

What's in a Name? Examining the Consequences of Inter-legality in Australia's Superannuation System

M Scott Donald*

Abstract

This article views the regulatory scheme shaping Australia's superannuation system from the perspective of the fund member. It presents five characterisations of the fund member: the member as beneficiary, as employee, as consumer, as investor and as financial citizen. Each characterisation derives from a distinct legal domain, and the influence of each can be discerned in different parts of the tapestry of rules and norms constituting the regulatory scheme that applies to the superannuation system. Most importantly, these domains are characterised by distinct preoccupations and priorities. The result is a regulatory scheme that is uneven, and lacks normative and instrumental cohesion. The article also discusses how the recommendations in the recent *Review into the Governance, Efficiency, Operation and Structure of the Superannuation System* (the 'Cooper Review') address some of the issues posed by this complex inter-legality.

Introduction¹

Australia's superannuation system is embedded between public policy and private markets, and between industrial relations and social security. Not surprisingly, then, the legal infrastructure on which it is built spans a number of distinct legal domains, each with a unique set of preoccupations and priorities. This article views that infrastructure from an unusual perspective: that of the fund member. It presents five distinct characterisations of the fund member: the member as beneficiary, as employee, as consumer, as investor and as financial citizen. Each is an important facet of what is a complex and, at times, ambiguous reality. Each represents a relationship between the individual and other

* Lecturer, Faculty of Law, University of New South Wales. The author would like to thank Simone Degeling, Dimity Kingsford Smith, Geoff Warren, Terry Brigden and two anonymous referees for their helpful and encouraging comments, as well as Nicholas Taylor for suggesting the topic in the first place, whilst retaining full responsibility for all views, errors and omissions.

¹ The material in this article is based on a presentation to the Law Council of Australia's annual superannuation conference in February 2008: M Scott Donald, 'Beneficiary, Investor, Citizen. Characterising Australia's Super Fund Participants' (Paper presented at the Law Council of Australia Superannuation Conference 2008, 'Superannuation 08—Slip Slop Slap', Brisbane, 29 February 2008).

participants in the superannuation system. In addition, and importantly, each highlights facets of the treatment afforded to fund members by the regulatory scheme that applies to the superannuation system. The article thus extends an ongoing conversation in the academic literature about the nature and responsibilities of participants in the financial system (especially different types of ‘investor’) to the superannuation context.²

A few further comments on the method employed in this article are warranted at this point. This article does not attempt to suggest that the characterisations represent empirically observable prototypes. Nor are the characterisations merely descriptions. Nor is one necessarily to be preferred over others. Rather, it is asserted here that the characterisations inform our imagination and inspire our understanding of what it means to be a member of a superannuation fund, and do so in a way that highlights fundamental normative assumptions that would otherwise be obscured.

This idea is hardly new. Writing in the field of social work, for instance, McDonald has noted:

The words we use to describe those who use our services are, at one level, metaphors that indicate how we conceive them. At another level such labels operate discursively, constructing both the relationship and attendant identities of people participating in the relationships, inducing very practical and material outcomes.³

On a slightly different tack, but closer to home for present purposes, Hickman and Hill trace the way in which regulatory law operates by a process of categorisation.⁴ In an argument reminiscent of Wittgenstein, they posit that those objects of regulation possessing the characteristics that entitle them to membership of a particular category become, as a result of that categorisation, subject to the set of legal consequences appurtenant to that category. A particular combination of financial inputs and outflows might constitute ‘taxable income’, for instance, and that categorisation would attract certain consequences under relevant fiscal statutes that might not apply had they not attracted that categorisation.⁵ Or, to apply Hickman and Hill’s approach in the context under consideration here, a member of a superannuation fund seen as a ‘beneficiary’ might attract a set of consequences quite distinct from those that would be accorded to an ‘employee’, ‘consumer’, ‘investor’ or ‘financial citizen’.

Both these analyses highlight that the juridical overlap in which superannuation fund members find themselves represents a doctrinal issue of some practical importance. The finding that the regulatory scheme implicitly adopts different characterisations in different circumstances is important because each

² See, eg. Dimity Kingsford Smith, ‘Regulating Investment Risk: Individuals and the Global Financial Crisis’ (2009) 32 *University of New South Wales Law Journal* 514; Gail Pearson, *Financial Services Law and Compliance in Australia* (Cambridge University Press, 2009) 303–4, 450–2.

³ Catherine McDonald, *Challenging Social Work: The Institutional Context of Practice* (Palgrave Macmillan, 2006) 115, cited in Hugh McLaughlin, ‘What’s in a Name: “Client”, “Patient”, “Customer”, “Consumer”, “Expert by Experience”, “Service User” — What Next?’ (2009) 39 *British Journal of Social Work* 1101, 1102.

⁴ Kristin E Hickman and Claire A Hill, ‘Concepts, Categories, and Compliance in the Regulatory State’ (2010) 94 *Minnesota Law Review* 1151.

⁵ *Ibid.*, 1185–6.

characterisation embodies a mix of preoccupations and priorities peculiar to the domain that inspires it. Being perceived as a 'beneficiary' in one context and an 'investor' in another is, for instance, consequential. The fact that the system sustains these alternate characterisations can, and does, give rise to doctrinal frictions. Perhaps more importantly, it also causes material discontinuities and inconsistencies in practice. To see why, it is first necessary to outline briefly the nature of the regulatory tapestry that gives the superannuation system its current shape.

II A Regulatory Tapestry

The regulatory scheme that shapes the superannuation system in Australia is a multi-juridical tapestry. Lord Justice Hoffmann, speaking extra-curially in 1994, described the interplay of four juridical sources present in Australia's superannuation system:

- contract;
- equitable principles;
- statutory regulation; and
- administrative discretion.⁶

For Lord Hoffmann, the importance of this distillation was that it identified the enhanced role played by statute in defining the role of each of the juridical sources in the regulatory scheme. However, this has to be seen in historical context. In 1994, the statutory framework had recently been substantially revised, and indeed intensified, by the newly enacted *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*').

The relevance of Lord Hoffmann's distillation today lies elsewhere. His analysis presciently highlighted the potential emergence of inconsistencies within the regulatory scheme resulting from differences in the remedial architecture, as well as the preoccupations and the priorities inherent in the four strands of law. The inconsistencies arising from this inter-legality⁷ have since manifested themselves in cases such as *Re VBN and Australian Prudential Regulation Authority (No 5)* ('*Re VBN*'),⁸ *Sayseng v Kellogg Superannuation Pty Ltd*,⁹ *Vidovic v Email Superannuation Pty Ltd*¹⁰ and, most recently, *Finch v Telstra Super Pty Ltd*.¹¹ They

⁶ Lord Hoffman, 'The Direction of Equity and its Role for Superannuation / Pensions in the 90s' (Speech delivered at the National Conference for Lawyers on Superannuation, 'Superannuation 94', Law Council of Australia, February 1994).

⁷ De Sousa Santos coined the phrase 'inter-legality' to describe the phenomenological dimension of legal plurality in which 'everyday life crosses or is interpenetrated by different and contrasting legal orders and legal cultures': Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2nd ed, 2002) 97. Closer to home, Kingsford Smith uses the term specifically in relation to the way 'various types of state and decentred regulation interrelate and shape each other': Dimity Kingsford Smith, 'What is Regulation? A Reply to Julia Black' (2002) 27 *Australian Journal of Legal Philosophy* 37.

⁸ (2006) 92 ALD 259. For a discussion of the impact in *Re VBN* of applying an administrative law frame of reference to the interpretation of what was typically perceived to be a trust law concept, see M Scott Donald, "'Best" interests?' (2008) 2 *Journal of Equity* 245.

⁹ [2003] NSWSC 945 (13 November 2003).

¹⁰ (Unreported, Supreme Court of New South Wales, Bryson J, 3 March 1995).

were also the subject of consideration in the recent Cooper Review.¹² Key, though, to this article is the proposition that the inconsistencies are manifestations of dissonance at a more fundamental level. This article argues that behind the inconsistencies in practical outcomes lie fundamental differences in the normative foundations of the various sources of law intersecting in the superannuation system.

This exercise draws further inspiration from Moffatt's analysis of the flurry of occupational pension fund cases seen in the United Kingdom ('UK') in the early 1990s.¹³ Applying a taxonomy borrowed from the Critical Legal Studies movement, Moffatt distinguished three realms of social life: 'family and friendship', within which he placed trust law; 'work and exchange', within which he placed employment law; and 'state and citizenship'. The location of pension plans in both trust and employment law meant they straddled the boundary between two different realms. (Had he been writing in Australia, he might easily have recognised the impact of compulsory superannuation in bringing superannuation law into the third realm, state and citizenship, also.) The doctrinal friction he identified in the UK pension cases arose from the conflict between normative structures that are largely independent and, for the most part, unreconciled. The material that follows below is inspired by this insight, though it does not adopt the precise taxonomy employed by Moffatt.

