A Servant of Two Masters?

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Abstract

The classic fiduciary proscription on conflicts of duties would, on a strict reading, challenge institutional structures common in Australia's financial services industry. This article considers the application of that proscription to the evolving models of governance found in the superannuation and managed funds sectors. It addresses specifically the situation where incorporated trustees act for more than one superannuation fund or managed investment scheme, and also the situation where individuals occupy multiple directorships either within horizontally and vertically integrated financial services groups or in unrelated entities. It also briefly addresses the contested issue of independence on superannuation fund boards. The article finds that traditional equitable principles are capable of addressing most of the issues raised by these situations but that the regulatory state is increasingly employing statutory and other means to supplement and buttress those equitable principles, resulting not just in multi-valency but also an evolution in the substantive content of the proscription on conflicts specifically in the context of financial services.

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Introduction

Carlo Goldoni's classic 18th century comedy, *Il servitore di due padroni*,[2] follows the travails of a (somewhat) faithful retainer, Truffalino, who finds himself serving two masters. As the plot develops, Truffalino becomes hopelessly (it seems) entangled, unable to satisfy both simultaneously, nor reconcile the duties owed to one with the duties owed to the other.

Most participants in Australia's financial services industry would be familiar with Truffalino's predicament. Potential conflicts of duty are pervasive in financial markets. Intermediaries often serve multiple clients and vertical and horizontal integration commonly occurs within corporate groups. Specific individuals often play multiple roles within these integrated groups. The result? Empirical research suggests that conflicts of duty (as well as the structures and processes designed to sidestep the conflicts rules) have enabled inefficient intra-group pricing of services within some financial services groups that may have 'cost' superannuation fund members millions of dollars.[3]

It is surprising, then, that conflicts of duties, such as those faced by Truffalino, have attracted far less attention than have conflicts of interest.[4] Perhaps this is because, as Conaglen notes,[5] conflicts of duty are often eclipsed in litigation by allegations of conflicts of interest. Or perhaps it is because, notwithstanding Goldoni's comic attempts, conflicts of duty lack the voyeuristic appeal of conflicts of interest. They do not cast the spotlight on human nature in quite the same way. The question is not whether an individual can supress his or her self-interest when acting on behalf of another, but how that individual can reconcile obligations owed to two or more deserving parties. One offers the prospect of exposing greed and deception; the other offers merely the prospect of observing the frustration inherent in an 'impossible situation.'[6]

This paper is concerned to redress this neglect in some small way. It first describes the typical structure of the institution subject to analysis in this article: the APRA-regulated superannuation fund.[7] It then outlines the relevant equitable principles applying to trustees and directors and the statutory provisions applying to those roles in the superannuation context, and in the managed investment scheme ('MIS') context with which it often overlaps. It concludes by considering three situations of contemporary relevance in which those principles and provisions apply: multiple trusteeship, multiple directorship and 'independent' directorship.

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2 Trans. The Servant of Two Masters

3 See for instance Kevin Liu and Bruce Arnold 'Superannuation and Insurance: Related Parties and Member Cost' (2013) 5(1) *Journal of Superannuation Management* 44.

4 The most notable exception to this is Matthew Conaglen, 'Fiduciary Regulation of Conflicts between Duties' (2009) 125 *The Law Quarterly Review* 111. The issue is also addressed, albeit less comprehensively, within Michael Christie, 'The Director's Fiduciary Duty not to Compete' (1992) 55 MLR 506; Rosemary Teele, 'The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties; (1994) 22 *ABLR* 99; Malcom Fitzsimmons, 'Managing Pension Scheme Trustee Conflicts of Interest (2006) 20(4) *Trust Law International* 211.

5 Mathew Conaglen, *Fiduciary Loyalty. Protecting the Due Performance of Non-Fiduciary Duties* (Hart, 2010).

6 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 366.

7 APRA here refers to the Australian Prudential Regulation Authority. Note: self-managed superannuation funds (SMSFs), which are not APRA-regulated, are an increasingly sizeable segment of the superannuation system but are excluded from consideration here because of their different governance arrangements; see for instance Josephine Castillo, 'The SMSF trustee-members' (2012) 40 *Australian Business Law Review* 177.

Two key themes emerge from the analysis. The first is the need to locate accurately the duties alleged to be in conflict in the different institutional structures present in the superannuation system. To fail to do so is to risk mis-diagnosing the potential risks to good governance in the sector. The second is to recognise that neither the curial rhetoric requiring 'avoidance' of all conflicts nor the apparently more accommodative regulatory rhetoric encouraging 'management' of conflicts should be taken at face value. As might be expected in a system as complex as the Australian superannuation system, regard must be had for the circumstances in which the rules are to be applied if conclusions about their substantive effect are to be reliable.

The findings in this paper are naturally of most relevance to the Australian financial services context. However the analysis is relevant to a broader range of commercial contexts and to the governance of similar financial institutions in other common law jurisdictions. The findings particularly emphasise the ways in which the multiple layers and sources of regulation common in many jurisdictions today lend a degree of multi-valency to the regulatory environment shaping the financial services sector in markets across the globe.

1 The Institutional Structure of Superannuation Funds in Australia

The overwhelming majority of superannuation funds are constituted as trusts[8] with a corporation acting as trustee[9] and individuals serving as directors of the trustee company. There is considerable diversity beyond that similarity but for present purposes the institution we know as an Australian superannuation fund is likely to conform to one of four operating models, each of which is described briefly below. Notably, these four operating models do not replicate the 'functional' classification system on which APRA relies. However, the taxonomy proposed in this article is ideally suited to highlight the key issues of substance and form arising in respect of conflicting duties. In contrast, APRA's functional classification system was a response to the limitations from an analytical perspective in the distinctions present in the SIS Act. However, the trend towards trustees making their funds available to members of the public has reduced the value of this taxonomy. Likewise, distinctions based on whether the fund contains schemes in which members' entitlements are of a defined benefit ("DB") or defined contribution ("DC") nature are undermined by the large number of 'hybrid' funds in which schemes of both types are present within the same fund.[10]

Multi-employer DC fund: this operating model encompasses funds that would traditionally have been regarded as 'industry' funds as well as a number that would have been regarded as 'public sector' funds.[11] These funds are almost all public offer funds.[12] They are administered by a corporate trustee that is governed by a board of directors with an equal number of employer and employee nominees which makes the key decisions for an incorporated trustee. The trustees of almost all of these funds have appointed external investment managers, but a small number of larger funds now have internal teams that undertake investments for a portion of their portfolio in listed and unlisted securities. Member benefit administration is almost always conducted by a third party organisation,[13] as is custody.[14] There are forty large funds[15] of this type in Australia, with a

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8 Section 19(2), *Superannuation Industry (Supervision) Act* 1993 (Cth) ('*SIS Act')* provides that all superannuation funds must have a trustee. The same is true of entities administering managed investment schemes; Pamela Hanrahan, 'The Responsible Entity as Trustee' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law* (LexisNexis Butterworths, 2002).

9 Section 19(3) requires that either the trustee be a corporation or that the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions. In practice, almost all funds choose to have a corporate trustee. These bodies corporate are formally titled 'Registrable Superannuation Entity Licensees' in the *SIS Act;* Part 2A*, SIS Act*.

10 APRA, *Classification of superannuation entities* (May 2005). APRA has recently attempted to remedy some of the more obvious shortcomings in this classification system by reallocating a number of corporate and industry funds into the retail fund group; APRA, *Segmentation of superannuation entities* (February, 2015).

11 Only some funds established for public sector employees have voluntarily submitted to regulation by APRA. For a list of those outside APRA's supervision, and also the ambit of this article, see Schedule 1AA of *Superannuation Industry (Supervision) Regulations 1994* (Cth).

12 Section 18, *SIS Act*. Broadly a public sector fund is a fund that is offered to the public on a commercial basis and as such is subject to a range of market conduct and prudential rules than those funds, now a minority, that are not so available.

13 Kevin Liu and Bruce Arnold, 'Australian Superannuation Outsourcing' (2010) *JASSA*, no. 4, 6.

14 M Scott Donald and Rob Nicholls, 'Bank custodians and systemic risk in the Australian superannuation system' (2015) 26 *Journal of Banking and Finance Law and Practice* 25; Liu and Arnold, above n 13.

15 Defined here as funds with net assets greater than $350m as at 30 June 2014, of which there were 125 in total. Although apparently arbitrary, the cut-off of $350m marks the point at which information

median size of approximately A$3.8bn.[16] They have a combined value of approximately A$300bn, accept approximately A$26bn in contributions each year and represent approximately 9.6 million members.

Retail DC fund: this operating model encompasses funds provided by commercial organisations, such as banking and insurance groups and investment management firms. They are by definition therefore all public offer. They are typically administered by a specialised subsidiary acting as trustee that has a board with less than 5 members who are either executives of the group or formally independent according to ASX governance principles. Key administration tasks, such as investment management and member benefit administration, are typically sourced from inside the group on a contractual basis, as is master custody.[17] There are thirty-four large funds of this type in Australia, with a median size of approximately A$2.0bn.[18] They have a combined value of approximately A$300bn, accept approximately A$20bn in contributions each year and represent approximately 7.4 million members.

