THOMSON GEER
LAWYERS

# Superannuation Case Law Update

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Contents



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Thomson Geer thanks: Scott Charaneka (Head of Superannuation and Wealth Management), Stanley Drummond (Adjunct Head of Superannuation and Wealth Management) and Tina McDill (Senior Associate) for their assistance in preparing this publication.

## 1. TPD claim – the meaning of "reasonably fitted by education, training or experience" – *Jones v United Super Pty Ltd* [2016] NSWSC 1551

In allowing a claim by a member of a superannuation fund for a total and permanent disablement (TPD) benefit, the NSW Supreme Court (Brereton J) has said that "a job which a person may be able to perform without further education, training or experience is not necessarily one for which he or she is reasonably fitted by education, training or experience"; and that the purpose of the phrase "reasonably fitted by education, training or experience" is to provide a benefit for people who are disabled from pursuing "those employments or careers for which the insured has been prepared and shaped by his or her past vocational history". The case is *Jones v United Super Pty Ltd* [2016] NSWSC 1551.

**Background**

The claimant was born in 1982. He left school in NSW at age 16, having obtained his School Certificate.

He completed an apprenticeship with a roofing contractor and qualified as a tradesman roof plumber with a Certificate 3 in metal roof plumbing. He subsequently gained a number of additional tickets, including Professional Association of Climbing Instructors, asbestos removal class B, safe work at heights ticket, elevated work platform over 11 metres, 20 ton non-slew crane, occupational health and safety induction, and explosive power tools.

In 2002 he suffered an injury to his lower back while lifting metal roof and wall sheets over a parapet wall to a fellow worker. This caused pain to radiate down the back of his left leg. His condition worsened and in 2003 he underwent a hemi-laminectomy at S1 on the left side, which was successful. He returned to work three months later with a different employer, as a roofing supervisor.

From 2003 until 2011 he worked in a series of supervisory roles with different roofing companies. All these roles involved significant manual labour. In early 2007, he took up a supervisory position with CMC Metal Roofing in Townsville, Queensland. (Although not mentioned in the judgment, it appears that at about this time the claimant moved from Sydney, where his previous employers were based, to Townsville.)

Although the operation in 2003 had been successful, he continued to have pain in his lumbar spine which radiated down the back of his left leg, which was worse when bending or lifting or while standing or sitting for long periods.

In mid-2011 he was loading asbestos sheeting, which was quite heavy, into a bin when he noticed some soreness in his back, which increased significantly, and he developed right leg pain, which became more severe than the back pain. On 7 September 2011 he had a CT scan of the lumbar spine, which was reported as showing, at L5/S1, a prominent central disc protrusion with calcification, somewhat more pronounced towards the left side. The previous hemi-laminectomy at S1 on the left side was noted.

At about this time he stopped working, and on 10 October 2011 his employer closed down. Its jobs and its employees were transferred to other contractors. However, the claimant did not resume work.

In June-October 2012 the claimant lodged a claim with the trustee of his superannuation fund for a TPD benefit.

In October 2012 the claimant underwent a re-do laminectomy, which resulted in some improvement. However, he still had pain in the right calf and walked in a restricted fashion.

Shortly before this, he had been referred to Dr Marshman, neurosurgeon, for further investigation, particularly of discogenic pain. Dr Marshman first saw him in August 2012. In March 2013 Dr Marshman noted that there were "a lot of fear-avoidance mechanisms in operation that he freely admits to" (at [24]-[25]).

Dr Marshman provided a report dated 22 August 2013 to the superannuation trustee. This relevantly read (at [33]):

> 2. The clinical diagnosis is persistent right L5 sciatica. The cause is considered to be cytokine-mediated irritation of the exiting L5 nerve root as a result of the co-localisation of a residual protruded and degenerate L5/S1 disc after prior surgery. Fear-avoidance mechanisms (which Clinton freely acknowledges) also compound this case, and Clinton has become somewhat dependent upon opiate analgesia.
>
> …
>
> 5. The two operative medical conditions are: 1) cytokine-mediated right sciatica, and 2) psychological factors such as fear-avoidance and opiate dependence.
>
> 6. The two operative medical conditions outlined in Q5 above *are both equally limiting* upon a successful return to work.
>
> …

> 8. The prognosis for a return to work (both medium and long-term) is currently poor *without successfully addressing both conditions outlined in Q5 above*.
>
> 9. Clinton has continued pain and operates fear-avoidance mechanisms: *both render him unfit* to return to his previous employment.
>
> 10. It is possible for Clinton to retrain for a desk job which can capitalise up-on his previous knowledge and experience.
>
> 11. Yes, I believe that Clinton could be re-employed as a Building Supervisor with no manual duties.

Later in August 2013 the trustee asked the fund's group life insurer to assess the claim.

**The TPD definition**

TPD was defined in the insurance policy in the following terms (at [3], emphasis added):

> **What is Total and Permanent Disablement?**
>
> 1.3 Total and Permanent Disablement in respect of an Insured Person who was gainfully employed within the six months prior to the Date of Disablement is where:
>
> 1.3.1 the Insured Person is unable to follow their usual occupation by reason of accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remunerative Work *for which the Insured Person is reasonably fitted by education, training or experience*; or …

The Policy contained the following definitions of "Date of Disablement" and "Regular Remuneration Work" [sic] (at [4]):

> **Date of Disablement**
>
> Total Permanent Disablement is treated as having occurred on the Date of Disablement which is the earlier of:
>
> (a) the date on which the six (6) months consecutive inability to work that results in Total and Permanent Disablement began; or …
>
> **Regular Remuneration Work**
>
> An Insured Person is engaged in regular remunerative work if they are doing work in any employment, business or occupation. They must be doing it for reward – or the hope of reward – of any type.

