

2 November 2012

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Dear Sir/Madam

Superannuation Legislation Amendment (Further Measures) Bill 2012

The writers act for superannuation fund trustees and their directors across all sectors of the industry. We have acted for trustees in defending proceedings brought by members alleging that the trustee has breached its statutory and general law duties. We think it is very likely that, following the commencement of the *Trustee Obligations and Prudential Standards Act*, directors will be joined in most, if not all, actions brought against a trustee for breach of its covenants. Applicants will allege that the trustee and its directors have breached their statutory and general law duties to applicants or the applicant. These cases will range from matters affecting all members to individual claims in relation to disability benefits.

We therefore welcome the introduction of a hurdle which must be passed before an action for compensation can be brought against a director personally.

We consider that requiring the leave of the court before an action can be brought against a director should provide directors with an appropriate level of protection, at the same time as ensuring that members are able to obtain compensation for loss caused by a breach of duty by directors. However, we have two concerns with the proposed terms of the exposure draft Bill:

- the matters to which the court must have regard in deciding whether to grant leave are unlikely to be effective in preventing any properly brought claims against directors, including where a claim lies against the trustee; and
- the proposal does not protect directors from claims brought in relation to their general law duties even though they will be in substantially the same terms to their statutory covenants.

Proposed terms and the effectiveness of the hurdle

The exposure draft Bill proposes that a person who brings an action under section 55(3) of the *Superannuation Industry (Supervision) Act 1993* will need the leave of the court to do so if the action is brought against a director of a corporate trustee of a superannuation fund (proposed section 55(4A); see also proposed section 29VPA(3)). In deciding whether to grant an application for leave to bring such an action, the court must take into account whether (proposed section 55(4B); see also proposed section 29VPA(4)):

- the applicant is acting in good faith; and
- there is a serious question to be tried.

The exposure draft Explanatory Memorandum says (paragraph 5.10):

“Before granting leave, the Court will take into account whether the person is bringing the action against the director in good faith and that in bringing the action there is a serious question to be tried. This is separate from demonstrating there is a prima facie case for the action, as the Court only needs to be satisfied that there is a serious legal question to be asked. A failure to demonstrate these two elements to the Court will result in an inability of the affected person to bring action against the individual director for the breach of duties as alleged.”

In our opinion, these provisions are very unlikely to create an effective hurdle to an applicant bringing an action against a director. If the applicant is not acting in good faith, or if there is not a serious question to be tried, the action should not be brought at all. Legislation governing courts, and court rules, require applicants and their lawyers to be satisfied that the proposed action has a proper basis before proceedings are commenced. If applicants and their lawyers are in a position to be able to give the certifications required in order for proceedings to be commenced, it is very difficult to see that there is much, if any, room to argue that the applicant is not acting in good faith or there is not a serious question to be tried.

The weakness in the proposed approach is reinforced by the implication made in the EM – that the test of whether there is a serious question to be tried is *easier* to satisfy than the test of whether there is a prima facie case for the action.

Protection against general law claims

It is very likely that the statutory covenants will create a general law fiduciary relationship between a director and the members of a superannuation fund. As a consequence it will be open to a member to bring a claim in equity for breach of the director's fiduciary obligation in addition to, subject to the hurdle, breach of the director's covenants. The claim would mirror the terms of a claim brought against the director for breach of their statutory covenants. In order to ensure that the hurdle is effective, it should extend to all claims brought against a director for breach of their general law duties owed to fund members as well as claims for breach of their statutory duties and covenants, where those duties are substantially the same as their statutory duties.

Terms of amendment

In our opinion, the proposed provisions should be amended before the Bill is introduced into the Parliament. We suggest that an appropriate balance between protecting the legitimate interests of directors and the members is to allow a court to grant leave only where it considers that an appropriate remedy would not be available in a claim against the trustee, if the action is successful. The Bill should also be amended to

require the leave of the court to bring a claim for compensation under the Superannuation Industry (Supervision) Act or the directors' corresponding general law obligations.

Yours sincerely



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