

**TRUSTEE RESPONSIBILITIES**  
**AND**  
**OVERPAYMENTS**  
**IN**  
**SUPERANNUATION**

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**TRUSTEE RESPONSIBILITIES**  
**AND**  
**OVERPAYMENTS IN SUPERANNUATION**

**INTRODUCTION**

1. The question of overpayments in superannuation arises in two ways:
  - (a) Overpayment of a lump sum or a pension from a superannuation fund; and
  - (b) Overpayment of contributions to a superannuation fund by:
    - (i) a member;
    - (ii) someone for the benefit of a member, most commonly an employer.
  
2. The fact of an overpayment is likely to give rise to two kinds of problem for the trustee of a superannuation fund:
  - (a) whether the overpayment is recoverable by the person who made it; and
  - (b) whether any person who caused the overpayment is liable for any loss occasioned by the overpayment.
  
3. In addition, an overpayment may lead to the erroneous calculation of tax liability. In principle, such errors may be corrected by appropriately amending the relevant tax return but the delay in thus achieving the correct tax position may produce, on the one hand, an obligation to pay interest at penal rates to the Commissioner or even the imposition of penalty tax or, on the other hand, a loss of investment income because of having paid, in the first instance, too much tax.

4. In principle, these questions may be analysed by reference to ordinary rules of law in the areas of trusts, contract, restitution and tort.

## **RECOVERY OF OVERPAYMENTS**

5. The basis for recovery of an overpayment of money may come from the law of trusts or be contractual or restitutionary. In addition, a contract, trust deed or the general law may permit an overpayment of one amount to be set off against some later payment due from the payer to the recipient.

### **What is an Overpayment?**

6. For present purposes, it is important to distinguish between an overpayment in the sense of an amount paid in the belief that the payment of that particular sum is necessary or desirable, on the one hand, and an amount paid deliberately without regard to whether it is truly due or ought to be paid, on the other hand. The latter type of payment, usually labelled voluntary payments<sup>1</sup>, cannot be regarded as an overpayment and, depending on the circumstances, might quite properly be made and be irrecoverable. A voluntary payment (in this sense) might be made to settle a contentious claim or to avoid an expensive or difficult enquiry as to the existence or quantum of a postulated liability.

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<sup>1</sup> See *Hookway v Racing Victoria Limited* (2005) 13 V.R. 444 at [41] ff.

## Settlements

7. A trustee is entitled to settle a dispute as to the existence or amount of a claim upon a superannuation fund<sup>2</sup> and should also, in principle, be entitled to make a payment to satisfy a putative obligation where the cost of definitely establishing the existence or amount of the obligation would be disproportionate to the postulated payment<sup>3</sup>.

## Overpayment of a Pension or Lump Sum

8. It is the duty of a trustee who overpays a beneficiary to recover the overpayment.<sup>4</sup> This general principle applies to the trustee of a superannuation fund unless the trust deed provides to the contrary.<sup>5</sup>
9. An overpayment to a beneficiary may be recovered, as a matter of general law, out of payments due, in the future, to that beneficiary.<sup>6</sup>
10. It is commonplace, in addition, that superannuation fund rules provide for the recovery of overpayments. For example, the trustee of the Military Superannuation and Benefits Scheme was entitled by statute to recover any overpayment of benefits.<sup>7</sup> On the other

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<sup>2</sup> H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts*, Thomson Reuters, Update 146 (2016) at [12.9810].

<sup>3</sup> See *Australian Prudential Regulation Authority v Kelaheer* [2019] FCA 1521 at [154] in relation to practical considerations including cost, expense, as well as legal considerations, in the context of potential claims by the trustee.

<sup>4</sup> Ford and Lee, *op. cit.*, Update 134 (2015) at [9.4230].

<sup>5</sup> *Australian Prudential Regulation Authority v Kelaheer* [2019] FCA 1521 at [280] and [292].

<sup>6</sup> *Dibbs v Goren* (1849) 11 Beav. 483; 50 E.R. 904.

<sup>7</sup> See section 43(3)(a) of the Military Superannuation and Benefits Act 1991 and *Military Superannuation and Benefits Board of Trustees No. 1 v Drake* [2003] FCA 78 per Merkel J.

hand, the trust deed of the First State Superannuation Scheme<sup>8</sup> specifically provided that the trustee might recover overpayments made by the trustee which had been made on the basis of information provided by a beneficiary, a provision from which it might be arguable by reference to the *expressio unius*<sup>9</sup> principle that overpayments not so caused were irrecoverable.