Wholesale master fund: this operating model represents a major innovation in the Australian superannuation system over the past fifteen years. Master funds are offered by the same types of entities which offer retail funds, but permit the employer to maintain a distinct fund for its employees within an overall administration umbrella overseen by a single trustee. Typically, each sub-fund has a formally constituted advisory committee with an equal number of employer and employee nominees. However, formal responsibility for administering the fund lies with the trustee of the master fund and key administration tasks, such as investment management and member benefit administration, are typically sourced from inside the group of which the trustee of the master fund is a part. There are twenty-four large funds of this type in Australia, with a median size of approximately A$2.8bn.[19] They have a combined value of approximately A$180bn, accept approximately A$12bn in contributions each year and represent approximately 4.6 million members.

Single employer hybrid DB/DC fund: There are very few open defined benefit funds in Australia today. However there are approximately twenty employers who continue to offer membership of corporate funds to their employees in DC divisions that operate alongside large DB divisions that are closed to new members. With only one exception, these funds are not public offer. Member benefit administration is often, but not always, conducted by a department or subsidiary of the employer. Otherwise, their governance and administration arrangements currently resemble those of multi-employer DC funds, with an equal representation board and a range of agents providing services. There are twenty-seven large funds of this type in Australia, with a median size of approximately A$4.8bn.[20] They have a combined value of approximately A$266bn, accept approximately A$23bn in contributions each year and represent approximately 3.2 million members.

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gathering becomes very problematic as public disclosure is much less reliable in smaller funds. All data sourced from APRA, *Superannuation Fund-level Profiles and Financial Performance (interim edition) (June 2014)*, (issued 20 May 2015).

16 All data based on fund-level data sourced from APRA, ibid.

17 Liu and Arnold, above n 13.

18 All data based on fund-level data sourced from APRA, above n 15.

19 All data based on fund-level data sourced from APRA, ibid.

20 All data based on fund-level data sourced from APRA, ibid.

In each of these models, then, a central decision-making body constituted as a trustee[21] administers the trust on behalf of members. The relevance of the general law rules described in Part 2 and the more specific regulatory rules described in Part 3 will however depend to a considerable degree on the operating model employed by the trustee. Part 4 illustrates this by examining two recurrent phenomena in the system: multiple trusteeships and multiple directorships, and one contemporary cause célèbre: independent directorships.

2 The Trustee and the Fiduciary Paradigm

The trustee is often identified as the archetypal fiduciary.[22] That means that a trustee must at all times prefer the interests of the beneficiary(ies) over the trustee's own.[23] This is the classic 'conflicts of interest' proscription familiar to all scholars of trust law. The trustee must also avoid situations in which its duties under the trust conflict with any duties of loyalty it owes to other parties.[24] This second type of conflict is usually termed a 'conflict of duty' and is the focus of this article.

It is worth examining the logical structure of a conflict of duty a little more carefully. In a conflict of duties it is not the trustee's personal interests which conflict with those of the beneficiary, but rather the interests of some other party, made relevant through the duties owed by the trustee to that third party. Such conflicts may arise in relation to a specific circumstance, such as an individual transaction contemplated by the fiduciary, or the conflict may be more pervasive. The conflict may be 'head-on', as where the interests of two sets of beneficiaries of trusts administered by the trustee are diametrically opposed, or it may be more oblique, such as where a valuable opportunity is potentially available to one only of the (potentially multiple) trusts administered by the trustee, in which circumstance the interests might appear, in a logical sense, to compete rather than conflict.

The courts intervene in respect of conflicts of duty because as Gummow J noted in *Breen v Williams*:

> 'the fiduciary … may be unable to discharge adequately the one obligation without conflicting with the requirement for observance of the other obligation.'[25]

The intervention, then, is prompted by the court's desire to ensure that the interests of each party to whom a fiduciary duty is owed has the loyal and undistracted attention of its designated fiduciary. That said, as Richardson J noted in *Farrington v Rowe McBride & Partners*:[26]

> 'the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests. Such cases seem straightforward so long as it is apparent that there is no actual conflict between duties owed in each relationship.'[27]

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21 Section 19, *SIS Act*.

22 In recent times the appellation 'fiduciary' has assumed a role in the public discourse surrounding financial regulation that transcends this limited legal meaning, extrapolating its normative dimensions in the service of investor or member 'protection'; M Scott Donald 'Regulating for Fiduciary Qualities of Conduct' (2013) 7 *Journal of Equity* 142.

23 *Stuart v Kingston* (1924) 34 CLR 394.

24 *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.

25 (1996) 186 CLR 71, 135. Also *Moody v Cox and Hutt* [1917] 2 Ch 71, at 81-2; *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1; *CBA v Smith*, above n 24, 477. See also Paul Finn, 'Fiduciary Law and the Modern Commercial World' in E. McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992), 7, 24.

26 [1985] 1 NZLR 83.

Identifying the scope, then, of the fiduciary relationship is crucial. The fiduciary proscriptions apply only within a prescribed ambit.[28] They may be circumscribed expressly or implicitly by the constitutive documents[29] or by the circumstances surrounding the creation of the relationship itself.[30] It is also possible that the relationship will comprise elements to which the fiduciary proscriptions apply and some to which they do not.[31]

There is another aspect of the proscription against trustees acting when subject to conflicting duties that deserves ventilation at this point. As we have seen, the courts are concerned to prohibit trustees from acting where they face an actual conflict of interests or conflict of duties. However, they have also expressed a desire to discourage those in a fiduciary position from even encountering situations of conflicting duties – its so-called 'prophylactic' ambition.[32] The words of Lord Cranworth LC in *Aberdeen Railway v Blaikie Brothers* are often quoted in this respect. His Lordship said:

> 'it is a rule of universal application that no one having [fiduciary] duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.'[33]

Although expressed in terms of conflicting interests,[34] this rule applies, in principle, also to conflicts of duty. But just how far does the rule extend? In the landmark case of *Boardman v Phipps,* Upjohn LJ observed:

> 'The phrase "possibly may conflict" [in *Aberdeen Railways*] requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a *real sensible possibility of conflict*; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.'[35] (*emphasis added*)

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27 *Farrington v Rowe McBride & Partners*, above n 26, 90. This statement was approved by HCA in *Maguire v Makaronis* (1997) 188 CLR 449, 465.

28 *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1130; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Eric Preston Pty Ltd v Euroz Securities Ltd* [2010] FCA 97.

29 *Hilton v Barker Booth & Eastwood* [2005] UKHL8, [30], (Lord Walker); *Kelly v Cooper* [1993] AC 205. In *Hillsdown Holdings Plc v Pensions Ombudsman* [1977] All ER 862, Knox J (at 896) alluded to the possibility that the deed of a fund might contain an express provision permitting the trustee to negotiate with an employer in respect of matters relevant to the size of the surplus to which the employer might be entitled, notwithstanding the trustee acting as a director of that employer. Although, with respect, the phrasing is slightly ambiguous, his Honour appears to suggest that the presence of such a provision would relieve the director of his or her duty to the company in negotiations of that type. Also Fitzsimmons, above n 4, 211.

30 *Sergeant v National Westminster Bank plc* (1991) 61 P&CR 518; *Re Drexel Burnham UK Pension Plan* [1995] 1 WLR 32*; Bristol and West Building Society v Mothew* [1998] Ch 1,19, (Millet LJ). Commonly the implication may arise from careful construction of the terms of the relevant commercial contract or contracts as occurred in *ASIC v Citigroup Global Markets Australia Pty Ltd (no.4)* (2007) 241 ALR 705.

31 *El Sayad v El Hawach* [2015] NSWCA 26.

32 Although this term is loosely used in a number of important cases, it is used by academic commentators in a quite limited, specific way. See for instance Lionel Smith, 'Deterrence, prophylaxis and punishment in fiduciary obligations' (2013) 7 *Journal of Equity* 87; Conaglen*,* above n 5.

33 *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq 461, 471-2.

34 Indeed it seems likely that today the conflict confronting the defendant in that case would be more likely identified as primarily a conflict of duties, and only secondarily as a conflict of interests.

35 [1967] 1 AC 46. To similar effect, Lord Hodson noted in the same case:

Importantly, this statement does more than simply rehearse Upjohn LJ's earlier finding in *Boulting v Association of Cinematograph, Television and Allied Technicians* [36] that the court would require more than a 'theoretical or rhetorical' possibility of conflict. Rather, his Lordship's observation in *Boardman v Phipps* identifies not one but two possible types of uncertainty that may exist in respect of an alleged conflict. The first is the materiality of the distraction. The second is the likelihood that a circumstance crystallising the conflict might occur. That is to say, the courts will not chase phantasms. The possibility of conflict must be both material (not 'feeble')[37] and likely (not 'remote'[38] or 'theoretical'[39]).

The need for the quantum of the personal interest to be sufficiently material is straightforward. As Heydon JA noted in *Harris v Digital Pulse*, the proscription on conflicts is designed to nullify temptation.[40] It would appear to flow as a matter of logic from that objective that the court will not intervene where the alleged conflict is, as Judge Learned Hand found on the facts in *Phelan v Middle States Oil Corporation*:

> 'too feeble an inducement to be a determining motive.'[41]

The second facet of 'possibility' to which it might be thought that Upjohn LJ alludes is the possibility that there might occur a change in circumstances which causes an actual conflict to arise where none had previously existed. An individual who serves on the board of an entity acting as trustee who becomes a director of a second entity that could hypothetically provide services to the first entity is a good example of such a situation. The individual would face conflicting duties if the first entity resolved to put its service contract out for tender because their duty to the trustee company to find an appropriate service provider on the best terms would conflict with their duty to the service provider to secure the contract on terms attractive to it. Another example is where an individual acting on the board of the trustee of two trusts becomes aware of an attractive business opportunity which can only be exploited by one of the trusts. Unlike the first situation, in this example, it is the change in the opportunity set offered by the surrounding circumstances that brings the conflict into being, not any conduct in which the individual has played an active role. However, Equity's primary interest in these circumstances is not to extract retribution from the defaulting office-holder. Rather, it is to protect those to whom the duties were owed, so Equity ignores the structural difference between the two situations: both are breaches.

