appoint a scheme auditor, actuary and fund manager as professional advisers (s 47(8)) and provide the prescribed information to those advisers (s 47(11)). \\
\hspace{1cm} \bullet \hspace{1cm} not act as an auditor or actuary of the scheme (s 27). \\
\hspace{1cm} \bullet \hspace{1cm} keep money received in a separate account at a prescribed institution (s 49(1)). \\
\hline
\end{tabular}
\caption{Selected Duties of Trustees}
\end{table}
• keep books and records relating to prescribed transactions and records of meetings (s 49(2)).
• secure arrangements for the resolution of disagreements about matters in relation to the scheme and ensure such arrangements are implemented (s 50).
• comply with the minimum funding requirement by obtaining the prescribed actuarial valuations (s 57), securing the preparation of a schedule of contributions (s 58), and giving notice to OPRA and the members where amounts payable in accordance with the schedule of contributions by the employer have not been paid (s 59).
• disclose the prescribed information to members, prospective members, spouses of members and prospective members, and independent trade unions recognised for the purposes of collective bargaining in respect of the members, including:
  • documents constituting the scheme (reg 3);
  • the prescribed basic information about the scheme (reg 4 & Sch 1 of those regs); and
  • a copy of the annual report upon request (reg 6).
• disclose the prescribed information regarding the benefits payable to individuals (reg 5, Sch 2).

The reference to regulations in this table is to the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 SI 1996/1655 (UK) (enacted pursuant to PSA s 113; Pensions Act s 41)

At general law the framer of the trust deed is free to include a wide exoneration clause that exempts trustees from liability from imprudent or negligent (but not dishonest) breaches of trust.\(^63\) The Pensions Act limits this principle in two ways. First, liability for breach of an obligation to take care or exercise skill in the performance of any investment function exercisable by a trustee (or a delegate of a trustee) cannot be excluded or restricted by any instrument or agreement.\(^64\) Secondly, amounts cannot be paid to the trustee either directly, or by way of reimbursement, for prescribed fines and penalties.\(^65\)

### 3.1.2.3 Trust Property

The property of a pension scheme is defined by the trust deed of the relevant scheme, which in turn is influenced by the requirements of the legislative regime. Typically trust property will be defined to include contributions to the scheme, investment earnings on those contributions, and transfers of accrued benefits into the scheme. In that the object of a pension scheme is to make provision for members in retirement, trust property is generally preserved in a scheme for payment upon retirement. The following outlines the influence of the legislative regime on contributions, investment, preservation and benefits.

\(^63\) Armitage v Nurse [1997] 3 WLR 1046 at 1056 per Millett LJ.

\(^64\) Pensions Act 1995 (UK) s 33.

\(^65\) The fines and penalties prescribed are: (i) fines imposed by way of penalty for an offence for which the trustee has been convicted, including any penalties accruing under a policy of insurance in respect of the payment of premiums; and (ii) the penalties imposed under the PSA: Pensions Act 1995 (UK) s 31.
Contributions

Provision for employer contributions is influenced by three separate statutory regimes: the requirements of the ICTA for approval as an “approved” scheme, the requirements under the PSA if an employer contracts-out of the SzP/SERPS system, and the minimum funding requirements prescribed by the Pensions Act.

A prerequisite for approval as an “approved scheme” is that employers contribute to the scheme in respect of employees. Inland Revenue will not exercise its discretion to approve a scheme if employer contributions “appear to be mere token contributions or insignificant amounts”.66 Added to this is the minimum funding requirement (“MFR”) prescribed by the Pensions Act.67 The MFR is designed to secure the solvency of schemes that offer salary-related benefits (defined benefits) by setting a benchmark against which trustees must measure the funding level of a scheme:68 the level of contributions coming into the scheme must ensure that the value of the scheme’s assets is not less that the actuarial value placed on its liabilities.69 To facilitate compliance, trustees are duty bound to ensure that a schedule of contributions, stating the rates of contributions payable by the employer and the dates that such contributions are due, is prepared and maintained.70 Moreover, if the contributions are not paid at the correct time, trustees must report to both OPRA and members within the specified time.71

Although the MFR does not apply in respect of defined contribution (money purchase) schemes, the Pensions Act nevertheless requires trustees to prepare and maintain a schedule of contributions72 and that notice be given to OPRA and the members in the event of non-compliance.73

69 Pensions Act 1995 (UK) s 56.
70 Pensions Act 1995 (UK) s 58.
72 Pensions Act 1995 (UK) s 87.
The provisions of the PSA that permit a scheme to contract-out of the S2P/SERPS regime\(^\text{74}\) also impact upon the level of contributions that are paid by employers. If an employer chooses to contract-out of S2P/SERPS, employees upon retirement will in effect receive only the basic old age pension from the State with the scheme providing an additional private pension.\(^\text{75}\) Contracting-out is premised upon the notion that employers, in return for lower social insurance premiums, will direct that saving into a scheme that will provide broadly equivalent pension benefits as those under S2P/SERPS.\(^\text{76}\) The statutory rules that give effect to this principle take different forms depending on the type of scheme. In respect of a final salary scheme, the scheme must satisfy the reference scheme test: that the pensions provided by the scheme are broadly equivalent to the benefits set out in the legislation.\(^\text{77}\) As a final salary scheme must also be solvent on an MFR basis, the contributions paid into the scheme must support the benefits provided. Conversely, where schemes are contracted-out on a money purchase basis, a basic minimum level of contributions must be paid into the scheme.\(^\text{78}\)

In respect of employees, the rules of a scheme may or may not require employee members to contribute to the scheme. However, schemes must permit members to pay additional voluntary contributions to a maximum of 15 per cent of full gross earnings.\(^\text{79}\)

**Investment**

Subject to any restriction imposed by the trust deed, a general statutory power is conferred upon trustees to invest scheme assets as if they were absolutely entitled to those assets.\(^\text{80}\) In the exercise of this power, trustees must prepare and maintain a statement of investment principles that addresses the balance between types of

\(^{74}\) See the heading "Social Insurance" in 3.1.

\(^{75}\) Grant, "A UK International Perspective - Trustees on Trial", presented at Superannuation 2000: An Eye to the Future, Launceston, March 2000, Law Council of Australia, at ¶1.3.3.

\(^{76}\) Grant, "A UK International Perspective - Trustees on Trial", presented at Superannuation 2000: An Eye to the Future, Launceston, March 2000, Law Council of Australia, at ¶1.3.3.

\(^{77}\) See Pension Schemes Act 1993 (UK) ss 9(2), 12A, 12B (in particular note s 12A(3)). See also Grant, "A UK International Perspective - Trustees on Trial", presented at Superannuation 2000: An Eye to the Future, Launceston, March 2000, Law Council of Australia, at ¶1.3.3.

\(^{78}\) See Pension Schemes Act 1993 (UK) ss 9(3), 10. See also Grant, "A UK International Perspective - Trustees on Trial", presented at Superannuation 2000: An Eye to the Future, Launceston, March 2000, Law Council of Australia, at ¶1.3.3.

\(^{79}\) Pension Schemes Act 1993 (UK) s 111. See also in respect of voluntary contributions: Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987 SI 1987/1108 (UK); Retirement Benefit Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993 SI 1993/3016 (UK).

\(^{80}\) Pensions Act 1995 (UK) s 34.
investments and the risk of investments. Interestingly, in performing this duty trustees must not only seek professional advice as to the content of the statement, but must also consult with the employer in this regard. This latter requirement is somewhat curious given that the *Pensions Act* expressly prohibits the trust deed or the statement of investment principles from imposing a restriction on the trustee vis-à-vis the employer.

Regarding specific types of investment, trustees are prohibited from investing more than five per cent of the current market value of the resources of the scheme in employer-related investments.

**Preservation and Benefits**

The availability of taxation concessions is in part premised upon the preservation of benefits until retirement. As such, the taxation approval process impacts upon the types of benefits payable, and on the timing and amount of those benefits.

Inland Revenue will not exercise its discretion to “approve” a scheme where the scheme provides benefits in excess of the prescribed maximums. Permitted benefits include retirement benefits, incapacity benefits and death benefits.

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81 *Pensions Act 1995* (UK) s 35(1). The matters that must be addressed by the statement of investment principles are prescribed by s 35(3).

82 *Pensions Act 1995* (UK) s 35(5). The duty of trustees to seek the advice of qualified professionals in respect of the statement of investment principles applies likewise to trustees in the selection of investments: s 36(8).


84 *Pensions Act 1995* (UK) s 40; Occupational Pension Schemes (Investment) Regulations 1996 SI 1996/1312 (UK) reg 5. As to those investments that are excepted see reg 6.


86 *Pensions Act 1995* (UK) s 40; Occupational Pension Schemes (Investment) Regulations 1996 SI 1996/1312 (UK) reg 5. As to those investments that are excepted see reg 6.

87 A “retirement benefit” is a benefit payable upon the member attaining the “normal retirement date”. This date must be specified by the rules of the scheme, and may be any age between 60 and 75 years. The maximum total retirement benefit (pension and lump sum) that can be prescribed by a scheme is two-thirds of a member’s final remuneration. This Inland Revenue limit applies both to final salary and money purchase schemes. Separate maximums also apply for pension benefits and lump sum benefits. However, the total benefit, whether a pension benefit, lump sum benefit or a combination of both, must fall within the total retirement benefit maximum. A further significant limit placed upon total retirement benefits is the salary that can be counted towards “final remuneration”. An earnings cap, termed a “permitted maximum”, has been placed upon the amount of remuneration that can be treated as final remuneration. For the 2001-2002 year the earnings cap was set at £95,400. Persons earning more than this amount cannot be provided with benefits in excess of the permitted maximum from a tax approved scheme. However, provision for additional benefits can be made via an unapproved arrangement: see United Kingdom, Inland Revenue, Occupational Pension Schemes Practice Notes “On the Approval of Occupational Pension Schemes”, IR12, 2001, at ¶¶6-8; United Kingdom, Inland Revenue, Occupational Pension Schemes: A Guide for Members of Tax Approved Schemes, IR2 (Personal Taxpayer Series), 2002 at Ch 6, Grant, “A UK International Perspective - Trustees on Trial”, presented at *Superannuation 2000: An Eye to the Future*, Launceston, March 2000, Law Council of Australia, at ¶1.4.4, ¶1.5.5.
Benefits accrued within a scheme vest in a member after an initial two year qualifying period. Thereafter, if a member leaves scheme membership prior to the normal retirement date, the benefits accrued must be either preserved within the scheme until the normal retirement date whereupon a "short service" benefit is payable, or transferred to another prescribed retirement benefit arrangement (for example, to another occupational pension scheme or a personal pension scheme). A member who leaves scheme membership prior to the qualifying service period is entitled to a refund of his or her own contributions to the scheme.

3.1.2.4 Beneficiaries

As with all of the jurisdictions canvassed in this Chapter, the statutory rights that accrue to members (in addition to those at general law) focus on the disclosure of information. Members, prospective members, and spouses of members and prospective members, are entitled to the disclosure of various documents and information including:

- the trust deed and rules of the scheme or any other documents constituting the scheme;
- the prescribed basic information about the scheme, which includes eligibility conditions and how contributions are determined and calculated.

A scheme may make provision for the payment of benefits upon incapacity. In this situation Inland Revenue permits the benefits specified in the scheme to be paid immediately regardless of age. The benefit is calculated as a fraction of the final remuneration the employee could have received had he or she remained in service until the normal retirement date: United Kingdom, Inland Revenue, Occupational Pension Schemes Practice Notes "On the Approval of Occupational Pension Schemes", IR12, 2001, at ¶6.2.