The definition of TPD in the policy also determined the meaning of TPD in the trust deed of the fund.

**The claim is declined**

In January 2014 the insurer declined the claim. The trustee agreed with the insurer's decision. The claimant asked for the decisions to be reviewed, and provided a further medical report. In March 2014 the insurer confirmed its earlier decision. The trustee again agreed with the insurer's decision. This was communicated to the member in April 2014.

Briefly stated, the insurer's position, with which the trustee agreed, was that the following occupations were suitable for the claimant (at [47] and [53]):

> Retail Sales (Hardware)
>
> Courier/Delivery Driver
>
> Console Operator
>
> Customer Service Advisor/Telemarketer.

Later in 2014 the claimant commenced proceedings against the trustee and the insurer in the Supreme Court of NSW.

**The court's judgment**

The court held that the decisions of the insurer and the trustee were void, and that the claimant was TPD as he satisfied both limbs of the definition of TPD.

*The first limb – unable to follow usual occupation for six months*

In relation to the first limb of the definition of TPD ("unable to follow their usual occupation by reason of accident or illness for six consecutive months"), the court found that the claimant was on any view unable to follow his usual occupation of roof plumber for a period of six months from 10 October 2011. It did not matter that his employer had ceased to trade (at [89]-[90]).

*The second limb – the relevance of psychological factors*

In relation to the second limb of the definition of TPD ("unlikely ever to be able to engage in any Regular Remunerative Work for which the Insured Person is reasonably fitted by education, training or experience"), the court noted that the claimant's "employment history was entirely in the roofing industry" and said that "there is nothing to suggest that ability to work is to be judged only by physical factors, to the exclusion of the psychological". Here, the insurer's reasons for declining the claim addressed only the claimant's *physical* capacity, and not ability having regard his psychological makeup, most significantly his fear-avoidance syndrome. Dr Marshman had reported that "the prognosis for a return to work

(both medium and long-term) was poor without successfully addressing *both* his right sciatica *and* psychological factors including fear-avoidance; and that psycho-social factors, especially fear-avoidance beliefs, which had been present all along, had become predominant". The insurer's approach also failed to take into account the competitive disadvantages that the claimant would face in seeking employment (at [41] and [68]-[69]).

*"Reasonably fitted by education, training or experience"*

Moreover, there was a question of whether the suggested occupations of retail sales assistant, service station console operator, courier/delivery driver or customer service adviser/telemarketer were ones for which the claimant was "fitted" by has past education, training and experience. On this question, the court said (at [71]):

> … a job which a person may be able to perform without further education, training or experience is not necessarily one for which he or she is reasonably fitted by education, training or experience …

and (at [71]):

> The concept of an occupation or work "for which the Insured Person is reasonably fitted by education, training or experience" directs attention to the insured's vocational history to date, and to occupations for which that vocational history *fits* the insured. It refers not to *any* work for which the insured might have physical and mental capacity without further training, but to work for which the insured has been prepared and shaped by education, training and/or experience. The purpose of the provision is to provide a benefit for those who are disabled from following the vocations for which their past education, training and experience has prepared them – not any occupation which may be conceived, however far removed from his or her vocational history, which can be performed without further education, training or experience. The policy insures the capacity of an insured to perform regular remunerative work, not *simpliciter,* but in an occupation for which the insured's education, training and experience has prepared him or her. In that way, it insures against loss of the ability to pursue those employments or careers for which the insured has been prepared and shaped by his or her past vocational history.

The court then gave the following illustration of a surgeon who loses the fine motor skills required for surgery, but who is otherwise physically fit and capable of working as a manual labourer (at [71]):

> The point is illustrated by the reverse of the current type of situation: a surgeon whose tertiary education was in medicine and whose entire vocational history was in surgery, who lost the fine motor skills required for surgery, but was otherwise physically fit, would not be reasonably fitted *by education, training or experience* for work as a manual labourer, even though he or she might be perfectly capable of performing it without further training.

Here, the only work for which the claimant was reasonably fitted by education, training or experience was manual labour, in which he had been consistently engaged since the age of about 16 when he had left school, and in which the insurer accepted that he was never again likely to engage. The inquiry need have proceeded no further (at [76]).

*The suggested occupations*

With the possible exception of courier/delivery driver, all the suggested occupations involved customer contact and service. The claimant's education, training and experience has not prepared or fitted him for customer service positions. His vocational history revealed no experience in or aptitude for customer service. As for work as a courier or delivery driver, even if it could be said that, as he had a driving licence and could carry light goods, his education, training and experience fitted him for such work, he was unlikely ever to be able to engage in regular remunerative work as a courier or delivery driver. Work as a courier would involve getting into and out of the vehicle, lifting and carrying parcels, and walking up and down stairs – which the claimant's medical restrictions excluded (at [78] and [103]).