III An Exercise in Characterisation

It is customary in Australia to describe the key stakeholders in a superannuation fund as 'members.' The term is without strict legal import in the context of a superannuation fund (in contrast to some other contexts) other than as a means of identifying whether specific individuals belong to a class to which certain trust provisions apply. That is to say, the courts typically do not attach any consequences to 'membership' beyond those expressly defined in the rules of the trust instrument.

It is, however, possible to characterise a member in other ways, such as a 'beneficiary', 'employee', 'consumer', 'investor' and/or 'financial citizen'. The typical member is of course all of these at once. The different characterisations are

¹¹ (2010) 271 ALR 236 (*Finch v Telstra Super*).

¹² The Review was announced in April 2009 and reported on 30 June 2010. Jeremy Cooper, former Deputy Chairman of the Australian Securities and Investments Commission, was chosen to Chair the Review. Its terms of reference were to 'comprehensively examine and analyse the governance, efficiency, structure and operation of Australia's superannuation system'. It was to be guided by 'the concepts of the best interests of the member and the maximising of retirement incomes for Australians': Super System Review Panel, Commonwealth of Australia, *Final Report—Part One: Overview and Recommendations* (2010) v-vi (*Final Report—Part One*) ('Cooper Review'). The publications of the Review relevant to this paper are cited below as: Cooper Review, *Preliminary Report: Governance*; Cooper Review, *Final Report: Part One* http://www.supersystemreview.gov.au/content/downloads/final_report/part_one/Final_Report_Part_1_Consolidated.pdf; and Cooper Review, *Final Report: Part Two* <http://www.supersystemreview.gov.au/content/downloads/final_report/part_two/Final_Report_Part_2_Consolidated.pdf>. The government has recently responded in a broadly positive manner to the recommendations made by the Review: Treasury, Commonwealth of Australia (2011). The author was a consultant to Treasury advising the Review.

¹³ Graham Moffatt, 'Pension Funds: A Fragmentation of Trust Law' (1993) 56 *Modern Law Review* 471.

simply different facets of the one reality. The importance here is that each of the descriptions highlights different aspects of that reality.¹⁴

A The Member as Beneficiary

The use of the trust as the legal architecture for superannuation funds means that a member of a superannuation fund is, in strict legal terms, a beneficiary of the trust.¹⁵ As with the other characterisations, that status is literally true. The importance here, however, is that the trustee/beneficiary relationship is imbued with a distinct character. It is not necessary to characterise the member as the hapless and vulnerable beneficiary of equity lore, as exemplified by the Jarndyce wards of Dickens' *Bleak House*, to recognise nevertheless that the trustee/beneficiary relationship is paradigmatically paternalistic (from trustee to beneficiary) and dependent (from beneficiary to trustee).

The dominant feature of the characterisation of the member as 'beneficiary', then, is the reliance it places on the trustee to secure the interests of members. However, there is more to this than appears at first glance. The often strident language used by the courts in articulating fiduciary and trust law principle,¹⁶ and the unstinting standards derived from cases such as *Keech v Sandford*,¹⁷ underscore the protective, paternalistic nature of the trustee role. However, at the same time trust law offers comparatively ineffectual mechanisms for the protection of members' interests, either by the members themselves, or by third parties. Members' access to information about the administration of the trust is constrained by the courts' reluctance, except in extreme circumstances, to countenance review of the merit of a trustee's decision. We shall return to this in more detail a little later.

(i) Member Investment Choice

One area where the character and extent of the trustee's role comes into sharp focus in the superannuation context is where trustees offer what is commonly called 'member investment choice'. Most defined contribution superannuation funds today offer their members a choice of alternative sub-funds into which their contributions can be placed. Sometimes the alternatives differ by risk level, for instance where a fund offers its members a choice between conservative, balanced and aggressive options. In other cases the difference between the

¹⁴ Of course, even the designation 'member' is not entirely neutral. 'Member' carries a tone of inclusion and identity that contrasts to other more neutral descriptions, such as 'unit-holder' or 'participant'. It is, however, the term customarily employed in the industry.

¹⁵ They are, however, potentially not the only beneficiaries of the trust. Depending on the circumstances of the trust, other beneficiaries may include former members: *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 [53].

¹⁶ For a discussion of the rhetorical nature of fiduciary discourse, albeit in the US context, see Lyman Johnston, 'Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles' (2009) *Michigan State Law Review* 847; Marleen A O'Connor, 'How Should we Talk about Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance' (1993) 61 *George Washington Law Review* 954.

¹⁷ (1726) 25 ER 223.

alternatives relates to the investment strategy employed, for instance where super funds offer their members access to a ‘sustainable’ or ‘ethical’ option, or to passive, active or multi-manager options. And there are others where members are offered sub-funds that can act as building blocks to enable members to build an investment strategy tailored to their own circumstances and objectives.

This phenomenon has inspired an ongoing debate about the extent to which the trustee of the superannuation fund is responsible for the actual decisions taken by each member.¹⁸ Just how far does (or ought) the paternalism inherent in trust law extend where members have the opportunity to direct the investment of their contributions in a particular way? A highly paternalistic approach, in which members are truly beneficiaries, would see trustees responsible for those decisions. That is to say, a beneficiary who suffers a loss from having made a choice that was in some objective sense inappropriate for their needs, might have recourse against the trustee that gave effect to that member’s direction. At the other end of the spectrum, it is possible to argue that the trustee ought merely to be responsible for giving effect to the decisions taken by the member and not for the suitability of the investment choice made by that member. In 2006, the Australian Prudential Regulatory Authority (‘APRA’) articulated a position between these extremes, in essence holding the trustee accountable for the decision environment in which the member receives the offer.¹⁹ For instance, the Circular observed:

In APRA’s view, it is difficult to conclude that a trustee is acting in the best interests of members if narrow or risky choices are made available without regard to the amount or proportion of the member’s interest that may be placed in the particular strategy.²⁰

It thus marries the paternalism of traditional trusteeship with the practical requirement articulated in s 52(2)(f) of the *SIS Act* to formulate and give effect to an investment strategy for the fund. Again, the Circular notes:

The fact that members may, in limited circumstances, direct their investments does not relieve a trustee itself of the requirement to act prudently, nor can it divest the trustee of its duty to have regard to diversification, risk, liquidity and other factors when setting investment strategies.²¹

This view, albeit positioned some distance from both extremes of the spectrum of views, remains controversial.²²

¹⁸ For a description of the debate and its key parameters, see M Scott Donald, ‘The Prudent Eunuch: Superannuation Trusteeship and Member Investment Choice’ (2008) 19 *Journal of Banking and Finance Law and Practice* 5

¹⁹ Australian Prudential Regulation Authority, *Superannuation Circular No II.D.1: Managing Investments and Investment Choice* (2006) 12 <<http://www.apra.gov.au/Superannuation/upload/Superannuation-Circular-II-D-1-Managing-Investments-and-Investment-Choice.pdf>>.

²⁰ *Ibid.*

²¹ *Ibid* [49].

²² See the summary of submissions provided to the government’s inquiry into the superannuation industry: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *The Structure and Operation of the Superannuation Industry*, (Senate Printing Unit, 2007) [4.25]–[4.38]. Also, see Ross Clare, ‘Developments in the Governance of Superannuation Funds’ (Paper presented to 17th Australian Colloquium of Superannuation Researchers, Centre for Pensions and Superannuation, University of New South Wales, July 2009) 13 <<http://www.docs.fce.unsw.edu.au/fce/Research/ResearchMicrosites/CPS/2009/papers/Clare.pdf>>.

The courts have had limited opportunity to resolve the uncertainty. In *Perpetual Trustees Australia Ltd v Wallace* ('Wallace'),²³ Edmonds J was asked to review a determination of the Superannuation Complaints Tribunal (the 'SCT') relating to a trustee's obligations in respect of an investment choice made by a member of a single-member superannuation fund. The SCT found that the trustee had breached its duties under the *SIS Act* in acceding to a member's direction to invest his superannuation moneys almost wholly in speculative share investments.²⁴ In reaching this determination, the SCT had regard for the fact that the member was 70, unwell and in receipt of a pension from the fund. The SCT also found that the trustee's decision not to compensate the member for the loss he had suffered as a result of the 'unlawful' investment choice was not fair and reasonable in the circumstances.²⁵ Edmonds J set aside the SCT's determination. However, he did so on grounds relating to the procedural circumstances of the SCT's determination. He was not required to address the fundamental issue—whether the trustee had breached the duties imposed by the *SIS Act*—because that point was not argued by the respondent (the trustee) before the Court.