A scheme may make provision for the payment of benefits on the death of a member to his or her survivors. Inland Revenue permits two types of death benefits when a member dies whilst still employed. First, a lump sum benefit, of up to a maximum of four times the total remuneration of the deceased member at the date of death, may be payable to person(s) chosen at the discretion of the scheme trustees (generally the person(s) nominated by the member). Secondly, the scheme may provide for a pension to the spouse or dependants of the deceased member. The maximum pension available is two-thirds of the amount of the pension available to the member had he or she retired due to incapacity at the date of death. Where death occurs after the member has retired, the scheme may provide a pension for a spouse or a dependant upon the maximum pension payable being two-thirds of the pension payable to the member upon retirement. The term "dependant" refers to persons who are financially dependent upon the deceased member. Children are automatically deemed to be dependent until the age of 18 or until full time education ceases. A spouse is a person who is legally married to the deceased, and does not include de facto or same-sex partners. Such partners will only qualify for a benefit in circumstances of financial dependence (as determined by the scheme trustee): see generally United Kingdom, Inland Revenue, Occupational Pension Schemes Practice Notes "On the Approval of Occupational Pension Schemes", IR12, 2001, at ¶Pt 11.

Pension Schemes Act 1993 (UK) s 71.

Pension Schemes Act 1993 (UK) s 95(2).

Pension Schemes Act 1993 (UK) s 71.

• a copy of the annual report upon request;\textsuperscript{93}
• in prescribed circumstances, and when requested, a copy of the latest actuarial valuation, schedule of contributions or payment schedule, or statement of investment principles;\textsuperscript{94} and
• prescribed information regarding benefits payable and the alteration of such benefits.\textsuperscript{95}

Also, active members are entitled to the disclosure of information during the course of their membership regarding the amount of benefits and survivor benefits payable in the future (in a defined benefit scheme),\textsuperscript{96} or the contributions accumulated in the scheme and the value of accrued and protected rights (in a money purchase scheme).\textsuperscript{97} In the event the scheme is to be wound up, members are entitled to the information prescribed in the regulations.\textsuperscript{98}

3.1.3 Pension Schemes, Trusts and the Employment Relationship

The issues that arise in Australian law relating to superannuation in the context of the employment environment likewise arise in the United Kingdom. In addition to restrictions on employer investment, the principal issues addressed by the United Kingdom legislation relate to the power of amendment and the repatriation of surplus.

Amendments

The power to amend a pension scheme will usually be conferred on the scheme trustees, the principal employer or both (i.e., where consent of one or the other is required). In addition to general law requirements and any restrictions expressed in the trust deed, the Pensions Act prohibits the exercise of a power of amendment by the trustee or any other

\textsuperscript{92} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 4, Sch 1.
\textsuperscript{93} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 6.
\textsuperscript{94} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 7.
\textsuperscript{95} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 5(a), 5(b), Sch 2.
\textsuperscript{96} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 5(4), Sch 2.
\textsuperscript{97} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 5(5), Sch 2.
\textsuperscript{98} Occupational Pension Scheme (Disclosure of Information) Regulations 1996 S1 1996/1655 (UK) reg 5(10).
person in a manner that would or might affect any entitlement, accrued right\textsuperscript{99} or pension credit right, of any member\textsuperscript{100} of the scheme, unless the trustees\textsuperscript{101} have first satisfied themselves that either of the following requirements have been met:

- **The "certification requirements":** These are the prescribed requirements for securing the opinion of an actuary that the exercise of the power would not adversely affect any member of the scheme in respect of his or her entitlement;\textsuperscript{102} or

- **The "consent requirements":** These are the prescribed requirements for obtaining the consent of member of a scheme to the exercise of the power.\textsuperscript{103}

Two further restrictions on the power of amendment relate to the taxation and social security status of schemes. First, in order to maintain status as an "exempt-approved" scheme, Inland Revenue must approve any alterations.\textsuperscript{104} Secondly, where a scheme is a contracted-out scheme, all amendments will be void unless they were made in the prescribed circumstances or are of a prescribed description.\textsuperscript{105} The circumstances and descriptions prescribed in the regulations essentially relate to the protection of protected rights under a money-purchase scheme, guaranteed minimum pension entitlements, and accrued rights under a salary-related scheme.\textsuperscript{106}

Unlike the other jurisdictions canvassed by this thesis, the *Pensions Act* not only restricts the power of amendment but also specifically confers a limited power of amendment so

\textsuperscript{99} An "accrued right" is: (i) any right to future benefits that has accrued to (or in respect of) the member; and (ii) at any time when the pensionable service of a member of an occupational pension scheme is continuing, the member's accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service: *Pensions Act 1995* (UK) s 124(1). In the case of a member who has died, the definition extends to: (i) a widow or widower; or (ii) in the case where there is not widow or widower, any other person who has an entitlement to a payment under the scheme in respect of the deceased member: *Occupational Pension Schemes (Modification of Schemes) Regulations 1996* SI 1996/2516 (UK) reg 2.

\textsuperscript{100} "Member" is defined to mean any active, deferred or pensioner member: *Pensions Act 1995* (UK) s 124(1). In the case of a member who has died, the definition extends to: (i) a widow or widower; or (ii) in the case where there is not widow or widower, any other person who has an entitlement to a payment under the scheme in respect of the deceased member: *Occupational Pension Schemes (Modification of Schemes) Regulations 1996* SI 1996/2516 (UK) reg 3.

\textsuperscript{101} In the situation where the power of amendment has been conferred on a person other than the trustee(s), the trustees must have approved the exercise of the power in that manner (i.e in accordance with the certification or consent requirements): *Pensions Act 1995* (UK) s 67(3)(a); *Occupational Pension Schemes (Modification of Schemes) Regulations 1996* SI 1996/2516 (UK) reg 4.


\textsuperscript{104} *Income and Corporation Taxes Act 1988* (UK) s 591B(a).

\textsuperscript{105} *Pension Schemes Act 1993* (UK) s 37. See further *Occupational Pension Schemes (Contracting-out) Regulations 1996* SI 1996/1172 (UK).

that trustees can effect modifications in relation to certain prescribed purposes, which include:

- extending the class of persons who may receive death benefits;
- providing arrangements for the selection of member-nominated trustees;
- permitting any power to distribute surplus to be exercised only by the scheme trustees; and
- effecting compliance with the prescribed requirements for the distribution of surplus upon winding up.

**Surplus**

The UK regulatory regime regulates the management and distribution of scheme surpluses. The regulation of actuarial surpluses is premised upon the notion that "money should not be held except to provide benefits which the scheme has a commitment to pay and that the amount of money held should not be more than sufficient to pay those benefits when they would normally become payable". This principle is implemented by requiring the administrator of the scheme to make proposals to Inland Revenue for reducing scheme surplus in excess of five per cent of the scheme's liabilities.

The permitted methods for reduction are by:

- making payments to an employer;
- suspending or reducing an employer's obligations to make contributions under the scheme;
- suspending or reducing employees' obligations to make contributions under the scheme; or
- improving existing benefits or providing new benefits.

Where Inland Revenue has approved a surplus reduction proposal, the administrator must carry out the proposal. The feasibility of the surplus reduction proposal will depend on the powers contained in the trust instrument as well as any further legislative restrictions. A particular difficulty may be the payment of surplus out to an employer. If the trust deed

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107 *Pensions Act 1995* (UK) s 68.
109 For the purposes of the ICTA the administrator of a scheme is the trustee(s) of the scheme: *Income and Corporation Taxes Act 1988* (UK) s 611AA.
vests power to make payments out to the employer during the continuation of the fund in an individual other than the trustee, the Pensions Act prohibits the exercise of the power by that individual. To cure this want of power, the trustee is statutorily permitted to exercise that power. Further restricting any payment out to the employer during continuation of the scheme, OPRA must be first satisfied that:

- exercise of the power is part of a surplus reduction proposal approved by Inland Revenue (as described above);
- the trustees are satisfied that it is in the best interests of the members that the power be exercised in the manner proposed;
- if the terms of the trust instrument originally conferred the power on the employer, that the employer has requested, or consented to, the exercise of the power;
- the rates of pensions provided under the scheme have been increased by at least the prescribed percentage; and
- the prescribed notices have been given to the members, namely: (i) notice of the approved proposal that informs the member of how it is proposed to reduce the surplus as well as that the member may make written representations to the trustees in respect of the proposal; and (ii) a notice informing members that the trustees intend to proceed with the proposal, noting also that the members may make written representations to OPRA in respect of the proposal.

Payment to the employer in the event of a winding up is likewise restricted. Here OPRA must be satisfied that:

- the liabilities of the scheme have been fully discharged;
- in the event that there is power under the scheme to distribute assets to any person other than the employer, there has been a decision not to exercise that power;
- the annual rates of pensions have been increased by the appropriate percentage; and
- the prescribed notices has been given to members regarding the proposal to exercise the power, namely: (i) notice informing the members of the trustees’ estimate of the surplus assets and the proposed plan for distribution of the surplus as well as that members may make written representations to the trustees in respect of the proposals; and (ii) a notice (at least three months prior to the exercise of the power) containing again the trustees’ estimate of the surplus and the proposed plan for distribution, but also advising that members may make written representations to OPRA is respect of the proposed distribution.

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113 Pensions Act 1995 (UK) s 37(2).
114 Pensions Act 1995 (UK) s 37(2).
117 Pensions Act 1995 (UK) s 76.
Where the trust deed prohibits the distribution of assets to the employer, the trustees may nevertheless distribute surplus assets to the employer on termination on condition that the trustees have provided additional benefits or increased the value of benefits to the maximum allowed by the *Income and Corporation Taxes Act 1988* (UK).  

The final statutory initiative of note is that the *Pensions Act* confers upon OPRA a power to order, upon application of the trustees, that the scheme be modified so as to reduce a statutory surplus (as required by the ICTA) or repay a surplus to the employer upon winding up. This power may be exercised by OPRA regardless of whether such an amendment is permitted by the trust deed. However, OPRA cannot make an order unless satisfied that the purpose for which the application is made cannot otherwise be achieved, the procedure for achieving that purpose is unduly complex or protracted, or involves obtaining consents which cannot be obtained or only obtained with undue delay or difficulty. Two further requirements must be met before a trustee can make application to OPRA for this purpose. First, to permit an opportunity for member comment, the prescribed notices that must be sent to members prior to distributing surplus to an employer must advise that implementation of the proposed distribution requires a modification order. Secondly, if the proposed distribution occurs upon winding up, in addition to the requirements described above, the trustees must be satisfied that the proposal is in the interests of the members. Once an order is made by OPRA, it is deemed to be effective in law as if it had been made under a power conferred by or under the scheme.

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120 *Pensions Act 1995* (UK) s 69.


124 *Pensions Act 1995* (UK) s 71(2).
3.2 CANADA

The retirement income system in Canada is characterised by three main pillars of income support: government pensions; social insurance schemes; and private pensions.

**Government Pensions**

The first pillar of income support refers to the provision of government funded pensions for all persons over a specified age. Akin to the age pension in Australia, eligibility is judged pursuant to an income and residency test, and is not based upon previous labour force participation. The pensions are unfunded and financed from general revenue.

**Social Insurance Schemes**

The Canada Pension Plan ("CPP") forms the basis of a national social insurance scheme. The objective of this scheme is "to introduce a system where all working Canadians... provide for their retirement through their own contributions". Participation in the CPP is compulsory for all employees and self-employed persons. Benefits, financed from employee and employer contributions, include retirement pensions, disability benefits and survivor benefits. Contribution to the CPP, and therefore previous participation in the workforce, is the criterion for eligibility for the various benefits offered.

The CPP was originally financed on a pay-as-you-go basis. Other than a small reserve fund, current contributions equalled current benefits. The security of the CPP was therefore reliant upon the ability of the current workforce to fund the benefits of the preceding

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127 Persons over the age of 65 who have contributed to the CPP are eligible to receive a retirement pension that is paid monthly. For the relevant payment rates see Canada, Department of Human Resources, Canada Pension Plan Payment Rates: January-December 2000 (http://www.hrdc-drhc.gc.ca/isp/cpp/rates_e.shtml).

128 Persons whose capacity to work is affected by a severe and prolonged mental or physical condition and who contributed to the CPP are eligible to receive a disability benefit: Canada, Department of Finance, An Information Paper for Consultation on Canada Pension Plan, 1996, p 11.