> 'Even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied.'

Lord Hodson's statement of the law has been cited with approval by the House of Lords in *Bray v Ford* [1896] AC 44 and *Regal (Hastings) v Gulliver* [1967] 2 AC 134, 137, 144-5, and in the High Court of Australia by Dawson J in *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41, 146.

36 [1963] 2 QB 606.

37 *Boardman v Phipps* [1967] 2 AC 46, per Upjohn LJ.

38 Ibid.

39 *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 637, per Upjohn LJ.

40 (2003) 56 NSWLR 298, [470]. Also *Bray v Ford* above n 35, 51.

41 (1955) 220 F.(2d) 593, 602-3. This statement was cited with approval by Mason J in *Hospital Products*, above n 35, 104. But cf Swinfen Eady LJ in *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, 503 who stated 'the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary'. With respect it seems that the more recent cases cited above identify a need for at least a threshold level of materiality, above which it is true that the extent of the adverse interest will be irrelevant.

Conceptually, the possibility of such changes in the ambient circumstances could range anywhere on a spectrum from highly unlikely to almost certain. However as the NSW Court of Appeal in *Beach Petroleum v Kennedy* noted:

> 'In a situation of alleged conflict of duty and duty, there must be "a real sensible possibility of conflict". It is not enough to identify "some conceivable possibility" which may result in a conflict'[42]

The question then is, at what point on the spectrum would the court intervene? Would it wait until a transaction in which the judgment of the fiduciary was potentially distracted had occurred, or would it intervene before that, based on a view that a tainted decision was sufficiently likely to warrant pre-emptive intervention? And if the latter, what degree of certainty might be required? Although the rhetoric in cases like *Bray v Ford* [43] and *Aberdeen Railway v Blaikie Brothers*[44] suggests a preparedness on the part of the court to act pre-emptively, the weight of case law suggests otherwise.[45] The cases on which both the courts and theorists rely for authority when articulating the fiduciary canon all deal with transactions that had already occurred.[46] The plaintiffs may have been seeking rescission of a contract,[47] monetary compensation for loss,[48] an account of profits[49] or a remedy against a third party into whose hands the misapplied property can be traced, but all these remedies respond to situations in which the transaction has already occurred. The possibility that the court might grant an injunction to restrain what would otherwise be a conflicted act by a fiduciary does not change this. The justiciable breach arises from the transaction (broadly defined) not from the assumption of a role which might in some hypothetical future state of the world require the conflicted party to make a decision in which the two duties compete.[50]

It is in this sense that the oft-quoted[51] description of the conflicts rules by Sir Frederick Jordan as 'a counsel of prudence' is best understood. Quoted more completely, Sir Frederick noted in *Chapters on Equity in New South Wales*:

> 'It has often been said that the person who occupies a fiduciary position ought to avoid placing himself in a position in which his duty and his interest, or two different fiduciary duties, conflict.

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42 Above n 25, [425].

43 Above n 35.

44 Above n 33.

45 One reason for the alternative view is that some of the references to prophylaxis use that term to describe the over-inclusive nature of the doctrine (ie a breach is found even where there would be evidential challenges in establishing that the fiduciary's judgment was in fact distracted by the competing interest or duty). See further Conaglen, above n 5, 68-70.

46 Indeed, even in *Aberdeen Railways* the breach arose when the director caused the company to enter into the contract with a partnership of which he was a member, not from his assumption of the second of his positions.

47 See for instance *Transvaal Lands*, above n 41; *Haywood v Roadknight* [1927] VLR 512.

48 See for instance *Nocton v Lord Ashburton* [1914] AC 932; *Commonwealth Bank of Australia Ltd v Smith* , above n 24.

49 See for instance *Regal (Hastings) Ltd v Gulliver*, above n 35.

50 Note this is a slightly different question than whether the fiduciary need have 'pursued' the opportunity afforded to him or her in order for the breach to occur. Implicit in the treatment in this article is the view that pursuit is not required; *Agricultural Land Management v Jackson (No.2)* (2014) 98 ACSR 615, 658-9 (Edelman J).

51 See for instance *Hospital Products*, above n 35, 103, (Mason J); *Chan v Zacharia*, 53 ALR 417, 423, (Deane J).

> This is rather a counsel of prudence than a rule of equity; the rule being that a fiduciary must not take advantage of such a conflict if it arises.' [52]

This clarification is of real consequence. For instance it crucially informs the position in company law that individuals can serve as directors of more than one company, and that their fiduciary duties will be breached only when their duty to one company can be shown to have affected their conduct, resulting in detriment to the other company (for instance, through the disclosure of confidential information, or solicitation of the other company's clients).[53] A similar position would seem to apply, ignoring for a moment the legislative and other rules specifically applied to the superannuation context, to entities acting as the trustee of a superannuation fund and to the individuals serving on the boards of entities acting as the trustee of a superannuation fund. As we shall see in Part 4, it is the occurrence of events, often but not necessarily transactions under consideration by the trustee, that enlivens the conflict, not the institutional structure within which the decisions are taken.

Finally, it is trite law that fiduciaries are prohibited from deriving unauthorised rewards from their office.[54] It should not need saying (although the stridency of some of the fiduciary rhetoric makes it necessary), but there is no proscription on fiduciaries receiving rewards that are properly authorised. In the case of a trustee, that authorisation can arise from the express terms of the trust, as evidenced in the trust instrument.[55] Remuneration might alternatively be authorised by the court, upon application by the trustee,[56] or, by the fully-informed, unanimous and un-coerced[57] consent of the parties, all being *sui juris*, to whom the fiduciary duty is owed.[58] Importantly, merely disclosing the existence of a conflict of interests or duties to the party or parties to whom the fiduciary duty is owed is not sufficient at general law to satisfy the requirement that the fiduciary receive the consent of that party or parties.[59]

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52 Reproduced in Sir Frederick Jordan, *Select Legal Papers*, (Legal Books, 1983), 115

53 See for instance *Riteway Express v Clayton* (1987) 10 NSWLR 238; *Mordecai v Mordecai* (1988) 12 NSWLR 58; *On the Street v Cott* (1990) 3 ACSR 54.

54 *Robinson v. Pett* (1734) 3 P. Wms. 249; 24 E.R. 1049.

55 But cf *Re Thorley* [1891] 2 Ch 613 in which payments made under a will to trustees were characterised as gifts on a condition (the condition being that the individual act as trustee).

56 See for instance *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd [1999]* 2 Qd R 524; *In re Duke of Norfolk's Settlement Trusts* [1982] Ch. 61.

57 This element of the requirement is frequently unstated, but must pertain because pressure applied by a trustee on a beneficiary to secure consent would surely itself be inconsistent with the trustee's duties; *Barrett v. Hartley* (1866) L.R. 2 Eq. 789.

58 *Imperial Mercantile Credit Association v Coleman* (1871) LR 6 Ch App 558.

59 Ibid. Also *Maguire v Makaronis* (1997) 188 CLR 449, 466; *Queensland Mines v Hudson* (1978) 18 ALR 1.

3 The regulation of conflicts

Parliament has both expressly and implicitly disclosed its belief that the general law related to conflicts of duty requires buttressing in the corporate and financial services sectors. This is manifested most clearly in the *SIS Act* but is present also in a variety of other legislative and regulatory initiatives. As a result, the regulatory regime applied to the superannuation system has multiple layers and modalities of operation.[60] The core conflict provisions in the regime are found in Part 6 of the *SIS Act*: the covenants imposed by sections 52(2)(d) and 52A(2)(d). These covenants are presented and analysed below along with the other regulatory and self-regulatory rules and processes.

These various mechanisms and rules together constitute the regime regulating conflicts of interest and duty in the financial services sector. The picture that emerges from this analysis is one in which the substance of the different layers of regulation diverges in subtle ways from that pertaining at general law. Perhaps more importantly, there are significant differences in the consequences that flow from transgression. Where the general law is largely remedial in nature, the additional layers described below are quintessentially regulatory. The result is a truly multi-valent regulatory regime in which specific regulatory objectives, in this case the elimination of influences that distract individuals and the institutions they serve from the pursuit of the interests of members, are pursued simultaneously against multiple actors in a variety of ways.

3.1 The *SIS Act* covenants

Section 52(2) of the *SIS Act* contains covenants by the corporate trustee that are taken to be included in the governing rules of the superannuation fund (and as such are not direct legislative requirements, per se). Specifically, the covenant in section 52(2)(d) is:

> 'where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
>
> (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
>
> (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
>
> (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
>
> (iv) to comply with the prudential standards in relation to conflicts'

A number of issues immediately present themselves.