*The second limb – conclusion*

In relation to the second limb, the court held that the claimant was fitted by his education, training and employment for work as a labourer, and for no other employment. As at April 2012 (being the end of the six month qualifying period), he was not able, and never likely to become able, to perform the duties of a labourer (at [97]).

*Must work be available locally?*

Although not essential to the court's conclusion that the claimant was TPD, the court expressed support for the view that the concept of "work" in the definition of TPD is limited to work that is available locally (at [67]). The courts have been divided on this question, with the Full Federal Court, the Queensland Court of Appeal and the Victorian Court of Appeal all expressing the view, in similar contexts, that the concept of "work" is *not* limited to work that is available locally: *Repatriation Commission v Hill* [2005] FCAFC 7; (2005) 142 FCR 88 at [39] and [58]; *Wells v Australian Aviation Underwriting Pool* [2004] QCA

43 at [17]; and *Hannover Life Re of Australasia Ltd v Colella* [2014] VSCA 205 at [30(6)] and [34]-[37].

**The result**

In the result, the court held that the claimant was TPD, ordered the insurer to pay the TPD benefit together with interest pursuant to s 57 of the *Insurance Contracts Act 1984* (Cth), and ordered the trustee thereupon to pay that sum to the claimant. The court said that, prima facie, the insurer and the trustee should pay the claimant's costs (at [114].).

**Comments**

The salient feature of this judgment is the view taken of the concept of work for which a person is "reasonably fitted" by education, training or experience, in the definition of TPD. In particular, the concept is limited to "those employments or careers for which the insured has been *prepared and shaped* by his or her past vocational history" (emphasis added), with the consequence that "a job which a person may be able to perform without further education, training or experience is not necessarily one for which he or she is reasonably fitted by education, training or experience" (at [71]). It is submitted that this extends the law in this area.

Many people change careers over their working life, for many reasons. Some people undertake part-time study and obtain qualifications which enable them to make a career change. Other people change careers as their interests change, the opportunities for employment change, or their capacity to do heavy manual work diminishes as they get older. Some industries decline, while other new ones emerge. While many career changes can be seen as voluntary, many others are involuntary.

Many people take jobs that they are not particularly fond of, to make ends meet.

Against this background, the proposition stated in the judgment that a surgeon who loses the fine motor skills required for surgery, but who is otherwise physically fit and "perfectly capable" of working as a manual labourer without further training, is not thereby excluded from qualifying for a TPD benefit (at [71]), might be regarded as surprising. It seems to go beyond the question of *capacity* for work and introduce notions of personal inclination and preference.

Finally, it is to be observed that the definition of "permanent incapacity" in reg 1.03C or the *Superannuation Industry (Supervision) Regulations 1994* (Cth) uses the expression "reasonably *qualified* by education, training or experience", not "reasonably *fitted* by education, training or experience". It remains to be seen whether, in the TPD context, "qualified" and "fitted" have the same, or a different, meaning.

## 2. TPD claim – effect of termination of employment – *Daffy v MLC Nominees* [2016] VSC 606

The Supreme Court of Victoria (McDonald J) has considered the effect of termination of a superannuation fund member's employment during the qualifying period for a total and permanent disablement (TPD) benefit on the member's entitlement to the benefit. The court held that in the circumstances of the case, a benefit had already accrued to the member by the time his employment was terminated, and so termination of his employment did not affect that entitlement. The member was accordingly entitled to the TPD benefit. The case is *Daffy v MLC Nominees Pty Ltd*: [2016] VSC 606.

**Background**

The member was the general manager of a company. He also held shares in the company's parent company.

Throughout his employment by the company, he was a member of a superannuation fund. The trustee of the fund held a group life policy.

Employees of participating employers came under the First Schedule to the policy. Upon leaving their employment with a participating employer, a person was automatically transferred from the First Schedule to the Sixth Schedule. The definition of TPD in the Sixth Schedule was more onerous than that in the First Schedule.

As an employee of a participating employer, the member came under the First Schedule.

In 2010 the member suffered a prolapsed disc while lifting a large sliding door at work. He was hospitalised and absent from work for

approximately 4 weeks. Following his return to work, he worked reduced hours and was not able to perform his usual general manager duties. He suffered from pain and experienced significant difficulties during this time in both the workplace and with his daily living activities. However, he continued to work reduced hours for a further 6 months.

The member's last day at work was 20 May 2011.

On 24 May 2011 (being 4 days later and during the 6 month qualifying period for a TPD benefit under the policy) the member attended a meeting with fellow directors of the company and the parent company. He attended this meeting in his capacity as a shareholder of and investor in the company, and not in his capacity as general manager. The meeting arose out of a demand by the majority shareholder of the parent company that the company owed it $1.2 million, and should repay this money. The member objected to this and during the course of the meeting, his employment was terminated. The termination was related to this dispute about repayment of the debt, and not the member's injury.

In 2012 the member claimed a TPD benefit of approximately $1.5 million under the First Schedule to the policy, or alternatively under the Sixth Schedule.

**The policy**

The definition of TPD in the First Schedule to the policy read in part (at [122]):

> (b) the Member having been absent from their Occupation solely through Injury or Illness for six consecutive months and after which time the Member has become in MLC's opinion, after consideration of all evidence obtained, incapacitated to such an extent as to render the Member unlikely ever to engage in any gainful profession, trade or occupation for which the Member is reasonably qualified by reason of education, training or experience ...