129 There are three categories of survivor benefits: death benefit; surviving spouse's pension; and children's benefit.
To further secure the CPP two reforms were implemented. First, the CPP moved from pay-as-you-go financing to a fuller funding regime. Essentially, contributions were increased so as to substantially increase the value of the reserve fund. Secondly, in 1999 the Canada Pension Plan Investment Board was established for the purpose of investing the reserve fund with a view to achieving a maximum rate of return without undue risk of loss. The Board is independent of the federal and provincial governments, and is governed by twelve directors.

Private Pensions

Although both employment pension plans and individual retirement savings plans constitute this third pillar of retirement provision, for the purpose of comparative analysis the focus of this chapter is on employment pension plans. Unlike Australia and the other jurisdictions discussed, the regulation of pension plans in Canada is governed at the provincial level, except where the work, undertaking or business is within the legislative authority of the federal government. Consequently, including the federal scheme, there are ten systems of pensions regulation throughout Canada. Given this multifaceted regulation pensions regime in the Canadian province of Ontario has been selected as the principal comparator regime.

3.2.1 The Ontario Pensions Legislative Scheme

In Ontario the pensions industry is governed primarily by the Pension Benefits Act RSO 1990, c P8 ("PBA"), which prescribes: (i) a system for the registration of pension plans; (ii) the matters to be provided for in the constituent documents of a pension plan; (iii) the...
duties and powers of administrators and trustees; (iv) the functions and powers of the regulator; (v) the information required to be disclosed to prescribed parties; (vi) the benefits and interests of the members of pension plans; and (vii) the procedures and requirements in respect of surplus, sales and transfers, and winding up of pension plans.

The Superintendent of Financial Services is the Regulator of the Ontario pensions industry. For the purpose of exercising this function the Superintendent is granted a number of powers including the powers relating to:

- **Registration**: Where the constituent documents of a pension plan do not comply with the PBA, the Superintendent may refuse to register the plan, or revoke its current registration. Either action operates to terminate or wind up the plan.

- **Amendment**: Amendment to a pension plan must be registered. The Superintendent's refusal to register an amendment or revocation of an amendment operates to terminate the amendment.

- **Investigations**: For the purpose of enforcing the PBA, the Superintendent may: (i) make examinations, investigations and inquiries; (ii) access business premises where the Superintendent has reasonable grounds to believe that books, papers and documents that relate to a pension plan or fund are kept; and (iii) remove or copy such books, papers and documents.

- **Compliance**: Where the Superintendent is of the opinion, upon reasonable and probable grounds, that a pension plan or fund is not being administered in accordance with its constituent documents, the PBA or the regulations, it may by written order require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or pension fund.

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136 The Superintendent of Financial Services operates under the auspices of the Financial Services Commission of Ontario ("FSCO"). The FSCO was created on July 1, 1998, as an arm's length agency of the Ministry of Finance. FSCO integrates the operations of the former Ontario Insurance Commission, Pension Commission of Ontario, and Deposit Institutions Division of the Ministry of Finance. FSCO is comprised of three key parts: the Commission or 'Board'; the Financial Services Tribunal (Tribunal); and the Superintendent and Staff. As an integrated regulator, FSCO merges Ontario's regulatory activities governing pensions, insurance, trust companies, credit unions, caisses populaires, co-operatives and mortgage brokers, into one body. FSCO's mandate is to enhance consumer confidence and public trust in the regulated sectors; and also to make recommendations to the Minister on matters affecting the regulated sectors. (1998) 7(1) Financial Services Commission of Ontario Pension Bulletin 3.

137 Pension Benefits Act RSO 1990, P8, s 18(i).
139 Pension Benefits Act RSO 1990, P8, s 18(4).
140 Pension Benefits Act RSO 1990, P8, s 106.
141 Pension Benefits Act RSO 1990, P8, s 87.
Surplus, Sales and Transfers: A withdrawal of surplus or a transfer of assets to a successor plan cannot be effected without the consent of the Superintendent. Where assets are transferred in contravention of this requirement the Superintendent may order the return of the assets to the original pension fund.

Winding Up: The Superintendent is conferred the power to require the partial or total winding up of a pension plan in prescribed circumstances.

The powers of the Superintendent are buttressed by the penalty regime established under the PBA. Persons who contravene the PBA, or contravene an order made under the PBA, are liable on conviction to a maximum fine of $100,000 at first instance and $200,000 at second instance. Liability is also extended to directors, officers, officials or agents who cause, authorise or permit the commission of an offence and or fail to take reasonable care to prevent the corporation from committing an offence.

Generally speaking, whenever the Superintendent exercises a power in relation to a pension plan, a right to appeal the exercise of that power (or a decision made pursuant to that power) is granted. The Financial Services Tribunal is the independent adjudicative body that exercises the powers conferred under the Financial Services Commission of Ontario Act RSO 1997, c 28 and the PBA. The Tribunal has exclusive jurisdiction to determine all questions of fact or law that arise in any proceeding before it. It may order the

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142 Pension Benefits Act RSO 1990, P8, ss 78(i), 80(4). In respect of the transfer of assets to another plan, the Superintendent is required to refuse consent where the pension benefits or any other benefits of the members and former members are not protected: s 80(5).

143 Pension Benefits Act RSO 1990, P8, s 80(6).

144 Pension Benefits Act RSO 1990, P8, s 69. The prescribed circumstances include: (i) where there is a cessation or suspension of employer contributions to the pension fund or the employer fails to make contributions to the pension fund as required by the PBA or regulations; (ii) the employer is bankrupt within the meaning of the Bankruptcy and Insolvency Act RSC 1985, c B3; (iii) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer, or as a result of the reorganization of that business; (iv) all or part of the employer’s business or all or part of the assets of the employer’s business are sold, assigned or otherwise disposed of and the person who acquires the business or asset does not provide a pension plan for the members of the employer’s pension plan who become employees of the person; and (v) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part.


146 Pension Benefits Act RSO 1990, P8, s 110(2).

147 The circumstances in which decisions of the Superintendent may be appealed are set out in Pension Benefits Act RSO 1990, P8, s 89. These include when the Superintendent proposes: (a) to refuse to register a pension plan or an amendment to it; (b) to make or refuse an order in relation to the return of assets transferred to the pension fund of a successor employer or a new pension fund; (c) to wind-up a pension plan; and (d) to consent or refuse consent to an application for the payment of surplus to the employer.

Superintendent to act, or refrain from acting, as it considers appropriate. In effect, the Tribunal stands in the shoes of the Superintendent for the purpose of exercising the powers granted to the Superintendent. A party to a proceeding before the Tribunal may appeal its decision to the Divisional Court.

### 3.2.2 Pension Plans and Trusts

A unique feature of the Ontario legislative regime is the underlying governance structure prescribed by the PBA. This uniqueness is characterised by two main distinguishing features. The first relates to the documentation and funding of the pension plan. In Australia, as well as the other jurisdictions discussed, a superannuation/pensions scheme is required to take the form of a trust. The trust instrument therefore governs the duties and rights of the relevant parties (trustee, employer and beneficiaries). In comparison, the registration process prescribed by the PBA requires the filing of the documents that create and support the pension plan and the pension fund. The terms “pension fund” and “pension plan” are not used in a generic sense (as the term “superannuation fund” may be used in Australia) or interchangeably. Rather, the PBA specifically defines the terms as follows:

- **Pension plan** means a plan organized and administered to provide pensions for employees, but does not include, (a) an employees' profit sharing scheme or a deferred profit sharing plan, (b) a plan to provide a retiring allowance, (c) a plan under which all pension benefits are provided by contributions made by members.

- **Pension fund** means the fund maintained to provide benefits under or related to the pension plan.

The pension plan must detail the rules for its administration and management (see Table 3.2), and essentially represents the contractual arrangement between the employee and employer. Conversely, the pension fund refers to the documents that support the creation of the actual pool of contributions that fund the pension plan. Consequently, if the pension plan is funded through the vehicle of a trust, the document creating and supporting the pension fund is the trust deed. The express distinction between the pension plan and pension fund is that it places beneficiaries in a position, unlike Australian counterparts, where entitlements have a direct contractual origin.

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149 Pension Benefits Act RSO 1990, P8, s 89(9).
150 Pension Benefits Act RSO 1990, P8, s 91.
151 Pension Benefits Act RSO 1990, P8, s 9(2)
A further matter of divergence in the context of documentation is that the pension plan is not necessarily funded by a pension trust. The breadth of the “pension fund” definition contemplates other funding vehicles, such as a contract of insurance. Notwithstanding this, typically the trust instrument is the primary mechanism used to fund pension plans and for the purpose of this thesis it is assumed to be the case.

The second distinguishing feature relates to the administration of the pension plan. Unlike the traditional superannuation/pension scheme where the trustee governs the administration and management of the scheme, the responsible entity in Ontario is the administrator.

The constituent elements of the scheme of governance, which in essence represents a modified trust, are plan and fund documentation, the administrator, the trustee, trust property, and the beneficiaries.

3.2.2.1 DOCUMENTATION

The PBA prohibits the administration of a pension plan unless the plan is registered in accordance with its provisions. Application is made to the Superintendent, and certified copies of the documents that create and support the pension plan, and the pension fund, as well as a certified copy of any reciprocal transfer agreement related to the pension plan, must accompany the application. The following table details the information prescribed by the PBA that must be set out in the pension plan documentation.

<table>
<thead>
<tr>
<th>TABLE 3.2— DETAILS REQUIRED TO THE ADDRESS BY A PENSION PLAN (PBA s 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A pension plan must address the:</td>
</tr>
<tr>
<td>• method for appointing the administrator;</td>
</tr>
<tr>
<td>• conditions for membership in the pension plan;</td>
</tr>
<tr>
<td>• benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death;</td>
</tr>
<tr>
<td>• normal retirement date under the pension plan;</td>
</tr>
<tr>
<td>• requirement for entitlement under the pension plan to any pension benefit or ancillary benefit;</td>
</tr>
</tbody>
</table>

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55 As to administrators see 3.2.2.2.


• contributions or the method of calculating the contributions required by the pension plan;
• method of determining benefits payable under the pension plan;
• method of calculating interest to be credited to contributions under the pension plan;
• mechanism for payment of the cost of administration of the pension plan and pension fund;
• mechanism for establishing and maintaining the pension fund;
• treatment of surplus during the continuation of the pension plan and on the wind-up of the pension plan;
• obligation of the administrator to provide members with information and documents required to be disclosed under the PBA and the regulations;
• method of allocation of the assets of the pension plan on wind-up; and
• particulars of any predecessor pension plan under which members of the pension plan may be entitled to pension benefits.

Typically, the pension plan text details the administration and management of the plan as well as the mechanism used to fund the plan,58 which for the purposes of this Chapter is presumed to be a trust. The trust agreement addresses issues such as the establishment of the trust, appointment and removal of the trustee, contributions payable, investment, duties and powers of the trustee, accounting and audit, and amendment and termination of the trust.59

3.2.2.2 ADMINISTRATORS

The PBA requires every pension plan to be administered by an administrator. The role of the administrator must be carried out by either: an employer (or employers), a pension committee,60 an insurance company that provides benefits under the plan or, in the case of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees constituted by at least 50% member representatives.61

In that the administrator of a pension plan is conferred overall responsibility by the PBA for the general administration of the plan and the investment of plan funds, its function is akin to that of the Australian trustee.62 An administrator is required to carry

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60 A pension committee can consist of either: (a) all member representatives; or (b) at least one representative of the employer(s), one representative of other persons required to contribute to the plan, and one representative of the members of the plan: Pension Benefits Act RSO 1990, P8, s 8.
out the duties and exercise the powers specified in the pension plan and the PBA. The duties for this purpose are detailed in Table 3.3.