The first is that the covenant does not actually prohibit a trustee from establishing, or acting in the presence of, a conflict. Rather, it imposes a duty to give priority to the interests of members when a conflict arises. This resembles the duty imposed on the responsible entity of a managed investment scheme under section 601FC(1)(c) of the *Corporations Act 2001* (Cth) ('*Corporations Act')* to give priority to the interests of members, the duty imposed on an adviser to give priority to its client's

[60] For a discussion of the form and consequences of this multi-valency, see Donald, above n 22.

interests when giving advice under section 961J of the *Corporations Act*[61] and the duty imposed on a life company to give priority to the interests of current and prospective policy-holders under section 32(1)(b) of the *Life Insurance Act 1995* (Cth) ('*LIA*'). Each of these analogous provisions implicitly anticipates the existence of conflicts, and specifies how the regulated entity is to respond; by prioritising the interests of the members, clients and policy-holders. The covenant in section 52(2)(d) thus continues a trend in the legislative sphere[62] in Australia away from the strict proscription found in equitable doctrine towards what appears, on its face, to be a less absolute position in which the individual's interests (or those of a third party to whom the individual owes a duty of loyalty) need not be ignored so long as the interests of, and duties owed to, the other are prioritised.

It is easy however to overstate the extent of this divergence. The concept of prioritising is uncompromising. It goes beyond emphasising or according greater weight to the interests of the party to whom the duty is owed. Implicitly, it requires that the duties to, and interests of, others can only be considered once the duties to, and interests of, the beneficiaries have been satisfied. Note, however, that it does not preclude consideration of those duties and interests; the duties to, and interests of, the beneficiaries must simply be attended to first. This falls short of the absolute proscription found in the general law but is nonetheless very protective of beneficiaries' interests.

The second issue that presents itself is that the conflicting duty can be owed 'to any other person'. In this respect it differs from sections 601FC(1)(c) and 961J of the *Corporations Act,* both of which apply only to conflicts between the regulated entity (or a related party) and those of the member or client, respectively. Like section 32(1)(b) of the *LIA,* the covenant in section 52(2)(d) goes further. The covenant in section 52(2)(d) encompasses consideration of the duties that the corporation may owe to other parties, including the beneficiaries of another trust of which the corporation is trustee. This situation is specifically considered in Part 4.1 below.

The third issue that presents itself is the requirement in paragraphs (ii) and (iii) that the trustee 'ensure' that the interests of the beneficiaries are not adversely affected by the conflict. As Giles JA noted in *Manglicmot v Commonwealth Bank Officers Superannuation* in respect of the (now replaced) covenant in section 52(2)(c) of the *SIS Act* which employed the same infinitive verb:

> 'The words "to ensure" add nothing; an obligation is an obligation. Again, the respondent was exercising a discretionary power, and "to ensure" does not turn the question of exercise of a discretionary power into one of strict liability.'[63]

Perhaps, as Byrne J noted, in *Invensys v Austrac*:

> 'the best that can be made of these apparently superfluous words "to ensure that" in para (c) is that Parliament intended that they emphasise the seriousness of this covenant and the requirement that it be strictly observed.'[64]

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61 For a discussion of the policy background giving rise to this new obligation, see Hon Kevin Lindgren QC, 'Fiduciary duty and the Ripoll Report' (2010) *C&SLJ* 435. Although the article preceded the enactment of this provision, the comments remain apposite.

62 See also section 912A(1)(aa) of the *Corporations Act*, discussed below at n 76, which requires that holders of Australian financial services licences 'manage' conflicts. Also ASIC, *RG 181 Licensing: Managing conflicts of interest*. Accessed at http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-181-licensing-managing-conflicts-of-interest/ on 7 January 2016.

63 *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204, [121].

Finally, there is the question of what, if anything, paragraph (iii) adds to paragraph (ii). Perhaps the most generous interpretation of the drafting is that its inclusion clarifies, and thereby emphasises, the protective aspects of the covenant.

The *SIS Act* also expressly regulates the conduct of those directors of superannuation trustees whose duties and interests conflict with the interests of members.[65] The covenant in section 52A(2)(d) applies to the directors of all superannuation trustee boards. It has a similar structure to that in section 52(2). Specifically, the covenant is:

> 'where there is a conflict between the duties of the director to the beneficiaries, or the interests of the beneficiaries, and the duties of the director to any other person or the interests of the director, the corporate trustee or an associate of the director or corporate trustee:
>
> (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
> (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
> (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
> (iv) to comply with the prudential standards in relation to conflicts'

The observations relating to the way in which the covenant in section 52(2)(d) has been drafted apply with equal force here also. Again, it is a duty to prioritise, not avoid; the duty can be owed to any other person; the verb 'to ensure' is employed; and there is potential redundancy in the drafting.

More fundamentally, though, the covenants in section 52A(2) represent a paradigm shift in the regulation of the superannuation system. The covenant goes beyond equitable doctrine, which has traditionally held that the directors of a trustee company do not owe duties to the beneficiaries of a trust administered by that company.[66] In the absence of a locus of duty between director and beneficiary, there can as a matter of logic be no conflict with any other duty owed by the director. In contrast, the covenants in section 52A pierce the corporate veil, not only imposing obligations directly on directors to prioritise the interests of members, but making them justiciable directly by those members with the leave of the court.[67] These statutory covenants inhere to the directors' role notwithstanding the absence of any formal legal relationship between the director and members and the fact that the directors are not otherwise party to the governing rules of the fund. As we shall see in Part 4.2, this has particularly acute significance for individuals employed as directors within corporate groups, a relatively common governance arrangement in certain operating models

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64 *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87, [105].

65 For a more comprehensive description of the duties owed by officers serving in the financial services sector see Pamela Hanrahan, *Funds Management in Australia, Officers' Duties and Liabilities* (LexisNexis Butterworths, 2007). Also Pamela Hanrahan, 'Directors' liability in superannuation trustee companies' (2008) 2 *Journal of Equity* 204. Some, however, of the legislative initiatives described in this article have reformed the positions described in these texts.

66 *Young v Murphy* [1996] 1 VR 279, 301 (Phillips J). Also *ASC v AS Nominees Ltd* (1995) 133 ALR 1, 18; *Cope v Butcher* (1996) 20 ACSR 37; *Collie v Merlaw Nominees* [1998] VSC 203. But cf *Hurley v BGH Nominees Pty Ltd (No2)* (1984) SASR 499, 510; *Inge v Inge* (1990) 3 ACSR 63, 69-70, in respect of which see Barrett J's criticism of *Hurley* in the case note at (1985) 59 *Australian Law Journal* 46.

67 Section 55(4A), *SIS Act*.

of superannuation funds. Importantly, the section 52A(2)(c) covenant also overrides the statutory duties otherwise imposed on directors by Part 2D.1 of the *Corporations Act*.[68]

3.2 Prudential Standards

Part 3A of the *SIS Act* empowers APRA to determine standards with respect to prudential matters relating to the administration of regulated superannuation funds. The Prudential Standards have the status of legislative instruments. The thirteen Superannuation Prudential Standards determined since the power was granted to APRA in 2013 cover a wide range of topics related both to the investment of fund assets and the delivery of member benefits administration. Where possible, APRA has attempted to apply the principles and approaches employed in the Prudential Standards determined in respect of the Deposit-taking and Insurance sectors to the Superannuation Prudential Standards.[69] The Prudential Standards are supported by a set of twenty-two Superannuation Prudential Practice Guides that explain and elaborate on the requirements of the Prudential Standards.

Prudential Standard *SPS 521 Conflicts of Interest* specifically addresses the issue of conflicting duties. It provides that the trustee of a superannuation fund must have a conflicts management framework, approved by the board to ensure that the trustee identifies all potential and actual conflicts in the RSE licensee's business operations and takes all reasonably practicable actions to ensure that they are avoided or prudently managed.[70] The conflicts management framework is defined to be:

> 'the totality of systems, structures, policies, processes and controls within an RSE licensee's business operations that identify, assess, mitigate, manage and monitor all conflicts'[71]

The Prudential Standard expressly accommodates conflicts of duties within the broader concept of 'conflicts' to which it applies.[72]

The pragmatic notion that conflicts are inherent in the operation of a modern superannuation fund, and hence must be 'prudently managed', is crucial to this regime.[73] This stands in apparent contrast to the rhetoric present in the general law, with its emphasis on the avoidance of all conflicts. In practice, however, the apparent divergence between management and avoidance may have less substance. As Part 2 above noted, it seems likely that the statements of the court of the prophylactic, expressive role of the fiduciary proscriptions extend beyond their actual application. That is to say, it is the derivation of benefit or incursion of loss that represents the breach, not the assumption of a position from which such benefit might hypothetically be derived or whereby such loss may be occasioned. Moreover, as Part 4 below will discuss, there are circumstances in which an organisation can re-organise its internal structures and processes to avoid the potential for specific individuals associated with the organisation from finding themselves in a position of conflicting duties. This might reasonably be characterised as the organisation 'managing' the potential for conflicts. 'Managing' the conflicts might, in this sense, not represent a weakening of, or departure

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68 Section 52A(3), *SIS Act*.
69 APRA, *Annual Report 2013*, 15.
70 APRA, *SPS521: Conflicts of Interest* (July 2013), [8].
71 Ibid, [9].
72 Ibid, [7].
73 Ibid [15].

from, the general law position so much as a recognition that an organisation might be capable of cognitive pluralism in a way that is impossible at law for a natural person.

3.3 Other sources of 'conflicts' regulation

Rules with respect to conflicts are also imposed by a variety of other regulatory and self-regulatory regimes. The content of these obligations varies, as do the consequences flowing from proven transgression. Although the rules are expressed for the most part in terms of conflicts of interest rather than conflicts of duty, in most cases the regulation of conflicts of duty can be implied into them.