The definition of TPD in the Sixth Schedule read in part (at [127]):

> (d) a Member who is not actively employed and in MLC's opinion would have been absent from their previous or any similar occupation solely through Injury or Illness for a period of six consecutive months and after which time the Member has in MLC's opinion, after consideration of all evidence obtained, suffered a total irreversible inability to perform at least two of the Activities of Daily Living.

The court noted that the definition of TPD in the Sixth Schedule was more onerous than that in the First Schedule. The court said (at [146]):

> The TPD criteria prescribed by the Sixth Schedule are significantly more onerous than those prescribed by the First Schedule ... A claim for a TPD benefit under the Sixth Schedule by a Member who is not actively employed requires the Member to establish, not only that he/she would have been absent from their previous Occupation solely through injury or illness for a period of six consecutive months, but also that the Member has suffered a total irreversible inability to perform a least two of the Activities of Daily Living.

Another relevant section of the policy was clause 27.1(e), which provided (at [112]):

> 27.1 Notwithstanding any other provision contained in this Policy, MLC's liability to pay any Benefits which have not already accrued in respect of a Member shall cease on the occurrence of the earlier of any of the following events:
>
> …
>
> (e) on the date the Member ceases to be an employee of a Participating Employer, unless the Member is covered under Schedule 3 or continues to be covered under Schedule 4 of the Policy, or with respect to a Family Member on the date the Family Member no longer meets the "Family Member" eligibility conditions unless the Family Member continues to be covered under Schedule 6 of the Policy.

**The claim is declined**

The insurer declined the member's claim. The trustee agreed with the insurer's decision.

**The proceedings**

The member commenced proceedings against the insurer and the trustee in the Supreme Court of Victoria.

*Under the First Schedule*

The insurer's position was that upon termination of the member's employment, he was transferred from the First Schedule of the policy to the Sixth Schedule (which, as mentioned above, had a more onerous TPD definition than the First Schedule). The member had no right to have his TPD claim determined under the First Schedule, as he had ceased to be an employee. The insurer's liability was therefore excluded under clause 27.1(e) of the policy.

The insurer further contended that upon termination of the member's employment, he ceased to have an occupation. Without an occupation, the member could not satisfy the requirement in the First Schedule of being "absent from his occupation through injury for 6 consecutive months".

*Under the Sixth Schedule*

In relation to the member's alternative claim under the Sixth Schedule, the insurer said that the member had not satisfied the definition of TPD as he had not "suffered a total irreversible inability to perform a least two of the Activities of Daily Living".

**The court's judgment**

The court rejected the arguments of the insurer and the trustee (who were jointly represented) and held that the member was TPD under the First Schedule.

*First or Sixth Schedule?*

The court held that the member was automatically transferred from the First Schedule to the Sixth Schedule upon termination of his employment. Accordingly, the Sixth Schedule governed his entitlements to benefits in respect of illness or injury occurring after termination of his employment.

However, the member's right to make a TPD claim under the First Schedule in respect of the injury he had sustained before the termination of his employment was an "accrued benefit" for the purposes of clause 27.1 of the policy, and was thereby preserved. The court said (at [216]):

> … I have concluded that a First Schedule Member who sustains injury or illness giving rise to an entitlement to make a claim for a TPD Benefit, while employed by a Participating Employee, has an accrued benefit. The Member is entitled to have the TPD claim determined in accordance with the First Schedule notwithstanding subsequent termination of his/her employment. Where an injury/illness occurs post-termination of employment with a Participating Employer, a Member who has not elected to cease their insurance cover is subject to the Sixth Schedule.

Considering the medical evidence available to the insurer, the insurer should have formed the view that the member was incapacitated to such an extent as to satisfy the definition of TPD in the First Schedule. The member's termination of employment did not extinguish his right to claim a TPD benefit under the First Schedule, given that the injury giving rise to the claim had occurred prior to termination of employment.

*Cause of absence from occupation*

The court also considered whether the member's absence from work had been due to his injury or due to the termination of his employment following the meeting with representatives of the parent company. The court said that the relevant question to ask was whether, if the member's employment had not been terminated, he would have been absent from work for the next 6 months. The court concluded that the member would probably have continued to work for a short period of time after the meeting with representatives of the parent company, had his employment not been terminated. However, given that the member's physical condition had deteriorated following that meeting, he would have been able to work for no more than a few months, irrespective of whether his employment had been terminated after the meeting.

**The result**

In the result, the court held that the member was entitled to have his TPD claim determined in accordance with the First Schedule, and that he was TPD and entitled to the TPD benefit of approximately $1.5 million. The termination of the member's employment during the qualifying period did not automatically exclude his entitlement to claim a TPD benefit under the First Schedule, given that the injury that gave rise to his claim had already occurred. Under the policy, that entitlement was preserved.

## 3. TPD claim – legal professional privilege – *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325

The Queensland Court of Appeal (Margaret McMurdo P, Philippidis JA and Burns J) has held that the trustee of a superannuation scheme had not waived legal professional privilege in respect of legal advice given by the trustee's lawyers which had been referred to in the trustee's board papers. The case is *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325.

The Court of Appeal allowed an appeal by the trustee from a decision of the Queensland District Court (Smith DCJA) which had held that legal professional privilege had been waived: *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 (see item 11 of the December 2015 issue of the Case Law Update).