The Cooper Review sought a different approach. The Review's suggested solution was to distinguish between different types of member.²⁶ Members (and the superannuation funds in which they participated) would be identified as belonging to one of four categories: 'lost' members, MySuper members, Choice members and Self Managed Super Fund ('SMSF') members. Members who choose to leave investment decision-making to a trustee (those in the so-called MySuper category) could rely on the paternalism and protection implied by traditional notions of trusteeship. Indeed, the regulatory framework around such arrangements would be stiffened by statutory intervention to preclude undue erosion of those responsibilities by market participants.²⁷ The allocation of responsibility for making choices would in this situation be simple; the trustees of those types of fund (or sub-fund if both MySuper and Choice offerings co-existed within the same structure) would be fully accountable for the appropriateness of the strategy to the needs of the fund. Notably, though, appropriateness is measured in reference to the needs of the fund as a whole, not to specific members. Members wanting a bespoke investment strategy would have to move to the Choice or SMSF sectors, in which case they would be vested with responsibility for the consequences of the choices they make. The 'have-your-cake-and-eat-it-too' potential of cases like *Wallace*²⁸ would thus be avoided.

²³ [2007] FCA 527 (18 April 2007).

²⁴ Commonwealth of Australia, above n 22, 13.

²⁵ *Ibid.*

²⁶ Cooper Review, *Final Report, Part 1*, above n 12, 10–1.

²⁷ Cooper Review, *Final Report, Part 2*, above n 12, 1.

²⁸ [2007] FCA 527 (18 April 2007).

(ii) Vulnerability and the Super Fund Member

One final point should be made at this juncture. It relates to the ‘vulnerability’ of the member. There is recurring discussion in the courts²⁹ and the academic literature about the extent to which the imposition of fiduciary obligations on one party is dependent on the vulnerability of some other party.³⁰ In contrast with some other jurisdictions,³¹ the courts in Australia appear to have concluded that though vulnerability is a common *indicium* of fiduciary relationships, it is neither a necessary nor sufficient feature of such relationships.³² The debate is largely irrelevant for express trusts, such as superannuation trusts, where the existence of the fiduciary relationship is not an issue and attention is rather directed towards the content of the relationship.³³ Nevertheless, it is relevant here to recognise that there are important respects in which the member of a superannuation fund is ‘vulnerable’ and, as such, may deserve the protection that is such an important component of the ‘member as beneficiary’ characterisation.

The most obvious source of vulnerability is the requirement of ‘preservation’, namely that members are required to keep their superannuation entitlements within the system as a whole until retirement age. Members who have a desire to redeem their interests in a particular superannuation fund must find another qualifying fund capable of receiving their interest.

It is also clear that members have no direct interest in the underlying assets of the trust fund.³⁴ This has important implications for tax and administration

²⁹ See, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 142 (Dawson J) citing *Tate v Williamson* (1866) LR 2 Ch App 55, 60-1.

³⁰ Writing before the cases cited below, see D S K Ong, ‘Fiduciaries: Identification and Remedies’ (1986) 8 *University of Tasmania Law Review* 311.

³¹ For example, Canada: *Frame v Smith* {1988} 2 SCR 99; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.

³² *Breen v Williams* (1996) 186 CLR 71, 82 (Brennan CJ), 92-3 (Dawson and Toohey JJ), 106-7 (Gaudron and McHugh JJ); *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410. More recently, see *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, 78 [286] (Jacobson J). See also Antony Goldfinch, ‘Trustee’s Duty to Exercise Reasonable Care: Fiduciary Duty?’ (2004) 78 *Australian Law Journal* 678, 681; Rosemary Teele, ‘The Search for the Fiduciary Principle: A Rescue Operation’ (1996) 24 *Australian Business Law Review* 110, 111.

³³ That these questions are not, in truth, wholly distinct is evident from Finn’s assertion that ‘[i]t is not because a person is a “fiduciary” or a “confidant” that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant for its purposes’: Paul D Finn, *Fiduciary Obligations* (Lawbook, 1977) [2].

³⁴ *Re Coram; Ex parte Official Trustee in Bankruptcy v Inglis* (1992) 36 FCR 250. That said, as Edstein amply demonstrates, the question of precisely what interest a member may have in a particular circumstance quickly descends into a convoluted expedition beginning with a careful examination of the trust instrument and then proceeding through a tangle of statutory and regulatory rules and actuarial concepts: John V Edstein, ‘Superannuation Funds: A Beneficiary’s Interest and Accrued Benefits’ (2010) 13 *The Tax Specialist* 122. For a slightly more sanguine view, see Graham Hill, ‘The True Nature of a Member’s Interest in a Superannuation Fund’ (2002) 5 *Journal of Australian Taxation* 1.

efficiency,³⁵ but represents a further source of vulnerability, especially where the fund itself becomes insolvent.³⁶

Take, for example, the situation where one or more divisions in a superannuation fund containing multiple divisions becomes insolvent, perhaps through the insolvency of the contributing employer (if it is a defined benefit fund), or incurring of liabilities in excess of the assets of that notionally applying to that division (perhaps as a result of derivatives contracts). Absent careful drafting of the trust deed, it is possible that the assets of the 'solvent' divisions of the fund may be applied to meeting partially or wholly the liabilities of the 'insolvent' part. Such an outcome would no doubt come as a nasty surprise to the members in the solvent parts of the scheme.

However, perhaps the most insidious source of vulnerability stems from the very nature of trust law itself. The primacy of the trust instrument is, as Easterbrook and Fischel say, 'one of the cornerstones of trust law'.³⁷ Subject to a few 'irreducible' core elements that are required for the institution to be recognisable as a trust,³⁸ the trust instrument defines the rights, obligations and expectations of all key participants. As a result, the protections apparently offered to members by the principles and norms of trust law are subject to the terms of the trust instrument.

Important pensions and superannuation cases such as *Re Courage Group's Pension Schemes*,³⁹ *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*,⁴⁰ *Mettoy Pension Trustees Ltd v Evans* ('Mettoy')⁴¹ and *Lock v Westpac Banking Corporation* ('*Lock v Westpac*')⁴² illustrate this risk poignantly. Glover, for instance, commenting on the decision in *Lock v Westpac*,⁴³ concluded: 'The law of trusts has a role subordinate to the law of contract, and possibly subordinate to other categories as well, in the regulation of employee superannuation schemes.'⁴⁴

³⁵ Allan MacDougall, 'The Prudent Trustee, Managed Funds and the Commonwealth Superannuation Industry (Supervision) Act 1993' (1996) 7 *Journal of Banking and Finance Law and Practice* 93, 93.

³⁶ For a vivid description of the potential consequences of employer insolvency on member entitlements, see Shauna Ferris, 'Ansett's Superannuation Fund: A Case Study in Insolvency' in Hazel Bateman (ed), *Retirement Provision in Scary Markets* (Edward Elgar Publishing, 2007), 161. See also Shauna Ferris, 'Broken Promises: Solvency Issues for Defined Benefit Superannuation Funds' (2006) 5 *Law, Probability and Risk* 201.

³⁷ Frank H Easterbrook and Daniel R Fischel, 'Contract and Fiduciary Duty' (1993) 36 *Journal of Law and Economics* 425, 429. Note that it is not necessary to accept Easterbrook and Fischel's conclusion that fiduciary law is a merely a specialised form of contractual law to respect some of the observations that inspired that conclusion: see, eg, Roberta Romano, 'Comment on Easterbrook and Fischel, "Contract and Fiduciary Duty"' (1993) 36 *Journal of Law and Economics* 447.

³⁸ David Hayton, "'The Irreducible Core Content of Trusteeship'", in A J Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press, 1996), 47.

³⁹ *Re Courage Group's Pension Schemes*; *Ryan v Imperial Brewing and Leisure Ltd* [1987] All ER 528.

⁴⁰ [1991] 2 All ER 597.

⁴¹ [1991] 1 AC 171.

⁴² (1991) 25 NSWLR 593.

⁴³ *Ibid.*

⁴⁴ John Glover, '*Lock v Westpac Banking Corporation* and the Problem of Superannuation Fund Surpluses' (1992) 9 *Australian Bar Review* 172, 172.

In these cases, small differences in the drafting of key provisions had a material impact on the way the courts balanced the competing claims with the funds'.⁴⁵ They highlight that, in the absence of statutory intervention, members would be exposed to opportunistic drafting (and amendment), thereby tending to limit the obligations borne by the trustee and other participants, and circumscribing member rights.

It is important, however, not to interpret these comments in the wrong light. It is not argued here that the existence of these vulnerabilities is the source of the fiduciary obligations imposed on superannuation fund trustees. The relationship is unequivocally and unambiguously fiduciary in nature. As such, members do benefit from the protective shroud in which they are wrapped as 'beneficiaries' under a trust. Nevertheless, recognition of the vulnerabilities, combined with the inability of the general law to preclude private negotiations that have the effect of circumventing the protections that the presence of a relationship of trust might imply, underscores the need for additional mechanisms of member protection within the regulatory scheme. Trust law, positioning the member as 'beneficiary', would not be enough to secure member interests in the modern superannuation arena.

The regulatory scheme responds to these limitations in a number of ways, some which are discernible in the other characterisations presented below.

