

Chapter 8

Structuring Super: Courting the Contract or Trusting the Trust?

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1 Introduction¹

It is without doubt that the superannuation industry in Australia is a very dynamic industry. It is ever-changing not only because of the degree of legislative tinkering, but also because of the level of consolidation in the industry, the increasing impact of public offer funds (as opposed to employer-sponsored funds) and the changes in the nature and range of products offered.

A dynamic industry, coupled with a significant financial downturn, leads necessarily to an examination of the foundations of the system. In ‘Cooper’ speak – to roll up the carpet, look under the floorboards and examine the strength of the basic foundations. To this end the question that arises is – what governance model and funding structure is most appropriate for the delivery of superannuation benefits in Australia?

Historically superannuation has been provided as an *ex gratia* payment, or an employment promise for superannuation benefits funded via contract or trust. Of course the current regulatory structure is based firmly on the trust structure. So should we court of the contract (or even consider the company) or continue trusting the trust?

How to Assess?

From a regulatory point of review, the type of governance model adopted is in turn a function of the regulatory objectives sought to be achieved. The model of regulation and governance chosen should ideally be the model that best achieves the identified objectives. Also the success of a system of regulation or governance is assessed by the suitability of the mechanism chosen as its foundation to advance the identified objectives. In essence this process is theoretically termed ‘regulatory analysis’.

¹ Much of this conference paper is extracted from Lisa Butler, ‘The Priority of the Trust Structure in the Age of Superannuation’ (2004, PhD Thesis, University of Tasmania).

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