(a) AFS licence requirement

Section 911A of the *Corporations Act* provides that persons wishing to provide financial services in Australia must apply for and receive an Australian financial services ('AFS') licence appropriate for the type of activity they intend to undertake. In most cases the trustee of a superannuation fund (other than an SMSF) will require an AFS licence in order to perform its activities.[74]

Perhaps surprisingly, the statutory obligations imposed on AFS licence holders do not expressly include a requirement to address conflicting duties. Section 912A(1)(aa) of the *Corporations Act* imposes upon financial services licensees an obligation to:

> 'have in place adequate arrangements for the management of *conflicts of interest* that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative.' *(italics added)*

However, there is no express reference to conflicting duties. That requirement is left to section 912A(1)(a) which requires that an AFS licence holder must:

> 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'

The reference to fairness in that section might reasonably be expected to encompass situations where an entity's duty to one or more clients conflicted with their duty to one or more other clients.[75] That, of course, does not replicate the substance of the general law rule. Most obviously, it does not encompass duties owed to non-clients that may conflict with a duty to the client.

Perhaps more importantly, however, it is far from clear that transgression of section 912A would furnish members adversely affected by a conflict of duties with the same suite of remedies available under the general law because the requirements in section 912A are primarily intended to be enforced through licence-related administrative action by ASIC.[76]

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[74] Section 911A(2)(g)(iii)

[75] ASIC, *Regulatory Guide 181: Licensing: Managing conflicts of interest*, RG181.40-41.

[76] ASIC, *Regulatory Guide 98 Licensing: Administrative action against financial services providers*, RG 98.

(b) Fair Work Australia Act 2009 (Cth)

The *Fair Work Act* empowers Fair Work Australia to make, vary and revoke modern industrial awards. The Stronger Super reforms include amendments[77] to the *Fair Work Act* that govern the nomination of default funds in awards, an important process given around 10% of inflows into the superannuation system arise pursuant to an award.[78] Since October 2013, those defaults funds have been selected by an Expert Panel. Specifically, one of the criteria that the Expert Panel is to apply in making its decision is:

> 'whether the superannuation fund's governance practices are consistent with meeting the best interests of members of the fund, including whether there are mechanisms in place to deal with conflict of interest'[79]

Again, then, the focus is on conflicts of interest, rather than conflicts of duty. At best, the requirement to avoid conflicts of duty must be inferred from the need to ensure that the fund's governance practices are consistent with meeting the best interests of members of the fund. The inclusive way in which the conflicts of interest are nominated offers no major obstacle to (and no support, it must be said, for) such an inference.

The interesting aspect of the mechanism in the *Fair Work Act* is that it does not create a legal obligation directly but rather relies on market forces, and in particular the desire of organisations to compete for customers, to discipline those organisations. Nothing forces the operators of superannuation funds to organise themselves in a way that complies with the criterion above other than the self-interest of the operators in seeking to acquire the customers available through the default funds process.

(c) ASX Listing

Many of the entities acting as the trustees of retail and master funds are part of corporate groups whose ultimate parent company is listed on the Australian Securities Exchange ('ASX'). Condition 13 of the Listing Rules of the ASX requires that all listed entities disclose the extent to which they comply with the ASX Corporate Governance Principles and Recommendations. Those Principles and Recommendations do not specifically refer to the possibility of officers and employees encountering conflicting duties, but does implicitly recommend that entities articulate and maintain a process for dealing with conflicts of interests.[80] The use of 'if not, why not?' disclosure as a mechanism for regulating the design of internal processes of listed equities makes it a more flexible and less draconian, but potentially less effective,[81] means of securing compliance.

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77 *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012*

78 Productivity Commission 2012, *Default Superannuation Funds in Modern Awards*, Report No. 60, Final Inquiry Report, Canberra, 51. The choice of default fund in an industrial award may also influence the selection of the default fund in other contexts, such as enterprise agreements.

79 Section 156F(e), inserted by *Fair Work Amendment Act 2012* (Cth).

80 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3rd Ed, 2014), Box 3.1, 20.

81 See for instance Alice Klettner, Thomas Clarke and Michael Adams, 'Corporate governance reform: An empirical study of the changing roles and responsibilities of Australian boards and directors' (2010) 24 *Australian Journal of Corporate Law* 148. The authors report satisfaction on the part of both a majority of their interviewees and the ASX at the approach.

(d) Industry Self-regulation: FSC, AIST and ASFA

A number of membership associations operate in the superannuation system. Each seeks to influence their members in respect of governance matters, though only one, the Financial Services Council ('FSC') actively regulates conflicts issues.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and Public Trustees. It seeks to promote best practice for the financial services industry by setting mandatory Standards and providing Guidance Notes for its approximately 130 members.[82]

The FSC's Standard addressing governance issues has two main strands. The first is a series of rules concerning the make-up of the board. The Standard requires that the Chair of the board of a trustee company must be independent, the board must comprise a majority of independent directors and board meetings require a majority of independent directors to be quorate. Independence is specifically defined to exclude current (or recent) employees of the trustee company, any related companies, or any material professional providers. It additionally requires that directors be:

> 'free from any interest and any business or other relationship which could, or reasonably could be perceived to materially interfere with the director's ability to act in the best interests of the [trustee's] beneficiaries'[83]

In addition to the requirements for independence, the Standard prohibits persons serving on the board of more than one trustee company, where the trustees 'operate in an identical market or segment of the same market'.[84] This is designed to preclude persons serving as directors of two or more funds that are competing with each other for members. The FSC recognises that this may be beyond what is strictly required by the regulatory regime but argues that multiple competing directorships are inconsistent with:

> 'the current trends in corporate governance in Australia … [and hence] the openness and transparency [beneficiaries] are entitled to expect in the superannuation industry'[85]

The Standard therefore clearly goes beyond what is otherwise required by the regulatory scheme in certain respects. It does not address all aspects of conflicting interests and duties, but rather is positioned and acts as an additional set of requirements with which members implicitly agree to be bound.

The FSC maintains a dedicated committee, the 'Standards Oversight and Disciplinary Committee' which has responsibility for monitoring compliance with FSC Standards, responding to allegations of non-compliance and, where required, initiating disciplinary proceedings. Proven failure to comply with a Standard by an FSC member can lead to public or private censuring of the member concerned, suspension from membership, or in extreme cases even expulsion from membership.

The Australian Institute of Superannuation Trustees ('AIST') is an advocacy body representing trustee directors and staff involved in the not-for-profit sector. AIST does not impose specific governance rules on its membership. It does, however, publish guidelines for members and has

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82 FSC, *Policy Priorities 2013 – 2016*. Available at www.fsc.org.au.

83 FSC, *FSC Standard No. 20 Superannuation Governance Policy*, (March 2013), [8.2.3(a)(vi)].

84 Ibid, [9.2].

85 Ibid, [9.2].

indicated an intention to consult with its membership with a view to making components of its framework mandatory.[86]

The Association of Superannuation Funds of Australia ('ASFA') describes itself as the peak policy, research and advocacy body for Australia's superannuation (super) industry. It has both individual and corporate members drawn from all industry sectors. ASFA also does not impose specific governance rules on its membership. It does, however, publish Best Practice papers that capture and express the organisation's view of what is expected of trustees. The Best Practice paper addressing governance issues specifically summarises the law and recommends institutional arrangements that address identified issues in a principled manner.[87] These recommendations range across issues such as the need to maintain a register of soft dollar receipts by officers of a trustee company and the need to disclose related party arrangements even when they are conducted at arms-length. There are also cautionary comments about, for instance, the difficulty of managing conflicting duties to two parties. None of these are enforceable on members by ASFA, a position that in part reflects ASFA's position as a policy, research and advocacy body rather than a standards-making body.

[86] Ibid, 2.

[87] ASFA, *Superannuation Fund Governance. Understanding the framework. Addressing the issues*, Best Practice Paper No. 7 (October 2010).

4 Specific issues arising in the operating models of superannuation funds in Australia

The regulatory scheme described in Part 3 is certainly complex. Its various elements engage with the regulated population in a variety of ways, giving it a multi-valency that is hard to comprehend all at once. In addition, the participants in the superannuation system are actively adaptive. The regulatory regime that shapes the system is continuously inspiring actions and reactions on the part of participants seeking to optimise their position. Policy makers complain of the 'unintended consequences' of their initiatives but are naïve if they expect participants to accept regulatory constraints passively. The three specific issues analysed below show how the regulatory regime described in such detail in Part 3 interacts with specific organisational structures present in the superannuation system. It is crucial to recognise however that these institutional structures: multiple trusteeships, multiple directorships and independent directors, are both a product and a target of the regulatory regime. Their presence, form and extent mark not just the boundaries of permissible conduct but also the licence left by the regulatory regime for various forms of commercial (and other) self-interest to operate.

4.1 Multiple trusteeships

It is common practice in Australia today for financial services groups to locate responsibility for trustee and trustee-like activities in specially-constituted subsidiaries. These subsidiaries will be licensed by ASIC and APRA under the AFS and RSE regimes respectively. The subsidiaries might each administer a number of superannuation funds and managed investment schemes. For instance retail DC funds and wholesale master trusts of the type described in Part 1 above are commonly, but not inevitably, administered by entities operating within such organisational structures. This centralisation of trustee-like responsibilities in specialist subsidiaries creates the potential for the creation of a quite specific genus of duty-duty conflict.

