

## A point meant to keep successor fund transfers out of court



Superannuation fund trustees involved in merger or successor fund transfer (SFT) discussions can breathe a little easier after a recent decision poured cool water on concerns that certain merger related dealings may have exposed parties to the risk of criminal prosecution.

In early 2022, [a decision of the New South Wales Supreme Court](#) (BTFM) brought to the forefront a potential implication of criminal liability. The decision provided protection to the trustee from possible criminal exposure under s. 249E of the *Crimes Act* 1900 (NSW), that makes it a crime for a trustee to receive or to solicit a benefit from a person as an inducement or reward for the appointment of any other person as trustee.

This issue had not been widely considered previously and gave trustees reason to be cautious when contemplating an SFT, and to consider whether they should seek assent from the court to confirm that the transaction did not have criminal implications.

The trustee for the HESTA Superannuation Fund (HESTA) and the trustee for Mercy Super (Mercy) (collectively the Trustees) took the issue to the Supreme Court of Queensland in relation to the impending SFT between the two trustees in [H.E.S.T Australia Ltd v Attorney-General \(Qld\); Mercy Super Pty Ltd v Attorney-General \(Qld\) \[2022\] QSC 221](#).



### Relief Sought

The applicants sought:

- (1) A declaration that an SFT of Mercy members and their assets to HESTA in accordance with the definition of SFT under the SIS Act is not an "appointment" so as to trigger provisions under the Queensland *Criminal Code* and *Victorian Crimes Act 1958*; or in the alternative
- (2) Assent or directions in relation to the SFT.



### Relevant Legislation

The following provisions that are substantially similar:

- Section 442F of the Queensland *Criminal Code*
- Section 180 of the *Crimes Act 1958* (Vic),

together the "Offence Provisions." The Offence Provisions make it a crime to offer or give valuable consideration to a trustee or to receive or solicit any value consideration as trustee, without consent of the beneficiaries or a judge of the Supreme Court, as an inducement or reward for appointment.



### The Decision

The Trustees argued that the SFT did not involve an “appointment” of a trustee (does not involve replacement or substitution as contemplated by the Offence Provisions). It is instead “the transfer of trust assets and the beneficiaries’ interests in those assets to a different trust.”

Justice Kelly agreed and declared that an the proposed SFT was “not a substituted appoint for the purposes of [the Offence Provisions].”

Justice Kelly also determined that the Trustees are justified in pursuing the SFT, and in the event of error on the issue of appointment, “would be prepared to provide the required assent under the Offence Provisions.”

**Caution:** Trustees governed by the laws of any state or territory outside of Victoria and Queensland, and specifically those governed by the laws of New South Wales, should consider this decision and the risks associated with



### The Issue

In *BTFM*, BT Funds Management Limited – the transferring trustee – explored the transfer of all members of one part of the super fund to another super fund. As part of the transfer, the transferring trustee wished to pursue negotiations with the successor trustee and BT’s parent regarding the possibility of either paying all or part of the transferring trustee’s costs of the transaction, compensating members for any losses suffered in consequence of the transfer and indemnifying BT in respect of any claims made against it in respect of which it would otherwise be entitled to be indemnified out of the assets of the fund.

Following concern that section 249E of the *Crimes Act* 1900 (NSW) may be implicated, BT applied to the NSW Supreme Court for orders giving consent to conduct involving offering, soliciting and receipt of payments connected with the transaction.

Ball J assumed that the transferring trustee was “contemplating appointing another trustee to hold those assets on trust for the members in its place” and therefore did not analyse whether an SFT included the “appointment” of a trustee within the terms of the *Crimes Act* 1900. Justice Ball consented to the transaction.

Justice Kelly in did not read BTFM as being on point or binding in relation to the question posed by HESTA and Mercy.



### The Reasoning

“The historical legislative purpose of the Offence Provisions was to prohibit a known practice of trustee companies giving a secret commission to an executor for appointment as a replacement trustee.” While there is no definition of “appointment,” the concept is well known in trust law – the process by which a person becomes a trustee of an express trust, which usually includes:

- (1) Specific appointment by the instrument creating the trust;
- (2) Appointment as a new trustee in accordance with a power contained in the trust instrument; or
- (3) Appointment resulting from a statutory power.

“The established meaning of ‘appointment . . . as trustee’ is the placing or designation of a person in the office of trustee.” The SFT in this case does “not rely upon any power of appointment,” rather powers to transfer and receive member benefits in accordance with the statutory provisions defining an SFT.

The decision is important because it provides trustee directors, executives, and professional advisors involved in facilitating consolidation in the superannuation industry with a degree of comfort that most SFT related negotiations don't present a significant risk of resulting unexpected criminal prosecution. However, some caution is still prudent in relation to the law in NSW and negotiations which involve the appointment of a new trustee as part of a merger (where a new trustee is appointed without the fund merging). For now though, superannuation trustees, executives, and professional advisors will welcome the greater clarity that this decision brings.

## CONTACT US

If you have any questions or need assistance, you can contact us directly via the details below:



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