**Table 3.3 – Selected Duties of Administrators**

<table>
<thead>
<tr>
<th>Pursuant to the PBA administrators are under a duty to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• apply for registration of the plan and amendments to the plan (s 9, 12);</td>
</tr>
<tr>
<td>• ensure that the pension plan and pension fund are administered in accordance with the constituent documents and the PBA and accompanying regulations (s 189(1), 189(3));</td>
</tr>
<tr>
<td>• file all prescribed reports and annual returns of information (s 20);</td>
</tr>
<tr>
<td>• provide information regarding the plan, employees’ rights and obligations in respect of the plan and other prescribed information to each person who is eligible as, or is required to become, a member of the plan (s 25);</td>
</tr>
<tr>
<td>• issue annually to members and beneficiaries (those persons in receipt of benefits) the prescribed information in respect of the plan and members’ benefits (s 27);</td>
</tr>
<tr>
<td>• make available and allow copying of prescribed documents in respect of members, former members, spouses of members, any other person entitled to benefits under the pension plan, an agent of the foregoing or a representative of a trade union that represents members of the plan (s 29);</td>
</tr>
<tr>
<td>• advise the Superintendent when a contribution that is due is not paid (s 56(2)); and</td>
</tr>
<tr>
<td>• give written notice of the wind-up of a pension plan to the prescribed persons, including the Superintendent, members and former members (s 68(2)).</td>
</tr>
</tbody>
</table>

In a manner similar to a trustee at general law, the administrator must carry out its duties and powers to the required standard of care. This demands that the administrator take the same care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another.¶ Moreover, if special skills are possessed, or should be possessed, a higher standard is imposed.¶

Although an administrator’s function can be likened to a traditional superannuation/pensions scheme trustee, unless the administrator is also the trustee of the pension fund, the general law duties of trusteeship have no application. Nevertheless, the administrator acts in a fiduciary capacity vis-à-vis the members.¶ In the absence of


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¶ *Pension Benefits Act* RSO 1990, P8, s 22(i).

¶ *Pension Benefits Act* RSO 1990, P8, s 22(2).

¶ *R v Blair* (1993) 106 DLR (4th) 1; *Anova Inc Employee Retirement Pension Plan (Administrator of) v Manufacturers Life Insurance Co* (1994) 121 DLR (4th) 162. See Gilles, “Pension Funds: Who is a Fiduciary?” presented at *Pension Funds: Who is a Fiduciary?*, Toronto, October 1994, The Canadian Institute; *Pension Benefits Act* RSO 1990, P8, s 22(4) (where an administrator is prohibited from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. This conflict of interest rule applies also to the members of a
general trust law duties an administrator's position at general law would appear less onerous than the Australian trustee counterpart. However, consideration of the Canadian conceptualisation of the nature of the fiduciary duty demonstrates that the demarcation between trustee and fiduciary duty is somewhat blurred.

In Australia, equity imposes on the fiduciary proscriptive obligations not to obtain any unauthorised benefit from the relationship and not to be in a position conflict: the “no-profit” and “no-conflict” rules. By comparison, the content and breadth of a fiduciary’s duty in Canada is more expansive; fiduciary obligation extends beyond a prohibitive approach to the imposition of a positive requirement reflective (and to some extent duplicatory) of tort and contract duties. The High Court of Australia has rejected the Canadian approach, Gaudron and McHugh JJ in Breen v Williams stating:

...the Canadian law on fiduciary duties is very different from the law of this country with respect to that subject. One commentator has recently pointed to the “vast differences between Australia and Canada in understanding of the nature of fiduciary obligations”. One significant difference is the tendency of Canadian courts to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs. The Canadian cases also reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive. However, Australian courts only recognise proscriptive fiduciary duties.

In Australia a sharp distinction is to be drawn between trust and fiduciary duties, as it is clear that fiduciary duties do not translate into, nor are co-extensive with, trust duties. In this respect, Gummow J has commented that:

Such a sharp distinction is not drawn in Canada. Whilst administrators are not technically subject to the general law duties of trusteeship, the conceptualisation of the nature of a fiduciary’s obligation bolsters the applicable general law duties by nevertheless providing that the administrator, subject to the constituent documents of the pension plan and pension fund, owes in equity duties of a quasi-tortious or quasi-contractual nature.

\*pension committee or board of trustees where such committees or boards are the administrator of the pension fund.\*

166 Breen v Williams (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ.
167 See, for example, McInerney v MacDonald (1992) 93 DLR (4th) 415.
169 Breen v Williams (1996) 186 CLR 71 at 137.
3.2.2.3 TRUSTEES

The role of a pension fund trustee in Ontario (unless the trustee is also the administrator of the pension plan) has a diminished function when compared to its Australian counterpart. As the administrator of the plan has responsibility for its overall management and operation, the role of trustee is usually that of custodian of the fund, which may include an investment and contribution-monitoring role.170

Only prescribed persons can act as a trustee.171 Pursuant to the PBA regulations, eligible persons are: (i) a prescribed trust corporation;172 (ii) three or more individuals, provided at least three individuals reside in Canada and at least one individual is independent of any employers contributing to the fund;173 and (iii) a prescribed corporate pension society.174

Some debate has ensued in Canada as to the nature of the relationship between the administrator and the trustee. Many argue that the relationship is one of principal and agent.175 If this is so, the trustee is not only subject to general law duties of trusteeship,
but is required by statute to carry out its functions to the same standard of skill and care demanded of the administrator.\textsuperscript{176}

A concomitant issue that arises in the agency context is the nature of the relationship between the trustee and members of the plan. At general law, a trustee's duty to the beneficiaries is paramount. The issue, yet to be the subject of judicial pronouncement, is which relationship, principal-agent or trustee-beneficiary, will prevail in a situation of conflict between the two.\textsuperscript{177} Take, for example, a situation where the administrator instructs the trustee to make a particular investment that the trustee does not believe to be in the best interests of the beneficiaries. Is the trustee required as an agent to act at the direction of the administrator (as principal) thereby negating its duty to the beneficiaries? Or should the trustee disregard the direction thereby negating its duty to the administrator?\textsuperscript{178}

3.2.2.4 Trust Property

As is traditionally the case, trust property is constituted by both contributions to the fund and investment earnings thereon. Both the employers and employees may contribute to the fund, with the restriction that pension and deferred pension benefits must be funded by at least 50\% of employer-sourced contributions.\textsuperscript{179}

The PBA requires and permits the provision of a number of benefits by a pension plan. The structure of a plan may take the form of a defined benefits plan, defined contribution (accumulation) plan, or a combination of both. A benefit accrued after 1 January 1988 will vest in favour of a member when the member has had membership in

\textsuperscript{176} Pension Benefits Act RSO 1990, P8, s 22(8). As to the administrator's standard of care see 3.2.2.2.

\textsuperscript{177} As to trustees' duties to beneficiaries when exercising a custodian function see Froese v Montreal Trust Co of Canada (1996) 137 DLR (4th) 725; Bodenier v Centra Gas Manitoba Inc (1999) 170 DLR (4th) 310.

\textsuperscript{178} As to the role of custodian trustees see Campbell, "Record-Keepers or Whistle-Blowers? A Look at the Role of Pension Fund Custodians" (1996) 15 ETPJ 26.

\textsuperscript{179} Pension Benefits Act RSO 1990, P8, s 39(9). The "50\% rule" applies only to contributions made on or after 1 January 1987. Contributions in excess of this requirement must be refunded as a lump sum to the member upon termination of membership: s 39(4). See further McFarlane and McSweeney, Pension Benefits Law in Ontario (Carswell, Looseleaf), at PBA-133.
the pension plan for two years. Following the vesting period, a pension benefit is payable upon retirement. Upon termination prior to the retirement date, members are entitled to a deferred pension, which may in the prescribed circumstances be taken as an early retirement benefit. A member who terminates membership prior to the vesting of the benefit is entitled to receive upon termination the value of his or her contributions plus interest. Importantly, once a member has served the vesting period, the benefits are “locked in” until retirement. This does not, however, prevent the transfer of a deferred pension at the option of the member to another retirement savings arrangement.

The PBA also provides for the payment of compulsory survivor benefits, and expressly permits a pension plan to make provision for additional benefits, including disability, death and early retirement benefits.

The standards set by the PBA are minimum standards that must be met by a pension plan. Consequently, more advantageous benefits (subject to certain limitations in the Income Tax Act RSC 1985, c1(5thSupp) (Canada) may be offered to members.

3.2.2.5 Beneficiaries

In addition to the rights that accrue at general law, the PBA confers upon beneficiaries rights to prescribed information, including the right to: (i) statements on termination, retirement, death or winding up; (ii) an explanation of the provisions of the plan and the person’s rights and obligations in respect of the pension plan; (iii) an annual

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180 Pension Benefits Act RSO 1990, P8, s 37(2). In respect of membership prior to 1988, benefits do not vest until the member has attained the age of 45 and has at least ten years’ continuous membership in the plan: s 36(2).


182 Pension Benefits Act RSO 1990, P8, s 41. The member must be within 10 years of the normal retirement date specified in the plan.

183 Pension Benefits Act RSO 1990, P8, s 63(3).

184 Pension Benefits Act RSO 1990, P8, s 63.

185 Pension Benefits Act RSO 1990, P8, s 42.


statement of plan benefits;\textsuperscript{191} (iv) notice of applications for amendment,\textsuperscript{192} distribution of surplus and winding up; and (v) inspect prescribed documents.\textsuperscript{193}

### 3.2.3 Pension Plans, Trusts and the Employment Relationship

The interrelationship between the legislative regime, general law and the employment contract is a striking characteristic of the Ontario regulatory regime. The features that give rise to such intimate connection are threefold. First, the pension plan is in essence a contractual arrangement between the employee and employer.\textsuperscript{194} Secondly, the function of the administrator as the responsible entity may be carried out by the employer. Thirdly, the trustee is a delegate of the administrator. Some of the issues and tensions that arise as a result of this governing structure have been identified above. Two further issues, which arise in all nominated jurisdictions, are the amendment of pension plans and the withdrawal of surplus. These are noted below.

#### Amendment

There is no statutory prohibition on either conferring the power of amendment on the employer or effecting a reduction of accrued benefits or interests by amendment. However, amendment to a pension plan is not effective until registered with the Superintendent.\textsuperscript{195} In the latter scenario, the Superintendent must require the administrator to notify the persons specified (by the Superintendent) of the nature of the amendment and inviting comment to be submitted to both the administrator and the Superintendent.\textsuperscript{196} The Superintendent may register the amendment after the expiration of the prescribed period with such changes as requested by the administrator.\textsuperscript{197}

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\textsuperscript{191} Pension Benefits Act RSO 1990, P8, s 27; Pension Benefits Act RRO 1990, Reg 909, s 40.

\textsuperscript{192} Pension Benefits Act RSO 1990, P8, s 26; Pension Benefits Act RRO 1990, Reg 909, s 39.

\textsuperscript{193} Pension Benefits Act RSO 1990, P8, ss 29-30; Pension Benefits Act RRO 1990, Reg 909, s 45. The prescribed documents include: (i) documents that support and create the pension plan and fund; (ii) documents that delegate administration of the pension plan or fund; (iii) financial statements and reports; (iv) statements of investment policies and goals; (v) copies of agreements concerning the purchase or sale of businesses or assets relating to the pension plan; and (vi) with the exception of personal information, copies of correspondence between the Financial Services Commission of Ontario and the administrator.

\textsuperscript{194} Molson's Brewery (Ont) Ltd v Ontario (Pension Commission) (1969) 7 DLR (3d) 298 at 302 (OntCA). See further McFarlane and McSweeney, Pension Benefits Law in Ontario (Carswell, Looseleaf), p PBA-14; Gillespie, "Pension Plans and the Law of Trusts" (1996) 75 Can Bar Rev 221 at 229-231.

\textsuperscript{195} Pension Benefits Act RSO 1990, P8, s 13.

\textsuperscript{196} Pension Benefits Act RSO 1990, P8, s 26(i).