B The Member as Employee

From inception, the trust structure has been employed in superannuation as a vehicle to separate the administration of the superannuation scheme both from the day-to-day operations of the employer and from direct control by those employees comprising its membership.⁴⁶ Nevertheless, superannuation is, for most members, an incident of employment. It can arise from the employment contract or industrial award, or more generally from the operation of the Superannuation Guarantee ('SG'). Most members are thus also 'employees'.⁴⁷

The courts have been prepared to recognise the relevance of the employment context in their interpretation of the trust instrument.⁴⁸ Characterising the member, not as the vulnerable beneficiary of equity, but as a competent economic actor, influences the way in which the courts interpret the trust instrument and balance the equities between the parties.⁴⁹ The existence of expectations arising from the

⁴⁵ Richard Nobles, *Pensions Employment and the Law* (Clarendon Press, 1993) 32–63.

⁴⁶ *Ibid* 10.

⁴⁷ The main exceptions are the self-employed and those who make 'voluntary' contributions, which, by definition, occur outside the employment contract.

⁴⁸ *Finch v Telstra Super Pty Ltd* (2010) 271 ALR 236, 246–7.

⁴⁹ Michael Bryan, 'Reflections on Some Commercial Applications of the Trust' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis, 2002) 205. See also *Palmer v Abney Park Cemetery* (Unreported, High Court of England and Wales, Chancery Division, Blackett-Ord J, 4 July 1985), cited in Samantha Traves, 'Superannuation Fund Surplus: Another Problem for Trustees' (1992) 1 *Griffith Law Review* 210, 212.

employment contract goes to the 'matrix of fact'⁵⁰ relevant to the construction of specific clauses, such as those relating to the distributions of a surplus⁵¹ or the payment of benefits for termination,⁵² redundancy⁵³ or disability.⁵⁴

Of particular importance in this regard is the fact that the members are not volunteers.⁵⁵ For instance, in *Dillon v Burns Philp Finance Ltd*, Bryson J noted:

The parties' relationship [in a superannuation fund] is quite different to the relationship between beneficiaries and trustees who are administering a trust instrument which expresses the bounty of a settlor. ... The context ... is a contractual context in which an employee ... and the employer adhere to the Plan as a set of rules to regulate part of their employment relationship. Superannuation rights are not granted out of grace or bounty and members contribute their own money.⁵⁶

In the later case of *Sayseng v Kellogg Superannuation Pty Ltd*, his Honour elaborated:

Perhaps in their origin discretionary trusts in superannuation schemes were perceived as having a similar function as exercises of bounty, but if this was once so it has for a long time not accorded with the realities of the employment relationship, in which employees contribute their own funds, sometimes over many years, and bargain for employer contributions which have the economic function of being part of the reward for employee services.⁵⁷

The most fecund source of curial comment on the relevance of the employment contract is the line of cases relating to judicial review of trustees' exercises of discretion. The courts have, for the most part, applied traditional trust law doctrine in these cases. Perhaps most frequently cited are Bryson J's comments in *Vidovic v Email Superannuation*, to the effect that:

⁵⁰ *Mettoy Pension Trustees Ltd v Evans* [1990] 2 All ER 513, 1610 (Warner J) ('*Mettoy*'), approved by Waddell CJ in Eq in *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593, 602; see also *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* (2002) 174 FLR 1 ('*Ansett*').

⁵¹ *Lock v Westpac* (1991) 25 NSWLR 593; *Mettoy* [1990] 2 All ER 513; *Stevens v Bell* (Unreported, High Court of England and Wales, Chancery Division, Lloyd J, 16 February 2001).

⁵² *Hay v Total Risk Management Pty Ltd* [2004] NSWSC 94 (26 February 2004); *Blaikie v South Australia Superannuation Board* (1995) 65 SASR 85; *Gilberg v Stevedoring Employees Retirement Fund Pty Ltd* [2008] NSWSC 1318 (25 November 2008).

⁵³ *Ansett* (2002) 174 FLR 1.

⁵⁴ *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276. This principle was extended in *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522 where the fact that entitlement to membership of a fund flowed from an employment contract was held to impose an overarching obligation on the trustee to pursue payment from a third party of an ill health pension to which the member was entitled where no such obligation was owed under the terms of the trust deed and rules alone.

⁵⁵ *Finch v Telstra Super Pty Ltd* (2010) 271 ALR 236, 246-7; *Ansett* (2002) 174 FLR 1 [215], citing *Mettoy* [1990] 2 All ER 513; *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v ASEA Brown Boveri Pty Ltd* [1999] 1 VR 144, 159-60, citing *Cowan v Scargill* [1985] Ch 270, 159 (Beach J); *Kerr v British Leyland (Staff) Trustee Ltd* [2001] WTLR 1071.

⁵⁶ *Dillon v Burns Philp Finance Ltd* (Unreported, Supreme Court of New South Wales, Bryson J, 20 July 1988) 14.

⁵⁷ *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 (13 November 2003) [59].

It is a marked anomaly to use mechanisms drawn from fields of law remote from employment and relating to trusts for bounty or charity to administer important entitlements in an employment relationship ...⁵⁸

However, there is curial comment, all of it obiter, from the Federal Court⁵⁹ and the Supreme Courts of New South Wales,⁶⁰ the Australian Capital Territory⁶¹ and Victoria⁶² to the same effect.⁶³ A number of commentators have also weighed into the debate.⁶⁴

The issue recently came before the High Court of Australia in *Finch v Telstra Super Pty Ltd*.⁶⁵ The applicant in that case sought to challenge the decision of the trustee of the Telstra Superannuation scheme not to pay him disability benefits to which he believed he was entitled as a member. Justice Byrne, at first instance, found in favour of the member and remitted the decision to the trustee.⁶⁶ In setting aside Byrne J's decision, the Court of Appeal of the Supreme Court of Victoria applied the principles in *Karger v Paul* and found in favour of the trustee.⁶⁷ Counsel for the applicant advanced a variety of reasons why those principles should not apply in the superannuation context and, at one point in the judgment, it appeared as though the High Court was inclined to agree, at least in part. Their Honours commented:

Those reasons also suggest, though the contrary was apparently not put to it, that the Court of Appeal was wrong to approach the present controversy as if the principles stated in *Karger*, developed in and appropriate to other fields, were applicable in the present field without any qualification.⁶⁸

At this point they 'postponed' discussion. However, upon returning to the issue later in their joint judgment, their Honours detailed the arguments advanced by the parties and concluded that:

[I]t is not necessary further to evaluate the merits of the competing contentions about how far *Karger* principles were applicable and whether other principles should be adopted. That is because it is sufficient for the resolution of the present case to hold that Byrne J's reasoning in favour of the applicant is sound and the Court of Appeal's

⁵⁸ (Unreported, Supreme Court of NSW, Bryson J, 3 March 1995) 11.

⁵⁹ *Kowalski v NMAL Staff Superannuation Fund Pty Ltd [No 3]* [2009] FCA 53 [25] (Finn J).

⁶⁰ *Gilberg v Stevedoring Employees Retirement Fund Pty Ltd* [2008] NSWSC 1318 [18] (McDougall J); *Tufteviski v Total Risks Management Pty Ltd* [2009] NSWSC 315 [128] (Smart AJ).

⁶¹ *Minehan v AGL Employees Superannuation Pty Ltd* (1998) 134 ACTR 1, 10 (Gallop ACJ).

⁶² *Flegeltaub v Telstra Super Pty Ltd* [2000] VSC 107 [17] (Byrne J); and on appeal, *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276, 278 (Ormiston JA).

⁶³ But see *Alexander Forbes Trustee Services Ltd v Jackson* [2004] EWHC 2448 (Ch) [11] (Patten J), citing *Edge v Pensions Ombudsman* [1998] Ch 512, 534—Patten J refused to accept that the court was 'ever likely to be in a better position than [the trustees] to determine what is in the best interests of the beneficiaries': at [11].

⁶⁴ See, eg, Anthea Nolan, 'The Role of the Employment Contract in Superannuation: An Analysis Focusing on Surplus Repatriation Powers Conferred on Employers' (1996) 24 *Australian Business Law Review* 341; Lisa M Butler, 'Reviewing Trustees' Decisions: The Right to Reasons' (1999) 7 *Australian Property Law Journal* 1; see also Justice Joseph Campbell, 'Exercise by Superannuation Trustees of Discretionary Powers' (2009) 83 *Australian Law Journal* 159. ⁶⁵ (2010) 271 ALR 236.

⁶⁶ *Finch v Telstra Super Pty Ltd* [2008] VSC 481 [69].

⁶⁷ *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 [84].

⁶⁸ *Finch v Telstra Super Pty Ltd* (2010) 271 ALR 236, 248.

criticisms of it are unsuccessful. To offer answers to wider questions which might arise in disputes different from the present where it is not necessary to do so would have an unsettling effect on the law which may not be beneficial.⁶⁹

And there, for the time being at least, the matter rests.