11. A contractual basis for the recovery of an overpayment requires no detailed examination as it is not a matter of general law but dependent on the terms of the particular contract.

12. There will, in general, be a restitutionary right to recover an overpayment unless a relevant trust deed, contract or statute specifically excludes that right. The restitutionary principle is that when money is paid under a mistake, the person paying the money is *prima facie* entitled to recover it from the recipient.<sup>10</sup> The mistake may be a mistake of fact or a mistake of law.<sup>11</sup>

13. A number of defences are available to the recipient of a mistaken payment. For present purposes, the most significant defence is that restitution is not available<sup>12</sup> if:  
(with my underlining)

“it would be inequitable in all the circumstances to require [the recipient] to make restitution.”

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<sup>8</sup> This trust deed was the subject of *FSS Trustee Corporation v Eastaugh* [2016] VSC 636 (affirmed at [2017] VSCA 218), although the overpayment provision was not relevant to the decision.

<sup>9</sup> *Expressio unius est exclusio alterius* — The express mention of one thing is the exclusion of another: Osborn, *A Concise Law Dictionary*, Sweet & Maxwell, 1964.

<sup>10</sup> *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.* (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14 at [1].

<sup>11</sup> *David Securities Pty. Ltd. v Commonwealth Bank of Australia* (1992) 175 C.L.R. 333, 66 A.L.J.R. 768.

<sup>12</sup> *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.* (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14 at [69].

It should be noted that the enquiry is not whether the recipient has been unjustly enriched<sup>13</sup>: (with my underlining)

“the concept of unjust enrichment is not the basis of restitution relief in Australian law.”

14. The question whether it would be inequitable to require the recipient of a mistaken payment to make restitution is frequently addressed in the context of an alleged change of position on the part of the recipient. The following rules appear to be established by the authorities<sup>14</sup>:

- (a) The change of position may but need not relate to financial matters or other quantifiable detriment.<sup>15</sup>
- (b) The defence may be complete or may operate pro tanto, that is, to the extent of the inequity.<sup>16</sup>
- (c) The change of position must be in good faith. This means that at the time of the change of position, the recipient must not be on notice of the mistake.
- (d) The change of position must have been caused by the payment. Thus the payment of ordinary living expenses or the repayment of a debt which, in any event, had to be repaid do not constitute a change of position. On the other hand:
  - (i) Making an extraordinary payment or incurring additional expenses because of the mistaken payment, for example, making a gift or having an expensive holiday;

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<sup>13</sup> *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.* (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14 at [78].

<sup>14</sup> See Ford and Lee, *op. cit.*, at [17.6010], Update 146 (2016).

<sup>15</sup> See also *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.* (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14 at [88].

<sup>16</sup> See also *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.* (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14 at [17].

- (ii) Living on a more lavish scale as a result of the mistaken payment or payments;
  - (iii) Renovating a home in reliance on the mistaken payment;
  - (iv) Making a speculative and unsuccessful investment as a result of the mistaken payment;
  - (v) Using the moneys mistakenly paid in unsuccessful gambling —
- are a relevant change of position and will, depending on circumstances, provide a complete or partial defence to the restitutionary claim.

15. In *Australian Financial Services and Leasing Pty. Ltd. v Hills Industries Ltd.*<sup>17</sup>, the High Court held that change of position provided a full defence where the recipient had, on the faith of its receipt of the relevant moneys, refrained from taking legal proceedings or other steps to secure payment of debts owed to it by third parties.
16. It appears that the defence which, according to the High Court, exists if it would be inequitable to require restitution, includes but is wider than the change of position defence referred to in paragraphs 14 and 15 above. It was held in New Zealand, for example, that a recipient who knew that the payment to him was mistaken but who placed the moneys with a financial institution which then went into liquidation had a good defence.<sup>18</sup> It is difficult to analyse this case as involving a change of position on the faith of the mistaken payment but easier to justify the decision on the basis that, in the particular circumstances, it would have been inequitable to require restitution.

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<sup>17</sup> (2014) 253 C.L.R. 560, 88 A.L.J.R. 552, [2014] HCA 14.

<sup>18</sup> *National Bank of New Zealand Ltd. v Waitaki International Processing (NI) Ltd.* [1997] 1 N.Z.L.R. 724.