Traditionally, the individuals acting as trustees could act for multiple trusts because the interests of the beneficiaries in each case would be quite unlikely to conflict. Care would have to be taken if a trustee transferred beneficial ownership in an asset from one trust to another under its supervision, for instance by securing the informed consent of both parties prior to undertaking the transaction, but the duties owed by the archetypal dynastic family trusts of the eighteenth and nineteenth centuries were seldom in direct competition with each other.[88]

The situation is quite different inside a financial services group, especially one in which group companies are employed by the trustee subsidiary as agents to assist in the administration of the trust. It is not hard to imagine a situation in which a decision taken in respect of one trust, say to discontinue employing a group company in a particular capacity, might adversely affect the ability of that group company to deliver its service to the trustee subsidiary in respect of another trust. It might, for instance, undermine the ability of the service-providing group member to deliver the service at the agreed fee. Even if the interests of the corporate group to which the trustee subsidiary belongs were subjected to the duties owed by the trustee subsidiary *qua* trustee, the board of directors of the trustee subsidiary would, in those circumstances, face a situation in which

[88] But they are not unknown. For an example where multiple trusteeships caused individuals difficulty, see *Public Trustee v Cooper* [2001] WTLR 901.

the trustee company faced a conflict in the duties it owed to the two trusts. To pursue the interests of the beneficiaries of the first trust would, in this example, necessarily adversely affect the interests of the beneficiaries of the other. To make things more ineluctable, the trustee in this circumstance cannot choose not to act, for to refrain from making the decision would compromise the interests of the first in favour of the second.

Another example where a single trustee can encounter conflicting duties is where it discovers an investment opportunity which can only be exploited by one party. How can the trustee choose to which of the trusts the opportunity should be allocated? It is, in some ways, analogous to the corporate opportunity doctrine in corporate law,[89] albeit in this case it is not a competition between personal interest and the fiduciary's duty but between the trustee's duty to the beneficiaries of two distinct trusts.

The legislative overlay provided by the *Corporations* and *SIS Acts* does not assist in the resolution of these conundra entirely. Superficially, it might appear that those *Acts* protect the interests of MIS and superannuation fund members, and that as a result the trustee faces an inescapable gridlock of conflicts. The reality is more complicated.

Take first a competition between duties owed to the members of a superannuation fund on the one hand and the members of an MIS on the other. On its face, the covenant imposed by section 52(2)(d) of the *SIS Act* requires the trustee, when acting in its capacity as RSE licensee, to give priority to the interests of the superannuation fund members it serves over the interests of the members of any MIS it administers. That is because the protection afforded to members of an MIS by section 601FC(1)(c) of the *Corporations Act* is less comprehensive than that offered by the section 52(2)(c) covenant to superannuation fund members.

Section 601FC provides that:

> (1) 'In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must: …
>
> (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests'

The second element of paragraph (c), the duty to give priority to members' interests over those of the trustee's own, is not directly enlivened because of the way that the circumstances described above have been cast (as conflicts of duty not interest). In a conflict of duties, it is the trustee's duty to another, not its interests, that competes with its duty to the members. The members of the MIS must, therefore, rely on the first element: the duty imposed on the trustee to act in their best interests. However, that duty is expressly limited to when the trustee is 'exercising its powers and carrying out its duties' in respect of that trust. Decisions of a trustee taken while it is acting in another capacity (for instance its capacity as RSE licensee) would not appear to enliven this first element of section 601FC(1)(c). As a result, it would appear to be open for the trustee in some circumstances (ie those in which it is acting in its capacity as RSE licensee) to favour the interests of the members of the superannuation fund over those in the MIS without offending either the *SIS Act* or *Corporations Act*. The reverse, however, may not be true. Unlike section 601FC(1)(c) of the *Corporations Act*, and indeed the covenant imposed by section 52(2)(c) of the *SIS Act*, the covenants

[89] See for instance Robert Austin, 'Fiduciary Accountability for Business Opportunities', in Paul D. Finn (ed.) *Equity and Commercial Transactions* (Law Book Co,1987).

imposed by section 52(2)(d) of the *SIS Act* is not expressed in terms of the trustee's exercise of its powers. It appears to have universal application. If interpreted strictly, the covenant imposed by section 52(2)(d) would seem to limit the capacity of the trustee to place its duty to the members of the MIS ahead of its duty to members of the superannuation fund, even when the trustee is acting as the responsible entity ('RE') of the MIS. Put more plainly, a trustee might find that, having complied with section 610FC(1)(c) and acted in the best interests of the members of the MIS, it might nevertheless be found to have breached its section 52(2)(c) covenant. Whether a court would in practice give the section 52(2)(c) covenant such wide application remains to be seen. It might, for instance, instead be tempted to read narrowly the reference at the start of section 52(2) of the *SIS Act* to 'each trustee of the entity' to mean the person acting in their capacity as trustee, in which case the covenant would only be enlivened when the legal person in question was acting in that capacity. So long as it was always clear in which capacity the person was acting (a crucial point considered below), the interests to be prioritised would be unambiguous.

A similar argument applies also in respect of duties owed in respect of members of multiple superannuation funds. The logic of the covenant imposed by section 52(2)(c) of the *SIS Act* means that each set of members must have their interests prioritised. Reading the reference in section 52(2) of the *SIS Act* to 'each trustee of the entity' to mean the person acting in their capacity specifically as trustee of that fund (again assuming that can be identified unambiguously), might, as suggested above, be one way to solve the conflict.

The situation is simpler for an entity acting in respect of multiple MIS. In that case, the duty to prioritise the interests of each set of members is again limited only to those decisions taken when the trustee is exercising its powers and carrying out its duties in respect of that MIS. This would be consistent with the general law position, outlined above, that the assumption of multiple roles does not of itself constitute a breach; the breach must relate to a course of conduct (such as a decision) tainted by the potentially influential presence of a competing duty or interest.

This all presupposes that it is always clear when an entity is acting in its capacity as a trustee of a specific fund, whether superannuation fund or MIS. That is a big assumption. In practice it will not always be clear. The corporate opportunity example described above exemplifies this. Although it is now clear that the 'opportunity' discovered by the entity is not properly characterised as the 'property' of any beneficiaries,[90] per se, it still may be unclear in which capacity an entity was acting when awareness of the opportunity arose. Identifying from whence the opportunity arose, and hence to which of the trusts the opportunity 'belongs' may be a practical impossibility. It is also unclear the circumstances in which an entity can quarantine such information. Clearly, if the information is confidential to some context, then a trustee is under no obligation to apply it in other contexts, but what if the information is not confidential? Would an investment opportunity or risk, knowledge of which is publicly (but perhaps not widely) available, be information that a trustee would be expected to incorporate into its decision-making even if the information came to it in another capacity. It is hard to see from a practical perspective how it could be otherwise. The notion of prudence, for instance, is predicated on an awareness of the ambient risks and opportunities that are present. The trustees of superannuation funds, particularly those receiving

[90] *Boardman v Phipps* [1967] 2 AC 46, per Cohen LJ and Upjohn LJ (otherwise in dissent).

remuneration, would be ill-advised to assume that they owe those duties on a sporadic or part-time basis.[91]

ASIC and APRA's approach in regulating REs and RSE licensees is more accommodating of these sorts of practical difficulties than the statutory regimes created by the *Corporations* and *SIS Acts*. As noted in Part 3 above, the AFS licensing provisions in the *Corporations Act* do not merely require that trustees have a process for detecting and 'managing' conflicts.[92] Similarly, APRA's Prudential Standards require a 'conflicts management framework'. The absolute proscription implied by the general law requirement to avoid conflicts, and the slightly more permissive statutory requirements to prioritise certain identified interests or duties, are potentially points of calibration at one extreme along a spectrum of 'managing' strategies, to be reserved for situations of significant risk of prejudice to members' interests. The intent, then, of both ASIC and APRA is that trustees, and the broader institutional corporate groups of which they are often part, craft detailed rules and procedures outlining how such situations are to be addressed if and when they arise. Examples might include splitting a board for the purposes of a specific decision in order that different directors can represent the interests of different funds' members, getting independent expert advice (for instance on a proposed fee arrangement) or seeking member authorisation for a transaction. These procedures may be effective in satisfying ASIC and APRA that they need not intervene in respect of a transaction or course of conduct. The procedures may also limit members' rights under the general law to the extent that they are disclosed to members. However, it is far less obvious that they will be effective in satisfying the requirements imposed by whichever of sections 601FC(1)(C) and the covenant in 52(2)(d) apply. The drafting of both section 601FC(1)(C) and the covenant in 52(2)(d) imply a legislative intent to impose stringent rules and the courts may be reluctant to downplay that signal when it comes time to apply them to a deserving case.

The overall picture that emerges from this complexity is not dissimilar to that pertaining at general law. The statutory overlays provided by the *Corporations* and *SIS Acts* render the general law proscriptions on fiduciaries acting when facing conflicting duties harder to circumvent by institutional structuring. They do not, however, relieve the trustee of multiple funds of the burden of demonstrating undivided loyalty to each of them simultaneously, which as we have seen may be particularly hard to demonstrate in respect, for instance, of corporate opportunities. So, in that respect, the substance of the regulatory scheme is similar to that which would otherwise pertain at general law.