There is another important thread running through these cases. As noted above, the courts have traditionally been loath to fetter the freedom of settlors to include whatever terms they, the settlors, saw fit to include in the trust instrument, subject to some irreducible core that ensures that the arrangement created remains a trust.⁷⁰ However, the settlor in most occupational superannuation schemes was the employer at the time the scheme was established. Thus, the location of the superannuation system historically within the employment realm exposes it to the consequences of the unequal bargaining power presumed to exist within the employment relation itself. The SG addresses this to some extent by specifying minimum contribution levels. So too does the presence of multi-employer industry funds as alternatives to employer-based superannuation funds. Nevertheless, the potential for members' legitimate expectations to be thwarted through self-serving provisions in the trust deed (such as, for instance, the right of the employer to amend the deed unilaterally and without consideration of the interests of the members) remains an important challenge for the regulatory scheme shaping superannuation.

There are two further areas in which the status of members as employees generates interesting wrinkles in the regulatory framework. The first is the relevance of the duties owed by the employer qua employer to the superannuation context. For instance, in *Imperial Group Pension Trust v Imperial Tobacco*,⁷¹ Browne-Wilkinson V-C found that the obligation of good faith implied in contracts of employment arose also in the trust deed and rules of the company's pension scheme. A similar obligation was found by Waddell CJ in Eq in the Supreme Court of New South Wales in *Lock v Westpac*⁷² and by the Australian Industrial Relations Commission in *Amalgamated Metal Workers Union v Shell Refining*.⁷³ The problem, as Stewart identifies,⁷⁴ is knowing how far that obligation reaches.

The SG provides a very practical illustration of this issue. In effect, the SG requires employers to select a default fund for their employees. This circumstance affects those employees not covered by an award, by a public sector scheme or by a corporate fund. The problem is that it is currently unclear what (or indeed, if any) obligations and standards govern the employer's choice. The Australian Taxation Office ('ATO') guidance provided to employers limits itself to specifying that the fund must be a 'complying fund that meets the minimum insurance requirements'.⁷⁵

⁶⁹ Ibid 254.

⁷⁰ See David Hayton, 'The Irreducible Core Content of Trusteeship', above n 38, 49.

⁷¹ [1991] 2 All ER 597, 606–8. For a discussion, see Teele, above n 32, 121.

⁷² (1991) 25 NSWLR 593.

⁷³ *Australian Metal Workers Union v Shell Refining (Australia) Pty Ltd* (1993) 27 ATR 195.

⁷⁴ Andrew Stewart, 'Good Faith in Superannuation: Where Does it End?' (2007) 35 *Australian Business Law Review* 204. Nolan is also critical of this development: Nolan, above n 64.

⁷⁵ Commonwealth of Australia, *Employer Guide. Superannuation Guarantee. How to Meet your Super Obligations* (Australian Taxation Office, 2008); see also Department of Finance and Administration

There is apparently no requirement that the employer exercise any particular level of care in the choice,⁷⁶ or have regard to the needs of the workforce. Therefore, in theory the fund chosen could be unnecessarily expensive (for example, subject to retail pricing rather than wholesale pricing) or completely unsuitable for the workforce (for example, unduly risky for a workforce comprising workers near retirement age).

If the employer owes no particular responsibility for the decision, as seems to be the current consensus, then the member's only protection is to exercise his or her right under the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) to choose a more suitable fund. This is a step many in the workforce clearly feel ill-prepared to take.⁷⁷ Moreover, in acting independently in this way, the individual loses much of the bargaining power (on fees, for instance) that he or she might have exploited when acting collectively. This represents a major gap in the regulatory scheme, one for which there is not currently an appealing solution.⁷⁸ It was this concern that lay behind the Cooper Review's recommendation that the government mandate that the default for SG contributions be investment in so-called MySuper accounts—vanilla, low-cost funds with a no-frills investment strategy overseen by a trustee bearing traditional 'trustee'-type responsibilities.⁷⁹ These would not necessarily offer all the functionality and flexibility of more sophisticated fund offerings, but would represent a 'fair' deal for those members who through apathy or lack of confidence preferred to leave decision-making to another.

The second issue is that if employers are required under the SG to contribute to a superannuation fund, then it is more difficult to locate the superannuation contribution within the employment contract. It breaks the employment nexus in the sense that contributions by the employer into a superannuation fund are not as obviously a matter for negotiation as they were when such contributions were not required by legislation. (By way of comparison, payment of income tax on behalf of the employee is not viewed as part of the employment contract.)⁸⁰ This hypothesis, if accepted, would not affect the recognition of the employer's legitimate expectations in construing the trust instrument (for instance) where that

(Cth), *Superannuation Circular No 2006/6, Employer and Employee Responsibilities under the Choice of Superannuation Fund Arrangements* (2006), which highlights the need for employers to comply with the requirements of the funds they choose, and with the funding obligations they face under the SG, but does not address the issue of the choice made by the employer.

⁷⁶ One can presume that the standard of care ordinarily applying to employers' relations with their employees might apply here too, but that is untested.

⁷⁷ See, eg, the findings reported in Josh Fear and Geraldine Pace, 'Choosing Not to Choose: Making Superannuation Work by Default' (Discussion Paper No 103, The Australia Institute, November 2008) 103 <<https://www.tai.org.au/file.php?file=dp103.pdf>>.

⁷⁸ One possibility is the creation of a class of default funds where such things as fees and costs and investment strategy are closely regulated, but that would itself require substantial definition and a change in regulatory stance (a partial reversion to merits-based product-oriented regulation).

⁷⁹ Cooper Review, *Final Report, Part 2*, above n 12, 1–37.

⁸⁰ The SG does not of course entirely remove superannuation from the negotiations because superannuation contributions, like income tax, represent a cost of employment, and in some cases employers offer more than the minimum required under the SG. However, it is clear that employers are much less inclined to view superannuation contributions made pursuant to the SG as a negotiable benefit than they were before the introduction of the SG: see, eg, report by Rice Warner Actuaries Pty Ltd, *Is Choice of Fund Working?* (2007) <http://www.ricewarner.com/images/newsroom/1235564272_11s_Choice_of_Funding_Working_January_2007.pdf>.

instrument grants a power of some kind to the employer. It also probably would not affect the employer's right to a surplus (eg, in the event of a winding up), assuming that the entitlements of the members exceeded that required under the SG. However, it clearly challenges the rationale for equal employee/employer representation on trustee boards, an issue identified by the Cooper Review⁸¹ and discussed further below.

C The Member as Consumer

A third way to characterise the members of a superannuation fund can be seen in the approach taken by the Wallis Committee.⁸² The Wallis Committee's Report ('Wallis Report') in 1997 ushered in a fundamental shift in regulatory policy with respect to superannuation. The shift was even signalled in the terms used in the Report. Funds were referred to as 'products' and members as 'consumers'.

Both terms are illuminating. It is entirely consistent with the market-framed methodology that underpins the Wallis Report. At its core, the Report relied on the presence of empowered consumers actively pursuing their self-interests to create a competitive marketplace which, in turn, would promote a more efficient and productive economy. Systemic efficiency was thus accorded a higher priority than individual protection.

Perhaps the most obvious implication of the Wallis Committee's approach can be seen in the Fund Choice initiative introduced in 2005 by the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth). This legislation ensures that most employees are offered the opportunity to choose into which fund their contributions are placed.⁸³ Economists, including most notably Stanford and Drew, argued for this initiative as being 'welfare-enhancing' in an economic sense.⁸⁴ The system as a whole would also benefit since it was also expected that the industry would be forced to respond to the demand signals of its customers, thereby injecting a measure of consumer sovereignty into the superannuation system. The combined pressure created by the atomistic choices made by members might, for instance, be expected to encourage price competition, greater transparency and product innovation.⁸⁵

As it turns out, the Choice of Fund initiative has achieved only partial success.⁸⁶ Despite the fact that all individuals must traverse this decision node, only

⁸¹ Cooper Review, *Final Report, Part 2*, above n 12, 39–67.

⁸² Wallis Committee, Financial System Inquiry, Commonwealth of Australia, *Financial System Inquiry Final Report* (AGPS, 1997).

⁸³ For a detailed description of the coverage and application of the initiative, see Ross Clare, Association of Superannuation Funds of Australia, 'Implications of Choice of Superannuation Fund Legislation for Members, Employers and Funds' (2005).

⁸⁴ Michael E Drew and Jon D Stanford, 'Why Is Superannuation Compulsory?' (2004) 37 *Australian Economic Review* 184.

⁸⁵ Michael E Drew and Jon D Stanford, 'The Economics of Choice of Superannuation Fund' (2002) 8 *Accounting, Accountability and Performance* 1.