**Background**

A member of a superannuation scheme claimed a total and permanent disablement (TPD) benefit.

The member's claim was considered at a meeting of the board of the trustee on 3 September 2014. The board papers for that meeting included a recommendation by the trustee's insurance manager that the board uphold an earlier decision to decline the claim. An accompanying chronology of events read in part:

> In a letter to the board received on 26 June 2013, Ms Allen's appointed lawyers, Maurice Blackburn, requested the board to again review its decision to deny her claim for payment of a total and permanent disablement benefit. To support the claim a report from Dr Bankable Dotard dated 20 May 2009, a report from Dr Morris Berlin dated 12 December 2012 and a letter dated 13 February 2013 and a medical certificate dated 26 November 2012 from Dr Robert Cargill was provided. On 30 July 2013, the matter was referred to King & Co [ie King & Company, Solicitors] for legal opinion to determine if the board is obligated to re-examine the claim given the passage of time since the claim was first lodged and the two previous assessments of the claimant being declined. And in their response to the board dated 16 October 2013 King & Co confirmed that the board is required to reconsider the claim based on that fact that new medical evidence was supplied.

The insurance manager had used the King & Co advice in preparing the recommendation to the board, but the advice was not provided to the board and it was not before the board when it made its decision.

The board decided to decline the claim, as per the insurance manager's recommendation.

The member commenced proceedings against the trustee in the Queensland District Court.

The member's lawyers requested a copy of the King & Co advice. The trustee objected to producing the advice on the bases that it was not relevant and was subject to legal professional privilege.

The member applied to the court for disclosure of the advice.

**The District Court judgment**

As mentioned above, the District Court held that legal professional privilege had been waived. The court held that the whole of the advice (and not just part of it) had become disc losable.

The trustee appealed.

**The Court of Appeal judgment**

The Court of Appeal allowed the trustee's appeal.

In so doing, the court stated the following summary of principles applicable to a determination of whether legal professional privilege has been impliedly waived (at [69]):

(a) a person may waive privilege without intending that result; the test is objective and privilege may be waived regardless of the subjective intention of the privilege holder;

(b) privilege will be waived where the conduct of the privilege holder is inconsistent with the maintenance of confidentiality in the communication which the privilege would otherwise protect;

(c) the focus is on the conduct of the privilege holder, not the party attempting to destroy the privilege;

(d) whether there is relevant inconsistency is to be evaluated in accordance with the context and circumstances of the case and in the light of any considerations of fairness arising from that context and those circumstances;

(e) the privilege will not be lost merely because there has been a reference by the privilege holder to the privileged communication in a pleading or an affidavit, although it will be lost if the advice is reproduced in full in the pleading or affidavit;

(f) whether a limited disclosure of the existence, and the effect, of legal

advice is inconsistent with maintaining confidentiality in the terms of the advice as a whole so as to amount to an implied waiver with respect to the whole of the advice will again depend on the context and circumstances of the case;

(g) in such cases, the context can include the nature of the matter in respect of which the advice was received, the evident purpose behind making the relevant disclosure and the legal and practical consequences of limited rather than complete disclosure;

(h) where there has been disclosure of a privileged communication contained in the document, and the document deals with a single subject-matter, it will be unfair to allow a party to use part of the document and claim privilege as to the remainder; at least so far as the document concerns the same subject-matter.

Here, the legal advice was not directly relevant to an allegation in issue on the pleadings (at [85]). It followed that, independently of any question of legal professional privilege, the advice was not a document that the trustee was obliged to disclose to the member. However, even if that conclusion was wrong, there was nothing in the conduct by the trustee of its case to give rise to an implied waiver of privilege (at [86]).

There was nothing in the defence from which it could be concluded that the trustee placed, or intended to place, any reliance at all on the advice when reconsidering the member's claim. It was not, for example, expressed (or even implied) that the advice in some way supported the manner in which it reconsidered the member's claim or the decision it made. Nor could the disclosure of the complaint log and the submission be regarded as an act by reason of which privilege was waived (at [88]).

It followed that there had been no implied waiver of legal professional privilege (at [89]).

**The result**

In the result, legal professional privilege in respect of legal advice given by the trustee's lawyers had not been waived.

## 4. Excess non-concessional contributions – *Ward v Commissioner of Taxation* [2016] FCAFC 132

The Full Federal Court (Robertson, Davies and Winey JJ) has held that the Administrative Appeals Tribunal (AAT) erred in proceeding on the basis that the imposition of excess contributions tax was necessarily outside the scope of "special circumstances" because it was the natural and foreseeable consequence. The case is *Ward v Commissioner of Taxation* [2016] FCAFC 132.

The Full Court allowed an appeal from a decision of the AAT (Deputy President Gary Humphries) which had held that the taxpayer's situation did not meet the stringent test for "special circumstances": *Ward v Commissioner of Taxation* [2015] AATA 919. The Full Court remitted the matter to the AAT.

**Background**

In 2012, the Commissioner of Taxation issued a notice of assessment of excess non-concessional superannuation contributions tax for the year ended 30 June 2011 to Mr Ward. In response to the notice, Mr Ward applied to the Commissioner for a determination under section 292-465(1) of the *Income Tax Assessment Act* 1997 (Cth) that a specified amount of his non-concessional superannuation contributions for the relevant year be disregarded.