\textsuperscript{197} Pension Benefits Act RSO 1990, P8, s 26(c).
Surplus

The PBA regulates the return of surplus to the employer, during both the operation of the pension plan and upon winding up. The foundation of this regulation is consent, both of the Superintendent and the members. To this end, the regulation promotes a system of surplus sharing agreements. As a base requirement, a payment out of surplus cannot be made to the employer without the consent of the Superintendent. At the time of application, the employer must send the prescribed information to members, pensioners, beneficiaries and any representative trade union.

Where the pension plan is ongoing, the Superintendent may only consent to a repayment if: (i) he or she is satisfied that the pension has a surplus; (ii) the pension plan provides for the withdrawal of surplus by the employer (or the Superintendent is otherwise satisfied that applicant is otherwise entitled to withdraw surplus); (iii) the prescribed amounts are retained within the scheme; (iv) all members and pensioners have consented to the terms upon which the surplus will be paid out of the fund; and (v) the matters prescribed in regulations have been complied with. Where the pension plan does not provide for the withdrawal of surplus money while the pension plan continues in existence, it is statutorily required that the plan be construed so as to prohibit any such withdrawal.

Similarly, where the pension plan is being wound up, in whole or in part, the Superintendent may only consent to a repayment if: (i) he or she is satisfied that the pension has a surplus; (ii) the pension plan provides for the withdrawal of surplus by the employer; (iii) provision has been made for the payment of all liabilities; (iv) the collective bargaining agent of the members, or in the absence of such, at least two-thirds of the members, agree in writing to the payment; and (v) any other persons receiving payments under the scheme, consent in writing to the payment. Where the pension plan does not provide for payment of surplus money on the winding up of the plan, the surplus money is

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199 Pension Benefits Act RSO 1990, P8, s 78(1).
200 Pension Benefits Act RSO 1990, P8, s 78(2).
201 Pension Benefits Act RSO 1990, P8, s 79(1); Pension Benefits Act RRO 1990, Reg 909, s 10(1).
203 Pension Benefits Act RRO 1990, Reg 909, s 10(1).
204 Pension Benefits Act RSO 1990, P8, s 79(2).
205 Pension Benefits Act RSO 1990, P8, s 79(3); Pension Benefits Act RRO 1990, Reg 909, s 8(1).
to be distributed proportionately between members, former members and other persons
entitled to payments under the pension plan on the date of winding up. 206

3.3 NEW ZEALAND

The retirement income system in New Zealand is characterised by two main pillars: New
Zealand Superannuation ("NZ Superannuation") and superannuation schemes.

NZ Superannuation

The term "NZ Superannuation" should not be confused with the term "superannuation"
which in Australia refers to benefits flowing from a private trust settled for the direct
purpose of providing benefits on retirement. Instead, the term refers to a government
funded flat-rated pension paid to all persons who satisfy residential and age
requirements. 207 Eligibility is not premised on an income or asset test. 208 Moreover, the
pension is unfunded and financed from general revenue. 209 Having a universal pension as its
only form of public pension for those who have reached retirement age makes New
Zealand unique among developed countries. 210 Other countries have tended to adopt a
social insurance or means-tested pension model.

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207 The age of entitlement for NZ Superannuation is currently 65 years: Office of the Retirement
Commission (www.retirement.org.nz/current/policy/nz.html). See also Retirement Income
208 Todd argues that a form of means testing will be required in the near future in order to sustain
provision of the pension: Todd, "International Perspectives – New Zealand", presented at
5.1.
209 Todd, "International Perspectives - New Zealand", presented at Superannuation 2000: An Eye to
the Future, Launceston, March 2000, Law Council of Australia, at 5.1; Preston, Office of the
Retirement Commissioner, Retirement Income in New Zealand: The Historical Context, 1999, at 20-
21.
210 Preston, Office of the Retirement Commissioner, Retirement Income in New Zealand: The
Superannuation Schemes

The provision of benefits upon retirement through superannuation schemes constitutes the second pillar of the New Zealand retirement income system. Like Australia, such schemes operate in a regulated environment, are usually constituted as trusts and generally arise as a result of the employment relationship.

3.3.1 The New Zealand Superannuation Legislative Scheme

The New Zealand superannuation industry is regulated by the Superannuation Schemes Act 1989 (NZ) ("SSA"). Of the legislative schemes canvassed by this thesis, the New Zealand Scheme is the least regulated and complex. The SSA prescribes:

- the process for registering a superannuation scheme with the Government Actuary;\(^{211}\)
- those matters that must be provided for in the deeds of registered superannuation schemes;\(^{212}\)
- the financial information standards with which trustees must comply;\(^{213}\)
- members' rights to information;\(^{214}\)
- the process for winding-up a registered scheme;\(^{215}\) and
- the powers of the Government Actuary.

The registration of superannuation schemes is voluntary but, unlike Australia, incentive to register is not effected through the taxation regime.\(^{216}\) The main incentive to register is credibility in the eyes of employers, employees and prospective members.\(^{217}\)

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\(^{211}\) *Superannuation Schemes Act* 1989 (NZ) ss 3-6. The information to be set out in the application is detailed in Sch 1.

\(^{212}\) *Superannuation Schemes Act* 1989 (NZ) ss 7-11. See further 3.3.2.


\(^{214}\) *Superannuation Schemes Act* 1989 (NZ) s 17.

\(^{215}\) *Superannuation Schemes Act* 1989 (NZ) s 21.

\(^{216}\) Prior to 1987 taxation initiatives provided encouragement to invest in superannuation. Superannuation schemes were subject to an "Exempt/Exempt/Taxed" regime. Under this regime, contributions to superannuation schemes were allowable deductions for both employers and employees ("exempt"), investment income did not constitute assessable income ("exempt"), and distributions to members and beneficiaries were assessed as income ("taxed"). These taxation concessions were available only to schemes approved pursuant to *Superannuation Schemes Act* 1976 (NZ). See *New Zealand Superannuation Guide* (CCH, Looseleaf), at §800. The enactment of the *Income Tax Amendment Act (No 5)* 1988 (NZ) and the *Income Tax Amendment Act* 1989 (NZ) saw the Exempt/Exempt/Taxed regime replaced with the present system, under which registered superannuation funds are generally taxed as a trust. As a result, all income derived by trustees and beneficiary income derived by any person is assessable as income: *Income Tax Act* 1994 (NZ), s 13H 3(1). Importantly, distributions in the hands of beneficiaries are tax exempt (see the definition of "beneficiary income": ss OBI, HH3(6)). The Retirement Income Policies Periodic Report Group recommended in its 1997 Interim Report that private
The Government Actuary is the regulator of the superannuation industry. In order to facilitate this role, the SSA confers power on the Government Actuary to register and deregister superannuation schemes, direct that schemes be operated in a specified manner, order that a scheme be wound up, and gather information in respect of a scheme. Moreover, the SSA establishes a penalty regime designed to encourage compliance with its provisions. An offence is committed when a person: (a) refuses or fails to supply information or deliver documents, statements or reports as required by the SSA, or to carry out a direction or order of the Government Actuary; (b) makes statements or supplies reports or certificates knowing that they are false or misleading; or (c) advertises, promotes or describes a registered superannuation schemes as a unit trust. Where a company commits an offence, every officer who knowingly authorised or permitted the offence likewise commits an offence. Offences are punishable on summary conviction by fine.

### 3.3.2 SUPERANNUATION SCHEMES AND TRUSTS

A registered superannuation scheme must be established by a trust. As such, the SSA interacts with the general law of trusts to form the foundation of the regulatory system. The impact of the SSA on the constituent features of the trust relationship follows.

#### 3.3.2.1 PROVISIONS OF THE TRUST INSTRUMENT

A registered superannuation scheme must be established for the purpose of providing retirement benefits. The content of the deed is addressed at two levels. First, the SSA requires the deed to stipulate certain matters, including: (a) the conditions of entry and termination of membership; (b) the contributions payable; (c) the manner in which provision for retirement should be made on a wholly voluntary basis, without any tax incentives for savings or any compulsory requirement for private provision. However, it also recommended that priority should be given to reform to reduce the tax-induced distortions between different types of saving: Retirement Income Policies Periodic Report Group 1997, Department of Social Welfare (New Zealand), 1997 Retirement Income Report: A Review of the Current Framework, Interim Report, 1997, at 124-134, 146.

217 New Zealand Superannuation Guide (CCH, Looseleaf), ¶560.

218 Superannuation Schemes Act 1989 (NZ) s 19.

219 Superannuation Schemes Act 1989 (NZ) s 20. This power may be exercised when the Government Actuary has reasonable cause to believe that a registered superannuation scheme is not acting in accordance with the SSA or the financial position of the scheme, security of benefits, or the management of the scheme, is inadequate.

220 Superannuation Schemes Act 1989 (NZ) s 25.

221 Superannuation Schemes Act 1989 (NZ) s 25(3).

222 Superannuation Schemes Act 1989 (NZ) s 2(1) (definition of “superannuation scheme”).

223 Superannuation Schemes Act 1989 (NZ) s 2(1) (definition of “superannuation scheme”).
benefits are determined, and the conditions under which benefits are payable; (d) the number of trustees, and their manner of appointment and retirement; and (e) the circumstances in which the scheme may be wound up, and how assets will be distributed in that event.\textsuperscript{224} Secondly, certain provisions are implied into the trust deed of every registered scheme.\textsuperscript{225} These relate to the investment of scheme money,\textsuperscript{226} amendment of the deed,\textsuperscript{227} transfer of members,\textsuperscript{228} reversion of scheme assets\textsuperscript{229} and deferral of benefits.\textsuperscript{230}

### 3.3.2.2 Trustees

The New Zealand statutory superannuation regime preserves existing general law trustee duties. However, additional duties are imposed on trustees of registered superannuation funds. Trustees are required to ensure that proper books of accounts are kept in respect of the scheme, and that those accounts are prepared annually and audited by an auditor.\textsuperscript{231} Trustees must also prepare annual reports, a copy of which must be sent to the Government Actuary.\textsuperscript{232} Upon the winding-up of a registered superannuation fund, trustees must comply with the prescribed procedure to ensure that the financial accounts of the fund are in order.\textsuperscript{233} The standard of care with which trustees must carry out their investment duty is implied into the trust deeds of all registered funds. The standard implied is that prescribed by the Trustee Act 1956 (NZ): trustees exercising a power of investment must exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.\textsuperscript{234} Where the trustee's profession, employment, or business is or includes acting as a trustee or investing money on behalf of others, the standard is increased to that of a prudent person engaged in that profession, employment or business.\textsuperscript{235}

\textsuperscript{224} Superannuation Schemes Act 1989 (NZ) s 7.
\textsuperscript{225} Superannuation Schemes Act 1989 (NZ) s 11.
\textsuperscript{226} Superannuation Schemes Act 1989 (NZ) s 8. See further 3.3.2.2.
\textsuperscript{227} Superannuation Schemes Act 1989 (NZ) s 9A. See further the heading “Amendment” at 3.3.3.
\textsuperscript{228} Superannuation Schemes Act 1989 (NZ) s 9B.
\textsuperscript{229} Superannuation Schemes Act 1989 (NZ) s 10. See further the heading “Surplus” at 3.3.3.
\textsuperscript{230} Superannuation Schemes Act 1989 (NZ) s 9C.
\textsuperscript{231} Superannuation Schemes Act 1989 (NZ) ss 13, 14.
\textsuperscript{232} Superannuation Schemes Act 1989 (NZ) s 14(3).
\textsuperscript{233} Superannuation Schemes Act 1989 (NZ) s 21.
\textsuperscript{234} Trustee Act 1956 (NZ) s 13B.
\textsuperscript{235} Trustee Act 1956 (NZ) s 13C.
New Zealand superannuation schemes operate within the context of a voluntary regime, in that contributions payable are not set down by statute.\textsuperscript{216} However, the trust deed of all registered superannuation funds must define the contributions payable in respect of the scheme.\textsuperscript{217} In the context of access to benefits, the SSA prescribes no preservation standards. It is the relevant trust instrument that prescribes any restrictions on access to benefits.