⁸⁶ Cooper Review, *Final Report, Part 1*, above n 12, 6–9.

a minority of individuals do in fact exercise such a choice.⁸⁷ Although, as Clare notes,⁸⁸ it is inappropriate to conclude that because people do not choose to direct their contributions to a different fund they are not engaged in making a choice (they may be actively choosing to stay put or may, alternatively, be engaged in some other way), there is a near-consensus that consumer disciplines have been ineffective in disciplining the superannuation system either in terms of price or product differentiation.⁸⁹ This failure was nominated by the Cooper Review as a prime motivation for the reforms it recommended.⁹⁰

At a deeper level, however, it is important to recognise that the empowerment of individuals to choose their own funds has an important normative element. It responds directly to the libertarian principle that individuals are the best judges of their own interests, irrespective of their competence or desired level of engagement.⁹¹ Stanford and Drew correctly identified that the SG meant that ‘participation’ was not voluntary,⁹² but they failed to recognise that providing choice of fund operates at a deeper, normative level also insofar as it mitigates the coercive effects of the compulsion to participate in the system. The availability of choice is an important source of legitimacy for a system that is compulsory, whose products and processes are intangible and in which the benefits are long deferred.

This characterisation of the member as a self-interested and empowered participant in the system stands in stark contrast to the dependent vulnerability that inspires the paternalism embodied in the traditional trustee role. Further, and importantly in the current context, it exerts a powerful influence over the calibration and form of the regulatory scheme.

Taking the form of regulation first, it is apposite to note the way in which characterising individuals as consumers inspires application of ‘consumer protection’ measures to the regulation of interactions within the superannuation system. As a style of regulatory intervention, ‘consumer protection’ relies on a coalition of cognitively capable and attentive consumers, relevant disclosures and true-to-label products.⁹³

This reliance is problematic in the superannuation context. There are widely documented issues with both the levels of financial literacy⁹⁴ and with the extent of

⁸⁷ Joshua Fear and Geraldine Pace, ‘Australia’s “Choice of Fund” Legislation: Success or Failure?’ (2009) 2 *Rotman International Journal of Pension Management* 26; Paul Gerrans, Marilyn Clark-Murphy and Craig Speelman, ‘Retirement Savings Investment Strategy: Member Choices and Performance’ (Paper presented at 16th Annual Colloquium of Superannuation Researchers, Centre for Pensions and Superannuation, University of New South Wales, July 2008).

⁸⁸ Ross Clare, ‘Choosing to Choose’ (Paper presented at 18th Annual Colloquium of Superannuation Researchers, Centre for Pensions and Superannuation, University of New South Wales, July 2010), <<http://www.asb.unsw.edu.au/research/centreforpensionsandsuperannuation/Documents/R.%20Clare%20-%20Choosing%20to%20Choose.pdf>>.

⁸⁹ Sacha Vidler, Industry Super Network, ‘Supernomics: The More You Pay the Less You Get!’ (ISN Research Paper, March 2010) <http://industrysupernetwork.com/wp-content/uploads/2010/08/ISN_SUPERNOMICS_final_rpt.pdf>.

⁹⁰ Cooper Review, *Final Report, Part 1*, above n 12, 7–8.

⁹¹ Wallis Committee, above n 82, 191.

⁹² Drew and Stanford, above n 84.

⁹³ Pearson, *Financial Services Law and Compliance*, above n 2, 451.

⁹⁴ See, eg, Diana Beal and Sarath Delpachitra, ‘Community Understanding of Superannuation’ (2004) 11 *Agenda* 127.

individual engagement with superannuation⁹⁵. There are also issues with the quality of superannuation fund disclosures⁹⁶ and with fund-labelling.⁹⁷ Unfortunately, recent research is increasingly pessimistic about the ability of financial literacy education to address this issue (in contrast to non-stochastic, immediate-feedback decisions like credit-card management and home loan selection, where education does seem to be effective).⁹⁸

However, there is a pernicious corollary of this empowerment that is arguably as important in practical terms as the empowerment itself—that is, the way the empowerment implicitly locates primary responsibility for the success of the system in any instant case in the individual rather than a trustee or, ultimately, the government. This is what is meant when reference is made to the ‘calibration’ of the regulatory scheme—on whom and to what extent, and in what circumstances, does responsibility for any failure rest?

As was noted above, protection for individuals in the consumer protection paradigm is predicated on the creation of an environment in which individuals can protect themselves through the active exercise of their informed judgment. However, the corollary is that fund members must take responsibility for protecting themselves. As Beal and Delpachitra, note:

The upshot of [the Fund Choice initiatives], even though they were made with the best of intentions to allow fund members to align their superannuation investments with their personal risk tolerances, has been to put pressure on members to learn more about superannuation and to take some responsibility for decisions which will impact significantly on their eventual retirement incomes.⁹⁹

Individuals must therefore be actively engaged if they are to enjoy protection from a regulatory scheme in which they are characterised as ‘consumers’. Taken to the extreme, if individuals do not avail themselves of the opportunity to become ‘informed’, then they bear responsibility for any financial injury they suffer as a consequence of their ignorance or apathy. There is thus a transfer of responsibility, not just for the outcome but also for securing protection along the way. Or, to put the issue in more emotionally-charged language, if members’ expectations are disappointed, then to some extent at least the ‘fault’ will lie with the member for not having adequately looked after his or her own interests.

⁹⁵ Cooper Review, *Final Report, Part 1*, above n 12, 9.

⁹⁶ Gerry Gallery and Natalie Gallery, ‘Inadequacies and Inconsistencies in Superannuation Fund Financial Disclosure: The Need for a Principles-Based Approach’ (2003) 36 *The Australian Economic Review* 89.

⁹⁷ See, eg, Gerry Gallery, Natalie Gallery and Lyn McDougall, ‘Don’t Judge a Superannuation Default Investment Option by its Name’ (2010) 20 *Australian Accounting Review* 286; John Kavanagh, ‘Don’t Always Trust the Label’, *The Sydney Morning Herald* (6 May 2009), 12; John Collett, ‘Super Funds Urged to Adopt Truth in Labelling’, *The Brisbane Times* (16 September 2009) <<http://www.brisbanetimes.com.au/business/super-funds-urged-to-adopt-truth-in-labelling-20090915-fpqw.html>>.

⁹⁸ See, eg, Sandra Braunstein and Carolyn Welch, ‘Financial Literacy: An Overview of Practice, Research and Policy’ (2005) 88 *Federal Reserve Bulletin* 445; Organisation for Economic Co-operation and Development, *Improving Financial Literacy, Analysis of Issues and Policies* (2005).

⁹⁹ Beal and Delpachitra, above n 94, 127–8.

That is a far cry indeed from the characterisation of the member as a beneficiary, as described above.

D The Member as Investor

The Wallis Committee went one step further than simply characterising members as ‘consumers’. The Committee noted that members’ exposure to market outcomes made them not just consumers, but consumers of market-linked products or, in the vernacular, ‘investors’.

This is an important gloss. Where consumer protection exists to provide redress to consumers for faulty products, investment is by its nature risky and investors are expected to bear the consequences of that risk. The Corporate Law Economic Reform Program (‘CLERP’) Paper No 6 recognised that reality when it noted: ‘Risk taking is a central component of financial markets. Market regulation is not intended to guarantee the success of a particular investment decision.’¹⁰⁰ Moreover, whilst individuals may, through good luck or good management, avoid losses, not all investors can enjoy this good fortune. Losses will be experienced by some investors somewhere in the population.¹⁰¹ Finance theory makes it clear that some investments must fail—it is the *sine qua non* of the equity risk premium and the credit spread on non-sovereign debt securities. Implicit, then, in characterising members as ‘investors’ is an acceptance that the superannuation entitlements of some portion of the population will be inadequate, not because of anything in the power of the member, but due to the actuation of adverse investment outcomes. Put bluntly, investment markets inevitably have ‘losers’ as well as winners.

Such an outcome contrasts starkly with the capital preservation and anti-speculation ethos present in much of the rhetoric surrounding trust investment.¹⁰² More fundamentally, it presents an important challenge for a policy aiming to secure some measure of social inclusion. The likelihood that the superannuation system will fail to provide adequate retirement savings for some portion of the population (for reasons beyond the direct control of those individuals) cannot be ignored. If nothing else, it emphasises the importance of the complementarity between the superannuation system and the ‘safety net’ provided by other welfare systems.

There is another aspect to the member qua investor characterisation that is worth noting briefly. In theory, investors, whether shareholders or debtors, play an important part in the governance of corporate entities.¹⁰³ That role can be formal, as in the exercise of voting rights or the specification of restrictive covenants in loan terms, or it can be informal. The problem identified by Drucker over 30 years

¹⁰⁰ Corporate Law Economic Reform Program, Treasury, *Proposals for Reform Paper No 6: Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (1997) 28.

¹⁰¹ The term ‘losses’ is to be interpreted loosely in this context. Whilst the actuation of risk may cause actual financial loss of capital, loss in this context also connotes investment outcomes where the rate of return is positive but unexpectedly low.

¹⁰² For a description, see M Scott Donald, ‘Prudence under Pressure’ (2010) 4 *Journal of Equity* 44, 45-47.

