Remarks of the Hon. Marilyn Warren AC
Chief Justice of Victoria
on the occasion of the

Law Council of Australia Annual
Superannuation Conference
Thursday, 23 February 2012

Chair, ladies and gentlemen. May I congratulate you on an excellent conference program. As delegates you are focusing on the top topics of superannuation law and investment at this time:

The duties owed by trustees.

The obligations of trustees to give reasons.

Fiduciary duties in the context of risk.

Law reform, especially, My Super.

Prudential standards.

Risk assessment.

With the increases in employer contributions and the sustained interest in superannuation investment in a context where funds are suffering loses, the role, duties and fiduciary obligations of trustees are very topical. With the My Super and Future of Financial Advice

Reforms due and the anticipated regulatory guidance from ASIC forthcoming litigators and legal advisors are keen for discussion.

For trustees and contributors times are uncertain. Managers we are told, are struggling to meet the July 1 reforms of the federal government.[1] There are concerns about the costs of implementing the reforms. It seems there are multiple tranches of legislative and regulatory reform. The parliamentary joint committee on companies and financial services is due to report shortly. It is a fluid time.

If the new laws are enacted ASIC it seems will consider duties, conflicts and licensing cancellation and suspension provisions.

Inevitably, demand for legal advice and possibly the necessity for litigation will increase. It is highly desirable, indeed essential, that litigators and legal advisors are ready to respond. The stakes are high.

Superannuation is probably the most important investment people can make outside buying their homes. It is important we can trust and rely on the trustees who manage both the Schemes and the Funds.

Hughes, D., "Leeway likely as super reform looms", *Australian Financial Review*, 10 February 2012, p.46.

This brings me to give a recent example:

National Nominees Ltd & Anor v Agora Asset Management Pty Ltd [2011] VSCA 327 in the Court of Appeal of the Victorian Supreme Court.

Military Scheme were nominees of the (now-superseded) Military Superannuation and Benefits Board of Trustees and the CSC – statutory corporations created to administer the Military Superannuation and Benefits Scheme. From May 2008, the appellants held units in Agora Absolute Return Fund II, whose trustees were the respondent. The Agora fund is an unregistered managed investment scheme. Prior to this, Agora managed Military Super's investment under a contract between the parties. The fund was created as an investment vehicle for Military super. The estimated value of Military Super's investment was about $160 million.

At the time the Military scheme invested in Agora there was no withdrawal fee, but the information memorandum disclosed that fees could be changed, but could not be raised above the amounts allowed for in the fund's trust deed without investor approval. A further information memorandum was published and provided to the

appellants in November 2010, to become effective in December 2010. It provided that withdrawal fees might be up to 5% of the withdrawal proceeds at the absolute discretion of Agora.

The trust deed/constitution of the fund provided that the responsible entity may determine that a unit holder has to pay a fee not exceeding 5% of the proceeds of a withdrawal request.

At about December 2010 the Military trustees became dissatisfied with the performance of Agora and proposed a substantial redemption. In February 2011 a full redemption was sought. In about May 2011 it became apparent that Agora, applying the withdrawal fee, had an estimated charge of close to $8 million. Military Super was apparently unaware that an exit fee would be charged. The Military trustees sought to cancel the redemption.

Agora's consent was required under the terms of the trust deed/constitution. Agora did not consent. The Military trustees sought and were granted an injunction to stop the Agora from acting on the withdrawal request before the trial.

The case was concerned with

a) Agora's legal ability to charge the exit fee as a matter of contract

b) Agora's exercise of its discretionary powers under the Fund's constitution by imposing the fee and refusing to consent to the cancellation of the withdrawal.

The appellants sought Agora's removal as trustee by way of remedy for breach of trust.

The trial judge, Justice Davies of the Commercial Court, found that Agora did not act other than in accordance with its fiduciary and contractual duties. Her Honour also held that the Information Memorandum formed part of the contract between the parties.
The Military Scheme appealed and the appeal was dismissed.

Topics of discussion raised by this case

So, the Lesson for super trustees? Know contract law. Understanding is essential for management and operation of funds and not just in relation to relationship with members.