Members of registered superannuation schemes have, in addition to rights that accrue at general law, a statutory right to prescribed information. New members must receive information in respect of the contributions payable, charges and fees, principal rights and benefits, an annual report, and information regarding any circumstances that the trustee reasonable foresees may reduce benefits over time.\textsuperscript{218} Moreover, existing members are entitled to receive a copy of the financial report annually, and upon request are further entitled to: (i) an estimate of the member's benefits; (ii) view the trust deed; and (iii) receive a copy of the trust deed (upon payment of a reasonable fee).\textsuperscript{219}

The issues that arise in Australian law relating to superannuation in the context of the employment environment are replicated in New Zealand. The SSA addresses the interaction of general principles of trust law with the employment environment in two areas: amendment and surplus.

\textsuperscript{216} The New Zealand Government in 1997 proposed a compulsory Retirement Savings Scheme. Under this proposal, all persons who earned over $5,000 per annum would have been required to contribute a percentage of earnings into a private sector retirement fund of their choice. The proposed scheme was very similar to the Australian SG Scheme (as to which see 2.2.4.1). The proposal was defeated comprehensively by referendum. For the details of the proposed scheme, see New Zealand, Department of Treasury, \textit{You and Your Retirement Savings: The Proposed Compulsory Retirement Savings Scheme}, 1997.

\textsuperscript{217} Superannuation Schemes Act 1989 (NZ) s 7.

\textsuperscript{218} Superannuation Schemes Act 1989 (NZ) s 16.

\textsuperscript{219} Superannuation Schemes Act 1989 (NZ) s 17.
Amendment

Unlike the SIS Act in Australia, the SSA does not require trustee involvement in the amendment process. Thus the employer may have a unilateral right to amend. However, to protect the interests of members, the SSA strictly limits those matters that may be the subject of an amendment without beneficiary consent. Implied into the trust deed of every registered superannuation fund is a provision that prohibits, without the written consent of every beneficiary, an amendment that has the effect of adversely affecting benefits, removing the right of members to participate in management, increasing contributions, fees or charges, or providing for further reversion of assets to the employer. Also, prior to any amendment, a trustee must certify that the amended trust deed will comply with prescribed sections of the SSA, and must obtain such certification from the administration manager or a solicitor. The trustee must then lodge the prescribed certificates and a copy of the amendment with the Government Actuary within 14 days of the amendment.

Surplus

The Government Actuary expressly regulates the distribution of surplus to the employer. To this end, implied into the trust deed of every registered superannuation fund is a provision to the effect that no part of the scheme assets will revert to the employer without the prior written consent of the Government Actuary.

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241 The prescribed sections are Superannuation Schemes Act 1989 (NZ) ss 7 (content of trust deeds), 8-10 (implied provisions).

242 An "administration manager" is any person to whom the trustees have contracted some or all of the administration of the scheme: Superannuation Schemes Act 1989 (NZ) s 2.

243 Superannuation Schemes Act 1989 (NZ) s 12.

244 Superannuation Schemes Act 1989 (NZ) s 11 (see also s 22 as to the matters that the Government Actuary must consider before consent is granted).
3.4 **Hong Kong Special Administrative Region**

The retirement income system in Hong Kong is characterised by two main pillars: social security and private pensions. To the extent that private savings are, more so than any other jurisdiction discussed, also a significant feature of the Hong Kong community they could also be considered one of the pillars of income support in retirement.

**Social Security**

There is both means and non-means tested social security provision in Hong Kong. The Normal Old Age Allowance provides, subject to a means test, income support for persons between the age of 65 and 69. A more generous allowance, the Comprehensive Social Security Allowance, is available for those who satisfy a very stringent income and capital test. The Higher Old Age Allowance provides a monthly grant for citizens over 70 years of age regardless of means. Commonly called the “fruit allowance”, it is not aimed at, nor sufficient to, provide even subsistence of living.

**Private Pensions**

Concerned with an ageing demographic crisis, like Australia, Hong Kong has harnessed the trust as a private saving structure in order to enforce a compulsory contributory pension system termed the Mandatory Provident Fund (“MPF”). Pursuant to the MPF system, employers must enrol employees in an MPF registered scheme. Once enrolled, both employers and employees must each contribute a prescribed minimum percentage, with accrued benefits preserved until retirement. Prior to the introduction of the MPF regime, retirement provision by employers was governed by the *Occupational Retirement Schemes Ordinance 1992 (Cap 236) (HK)* ("ORSO"). This Ordinance established a registration

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245 Ho, "Mandatory Provident Funds in Hong Kong: Too Little, Too Late" (2001) 23 *Asian Journal of Public Administration* 65 at 80. See also Hong Kong (SAR), Education and Manpower Branch Government Secretariat, *An Old Age Pension Scheme for Hong Kong*, Consultation Paper, 1994, at ¶3.1-3.5.

246 Ho, "Mandatory Provident Funds in Hong Kong: Too Little, Too Late" (2001) 23 *Asian Journal of Public Administration* 65 at 66.

247 In less than 40 years it is expected that the proportion of Hong Kong citizens aged 65 and above will double: Pragnell, "Clearer in Hong Kong" (2001) 71(1) *Australian CPA* 20 at 21.
system for voluntarily established occupational retirement schemes. Though there was no compulsion to establish or register a scheme, once registered schemes were subject to various prudential and reporting requirements. The aim of the system was to increase, via regulation, the certainty that benefits promised to employees would be paid out when they fell due. Like most voluntary systems, registration was encouraged via the availability of taxation concessions. The ORSO regime was not discontinued with the introduction of the MPF scheme. Instead certain schemes registered under the ORSO regimes were exempted from some but not all MPF requirements. This allowed employees to remain members of their existing scheme. However, some amendments to the ORSO schemes were mandated and employers were required to offer a choice between an ORSO scheme and an MPF scheme. As the dominant legislative scheme, the remainder of this section focuses on the MPF regime.

3.4.1 THE MANDATORY PROVIDENT FUND LEGISLATIVE SCHEME

The MPF regime commenced in December 2000 and is governed by the Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) ("MPF Ordinance") and associated regulations made under the Ordinance. The purpose of the MPF Ordinance, as stated in its Long Title, is to establish non-governmental MFP Schemes for the purpose of funding benefits upon retirement and to provide a regulatory regime in respect of such schemes. It establishes and appoints a regulator, and governs: (a) the registration of schemes; (b)
contributions and preservation of contributions until retirement; (c) the approval and conduct of trustees; and (d) the administration and management of schemes.

The Mandatory Provident Fund Schemes Authority ("MPFA") is constituted as the regulator of the MPF regime, with a mission to "ensure the provision of retirement protection of Hong Kong's workforce through an effective and efficient system of prudential regulation and supervision of privately managed provident fund schemes under the MPF system."

The MPF Ordinance sets out the functions of the MPFA as to:

- ensure compliance with the MPF legislation;
- register MPF schemes;
- approve qualified persons to be approved trustees of registered schemes;
- regulate the affairs and activities of approved trustees and ensure as far as reasonably practicable that those trustees administer the registered schemes for which they are responsible in a prudent manner; and
- make rules or guidelines for the payment of mandatory contributions and for the administration of registered schemes with respect to those contributions.

For these functions the MPFA is accorded extensive powers, including the power to:

- bring proceedings to recover contributions that are in arrears;
- approve trustees or suspend or revoke such approval;
- approve registration as an employer-sponsored scheme, master trust or industry scheme;
- suspend and terminate an approved trustee's administration of a registered scheme;
- publish guidelines forbidding certain investment practices;

On 10 January 2000 the MPFA was also appointed as the Registrar of the Occupational Retirement Schemes. Originally the Office of the Registrar of Occupational Retirement schemes was established to fulfill the functions of this position: Mandatory Provident Fund Schemes Authority (Hong Kong), Syllabus for the Mandatory Provident Fund Schemes Examination - Study Notes, 2001, at §2.1.

Mandatory Provident Fund Schemes Authority (Hong Kong), Syllabus for the Mandatory Provident Fund Schemes Examination - Study Notes, 2001, at §5.1.

Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 6E.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 18.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20A, 20B.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) ss 21, 21A.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 33A.
Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 28.
require trustees to appoint an approved auditor to investigate whether or not there are any circumstances that may have prejudiced the accrued benefits of a member;

enter premises where the affairs of a registered scheme are being conducted and inspect the premises, examine any record found on the premises, take photographs of the premises or anything found on the premises, require any person on the premises to produce records, and make copies of records or statements;

require an approved trustee to give the MPFA any information or document in its possession or control;

investigate a scheme in circumstances where it reasonably believes that a person has contravened the MPF Ordinance, circumstances exist that could prejudice the interests of scheme members, or the trustee is failing (or has failed) to fulfil its duties; and

approve a voluntary winding up, merger or division or registered schemes.

The powers of the MPFA are buttressed by a penalty regime. To this end, the MPFA may serve a notice requiring payment of a prescribed financial penalty where a person fails to perform a duty or comply with a standard set by the MPFA. Criminal sanctions also apply in respect of prescribed offences. A person cannot be charged with an offence if proceedings for the recovery of a financial penalty have been brought for the same contravention.

Any person aggrieved by a decision of the MPFA in respect of prescribed matters may be appeal to the Mandatory Provident Fund Schemes Appeal Board ("Appeal Board"). The prescribed matters relate directly to the powers exercised by the MPFA, such as decisions in respect of registration, approval or trustees and schemes, suspension and termination of trustees and trustees' administration of schemes, and the division, winding up or merger of schemes. The Appeal Board may uphold, vary or quash the decision of the MPFA and

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164 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 30.
165 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 30A.
166 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 32.
167 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) ss 34, 34B-34C.
168 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 45B. If the penalty is not paid by the date specified the MPFA may bring proceedings to recover it: s 45C.
169 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 43B. For example, an employer who fails to arrange for employees to become scheme members is liable, on a first offence, to pay a fine and to six months' imprisonment: s 43B.
170 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 45E.
171 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 35. See also Ho, "Dispute Resolution Under Hong Kong's Pension Regimes" (2000) 33 International Pension Lawyer 39.
make consequential orders, including costs, as necessary.\textsuperscript{273} Any determination by the Appeal Board is specified by the MPF Ordinance to be final.\textsuperscript{274}

Limited compensation for loss is also available. An aggrieved member of a registered scheme, or a person who claims to have a beneficial interest in the accrued benefits of a member, may claim compensation if he or she has suffered a loss of accrued benefits and the loss was attributable to misfeasance or illegal conduct committed by a person concerned with the administration of the scheme.\textsuperscript{275} In that this avenue relief is premised upon proof of illegal conduct or misfeasance, as a form of dispute resolution it is not as extensive as that provided by the Pensions Ombudsman in United Kingdom or the Superannuation Complaints Tribunal in Australia.\textsuperscript{276} In the absence of illegal conduct or misfeasance a claim must be pursued at general law.