¹⁰³ This perspective is customarily attributed to the ground-breaking work in: Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Macmillan, 1932).

ago,¹⁰⁴ and since elaborated by a long list of commentators,¹⁰⁵ is that the institutional structure of capital markets has all but emasculated the role played by investors as the providers of capital. Only recently have superannuation funds routinely exercised their voting rights,¹⁰⁶ and arguably there is still a long way to go before they could be regarded as playing their role as 'owners' of the enterprises for which they provide the capital. Similarly, few institutional investors in debt markets engage in the kind of negotiating and monitoring activity that might be expected of an owner, as they perceive themselves and are perceived by corporate management to be transient.¹⁰⁷ To the extent that negotiation and monitoring occurs, it is largely undertaken by long-term investors,¹⁰⁸ especially bank-lenders,¹⁰⁹ with other market participants 'free-riding' on the monitoring activities of these engaged, long-term players and relying on the analysis provided by credit agencies.¹¹⁰

There have been calls for this disengagement to change. Some emanate from the 'responsible investing' movement.¹¹¹ Other calls have come more directly from corporate governance circles¹¹² and some, indeed, from government itself.¹¹³ However, major hurdles remain. Individual members have few if any mechanisms to enable them to engage more directly with the corporate entities in which their fund invests. Moreover, trustees, acting on the members' behalf, have limited resources to apply across their myriad tasks, and absent powerful and unequivocal direction from members (and at least acceptance from regulators) are unlikely to be prepared to commit material attention to what many perceive to be a 'second order' issue. The result is that most governance activity, if it occurs at all, is delegated to external parties provided with quite general principles.¹¹⁴ It therefore focuses on a few highly visible decision nodes, such as board elections and executive

¹⁰⁴ Peter F Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (Harper & Row, 1976).

¹⁰⁵ See, eg, Mark J Roe, 'The Modern Corporation and Private Pensions' (1993) 41 *University of California Law Review* 75; Ronald B Davis, *Democratizing Pension Funds. Corporate Governance and Accountability* (University of British Columbia Press, 2008).

¹⁰⁶ Geof P Stapledon, 'The Duties of Australian Institutional Investors in Relation to Corporate Governance' (1998) 26 *Australian Business Law Review* 331, 334.

¹⁰⁷ See, eg, John Hendry, Paul Sanderson, Richard Baker and John Roberts, 'Owners or Traders? Conceptualizations of Institutional Investors and their Relationship with Corporate Managers' (2006) 59 *Human Relations* 1101.

¹⁰⁸ Xia Chen, Jarrad Harford and Kai Lia, 'Monitoring: Which Institutions Matter?' (2007) 86 *Journal of Financial Economics* 279.

¹⁰⁹ Sungyoon Ahn and Wooseok Choi, 'The Role of Bank Monitoring in Corporate Governance: Evidence from Borrowers' Earnings Management Behavior' (2009) 33 *Journal of Banking and Finance* 425.

¹¹⁰ Sabine Montagne, 'Short-Termism as a Rule: The Effects of Portfolio Management Delegation' (2009) *Revue d'Economie Financiere*, 'Sovereign Funds' hors série 381.

¹¹¹ See, eg, Values Investment Strategies and Research Ltd, *Conference Report - Investing for Long-Term Value: Integrating Environmental, Social and Governance Value Drivers in Asset Management and Financial Research* (2005) <http://www.unglobalcompact.org/docs/issues_doc/Financial_markets/zurich_rep.pdf>.

¹¹² See, eg, James P Hawley and Andrew T Williams, *The Rise of Fiduciary Capitalism* (University of Pennsylvania Press, 2000).

¹¹³ See, eg, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Better Shareholders—Better Company: Shareholder Engagement and Participation in Australia* (2008).

¹¹⁴ Stapledon, above n 106, 356.

remuneration.¹¹⁵ It is not especially granular, nor, for the most part, especially nuanced.¹¹⁶

E The Member as Financial Citizen

The last of the characterisations is the notion of the member as a ‘financial citizen’. The concept of the financial citizen can be traced to Gray and Hamilton¹¹⁷ but has since been employed by a number of commentators.¹¹⁸ It connotes an individual who is an active participant in financial markets and in the polity in which those markets are embedded. To that extent, the ‘financial citizen’ is similar to the engaged financial consumer of the type assumed in the Wallis reforms. However, the conception of the financial citizen goes further. It connotes some responsibility, at least for the outcomes their decisions attract, not just for the financial citizen personally but for the polity more generally. That is, the financial citizen is responsible for contributing to the governance of the systems in which they participate.

This notion has obvious resonances in the superannuation context. Two in particular deserve attention. The first is the role of individuals in the system as a means of disciplining the system, either by holding other participants in the system accountable directly or by more indirect ‘market’ means. The second constitutes the implications of the hypothesised ‘public’ role for superannuation on the regulatory settings—namely, to what extent does the superannuation system’s ‘public’ role imply that consideration should be had for the distinct source of normative inspiration flowing from that public nature?

(i) Accountability and Discipline in the Superannuation System

By definition, any ‘system’ must have within its structure mechanisms and processes which govern the interaction of its constitutive parts, giving it cohesion and promoting its objectives. A system in which actors are not held accountable for their actions at best risks losing legitimacy, and at worst risks a quick descent towards anarchy. Surprisingly, then, there has to date been no comprehensive analysis of the location, mechanics and content of accountability across the superannuation system. There has been little academic work in the area and, at least until the Cooper Review, the issue has received scant attention from policy-makers.

¹¹⁵ Chief Justice James Spigelman, ‘Institutional Shareholders and Corporate Governance’ (2010) 28 *Company and Securities Law Journal* 235, 236–7.

¹¹⁶ For a more sanguine view, see Kirsten Anderson, Shelley Marshall and Ian Ramsay, Centre for Corporate Law and Securities Regulation, The University of Melbourne, ‘Do Australian Institutional Investors Aim to Influence the Human Resources Practices of Investee Companies?’ (2007).

¹¹⁷ Joanna Gray and Jenny Hamilton, *Implementing Financial Regulation. Theory and Practice* (Wiley, 2006), 187 - 225.

¹¹⁸ See, eg, Gail Pearson, ‘Financial Literacy and the Creation of Financial Citizens’ in Michelle Kelly-Louw, James P Nehf and Peter Rott (eds), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Ashgate, 2008) 3; Dimity Kingsford Smith, ‘Financial Services Regulation and the Investor as Consumer’, in Geraint Howells, Ramsay and Wilhelmsson (eds) *The Handbook on Research on International Consumer Law* (Edward Elgar, 2010) 431.

A few things are clear. Trustees clearly play a central role as decision-makers and communicators within the system.¹¹⁹ APRA¹²⁰ and the Australian Securities and Investments Commission ('ASIC') also have roles that span the spectrum from guidance to enforcement. Additionally, as in most financial markets contexts, there are a range of private sector 'gatekeepers' who contribute interdependently to the governance of the system as a whole.¹²¹

It is, however, increasingly clear that the system relies, in theory at least, on members also playing a role. In other words, members' responsibilities (in a loose, non-legal sense) do not end with the payment of moneys into the superannuation system.

An indirect role has already been suggested. As was noted above, superannuation fund members have responsibility for a range of choices within the superannuation system. In a competitive market these choices would exert a disciplining pressure on other participants. Viewed from this perspective, the limited engagement of members in the system described above represents an abrogation of responsibility by members as financial citizens. No doubt few members would currently see it in that light.

Members also possess a more direct role—that of ensuring that the accountabilities of other participants in the system are enforced. There are, however, certain preconditions for members to be able to engage directly in the affairs of the superannuation fund, and to hold accountable those who act on their behalf. The most obvious is the impotence of mechanisms within the regulatory scheme to assist them to enforce their own rights as members.¹²² Some of these were alluded to earlier — for instance, Kingsford Smith has expressly tied calls for greater transparency and more effective mechanisms for the review of the decisions of superannuation trustees to the 'public' nature of superannuation.¹²³ She has noted that:

[T]he superannuation trust has a significant public nature despite its legal form ... Should fund trustees remain unaccountable and unsupervised in the exercise of discretions ... when superannuation has become a privatised version of some aspects of social security?¹²⁴

¹¹⁹ John Dawkins, *Strengthening Super Security: New Prudential Arrangements for Superannuation: Statement by the Honourable John Dawkins, M P, Treasurer of the Commonwealth of Australia, 21 October 1992* (Australian Government Publishing, 1992) 1–3.

¹²⁰ Notably the Cooper Review has recommended measures that would see the Australian Prudential Regulation Authority's role further defined and, in some areas, extended: Cooper Review, *Final Report, Part 2*, above n 12, 303–30.

¹²¹ See, eg, John C Coffee Jr, *Gatekeepers. The Professions and Corporate Governance* (Oxford University Press, 2006). For a more recent discussion of the role of gatekeepers that emphasises their interdependence, see Andrew F Tuch, 'Multiple Gatekeepers' (2010) 96 *Virginia Law Review* 1584.

¹²² But see Senate Select Committee on Superannuation and Financial Services, Parliament of Australia, *Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services, First Report* (2001) 32 [3.61]. The Senate Select Committee concluded that, 'in most cases, there are already sufficient mechanisms in place for fund members to hold trustees accountable for their actions'.