## Overpayment of Contributions

17. In principle, an employee or employer who makes an overpayment to a superannuation fund as a result of a mistake is prima facie entitled to recover it according to the ordinary law of restitution. It is immaterial whether the mistake concerns legal liability to make the payment or any other matter but for which the payment would not have been made.<sup>19</sup> The defences ordinarily available to the recipient of moneys mistakenly paid would be available to the trustee, including the defence discussed in paragraphs 13 to 16 above which exists where it would be inequitable to require restitution.
18. It is apparent, however, that the question whether it would be inequitable to require a superannuation fund to repay a contribution mistakenly made to the fund can involve very different questions, in a practical sense, from those which arise when a payment is mistakenly made to a fund member. Two questions which might be particularly acute in relation to payments mistakenly made to a superannuation fund are:
- (a) whether the investment (made on the faith of the contribution and without notice of any mistake) of the moneys paid is sufficiently liquid to make restitution equitable; and
  - (b) whether the costs associated with investigating the question of repayment (especially in the case of an employer contribution where the employer and the member-employee disagree as to whether the contribution is an overpayment) should reduce the amount of the required restitution.

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<sup>19</sup> *David Securities Pty. Ltd. v Commonwealth Bank of Australia* (1992) 175 C.L.R. 333, 66 A.L.J.R. 768 at 376 to 378.

## **Superannuation Complaints Tribunal**

19. Under section 14(2) of the Superannuation (Resolution of Complaints) Act 1993, a member of a superannuation fund may complain to the Superannuation Complaints Tribunal that a decision of the trustee of the fund is unfair or unreasonable. In deciding such complaints, the Tribunal stands in the position of the trustee and is bound by the law and the rules of the fund in the same way as the trustee.<sup>20</sup> Since it is the duty of a trustee, other things being equal, to recover overpayments made to beneficiaries, it will rarely be the case that the Tribunal has any role where an overpayment of a pension or lump sum has been made to the beneficiary of a superannuation fund. Proceedings to recover any such overpayment would be taken by the trustee in an ordinary court. On the other hand, where a beneficiary has mistakenly made a contribution to a superannuation fund or made a contribution which is mistakenly excessive in amount, it will usually be the case that the question whether the beneficiary can recover the overpayment is closely related to the question whether it is fair and reasonable that the trustee should decide to repay the amount in question. It follows that in many cases, a beneficiary who alleges that he or she has made an overpayment of a contribution to a fund will be able to challenge in the Tribunal a decision by the trustee not to repay it. In such a case, failure by the beneficiary in the Tribunal would not preclude the commencement by the beneficiary of recovery proceedings in court since the Tribunal's decision to confirm the trustee's refusal to repay the amount in question as being fair and reasonable has no juridical effect on the beneficiary's cause of action against the trustee. The cause of action against the trustee can only be determined finally by the exercise of judicial power by a court.

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<sup>20</sup> *Lykogiannis v Retail Employees Superannuation Pty. Ltd.* (2000) 97 F.C.R. 361; [2000] FCA 327 at 372.

## LIABILITY FOR LOSS

20. The trustee of a superannuation fund has a statutory duty of care<sup>21</sup>:

“to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments”

The trustee also has a statutory obligation to act in the best interests of the beneficiaries<sup>22</sup> and to prefer the interests of the beneficiaries in the event of any conflict of interest<sup>23</sup>. A professional superannuation trustee also has a common law duty of care<sup>24</sup>: (with my underlining)

“any holding out by a trustee of a special or particular knowledge, skill and experience reflects an assumption of that special degree of responsibility.”

21. Any overpayment to a beneficiary of a pension or lump sum carries the risk that one or other of these obligations will have been breached by the trustee of the fund, with consequential liability for the trustee. For example, an overpayment of income to a beneficiary might result in the diminution of capital to the ultimate prejudice of that beneficiary. To the extent that a superannuation fund is diminished by an overpayment to a particular beneficiary or beneficiaries, the other beneficiaries may be prejudiced. In addition, the cost and expense of detecting and correcting an error would, if it is borne by the superannuation fund, prejudice beneficiaries generally.

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<sup>21</sup> See section 52(2)(b) of the Superannuation Industry (Supervision) Act 1993 as amended with effect from 1 July 2013 by the Superannuation Legislation (Trustee Obligation and Prudential Standards) Act 2012.