The Commissioner decided not to make a determination in response to Mr Ward's application. Mr Ward then lodged an objection against the decision, which was subsequently disallowed by the Commissioner.

Mr Ward applied to the AAT to review the Commissioner's decision.

**The AAT's decision**

The AAT determined that the Commissioner's decision not to disregard or reallocate Mr Ward's excess non-concessional contributions be affirmed.

The AAT said that notwithstanding that Mr Ward had acted honestly and in good faith, he had not established the existence of special circumstances pursuant to section 292-465. The AAT also said that, if it were to make the determination under section 292-465 sought by Mr Ward, such determination would be "consistent with the object of the Division".

**The appeal to the Federal Court**

Mr Ward appealed to the Federal Court against the Commissioner. He submitted that the AAT had erred in concluding that it did not consider that there were special circumstances.

The Commissioner filed a notice of contention to the effect that the AAT had erred in considering that the making of the determination sought by Mr Ward was consistent with the object of the Division.

**The Full Federal Court's decision**

The appeal was heard by the Full Federal Court.

The court held that the AAT had erred in proceeding on the basis that because the imposition of the tax was the natural and foreseeable consequence of the decisions of Mr Ward and his advisers, it was necessarily outside the scope of "special circumstances".

The court said:

> [43] In our opinion, the Tribunal erred in law by taking too narrow a view of what may constitute "special circumstances" within the meaning of the statute. This may have been caused by unnecessarily considering factors in isolation before focusing on the entirety of the circumstances said by the applicant to be special. It was certainly caused, in our opinion, by looking at expressions in other decisions and taking those expressions out of their factual and legal context.

The court also held that the Commissioner did not need leave to rely on his notice of contention.

**The result**

In the result, the court ordered that the decision of the AAT be set aside and the case be remitted to the AAT to be heard and decided again according to law.

## 5. Membership of contributory scheme – *The Retirement Benefits Fund Board v Wood* [2016] TASFC 9

The Full Court of Tasmania (Byrne, Emmett and Fraser AJJ) has held that a member of a public sector contributory superannuation scheme who resigned her appointment as a Magistrate to take up an appointment as a Judge the next day ceased to be an "employee" of the State, and therefore ceased to be a member of the scheme. The case is *Wood v The Retirement Benefits Fund Board* [2016] TASFC 9.

The Full Court allowed an appeal from a decision of the Supreme Court of Tasmania (Heerey AJ) that the member did not cease to be an employee of the State, and therefore did not cease to be a member of the scheme: *Wood v The Retirement Benefits Fund Board* [2016] TASSC 15 (see item 8 of the June 2016 issue of the case law update).

**Background**

A person (the member) was appointed as a Magistrate in 1994. She became a member of the contributory scheme under the *Retirement Benefits Act 1993* (Tas).

In 1999 there was a major change to the Tasmanian public sector superannuation system. Because very large unfunded liabilities were being incurred under the defined benefit contributory scheme, that scheme was replaced by an accumulation scheme. Under this new scheme, benefits would only be available insofar as they were funded by employer and employee contributions. The benefits under the accumulation scheme were less generous than the benefits under the contributory scheme.

As the member was already a member of the contributory scheme, she continued as a member of the contributory scheme.

On 8 November 2009 the plaintiff resigned her office as a magistrate. The resignation was in contemplation of her appointment as a judge of the Supreme Court of Tasmania, which in due course occurred on the following day, 9 November 2009.

**The issue**

The issue in the case was whether the member, by resigning her appointment as a Magistrate, had ceased to be an "employee" of the State, and had therefore ceased to be a member of the contributory scheme.

**The judgment at first instance**

As mentioned above, at first instance the Supreme Court of Tasmania (Heerey AJ) held that the member did not cease to be an "employee" of the State, and therefore did not cease to be a member of the scheme: *Wood v The Retirement Benefits Fund Board* [2016] TASSC 15.

The Retirement Benefits Fund Board appealed.

**The Full Court's judgment**

The Full Court allowed the appeal.

The Full Court held that when the member resigned her appointment as a Magistrate, she ceased to be an employee of the State, and therefore ceased to be a member of the contributory scheme.

The court said:

> [83] There is nothing in the 2005 Regulations or any of the other enactments to suggest that resignation from the office or position by virtue of which a person is an employee for some purposes is different from resignation for other purposes. The Respondent attaches some store to the fact that she resigned as a magistrate in order to be appointed as a judge. Whether or not it might have been possible for the Respondent to remain as a magistrate and still be appointed as a judge of the Supreme Court, she in fact resigned as a magistrate. It matters not that the purpose of her resignation was to enable her to take up an appointment as a judge. There could be no doubt that, if the Respondent had resigned as a magistrate with a view to retiring altogether, she would have been entitled to the same lump sum benefit.

**The result**

In the result, the full court held that by resigning her appointment as a Magistrate to take up an appointment as a Judge, the member had ceased to be an employee of the State, and had therefore ceased to be a member of the contributory scheme. The Board's appeal was allowed, and the proceedings by the member were dismissed.

## 6. Complaint treated as withdrawn – *McAtamney v Superannuation Complaints Tribunal* [2016] FCA 1062

The Federal Court (North J) has held that the Superannuation Complaints Tribunal (SCT), in treating a complaint as withdrawn on the basis that it was lacking in substance, had failed to fulfil its statutory function because it did not ascertain for itself whether there was substance in the applicant's complaint. The court set aside the SCT's decision and remitted the matter to the SCT. The case is *McAtamney v Superannuation Complaints Tribunal* [2016] FCA 1062.