¹²³ Dimity Kingsford Smith, 'Who Knows Best? Review of Discretionary Powers in Superannuation Funds' (2000) 28 *Australian Business Law Review* 428.

¹²⁴ *Ibid* 434.

This points to the elevation in importance of concepts such as accountability, due process and public trust. In theory at least, these are all priorities of administrative law.¹²⁵ To date the courts have been loath to accept this lead.¹²⁶

Also important is the fact that despite the rhetoric of ‘equal representation’, members typically have limited, and in most cases no, ability to influence the composition of the board of the corporation acting as a trustee for the fund(s) in which they are invested. Nor can they subject the directors and managers of their fund(s) to the scrutiny afforded by the governance mechanisms available to shareholders in a public company—for instance, as was anticipated by the Treasurer John Dawkins when he said in introducing the *SIS Act*:

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.¹²⁷

The possibility of prescribed trustee elections and corporate-style annual general meetings was expressly rejected as unworkable by the Cooper Review.¹²⁸

Financial literacy is also relevant here. As was noted above, the complexity of superannuation, combined with the abstract nature of investing and investment markets, is a formidable barrier to individuals engaging effectively with the superannuation system.¹²⁹ If, however, as Pearson and others contend,¹³⁰ dignified participation in modern western societies requires a level of financial literacy, a quantum step removed from current levels, there may be more fundamental issues at play. As Harlow and Rawlings note in the context of administrative decision-making:

Individuals are deprived of the conditions requisite for continued moral agency when they are denied the opportunity to participate in those decisions which affect them.¹³¹

From this ‘dignitarian’ perspective, the practical impotence of individuals in the superannuation system has relevance beyond the possibility that they may not intervene to ensure that the investment strategies applied to their contributions are optimal to their needs. It may represent a material disempowerment that undermines the legitimacy of the system as a whole. It may then be that the

¹²⁵ For a discussion of the emergence of ‘new principles’ underpinning judicial review of administrative action in Australia, see Mark Aronson, Bruce D Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2008) 176; see also Chief Justice James Spigelman, ‘Foundations of Administrative Law: Toward General Principles of Institutional Law’ (1999) 58 *Australian Journal of Public Administration* 3.

¹²⁶ For a description of the key authorities and secondary materials related to this area, see Justice Reginald Ian Barrett, ‘The Principle in *Re Hastings-Bass*’ (Paper presented at the Law Council of Australia and Leo Cussen Institute ‘Superannuation 2006’ Conference, Law Council of Australia, Melbourne, 23 February 2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_barrett230206>.

¹²⁷ Dawkins, above n 119, 3.

¹²⁸ Cooper Review, *Final Report*, above n 12, 58.

¹²⁹ See, eg, Financial Services Institute of Australia, *Saving the Future: Can the Under-40s Afford to Grow Old? Public Opinion Research* (2006); see also Australian Government Office for Women, *Aspects of Retirement for Older Women* (AGP, 2006). On superannuation more generally, see Beal and Delpatchitra, above n 94.

¹³⁰ Pearson, above n 2; Gray and Hamilton, above n 117.

¹³¹ Carol Harlow and Richard Rawlings, *Law and Administration* (Butterworths, 2nd ed, 1997) 498.

analogies made by Pearson between the push at the turn of the 20th century for public education to support universal suffrage and current financial literacy campaigns are less far-fetched than they at first appear.¹³²

(a) *The Public Role of the Superannuation System*

The location of compulsory superannuation within the public realm introduces a second nuance to the conception of the member as financial citizen. Fund members have an interest that transcends the narrow frame of the financial benefits they can expect to flow from the fund. They have a collective interest in ensuring that the system meets its objective.¹³³ This could be cast in a myopic self-interested frame as an interest in ensuring that 'not just me, but everyone else provides for themselves too', or it could be framed more broadly to reflect the interests of members of a polity in securing the fair and efficient operation of that polity. Calls for superannuation funds to invest 'responsibly',¹³⁴ or to support the development of national infrastructure,¹³⁵ are good examples of this. The other dimension is that failure on the part of the superannuation system to achieve its objectives would almost certainly act as a catalyst in the political arena for a recalibration of the welfare and taxation systems in favour of the retired cohort of the population.

It remains to be seen, however, how much traction these transcendent public considerations can gain. In *Finch v Telstra Super* the High Court expressed a preparedness to accord weight to the 'public' nature of the superannuation system in interpreting trust provisions.¹³⁶ Equally though, the courts have been loath to encourage the pursuit by trustees of members' interests outside those enjoyed qua member.¹³⁷ Tellingly, member take-up of 'sustainable' or 'responsible' investment options within superannuation funds has been anaemic at best.¹³⁸ Therefore, to date the strongest impetus for such public-minded considerations has come from the political sphere,¹³⁹ suggesting that individuals may be more inclined to support government intervention on their behalf than to act directly.

¹³² Gail Pearson, 'Reconceiving Regulation: Financial Literacy' (2008) 8 *Macquarie Law Journal* (Special Issue) 45, 57.

¹³³ This was noted in the Australian Law Reform Commission Report that informed the *SIS Act*, where the following was noted: 'because of the element of compulsion, the government and the community have a strong interest in ensuring that the investment of these funds is secure and successful' (emphasis added): Australian Law Reform Commission, *Collective Investments: Superannuation*, Report No 59 (1992) lix.

¹³⁴ See, eg, Chris Kennedy, 'Super Funds Need to Boost Responsible Investment' (2010) *Super Review* <<http://www.superreview.com.au/article/Super-funds-need-to-boost-responsible-investment/523338.aspx>>; Azhar Abidi, 'Trustees Should be Responsible', *Australian Financial Review* (Sydney) (17 March 2010).

¹³⁵ See the discussion in Leslie Nielson, 'Superannuation Investment in Infrastructure' (Research Note No 42, Australian Parliamentary Library, 4 April 2005) <<http://www.aph.gov.au/library/pubs/rn/2004-05/05rn42.htm>>.

¹³⁶ *Finch v Telstra Super Pty Ltd* (2010) 271 ALR 236, 247.

¹³⁷ *Cowan v Scargill* [1985] Ch 270.

¹³⁸ Paddy Manning, 'Ethical Investing a Difficult Option for Funds to Sustain', *The Sydney Morning Herald* (6 July 2009) 26. But see Tim Blue, 'Ethics and the Environment Sway Super Fund Members' *The Australian* (Sydney) (26 May 2010) 11.

¹³⁹ See, eg, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006).

IV Concluding Comments

The aim of this article has been first to provide an updated description of the inter-legality identified almost 17 years ago by Lord Justice Hoffmann, and then to portray the influence of the disparate strands in a personal, compelling way to expose what they each imply about the normative foundations of the system of rules and institutions that constitutes the Australian superannuation system. To that end, the article has successively characterised the hypothetical member as either a ‘beneficiary’, ‘employee’, ‘consumer’, ‘investor’ or ‘financial citizen’. Each characterisation is true to some extent and in some circumstances. However, each characterisation is animated by a different set of legal rules, each infused with a unique mix of preoccupations and priorities. The member as ‘beneficiary’ is accorded paternal protection, but as a corollary is given only rudimentary means of self-protection. In contrast, the individual is expected to be more self-reliant when characterised as an ‘employee’, ‘consumer’, ‘investor’ or ‘financial citizen’. As an ‘employee’, the member gains recognition of the employment context in which his or her entitlement arises but is exposed to the difference in bargaining power regularly found in that realm and by the constraints imposed by the industrial relations system. As a ‘consumer’, the member is adjudged to be the best arbiter of his or her own interests and can expect to receive information of a quantity, quality and timeliness sufficient to make an informed decision in pursuit of those interests. However, *caveat emptor* applies to a far greater degree. Similarly, the member as ‘investor’ is provided with copious amounts of information but is exposed to the risks of misinterpretation of that information, or of misspecification of their own needs or, indeed, of bad luck. Finally, the member as ‘financial citizen’ juxtaposes the rights of participation in the polity, and the emphasis on transparency and accountability of delegated decision-makers within that realm, together with the correlative responsibilities that those rights carry.

The overlap between the juridical strands underlying these characterisations thus has both instrumental and normative dimensions. It is therefore a rich illustration of the inter-legality identified by de Sousa and others in the modern legal order.¹⁴⁰ However, the entanglement of juridical strands in the superannuation system identified by Lord Justice Hoffmann is not simply a curiosity for legal theorists. It embeds in the superannuation system a contest of normativity that has important practical and policy ramifications. Some (but not all) of the inconsistencies and challenges were identified and addressed in the Cooper Review, but whether resolved or not over coming years, the analysis presented here highlights two important conclusions—first, that there are powerful normative foundations on which any policy initiatives in this area rest that ought not be ignored; and second, that the way in which we conceive participants in the system can subtly influence the priorities we privilege as well as the instrumental choices we make in pursuit of our policy objectives.

¹⁴⁰ See above n 7.