4.2 Multiple directorships

The trustees of most APRA-regulated funds and all MISs are incorporated entities. The natural persons animating them are therefore formally identified as directors, officers and employees of

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91 For a similar sensibility in relation to the trustee's sibling fiduciary office, the company director, see *ASIC v Adler* (2002) 168 FLR 253; 41 ACSR 72; [2002] NSWSC 171, [372] (Santow J), which principle was not considered on appeal.

92 For examples of ASIC's use of the language of 'managing' conflicts see ASIC, *RG 181 Licensing: Managing conflicts of interest.* Accessed at http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-181-licensing-managing-conflicts-of-interest/ on 7 January 2016. Also 'Managing conflicts of interest in the Australian financial services industry', paper presented by Jeremy Cooper, Deputy Chairman ASIC, to the Securities & Derivatives Industry Association, 26 May 2006, accessed at http://download.asic.gov.au/media/2103226/managing_conflicts_of_interest.pdfon 7 January 2016; Fitzsimmons, above n 4.

those entities. Some of these individuals may serve on the boards of more than one corporation. Some may serve as a director on the board of several corporations, each of them acting as a trustee of one or more superannuation funds or MISs. Some may serve as a director on the board of a trustee while simultaneously serving as a director on the board of a service provider or some other entity associated with the MIS or superannuation fund. This latter possibility is dealt with in Part 4.3 below.

What, then, of multiple directorships? These are less common in the superannuation context than was once the case,[93] but are not formally prohibited.[94] There is no equivalent data in respect of the MIS context but anecdotal evidence suggests the practice is common.

The general law's position on the assumption of multiple directorships is, as we have seen, relatively relaxed. The focus of both fiduciary doctrine and the relevant statutory provisions is on the individual's conduct once in the position, not the act of assuming the position. However serving on the board of two or more corporations in different industries with little or no overlap in commercial aspirations is quite different from serving on the board of two superannuation funds which, if public offer multi-employer DC or retail funds, could very conceivably find themselves competing for new members and which almost certainly would be competing for new investment opportunities. Indeed, irrespective of the operating model described in Part 1, the trustees of the funds would inevitably be encountering similar operating and regulatory issues in respect of which will accrete in the individual an accumulation of knowledge, the precise origins of which may become increasingly blurred over time. Examples might include insights drawn from fund-specific interactions with APRA or ASIC and information of a commercially sensitive nature about specific service providers.[95] The ability of an individual to quarantine forever each item of such information within its original context, as required by the general law, must be questioned.

The statutory and regulatory regimes applying to individuals largely replicate those outlined in Part 4.1 above in respect of the entities on whose boards they serve. The covenant in section 52A(2)(c) of the *SIS Act* that applies to the directors of RSE licensees is equivalent to the section 52(2)(c) covenant. Section 601FD(1)(c) of the *Corporations Act* is likewise similar to section 601FC(1)(c) discussed above, albeit with the buttressing support of sections 601FD(1)(d) and (e). They provide that an officer of the responsible entity of a registered scheme must:

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93 APRA reports there are currently 69 individuals serving on more than one board (across 1,130 board positions); APRA, *Annual Superannuation Bulletin 2015, 5*. In contrast, in 2008 APRA reported that the average number of board positions held by directors varied from 1.7 to 7, depending on the sector; APRA, 'Superannuation fund governance: Trustee policies and practices' (2008) *Insight* 2. See more generally, Elizabeth Ooi, 'Super Connected Directors: An Examination of Pension Funds' plenary presentation to 22nd Colloquium of Superannuation Researchers (UNSW, July 2014).

94 In an attempt to discourage multiple directorships, the Super System Review recommended that APRA administer a process by which funds affected by multiple directorship attest (and thereby implicitly consent) to the absence of a reasonably foreseeable conflict between the person's duty to the members of each fund and to the person's duty to each trustee company; Super System Review, *Final Report - Part One: Overview and Recommendations*, (July 2010), Recommendation 2.13. The recommendation was noted but not adopted by the government in its Stronger Super reforms; Commonwealth of Australia, *Stronger Super*, (2010), 28.

95 This is an issue in the superannuation context specifically because of the concentration of service providers in certain sectors; see M Scott Donald, Hazel Bateman, Ross Buckley, Kevin Liu and Rob Nicholls, 'Too connected to fail: the regulation of systemic risk within Australia's superannuation system' (2015) *Journal of Financial Regulation,* Online 11 December 2015.

> '(d) not make use of information acquired through being an officer of the responsible entity in order to:
>
> (i) gain an improper advantage for the officer or another person; or
>
> (ii) cause detriment to the members of the scheme; and
>
> (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme'

A similar tangle, then, exists in respect of the rules applicable to individuals performing multiple roles as was outlined in Part 4.1 in respect of multiple trusteeship, with one crucial difference. Natural persons are legally indivisible and hence cannot reorganise their internal processes in many of the multifarious ways in which an organisation can reorganise its internal structure and processes in order to 'manage' such conflicts of duties as they encounter. Individuals can absent themselves from deliberations or seek specific authorisation from members to act notwithstanding the conflict, but both possess a significant flaw in practice. Both attributed abstention and specific authorisation betray information about the presence and nature of the other, conflicting duty that a fiduciary ought properly to keep private. Perhaps the best that individuals can achieve is an express generic authorisation to act from each party to whom they owe a duty. However, even then there is a question about whether a court would view generic authorisation as 'informed' consent sufficient to relieve the fiduciary of his or her responsibility. The determination of fiduciary doctrine to secure individual loyalty in those held to be in a fiduciary position is hard to circumvent.

APRA's position on multiple directorships is relatively accommodative.[96] APRA is, however, concerned about the potential for conflicting duties to go unrecognised, and hence unmanaged. This was underscored by the results of its 2014 thematic review into conflicts in the superannuation industry.[97] The review found that:

> 'there is a wide range of practice in relation to conflicts management across the superannuation industry. APRA identified some positive developments and examples of good practice in the management of conflicts by RSE licensees. Overall, however, the review indicates that implementation of the requirements is still in its early stages and further steps need to be taken by many RSE licensees to improve their conflicts management practices to meet the requirements of the prudential standard.'[98]

Of particular concern to APRA were widespread failures in the identification of the presence of conflicts by those to whom conflicts rules applied.[99] As surprising as that may seem to fiduciary theorists and those with legal training, it is a recurrent finding. In its review APRA noted:

> 'APRA has previously indicated that the board of an RSE licensee is expected to assess the extent to which multiple directorships involve, or could be perceived to involve, conflicts and be able to demonstrate how the best interests of beneficiaries remain at the forefront of decisions being made by directors holding multiple positions. Further, where abstention is deemed an appropriate response to such a conflict, boards must also be able to demonstrate that board effectiveness is unimpeded and that critical decisions can continue to be made.'[100]

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96 See for instance its response to the question tabled in Parliament, reported in *Money Management* 11 October 2012, that 'It will be left to the RSE licensee and the director concerned to determine whether the holding of multiple directorships results in an unmanageable conflict.'

97 Reported in APRA, *Insight* (2015), 27.

98 Ibid, 29.

99 Ibid, 29, 30-31.

100 Ibid 31.

As was noted above, the difficulty an individual has in recognising and addressing effectively the distorting effects of a conflicting duty on the loyal performance of his or her duties is one of the reasons for the prophylactic rhetoric employed by the courts when describing the general law position. It is also one of the key rationales behind the push for 'independent' directors in the superannuation context, to which we now turn.

4.3 The push specifically for 'independent' directors

In the corporate sphere there is a strong trend towards limiting the number of current and (recent) former executives serving on corporate boards.[101] This reflects long-standing concerns about the ability of those individuals to quarantine themselves effectively from being influenced by the interests of management in decisions going to the board.[102] In that context, it is clearly a conflicts of interest, not duty, issue.

Recently, however, there has been a push for a similar sensibility to be applied to the superannuation context.[103] Both the Super System Review[104] and the Financial System Inquiry[105] recommended that the trustees of employer-sponsored superannuation funds be required to have boards comprising a minimum of one-third independent directors. The government has accepted the FSI's recommendation and in 2015 introduced a Bill into Parliament to that effect.[106] In its most recent form, the Bill nominated a set of relationships, any one of which would preclude a director of a company acting as the trustee of a superannuation fund from being identified as 'independent'.[107] Crucially, that definition responded to the way in which the conflict of duties arises depending on the operating model employed by the superannuation fund. It is therefore important to consider each in turn.

Multi-employer DC funds

The main risk in a multi-employer DC fund is that a board member of the trustee may owe duties to an external entity, such as a trade union, employer group or potential service provider, whose interests might be affected by decisions taken by the superannuation fund board on behalf of fund members.[108] Importantly, as was noted above, the duties owed by the board member to that external party do not arise as a consequence of the mere fact of nomination. Rather, the existence of conflicting duties is a consequence of the common practice for nominating entities in the superannuation sector to nominate individuals from amongst their senior executives and office

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101 Suzanne Le Mire and George Gilligan 'Independence and Independent Company Directors' (2013) 13(2) *Journal of Corporate Law Studies* 443, 448; Sally Wheeler, 'Independent directors and corporate governance' (2012) 27 *Australian Journal of Corporate Law* 168; Steven Young, 'The Increasing Use of Non-Executive Directors: Its Impact on UK Board Structure and Governance Arrangements' (2000) 27(9) *Journal of Business Finance and Accounting* 1311.

