

Publication: Superfunds
Date: October 2009
Page No: 48
Author(s): Jenny Willcocks (of Holding Redlich)
Publisher: The Association of Superannuation Funds of Australia Limited

Victimisation of trustees

On 5 August this year APRA issued a media release announcing that for the first time it was using its power under section 68 of the *Superannuation Industry (Supervision) Act 1993* (SIS) to take legal action against persons accused of victimising a trustee. Although this is the first time APRA has used section 68 it has previously been relied on in a civil claim by an individual in *Quinn v Carlton United Breweries Ltd – BC9803037*, Victorian Supreme Court 1998.

SIS has been in operation since 1994 but the fact that section 68 has not previously been used by APRA may indicate trustees are rarely victimised or they are not aware of their rights under the section. Another reason may be the difficulties involved in establishing a case under section 68.

While the outcome of this current case is still to be decided it is a timely reminder to consider the seriousness of offences under section 68 of SIS.

APRA alleges that a former Chief Executive Officer of the Queensland Retailers and Shopkeepers Association (QRTSA) victimised two directors of a superannuation trustee company. The alleged victimisation consists of the employment of a QRTSA employee and the engagement of the QRTSA auditor being terminated. Both were trustee directors of a superannuation fund linked to QRTSA.

It is alleged that the terminations followed the trustees' decision not to renew an outsourcing agreement with a corporation that had outsourced some of its services back to QRTSA. Therefore, the failure of the trustees to renew the outsourcing agreement resulted in a loss of income to QRTSA.

The trustees allege that they have suffered financial detriment from meeting their legal obligations as trustee directors.

Section 68 prohibits anyone committing an act of victimisation against a trustee or a responsible officer of a corporate trustee of an employer sponsored fund. Therefore, the section protects trustee directors and responsible officers.

An act of victimisation is defined in section 68 as occurring where the person committing the offence subjects, or threatens to subject, the trustee to a detriment because the trustee:

- has fulfilled, is in the process of fulfilling or proposing to fulfil, an obligation imposed on the trustee; or
- has exercised, is exercising, or proposing to exercise the trustee's powers in a particular way.

Dismissing, injuring or altering the position of an employee to his or her prejudice is regarded as subjecting an employee to a detriment. Any or all of these actions can be considered victimisation.

There are exceptions where an employer will not be taken to have subjected an employee to detriment. They are where the employer:

- permanently ceases to be an employer sponsor of the superannuation fund of which the employee is a member or
- temporarily ceases to contribute to a superannuation fund for a class of member which includes the employee or
- reduces the level of contributions to a superannuation fund for a class of member which includes the employee.

A breach of section 68 of SIS carries criminal and civil penalties. The criminal penalty is two years in prison.

Civil liability arises if the victim can prove loss or damage. They have the right to take action against the guilty person to recover the amount of this loss or damage.

In civil proceedings the person victimised does not need to prove the defendant's reason for the alleged action. The burden of proof is reversed and the defendant must prove the action was not motivated wholly or partly by the alleged reason. Therefore, the intention of the perpetrator of the victimisation will be an issue which can make these cases difficult to prove.

On the other hand the victim must show they have suffered the loss or damage. Consequently there has to be a clear connection between the act and the financial loss.

This connection can also be difficult to prove because there may be evidence to suggest there were other reasons for the termination of employment, for example redundancy or incompetence.

For corporate trustees who observe equal representation on their boards, it is inevitable that directors will have some affiliation with the fund as members or as employees of an employer sponsor. Trustees must act in the best interests of the members of the fund and cannot be influenced in their decision-making by other external allegiances.

It is also important for trustees to avoid a situation where clear conflicts of interest arise when companies related to an employer sponsor of the fund derive a direct benefit from the fund.

Any induction process for new directors on a trustee board and responsible officers should include information concerning their rights under section 68 of SIS. SIS imposes a very high duty of care on trustee directors and responsible officers of superannuation funds. Section 68 ensures that they are protected from personal detriment simply as a consequence of meeting that duty of care. It is therefore important that those intended to benefit from this protection are aware of its existence.

The outcome of this case will be watched with great interest because potentially it has far reaching implications for how section 68 will be used in the future both by APRA and individuals entitled to its protection.