**Background**

The member did the same work for 31 years in the same business. During this time, the ownership of the business changed a number of times and, on each of those changes, the member's superannuation fund membership also changed. Certain member data had been lost as a result of the changes.

The member was retrenched. Following his retrenchment, the trustee made a payment to the member from the fund.

The member complained to the trustee and the SCT in relation to his superannuation payment. The member's central concern related to the basis on which his benefit had been calculated.

**The SCT's decision**

The SCT determined to treat the complaint as withdrawn on the basis that it was lacking in substance, under section 22(3)(b) of the *Superannuation (Resolution of Complaints) Act 1993* (Cth).

**The appeal to the Federal Court**

The member appealed to the Federal Court against the SCT. The court treated the member's appeal as an application for relief against the decision of the SCT under section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and for an order of review of that decision under section 5 of the *Administrative Decision (Judicial Review) Act 1977* (Cth).

**The Federal Court's decision**

The court held that the SCT had not addressed its statutory task and had mistaken its function.

The court said:

> [9] These reasons for judgment explain that the [SCT] made a number of errors in arriving at its decision to treat the [member's] complaint as withdrawn. The [SCT] failed to fulfil its statutory function because it did not ascertain for itself whether there was substance in the [member's] complaint, but rather accepted the view expressed by the Trustee that the amount paid to the [member] was correct. Further, the [SCT] erred by placing an onus on the [member] to establish that the payment was fair and reasonable, whereas no onus applied to the [member]. Finally, the decision of the [SCT] was unreasonable in the legal sense in two respects. First, on the material available to it there was no evident and intelligible justification for the conclusion that there was no substance in the complaint that the payment was unfair and unreasonable. Second, the [SCT] failed to make enquiries into several critical matters concerning the calculation of the amount due to the [member] when those matters could readily be determined.

**The result**

In the result, the court set aside the SCT's decision and remitted the matter to the SCT to be determined in accordance with law.

## 7. Conversion of pensions to lump sum amounts – *Mercer Superannuation (Australia) Limited v Billinghurst* [2016] FCA 1274

The Federal Court (Moshinsky J) has held that, although the task of the Superannuation Complaints Tribunal (SCT) is to determine whether a decision of the trustee was fair and reasonable, the SCT is not precluded, in an appropriate case, from considering whether the process adopted by the trustee is such as to make its decision unfair or unreasonable. The case is *Mercer Superannuation (Australia) Limited v Billinghurst* [2016] FCA 1274.

**Background**

The member was receiving a lifetime pension from a superannuation plan.

The plan was due to terminate and the member was paid a lump sum payment from the plan as a result of the termination.

The member complained to the trustee about the basis used to calculate the lump sum. The trustee maintained that the lump sum amount was fair and reasonable.

The member complained to the SCT.

**The SCT's determination**

The SCT determined that it was not satisfied that the trustee's decision in relation to the calculation of the amount of the lump sum was fair and reasonable in the circumstances. It determined to set aside the trustee's decision and remit the matter to the trustee for reconsideration on a particular basis, set out in the SCT's reasons.

**The appeal to the Federal Court**

The trustee appealed to the Federal Court against the member.

The trustee's principal contention was that the SCT had erred in approaching its task primarily as a form of judicial review of the trustee's decision, and by focusing upon whether the trustee's reasoning and decision-making process was fair and reasonable, rather than whether the *decision* to select the impugned valuation methodology for the purpose of converting members' pensions to lump sums was fair and reasonable *in its operation* in relation to the member.

**The Federal Court's decision**

The court rejected the trustee's contention.

The court said (emphasis added):

> [19] … although it is true that the [reasons of the SCT] are in some respects expressed in language that is familiar in the context of judicial review, in substance the [SCT] addressed the correct question, namely whether the decision of the Trustee was fair and reasonable in the circumstances. The circumstances which may make a decision of a trustee unfair or unreasonable are many and varied and a narrow approach should not be adopted as to what may constitute unfairness or unreasonableness in decision. *Unfairness or unreasonableness in process may, in an appropriate case, lead to unfairness or unreasonableness in decision*. In the present case, it was open to the [SCT] to conclude that the Trustee's decision was not fair and reasonable because of the process adopted by the Trustee (including the adoption of a basis of valuation which it understood to be required or preferred by the Employer) and therefore to set aside the decision and remit the matter to the Trustee for reconsideration.

**The result**

In the result, the court dismissed the appeal. The SCT's determination that the matter be remitted to the trustee for reconsideration stood.

## 8. Defined benefits scheme – *FSS Trustee Corporation v Eastaugh* [2016] VSC 636

In giving a superannuation fund trustee judicial advice in relation to the construction of the fund's rules, the Supreme Court of Victoria (McDonald J) has held that recall payments made to members for the provision of emergency services are included in the meaning of "salary" for the purposes of calculating a member's defined benefit (DB) interest. The case is *FSS Trustee Corporation v Eastaugh* [2016] VSC 636.

**Background**

The trustee of a superannuation fund sought answers to 4 questions regarding the construction of the fund's rules.

On the trustee's application, a DB member, who was an anaesthetist, and a participating employer were appointed as representative defendants.