102 See for instance Fred Hilmer, *Strictly Boardroom: Improving Governance to Enhance Company Performance*, (1993, Australian Print Group).

103 For a more complete description than is possible here, see M Scott Donald and Suzanne Le Mire 'Independence and the Governance of Superannuation Funds' *CLMR Working Paper 16-1*, Feb 2016.

104 Super System Review, above n 94, Recommendation 2.6.

105 Financial System Inquiry, *Final Report* (November 2014), Recommendation 13.

106 *Superannuation Legislation Amendment (Trustee Governance) Bill 2015 ('Bill').* For a brief description of the stalled progress of that Bill, see Donald and Le Mire, above n 103.

107 *Bill*, Schedule 1, Part 1, item 1, paragraph 87.

108 This possibility was alluded to obliquely by Blue J in *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121, [191].

holders to positions on the trustee board. These individuals will necessarily owe duties to the nominating entity from being a director, officer or employee[109] of that entity, and it is those duties that may conflict with the duties they owe as members of the fund board. Structural independence would, in this context, therefore imply an absence of relationships that would give rise to such duties. Any legislated requirement for independence that is intended to address the potential for entrenched conflicts of duty ought to accommodate this peculiarity of superannuation fund governance. Parliament could, of course, go beyond the general law, and deem even those not formally owing duties, such as the members of trade unions and employer bodies, not to be independent. That would curtail nominating bodies side-stepping the requirement by nominating self-evidently 'tame' individuals from amongst their members to do their bidding. It would not, however, preclude the organisations nominating sympathetic individuals from other sources. That is one of the limitations of regulating for structural independence.

There is an argument that the mandatory nature of the current equal representation governance rules precludes a finding that nominated directors are conflicted.[110] It is, of course, true that the nomination process is expressly provided for in the governing rules[111] of the fund pursuant to the equal representation rules contained in Part 9 of the *SIS Act*. It might be thought that this brings the situation under the familiar principle that a conflict anticipated in the creation of a relationship can, in appropriate circumstances, be taken to have been accepted by the parties.[112] In such circumstances, the conflicted party can without impropriety act notwithstanding the presence of the conflict. The problem with this line of argument here is that it is open to the nominating entities to nominate someone who would not face such a conflict. They needn't nominate someone who already owes a duty likely to impinge on those they will acquire upon joining the fund board. Alternatively, the nominating entity could expressly evidence their consent to the breach of duty by issuing a formal acknowledgement of the individual's right to prioritise his or her duty to fund members over his or her duty to the nominating entity. So the argument that the equal representation governance structure implies that the conflict has been consented to does not appear compelling.

Retail funds and wholesale master trusts

The main risk of conflicting duties within the governance of retail funds and wholesale master trusts is that a board member of the company acting as trustee may owe duties to an entity related to the trustee as part of a corporate group. In some cases, that second entity may be a potential (or actual) provider of services to the entity acting as trustee of the superannuation fund.[113] The potential for a

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109 See *Hospital Products*, above n 35, 96 (Mason J).

110 This argument is largely unaffected by the *Bill*, as the deletion of Part 9 of the *SIS Act* by the *Bill* as currently drafted will not of itself remove the nomination processes entrenched in the governing rules.

111 Note however there is considerable uncertainty around the precise scope of the omnibus concept of the 'governing rules' of a fund. The definition in section 10 of the *SIS Act* expressly references the trust instrument but extends to: '[any] other document or legislation, or combination of them; or …any unwritten rules; governing the establishment or operation of the fund, scheme or trust.' APRA has provided guidance as to what it regards as being within the definition; see http://www.apra.gov.au/Super/Pages/super-licensing-faq-trust-deeds-governing-rules.aspx, accessed 6 April 2016. Although no doubt influential, this is not legally authoritative.

112 *Bristol & West Building Society v Motthew*, above n 30.

113 In 2007, approximately 13% of the directors of the trustees responsible for APRA-regulated funds were employed by service providers; APRA, (2008), above n 93, 6. How many individuals served on the

conflict of duties to arise in such a situation has been increased by the enactment of section 58A of the *SIS Act* which voids any provision of a trust instrument that expressly or implicitly requires the trustee to use any particular service provider (and would thereby circumvent the conflicts proscriptions in relation to such appointments). 'Independence' in the context of a retail fund or wholesale master trust might therefore need to be defined in terms of the absence of a formal relationship with other entities in the corporate group.

Hybrid funds

Finally, the main risk in a hybrid fund is that a board member may owe duties to the employer responsible for making up any financial shortfall in the defined benefit segments of the fund.[114] This risk is particularly acute given the custom of companies appointing finance and human resources executives to the boards of such funds.[115] Both types of executive might reasonably be expected to feel considerable pressure, even if unspoken, to safeguard the interests of the company which, in other contexts, it is their duty to advance. There is also a risk, as with multi-employer DC funds, that a board member may owe duties to an external entity, such as a trade union,[116] employer group or potential service provider. 'Independence' in the context of a hybrid fund might therefore need to be defined in terms of the absence of a formal relationship with the employer company.

Overall

The objective, then, in imposing rules requiring a minimum number of independent directors on superannuation fund boards is not actually to quarantine superannuation fund boards from these different potential distractions. The forced appointment of a minority of directors independent from the nominating bodies, group companies or employers to superannuation fund boards would clearly not remove the conflicts present for the other board members. However, the presence of the independent members on a board would potentially do more than simply dilute the conflicted members. Those 'independent' directors can provide an opportunity for the formation of specialist or temporary sub-committees that are untainted by relevant conflicts. Perhaps more importantly, their presence might also be expected to act as an informal accountability measure. Specifically, it might discipline the board's decision-making by making disloyalty or partisanship more uncomfortable. The impact of this sort of normative pressure should not be under-estimated. Research into board culture and decision-making repeatedly emphasises the importance of group norms in decision processes.[117] Independent directors, then, may assist in the 'management' of conflicts of duty on superannuation fund boards even if they cannot actually eliminate them. It remains to be seen whether that would be sufficient to address the cost of conflicted decision-making identified in the empirical analysis referred to above.

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boards of trustees which had appointed their employer was not disclosed. Whether this percentage has changed over the past decade is also not known.

114 Another, somewhat uncommon, set of circumstances where a conflict of duties can arise is illustrated by *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1, in which a liquidator was appointed to a company that is both the employer and the trustee of a pension plan possessed of a surplus. See further Richard Nobles, 'Don't Trust the Trustee' (1990) 53 *Modern Law Review* 377.

115 See Fitzsimmons, above n 4, 213; Richard Nobles, 'Conflicts of Interests in Trustees' Management of Pension Funds – An Analysis of the Legal Framework' (1985) 14(1) *Industrial Law Journal* 1.

116 But cf Nobles, who pragmatically sees a benefit in this to counteract, in the UK context where equal representation is not required, the influence of company-appointed trustees; Nobles, above n 115.

117 See for instance Cass Sunstein, *Infotopia: How Many Minds Produce Knowledge*, (OUP, 2008) and the research cited therein.

5 Concluding comments

In 1993, Professor Roy Goode noted in relation to pension plans in the United Kingdom:

> 'Trustees appointed by management frequently hold key positions within the company, whilst trustees appointed by members may feel obligations to those who appoint them. It is unrealistic to imagine that individual trustees will be able to leave behind entirely their other roles while acting as trustees. In the modern world, conflicts of interest [sic] cannot be avoided. They can, however, be managed. As long as trustees are aware of the potential for conflict and know what is required of them as trustees, they will be able to carry out their duties to the best of their abilities.'[118]

Professor Goode was no Panglossian, but the experience of the intervening years has exposed the naivety of this view. Conflicts of duty are pervasive in the superannuation arena, as in many other financial services sectors. Moreover, empirical research persuasively identifies them as a source of inefficiency and distortion in the system. Legislators and regulators have therefore felt the need to intervene directly to buttress the general law proscriptions on fiduciaries acting where they face conflicting duties. They have recognised the naivety of relying on curial incantations of abstract notions of fiduciary duty to inspire avoidance of conflicting duties when there is so much at stake, financially and politically, for the various actors in the superannuation system.

The result has been direct legislative intervention to address conflicts of duty. The covenants in sections 52 and 52A of the *SIS Act* now specifically require trustees and their directors to prioritise the interests of members over all others, encapsulating but extending the pre-existing position at general law. They interact in complicated ways with the general law, with APRA and ASIC's rules and guidelines and, in relevant circumstances, with the provisions of the *Corporations Act* relating to MISs. They are provided greater scope for application by sections 58A and 58B of the *SIS Act* which bring the process employed by the trustee in appointing service providers out from the protective cloak offered by the trust instrument and into the spotlight as related party transactions.

Unlike Goldoni's play, however, there is no guarantee of a happy ending in respect of regulating these types of conflicts in the superannuation sector. The financial rewards available to those employed in the sector fuel a vigorous regulatory dialectic in which organisations continuously adapt their institutional structure to optimise their operating models and practices in response to regulatory intervention. Sufficient rules exist already to address conflicts of duty in the superannuation sector. Indeed, with just a few exceptions, now addressed by sections 52A, 58A and 58B of the *SIS Act*, the proscriptions present in the general law for over a century could have dealt with the issues raised by the operating models described in this article. Enforcing the rules, and holding accountable those who contravene them, is another matter.

[118] Pension Law Review Committee, *Pension schemes: law and regulation of occupational pension schemes* (Sept 1992).