<sup>22</sup> See section 52(2)(c) of the Superannuation Industry (Supervision) Act 1993 as amended with effect from 1 July 2013 by the Superannuation Legislation (Trustee Obligation and Prudential Standards) Act 2012.

<sup>23</sup> See section 52(2)(d) of the Superannuation Industry (Supervision) Act 1993 as amended with effect from 1 July 2013 by the Superannuation Legislation (Trustee Obligation and Prudential Standards) Act 2012.

<sup>24</sup> *Australian Securities and Investments Commission v Drake (No. 2)* (2016) 340 A.L.R. 75; 118 A.C.S.R. 189; [2016] FCA 1552 at [276] per Edelman J.

*Australian Prudential Regulation Authority v Kelaheer*

22. Issues of the kind raised in the preceding paragraph were addressed by Jagot J. in the Federal Court in the recent and very lengthy case of *Australian Prudential Regulation Authority v Kelaheer*.<sup>25</sup> In that case, the beneficiaries of a fund were entitled to receive the income derived from the investment of the assets of the fund. The trustee relied on National Australia Bank Limited to determine what receipts were capital and what receipts were income. The Bank erroneously overstated the amount of income of the fund. The trustee paid amounts to the beneficiaries in accordance with the Bank's advice. It followed that the beneficiaries received larger amounts than should have been paid to them, receiving, in fact, amounts of capital as well as the income to which they were entitled.
23. The total amount of the overpayments was approximately \$6.16 million. The trustee sought to remedy these overpayments by obtaining \$1.5 million in compensation from the Bank and reducing the quarterly income yield to the beneficiaries by approximately 0.2% until the deficiency was recovered. One difficulty with this approach was that because of changes in the identity of the beneficiaries, some individuals who had not received any overpayment had their quarterly income reduced.
24. The Australian Prudential Regulation Authority sought disqualification orders against two directors and three responsible officers of the trustee. Its case failed on the evidence. The Court held, among other things, that there was no evidence of any lack of care, failure to act in the best interests of members or failure to prefer the interests

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<sup>25</sup> [2019] FCA 1521 (20 September 2019).

of members to those of the trustee and its associates. The Court held, in particular, that the question whether to pursue particular claims for loss against the trustee itself, indemnity insurers or outside parties is one<sup>26</sup>:

“more akin to an exercise of discretion because it involves a potentially wide range of relevant considerations and an evaluation of all those considerations including the amount at stake, the prospects of success, the practical and legal issues which will be confronted, and the available alternatives (at the least).”

As a result, the Court rejected any proposition that the trustee was bound to “exhaust” consideration of such potential choices in action. The Court held that a superannuation trustee’s duty:<sup>27</sup>

“does not amount to a duty to avoid all loss and that an ordinary prudent person (and for that matter prudent superannuation trustee) can commit errors of judgement without being liable.”

To be liable, evidence of actual lack of care, skill and diligence or of other causative breach of duty is necessary.

### **Insurance and Reserves**

25. In *Australian Prudential Regulation Authority v Kelaher*, the trustee had effected indemnity insurance in relation to losses occasioned by breach of duty on the part of itself or its officers. As mentioned in paragraph 24 above, the question whether to pursue such insurance rights was a matter for the trustee to determine by the proper exercise of business judgement.

26. In *Australian Prudential Regulation Authority v Kelaher*, the trustee had established a number of reserves within the superannuation fund. The amounts allocated to these reserves, although ultimately held for the benefit of the members of the fund, were not

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<sup>26</sup> Ibid. at [154].

<sup>27</sup> Ibid. at [39].

treated as moneys immediately held to the credit of particular members' accounts. Establishing reserves of this kind was one of the prudential requirements under the superannuation legislation of the Commonwealth. One of the reserves was an operational reserve. It was intended to cover loss and expense occasioned by operational mistakes and difficulties in the administration of the fund. It was held that the trustee was entitled to debit the operational reserve with costs and expenses associated with remedying the overpayment errors which had been made.<sup>28</sup> Jagot J. rejected APRA's submission that the operational reserve could only be used<sup>29</sup>:

“when there was no insurance or third party liability that could meet the loss such that the only recourse of the trustee was to the assets of the fund pursuant to the trustee's indemnity.”

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<sup>28</sup> Ibid. at [124] and [127].

<sup>29</sup> Ibid. at [122].