3.4.2 \textbf{THE MANDATORY PROVIDENT FUND AND TRUSTS}

The central feature of the MPF regime is that all schemes must be governed by a trust that:\textsuperscript{277}

\begin{itemize}
  \item provides for the payment of pecuniary benefits to members of the scheme when they reach the retirement age, or any other prescribed event occurs in relation to them; or
  \item in the case of members who die before reaching that age or before the occurrence of such an event, provides for the payment of those benefits to the personal representatives or beneficiaries of the estates of those members.
\end{itemize}

Schemes must be registered as one of three types: an employer sponsored scheme, a master trust scheme or an industry scheme.\textsuperscript{278} As discussed above, certain schemes that were registered under the Occupational Retirement Schemes regime could upon application be exempt from certain MPF requirements. Unlike MPF schemes, occupational retirement

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{273} \textit{Mandatory Provident Fund Schemes Ordinance} 1995 (Cap 485) (HK) s 36(4).
  \item \textsuperscript{274} \textit{Mandatory Provident Fund Schemes Ordinance} 1995 (Cap 485) (HK) s 37. Questions of law may be referred by the Appeal Board to the Court of Appeal for determination: s 39.
  \item \textsuperscript{275} \textit{Mandatory Provident Fund Schemes Ordinance} 1995 (Cap 485) (HK) s 17A.
  \item \textsuperscript{276} Ho, "Dispute Resolution Under Hong Kong's Pension Regimes" (2000) 33\textit{ International Pension Lawyer} 39 at 41.
  \item \textsuperscript{277} Employers are required to take all practicable steps to ensure that employees become members of a registered "scheme". The term "scheme" refers to "provident fund scheme", which in turn is defined to mean a scheme governed by a trust, with the purposes set out in the text: \textit{Mandatory Provident Fund Schemes Ordinance} 1995 (Cap 485) (HK) ss 2, 7.
  \item \textsuperscript{278} \textit{Mandatory Provident Fund Schemes Ordinance} 1995 (Cap 485) (HK) ss 21, 21A. For an overview of the types of schemes offered see Asher and Newman, "Hong Kong and Singapore: Two Approaches to the provision of pensions in Asia" (2001) 7\textit{ Journal of Pensions Management} 155 at 158-159.
\end{itemize}
\end{footnotesize}
schemes could be established by trust or contract.\textsuperscript{279} Significantly, however, only those occupational retirement schemes established by trust are eligible for exemption from the prescribed requirements of the MPF regime.\textsuperscript{280}

As with all nominated jurisdictions, the interaction of trust and statute forms the foundation of the Hong Kong pensions regulatory system. The following outlines the statutory impact on the constituent features of the trust relationship.

\subsection*{3.4.2.1 Scheme Documentation}

Registration applications for MPF schemes must be accompanied by a copy of the proposed rules that are to govern the scheme.\textsuperscript{281} As the MPFA may, as a condition of registration, require the applicant to enter into an undertaking with respect of the administration of the scheme,\textsuperscript{282} the process of registration itself may impact upon the content of scheme rules. Other than this, the MPF Ordinance implies five essential trustee covenants into the rules of every MPF scheme.\textsuperscript{283}

\footnotesize
\begin{itemize}
\item The term "occupational retirement scheme" refers to any scheme that provides benefits "in the form of pensions, allowances, gratuities or other payments, payable upon termination of service, death or retirement in respect of pensions gainfully employed...under a contract of service in any employment": \textit{Occupational Retirement Schemes Ordinance 1992} (Cap 236) (HK) s 21(1). The only limitations expressed are that an occupational retirement scheme does not refer to: (i) a contract of insurance under which benefits are payable only upon the death or disability of the insured (s 2(i) definition of "occupational retirement scheme"); and (ii) a contract of employment pursuant to which the employer agrees to pay a gratuity to the employee upon termination and the period of employment does not exceed four years (s 2(6)). The ORSO clearly contemplates that an occupational retirement scheme can be constituted by a contractual arrangement and not merely one based upon a trust. See further Hong Kong, Registrar of Occupational Retirement Schemes, \textit{A Guide to the Occupational Retirement Schemes Ordinance}, 1998, at 94.
\item There are two forms of such schemes: an "ORSO exempted scheme" and a "relevant ORSO registered scheme". In respect of both of these schemes, the MPFA has the power to issue an exemption certificate, although the effect of the certificate is to exempt members and employers only from Part III of the MPF Ordinance (\textit{Mandatory Provident Fund Schemes (Exemption) Regulation 1998}) (Cap 485B) (HK) regs 6, 17). Part III deals with the obligations of employers and employees to make contributions, and the preservation and portability of those contributions. The other requirements of the MPF Ordinance remain applicable to exempted schemes, including, most significantly in this context, the requirement to have an approved trustee (see generally \textit{Mandatory Provident Fund Schemes Ordinance 1995}} (Cap 485) (HK) Pt IV). Therefore, although the ORSO permits schemes to be established by contract, the effect of the MPF Ordinance is to ensure that all schemes, including those in respect of which an exemption certificate has been issued, are governed by trust law. This is reinforced by the requirement that exemption certificates can only be issued in respect of ORSO registered schemes established by way of trust (\textit{Mandatory Provident Fund Schemes (Exemption) Regulation 1998}) (Cap 485B) (HK) regs 2 (definition of "relevant ORSO registered scheme"), 16.
\item \textit{Mandatory Provident Fund Schemes Ordinance 1995} (Cap 485) (HK) ss 21(4), 21A(4).
\item \textit{Mandatory Provident Fund Schemes Ordinance 1995} (Cap 485) (HK) ss 21(8), 21A(8).
\item See 3.4.2.2.
\end{itemize}
\normalsize
3.4.2.2 TRUSTEES

Trustee Approval

The trustee is the central responsibility entity of the MPF regime. Reflecting the seriousness with which this office is viewed, the MPF Ordinance circumscribes the category of persons and entities otherwise permitted at general law to act as trustees. Trustees must be approved by the MPFA and the requirements set out by the MPF Ordinance and MPF Regulation as prerequisites for approval are, of all the jurisdictions discussed, the most stringent.

A company seeking approval as trustee must be a registered trust company whose business is limited to trust business. There must be at least five directors all of whom are natural persons and at least one director must be an independent director. Further requirements include:

- **Suitability:** The applicant must satisfy the MPFA that its controllers are persons of good reputation and character and have not been found guilty in any jurisdiction of an offence involving fraud or dishonesty.

- **Skill:** The applicant must satisfy the MPFA that its chief executive officer and a majority of directors have the skill, knowledge, experience and qualifications that are, in the opinion of the MPFA, necessary for the successful administration of provident fund schemes.

- **Financial Soundness:** The applicant must comply with the prescribed capital adequacy requirements and submit an auditor’s report confirming that the application has so complied.

- **Presence:** The applicant must have sufficient presence and control in Hong Kong.

- **Capability:** The applicant must satisfy the MPFA that it is capable of carrying on a business of administering registered schemes.

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184 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20.
185 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(1).
186 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(1).
188 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(2)(a).
189 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(2)(b).
190 The prescribed capital adequacy requirements are that applicant has at least $HK150 million of paid-up share capital, net assets and assets held in Hong Kong: Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 11.
191 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 18.
192 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(4). As to evidence that demonstrates the required presence and control see reg 16(5).
If the applicant is a natural person, he or she must ordinarily reside in Hong Kong and satisfy the MPFA that he or she is a person of good reputation and character and has not, in any jurisdiction, been found guilty of an offence involving fraud or dishonesty. A natural person is ineligible to apply for approval if he or she:

- is a public officer;
- has been found by the court to be of unsound mind and incapable of managing himself or herself and his or her affairs; or
- is an undischarged bankrupt or has entered into a composition with the person's creditors without paying the creditors in full.

Where individuals constitute the trusteeship, there must be at least two individual trustees, one of which is an independent trustee. Moreover, before scheme commencement each individual trustee must produce a performance guarantee in the form of an insurance policy or bank guarantee that indemnifies the named trustee for losses arising from a failure to perform, or other breach of, duties.

The MPFA is precluded from approving an application unless:

- it is of the opinion that all businesses carried on the applicant are compatible with the interests of members of the relevant provident fund scheme;
- it is satisfied that the applicant is likely to be able to perform, in a proper manner, the duties that an approved trustee is required by the MP Ordinance to perform in relation to registered schemes;
- the applicant enters into an undertaking with the MPFA that it will not, in its capacity as an approved trustee, refuse an application for membership by persons permitted or required to become members of that scheme; and
- it is satisfied that the applicant has complied with all of the requirements prescribed by the regulations.

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293 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 16(7).
294 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 19.
296 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 21(3)(b).
297 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 23(6).
298 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 23(7). The liability covered by the performance guarantee must be an amount equivalent to 10 per cent of the scheme's net asset value or HK$10 million, whichever is less: reg 23(8).
299 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 20.
300 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20(6)(a).
301 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20(6)(b).
302 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 20(6)(c). The requirements prescribed by the regulations are those outlined immediately above in the text in respect of companies and individuals seeking approval as trustees.
Unlike Australia or the United Kingdom, there is no requirement for the trustee or the trustee board to be constituted by employee members.  

**Trustee Duties**

Modelled upon the Australian approach, the MPF regime has sought to clarify, reinforce and add to existing general law duties of trustees by implying into the governing rules of all superannuation entities five essential trustee covenants that cannot be excluded or modified by the constituent documents. The covenants are that:  

(a) the approved trustee will comply with the governing rules;  
(b) in administering the scheme, the approved trustee will exercise the care, skill, diligence and prudence to be reasonably expected of a person administering a provident fund scheme, and is familiar with the operation of provident fund schemes;  
(c) the approved trustee will use in the administration of the scheme all knowledge and skill that the trustee has or ought reasonably to be expected to have, because of the trustee's profession or business, in so far as that knowledge and skill is relevant to the operation of the scheme;  
(d) the approved trustee will act in the interests of scheme members and not in the trustee's own interests;  
(e) the approved trustee will ensure that the funds of the scheme are invested in different investments so as to minimize the risk of losses of those funds, unless in a particular circumstance it is prudent not to do so.

The central importance of trustees is reinforced by repetition of these duties in the Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) ("General Regulations"), with the added duty that trustees must supervise and exercise proper control over all service providers appointed or engaged for the purposes of the scheme. The rationale for this repetition is that a trustee who, without reasonable excuse, fails to comply with one of the duties commits an offence and is liable on conviction to a
This creation of this offence goes further than its Australian counterpart, with Australian beneficiaries left to enforce such duties by action against the trustee.

The General Regulations further entrench the importance of the trustee role by rendering void any provision of the governing rules that purports to exempt trustees from, or to indemnify trustees against, liability for breach of trust (or to limit such liability) for: (i) a failure to act honestly; (ii) an intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee who is exercising a function in relation to a trust; or (iii) for a fine or penalty imposed by the law. 307

Together the MPF Ordinance and the General Regulations impose a host of further duties upon approved trustees. A selection of duties is outlined in the Table 3.4.

TABLE 3.4 – SELECTED DUTIES OF TRUSTEES

<table>
<thead>
<tr>
<th>Selected duties prescribed by the MPF Ordinance and the General Regulations require trustees to:</th>
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<tbody>
<tr>
<td>• comply with the duties and standards imposed by the regulations (ss 22, 27);</td>
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<tr>
<td>• prepare and maintain a statement of investment policy in respect of each constituent fund of the scheme, taking account of the prescribed factors (reg 38);</td>
</tr>
<tr>
<td>• prepare and maintain control objectives for the scheme, including objectives that seek to: (i) ensure that the scheme assets are safeguarded in the interests of the members; (ii) ensure that scheme assets are kept separate from those of the participating employers; (iii) monitor investments; and (iv) monitor assets and liabilities (reg 39);</td>
</tr>
<tr>
<td>• appoint an investment manager (reg 44);</td>
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<tr>
<td>• appoint a custodian of scheme assets (reg 50);</td>
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<tr>
<td>• not apply funds for the acquisition of financial futures or option contracts unless there is established an effective system for monitoring the risks inherent in dealing in contracts of those funds (reg 53);</td>
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<tr>
<td>• supply to members the prescribed information (regs 54, 55, 56, 58, 59);</td>
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<tr>
<td>• assist, as far as is reasonably practicable, to ensure that scheme members and participating employers are able to participate effectively in the operation of the scheme (reg 57);</td>
</tr>
<tr>
<td>• ensure: (i) the independent trustee is, as far as reasonably practicable, present at all meetings of the trustees; and (ii) in the event that decisions are taken in the absence of the independent trustee, that such decisions do not have effect until acknowledged in writing by the independent trustee (reg 60);</td>
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<tr>
<td>• disclose conflicts of interest between their duties as trustee and any other duties or personal interests (reg 61);</td>
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<tr>
<td>• notify the MPFA of events of a significant nature, including: (i) any material change in their ability or capacity to perform their duties; (ii) the cancellation, termination or expiry of insurance or performance guarantees; and (iii) the winding up of the trustees or appointment of receiver or manager over the assets of the trustees (reg 62);</td>
</tr>
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</table>
| • ensure that the scheme assets are: (i) administered and dealt with as trust property by service providers engaged by the trustees; (ii) held, recorded or otherwise controlled in accordance with currently

306 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 67.
prevailing market practices; and (iii) are applied for the purposes of the scheme (reg 64);

- ensure that scheme assets are separately recorded in the scheme records and are distinguished from trustees' personal assets and from any assets held by the trustees for the benefit of a participating employer or any other person (reg 64);

- ensure that the prescribed accounts and records are kept and kept in a place that is readily accessible in Hong Kong (reg 77);

- ensure that the prescribed financial statements are prepared (reg 81) and audited in the manner prescribed (reg 95);

- lodge with the MPFA the trustees' return within the times prescribed (reg 109); and

- check the accuracy of remittance statements from participating employers and require any employer who has failed to pay mandatory contributions to do so before the end of the prescribed period (reg 133).

