

2015: Super Forever...



Imperial Tobacco - the Commonwealth strikes back?

Scott Donald

Hebert Smith Freehills and UNSW Law

The essence of the problem



what constraint ought to be placed on employers who hold powers over some aspect of administration of the trust?

given that:

- in Australia, members of the workforce are required to participate in the superannuation system;
- superannuation contributions are a form of remuneration;
- superannuation continues to embody certain corporate tax arbitrages

but also

- the employer and employee have (in some approximate sense) bargained for the entitlements, including the distribution of discretions and powers

Imperial Group Pension Trust v Imperial Tobacco



*'I therefore reach the conclusion that the company's right to give or withhold its consent to an amendment ... is subject to the implied limitation that **the right shall not be exercised so as to destroy or seriously damage the relationship of confidence and trust between the company and its employees and former employees.**'*

Sir Nicolas Browne-Wilkinson V-C

Examples of powers reserved to employers



- to amend the deed – *Lock v Westpac*
- to consent to deed amendment – *Imperial Tobacco*
- to substitute a participating employer – *Re Courage Group Pensions Schemes*
- to suspend or determine contributions - *Hillsdown*
- to change benefits – *Prudential Staff Pensions*
- to terminate a fund or a division of a fund – *KCA Super*
- to distribute surplus monies – *Mettoy Pension Scheme v Evans*
- to appoint trustees (or directors of the trustee) – *Independent Pension Trustee v Law Construction*

The Commonwealth Strikes Back: *CBA v Barker*



Q: whether, under the common law of Australia, employment contracts contain a term that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between them.

HCA: No such universal (albeit rebuttable) implication appropriate

- not necessary for business efficacy
- not implied by custom
- not implied in law

But that may not be the end of the story ...



1. The implied term may be found on the facts
2. Don't underestimate the force of the powers

Exercising a power



A donee must

1. in good faith
2. for a proper purpose, and
3. after real and genuine consideration

act

Are all powers created equal?



Two (related) guiding principles:

1. Identify the purpose of the grant of power
2. Employ a 'purposive' construction

So certain powers are intrinsically designed to protect the employer's interest in the 'bargain'

Conclusion: The challenge of 'inter-legality'