One example of a trustee engaging in proceedings to seek determination as to the meaning and effect of provisions came before me in *BHLSPF Pty Ltd as trustee of the Brashs P/L Staff Provident Fund) v Brashs Pty Ltd and Ors*. The trustee was seeking an answer

to six questions related to the interpretation and application of the Rules of the Fund, the Trust Deed and a Supplementary Trust Deed. The first defendants were the principal employers of the fund and all other employees, the second defendant represented all those interested in the fund who would support one interpretation and the third defendant former members of the fund and their dependants who supported another interpretation. The questions arose in relation to what to do with the $3.6 million in surplus assets held by the Fund after the administration of Brashs Holdings. Once the application of the particular rules were decided, the trustee was entitled to exercise certain discretions with respect to distribution under the rules. But this case was conducted in the usual way by Originating Motion seeking answers to questions. However, these days there is potentially another far more expedient approach I will mention in a moment.

Another case which demonstrates the need for superannuation trustees to know their contract law is the recent decision in *Mang lic mot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd*. In this case the NSW Court of Appeal considered the duty of trustees under general fiduciary law and s 52 of the SIS Act. A member was suing the superannuation trustee who had changed insurers, arguing that it had resulted in a less beneficial insurance

scheme to members in relation to a total and permanent disability benefit. The NSW Court of Appeal found that ultimately, there was no material difference between the total and permanent disability clauses in the two insurance policies, also commenting on the internal and external reviews made in relation to the policies and that the trustees had given considerable attention to equivalence, and thought it had obtained it.

Interestingly, the Court also went on to consider what the result would have been if it had found that there *was* a material difference between the two insurance policies.

The Court stated that s 52(b) and (c) did not add anything to the general law requirements of a superannuation trustee. Section 52(c), of course, imports a covenant into the governing rules of a superannuation entity: "To ensure that the trustee's duties and powers are performed and exercised in the best interests of the Beneficiaries". The appellant had argued that by using the word "to ensure" in s 52(c), the question of the exercise of a trustee's discretionary power had been turned one of strict liability – looking at the result of an exercise of power rather than the trustee's motives. This was rejected and it was found that the Trustee would have been exercising a discretionary power when it negotiated the

terms of the new insurance policy, particularly the definition of total and permanent disability which related to the appellant. Liability still only arose when the discretion has been used improperly.

These are just examples of the courts responding.

The Commercial Court

Let me tell you a little about how the Commercial Court operates here in Melbourne.

The *Agora* case was an example of how the trial court and the appeal court can deal with cases when there is urgency (Injunction sought 27 May 2011, trial 8-10 August, judgment 1 September, appeal hearing 21 October, decision handed down on 28 October). These proceedings were completed from interlocutory judgment to appeal decision in five months.

Yet, how important stability and predictability in decision making is for superannuation. The superannuation industry is especially reliant upon a court system capable of producing predictable results well into the future. The Victorian Supreme Court and its Commercial Court in particular, is well placed and designed to

produce predictable and quick decisions in the case of disputes. A number of the specialist six judges in the Commercial Court have had experience in superannuation matters as counsel. They are conscious of the need to ensure that issues arising in a superannuation context need speedy resolution because of the impact that it will have upon individuals and for the fund into the future.

The other thing to bear in mind are the flexible processes available in the Commercial Court for litigators in the superannuation field. For example, early neutral evaluation is available and well suited to resolve the kinds of difficulties that may arise in the context of superannuation funds. Funds may need an indication of a position falling short of an actual decision. Early neutral evaluation could, conceivably, be of particular interest to superannuation funds as a means by which they may achieve the benefit of a judicial indication on matters requiring prompt board action for future investment or immediate payout. The Brashs case could have utilised an early neutral evaluation method. Quite a deal of information as to the different and flexible processes of the Commercial Court are available on the Commercial Court website http://www.supremecourt.vic.gov.au/home/commercial+court/. I

especially recommend looking at the *Green Book* of the Commercial Court.

Returning to the importance and relevance of timeliness in superannuation litigation it is worthwhile remembering the speed with which cases such as *EnvironInvest* and *Timbercorp* in the Commercial Court have been disposed of. *Timbercorp* came on for trial at a rapid rate with judgment delivered approximately six weeks later.

Thus, there is a lot happening in the superannuation field. It is an area that one way or another affects almost every person in Australia who has been employed since the late 80's or has been a dependant family member of a beneficiary or an individual who just wants to minimise taxation.

I understand that this conference marks its silver anniversary. Twenty-five years of excellent discussion in an area of dramatically changed relevance. I congratulate the Law Council of Australia on its achievement.

I formally open the conference and wish you well in your discussions and deliberations.