Under the fund's rules, a member's DB scheme balance was calculated by reference to their "salary". The term "salary" was relevantly defined to include (emphasis added):

> … ordinary time rate of pay, *plus any allowances* (not of a cost-reimbursement type such as an expense of office, uniform allowance, tool allowance, reimbursement for travel or other incidental expenses) *which are ordinarily payable regularly and periodically (including shift and roster related payments)*, ...

As a condition of his employment, the member was required to be available to be rostered "on call" outside of his ordinary hours of duty. When rostered on call, the member was paid an on call allowance, irrespective of whether he was

actually required to attend at work. If he was required to attend for duty while rostered on call, the member was paid a recall payment.

**The issue**

The first and main question in the case was whether recall payments were "roster related payments".

**The court's decision**

The court held that recall payments made to members for the provision of emergency services were roster related payments and should be included in the meaning of "salary" under the fund's rules.

The court said:

> [6] The primary issue in the present proceedings is the meaning of "salary" in r 3B.11.1 of the Rules. In particular, whether recall payments made to members are included in salary. This question is to be answered in the affirmative. A recall payment is a roster related payment. As such, it is included in the definition of salary as an allowance which is ordinarily payable regularly and periodically. This conclusion renders it unnecessary to address the question of whether recall payments are salary by reason

of being a "higher amount" advised to FSS by an employer.

and:

> [18] I have concluded that recall payments are roster related payments. A member can only be recalled, and thereby have an entitlement to a recall payment, when he/she is rostered on call. The fact that a member can only receive a recall payment if he/she has been rostered on call provides a direct nexus between a member being rostered on call and having an entitlement to being paid recall payments. Recall payments are therefore properly characterised as being roster related.

**The result**

In the result, the court answered 2 of the 4 questions asked. The court declined to answer the 2 other questions on the basis that this was inappropriate.

The 2 questions that the court did answer were answered as follows:

(a) Are recall payments made to members who are full time or part time employees (other than casual employees) for the provision of emergency services (whether full time or part time) included in 'Salary' (subparagraph (b)(ii) of the definition) within the meaning of r 3B.11.I? — Yes.

(b) In calculating the 'service fraction' within the meaning of rr 3C.2.6 and 3D.2.4, is the numerator the number of part time ordinary hours of work of the particular member and the denominator the number of full time ordinary hours of work of a comparable full time employee (excluding from both the numerator and the denominator time spent providing recall emergency services) — Yes.

The court ordered that the trustee's costs and expenses of and incidental to the proceeding be retained out of the fund. The court also ordered that the defendants' costs of the proceeding be taxed on an indemnity basis in default of agreement between the trustee and the relevant defendant and be paid out of the fund.

## Our superannuation expertise

We act for a broad range of superannuation clients located around Australia. Our clients include some of the country's largest industry, corporate and public sector schemes, with most of our client relationships going back many years. Our Superannuation team operates as a "seamless team" across our Sydney, Melbourne, Brisbane and Adelaide offices.

### Scott Charaneka, Head of Superannuation and Wealth Management

+61 3 8080 3637 | +61 477 700 380 | scharaneka@tglaw.com.au

Scott has comprehensive experience in the establishment, licensing, governance, administration, distribution, restructuring, investment and tax matters associated with superannuation, funds management and life insurance products. He has previously worked as an in-house counsel at Legal & General and ING. He is a regular speaker at conferences, has designed key training programs for boards and responsible managers and is a guest lecturer at UNSW law school. In 2012-2017 Scott was recognised by his peers in *Best Lawyers in Australia* in the Superannuation Law category, and in 2015-2017 in the Regulatory Practice category. In 2016 he was listed in *Who's Who Legal: Pensions & Benefits*.

### Stanley Drummond, Adjunct Head of Superannuation and Wealth Management

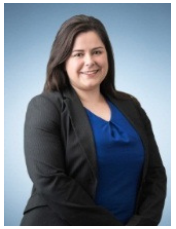
+61 2 8248 5854 | +61 400 676 386 | sdrummond@tglaw.com.au

Stanley specialises in insurance, superannuation, funds management, financial planning and FSR. He is a co-author of Wickens The Law of Life Insurance in Australia. His contributions have included new chapters "Insurance in Superannuation" and "Privacy and Direct Marketing". In 2015-2017 Stanley was recognised by his peers in *Best Lawyers in Australia* in the Insurance Law category. In 2016 he was listed in *Who's Who Legal: Pensions & Benefits*.

### Loretta Reynolds, Partner, Markets

+61 3 8080 3705 | +61 8 8236 1406 | +61 403 069 819 | lreynolds@tglaw.com.au

Loretta has been Chair of Thomson Geer since 2007. She has served as a director of an industry superannuation fund. Her main practice areas are funds management and private markets, and mergers & acquisitions. In *Chambers Asia Pacific* (2013, 2014 & 2015) Loretta was recognised in the Private Equity category for her "extensive experience in fund formation, handling of buyouts, and work for superannuation funds".



### Claire Gitsham, Partner

+61 3 8080 3554 | +61 407 146 339 | cgitsham@tglaw.com.au

Claire is an experienced commercial litigation specialist having practised in Victoria, New South Wales, Queensland, South Australia, Western Australia and federal jurisdictions. She has a particular expertise in SCT complaints, litigated TPD claims and general commercial matters, acting for superannuation trustees.