Where the trustee is a company, each of its officers has a duty to exercise a degree of care and diligence sufficient to ensure that, as far as reasonable practicable, the company complies with the prescribed regulations and standards, and fulfils the trustee's covenants.308

3.4.2.3 Trust Property

Contributions

The MPF Ordinance mandates that employer and employee each contribute an amount equal to five per cent of the employee's income to an MPF scheme.309 Persons who are self-employed are likewise required to contribute five per cent of their income to an MPF scheme.310 A maximum and minimum level is placed upon the amount of income that can be considered in the calculation of the contribution.311 Mandatory contributions vest immediately as accrued benefits, and are fully portable to other registered MPF schemes.312

There is no statutory limit on the making of voluntary contributions in addition to the prescribed mandatory contributions.313 However, the extent of additional contributions is defined by the governing rules of the MPF scheme. Moreover, the requirements

309 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 7A. This requirement does not apply in respect of casual employees (s 7A(3)(b), 7A(4)(b)). The rate of contribution for casual employees is determined in accordance with a published scale.
310 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 7C.
311 Contributions are required in respect of persons earning less than $HK4,000 per month, whereas contributions are not required in respect of income in excess of $HK10,000 per month: Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) ss 9, 10, Schs 2, 3.
312 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) ss 12, 14.
313 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 11.
specified in the MPF Ordinance in respect of vesting, preservation, portability and withdrawal rates will not apply in this context; such matters are defined by the governing rules of the scheme.314

**Investment**

Of the nominated jurisdictions, the MPF regime is the most prescriptive in respect of the duty to invest. Each MPF scheme must be divided into one or more constituent funds, each of which must be approved by the MPFA.315 If a scheme is comprised of two or more funds, so as to facilitate investment choice each fund must have a different investment policy.316 At least one fund must be in the form of a capital preservation fund317 the object of which is to provide a low investment risk product with minimum exposure to market fluctuations.318 To fulfil this objective, the assets of the fund must be must be placed in short-term bank deposits or debt securities that are issued or guaranteed by the government; investments in equities are prohibited.319 Other types of constituent funds commonly offered include guaranteed funds, money market funds, bond funds, stable or balanced funds, and equity funds.320 The governing rules cannot restrict entry of members to constituent funds; all must be available for member choice.321

As with all jurisdictions discussed, the trustee of an MPF scheme must ensure that a statement of investment policy is prepared and maintained.322 The statement of investment policy must enable scheme members to ascertain in respect of each constituent fund:

- the investment objectives of the fund;
- the policy as to the kind of securities that may be invested in;

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314 Mandatory Provident Fund Schemes Authority (Hong Kong), *Syllabus for the Mandatory Provident Fund Schemes Examination - Study Notes*, 2001, at §3.7.2.
315 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 36.
316 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 36(4).
317 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 37.
318 Mandatory Provident Fund Schemes Authority (Hong Kong), *Syllabus for the Mandatory Provident Fund Schemes Examination - Study Notes*, 2001, at §5.3.2.
319 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 37(a).
320 See Mandatory Provident Fund Schemes Authority (Hong Kong), *Syllabus for the Mandatory Provident Fund Schemes Examination - Study Notes*, 2001, at §5.3.2
321 Mandatory Provident Fund Schemes Authority (Hong Kong), *Code on MPF Investments*, 1999, at ¶B1.5.
322 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 38.
• the policy as to the balance between kinds of securities and other assets of the fund;
• the policy regarding the acquisition, holding and disposal of financial futures contracts and financial option contracts for the purposes of the fund; and
• the risks inherent in implementing the above policies and the expected return to result from giving effect to those policies.

Regard must also be had to the investment restrictions in the General Regulations. Generally, investments are restricted, both in type and quantum, under Schedule 1. For example, not more than 10 per cent of a constituent fund may be invested in shares listed on a stock exchange that is not a recognized stock exchange; the lending of securities or the borrowing of money is prohibited except in the prescribed circumstances; and not more than 10 per cent of the constituent fund may be invested in a participating employer.

To further facilitate the prudential security of investments, trustees are required to appoint an investment manager independent of both the trustee and the custodian of scheme assets. The investment manager must also be a company incorporated in Hong Kong, have paid up share capital and net assets of not less than HK$10 million, and be registered as an investment adviser under the Securities and Futures Ordinance 2002 (Cap 571) (HK). Although the trustee must supervise the activities of the investment manager, the investment management contract must impose significant “trustee like” duties upon the investment manager to (inter alia):

• exercise the degree of care, skill, diligence and prudence reasonably to be expected of a prudent person who is acting in a similar capacity to the manager and is familiar with the management of the investment of funds of a provident fund scheme;

• make use of all relevant knowledge and skill that the manager may be reasonably expected to have because of its business or occupation;

323 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) Sch 1, s 8.
324 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) Sch 1, s 3.
325 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) Sch 1, s 4. The prescribed circumstances are: (i) to enable accrued benefits to be paid to or in respect of scheme members; or (ii) settling a transaction relating to the acquisition of securities or other investments.
326 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 29; Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 118.
327 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 44. The trustee is not required to appoint an investment manager if the assets of the constituent fund are invested in approved pooled investment funds: s 44(2).
328 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 44(3).
329 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 44(5), Sch 2.
ensure that the funds of the scheme are invested in different investments so as to minimise the risk of losses to those funds, unless in particular circumstances it is prudent not to do so;

• act in accordance with the governing rules of the scheme; and

• act in the interests of scheme members, and not in the interests of the manager.

A trustee is also required to appoint a custodian of scheme assets unless the trustee itself is eligible as a custodian and chooses to so act. A person is eligible to act as a custodian only if it is an authorized financial institution or is a registered trust company incorporated in Hong Kong that has a paid up share capital of not less than $HK50 million. The custodian must be independent of each investment manager (and any delegates of the investment manager). The custodian agreement must require that schemes assets are recorded and controlled in such a manner as is customary and prudent. The agreement must further require that scheme assets be administered and dealt with as trust property (even if the assets are located in a place where the law of trusts is not force) and be recorded separately from all other assets of the custodian and trustee (including assets held by the custodian or trustee on behalf of a participating employer or any other person).

Preservation and Benefits

In respect of each member, all mandatory contributions and investment earnings thereon must be preserved in the scheme until the member attains the age of 65 or satisfies one of the conditions for early withdrawal. Early withdrawal is permitted upon early retirement at the age of 60 (provided the member has permanently ceased employment), permanent departure from Hong Kong, death, total incapacity, and in the prescribed circumstances where there is a small balance that does not exceed $HK5,000. Upon satisfying a condition of withdrawal, a lump amount equivalent to the member's accrued benefits will be paid to the member, or in the event of the member's death, to the member's legal personal representative.

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330 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 50.
331 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 68.
334 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 68(10).
333 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 50, Sch 3.
334 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 15(1).
336 The term “accrued benefits” refers to the member’s beneficial interest in the scheme derived from the contributions made by or in respect of that scheme member and any income or
The requirements for vesting, preservation and withdrawal in respect of voluntary contributions are prescribed by the governing rules of the relevant scheme.

3.4.2.4 Beneficiaries

The MFP regime adds to the rights conferred upon beneficiaries at general law. As with all jurisdictions discussed, these rights relate to the provision of information. The approved trustee is under a duty to ensure that members receive the prescribed scheme information,338 a membership certificate,339 an annual benefit statement340 and any changes in business particulars of the trustee.341

In addition to the above, the trustee is required, as far as reasonable practicable, to provide all assistance necessary to ensure that scheme members are able to participate effectively in the operation of the scheme.343

3.4.3 MPF, Trusts and the Employment Relationship

The degree of interaction between employer, trustee and beneficiary is less evident in the context of the MPF Scheme than that experienced in the other nominated jurisdictions. This flows mainly from the nature of the scheme: defined contribution schemes. Thus issues relating to surplus are largely avoided. In respect of amendment, although there is no prohibition upon an amendment power vesting in the employer, the amendment process is strictly controlled by the MPFA. The trustee is under a duty to lodge a copy of any proposed amendment with the MPFA, which will not take effect until approved by the MPFA.343 The issue of reducing accrued benefits will not arise in respect of contributions that are mandated. However, in what is regarded by the MPFA as a legislative oversight, there is nothing to prevent an employer from amending the rules governing voluntary

profits arising from any investments taking account of any losses: Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 2.

337 Mandatory Provident Fund Schemes Ordinance 1995 (Cap 485) (HK) s 15(4)

338 Within 60 days of joining a scheme the trustee is required to ensure that members are provided with a document containing the contact details of the trustee, a general description of the scheme, and the details of the constituent funds: Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 54.

339 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 55.

340 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 56.

341 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 58.

342 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 57.

343 Mandatory Provident Fund Schemes (General) Regulation 1998 (Cap 485A) (HK) reg 63.
contributions and the associated accrued benefits, even to the detriment of beneficiaries.344

It should be noted that the ORSO regulates defined benefit schemes and surpluses arising therefrom. In the context of a winding up, any surplus remaining after the satisfaction of liability will be paid to the employer unless the terms of the scheme provide otherwise.345 In respect of actuarial surpluses, repayment to the employer and contribution holidays are not statutorily prohibited, however, requisite power must be conferred by the trust deed.346

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**Conclusion**

While the superannuation and pension regimes of the nominated jurisdictions share the same foundations of trust, contract and statute, their complexity and coverage vary. This is in part a function of each regime's place in its jurisdiction's overall retirement policy. To this end, Australia (discussed in the Chapter 2) and Hong Kong, as the only jurisdictions to implement compulsory contribution systems, have stricter and more highly regulated regimes. What flows from this is the concomitant obligation to ensure that compulsorily collected funds are secure. Hong Kong, although highly regulated, stands out as a scheme that embraces simplicity and clarity.347 Moreover, it is said to have a "rigorous and transparent regulatory framework" where the "weight given to fiduciary responsibilities of the fund trustees is comparable to international best practices".348 As the most recent regime to be implemented it has clearly had the advantage of "learning" from others.

The least regulated superannuation industry is that of New Zealand, with Ontario and the United Kingdom falling somewhere in between. As voluntary regimes, encouraged by

345 Occupational Retirement Schemes Ordinance 1992 (Cap 236) (HK) s 56.
taxation incentives, a need to balance prudential controls against employers' interests is more apparent in these jurisdictions. The schemes must not only seek to secure the funds held but also encourage, or at the very least not discourage, employers to make voluntary retirement provision for their employees.

Notwithstanding these distinctions as to complexity and nature, the shared commonalities between the jurisdictions permit comparisons to be drawn and lessons to be learned. Even if contemporary initiatives from other regimes are considered inappropriate in the Australian context, at least the process of comparative analysis draws on why this is so.

The following chapter proposes a framework for the interaction of the features shared by all jurisdictions: trust, contract and statute. Thereafter, in Chapters 5 and 6 respectively, the impact of statute upon general principles of trust law, and the relationship between the trustee and employer, are analysed in light of the proposed framework.