

SUPREME COURT OF QUEENSLAND

CITATION: *H.E.S.T Australia Ltd v Attorney-General (Qld) & Anor; Mercy Super Pty Ltd v Attorney-General (Qld) & Anor* [2022] QSC 221

PARTIES: **In proceeding No BS 10464 of 2022:**
H.E.S.T AUSTRALIA LTD (ABN 66 006 818 695) in its capacity as trustee for the HESTA SUPERANNUATION FUND (ABN 64 971 749 321)
(applicant)
v
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first respondent)

AND

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
(second respondent)

In proceeding No BS 10501 of 2022:
MERCY SUPER PTY LTD (ABN 98 056 047 324) in its capacity as trustee for MERCY SUPER (ABN 11 789 425 178)
v
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first respondent)

AND

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
(second respondent)

FILE NO/S: BS 10464 of 2022
BS 10501 of 2022

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 October 2022

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2022

JUDGE: Kelly J

ORDER: In proceeding 10464/22, the orders of the court are that:

1. It is declared that a successor fund transfer of the members of the Mercy Super superannuation fund (ABN 11 789 425 178) (Mercy Super Fund) and their assets to the HESTA superannuation fund (ABN 64 971 749 321) (HESTA Fund) within the meaning and operation of regulation 6.29 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) is not a substituted appointment for the purposes of:

(a) *Criminal Code Act 1899* (Qld), Sch 1, s. 442F;

(b) *Crimes Act 1958* (Vic), s. 180;

(together, the Offence Provisions).

2. Pursuant to Rule 54.02 of the *Supreme Court (General Procedure) Rules 2015* (Vic) (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) and section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld)), it is directed that H.E.S.T. Australia Ltd (the HESTA Trustee) would be justified in, or alternatively, pursuant to the Offence Provisions (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) and section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld)), that the Court assents to the HESTA Trustee:

(a) offering to the Mercy Super Pty Ltd (the Mercy Super Trustee) and Mater Misericordiae Ltd (Mater) the promises (or any of them) set out in the Transaction Documents;

(b) giving to the Mercy Super Trustee and Mater the promises (or any of them) set out in the Transaction Documents.

3. The HESTA Trustee's costs of this application be paid or reimbursed out of the assets of the HESTA Fund on the indemnity basis.

4. I will hear the parties otherwise as to costs.

In proceeding 10501/22, the orders of the court are that:

1. It is declared that a successor fund transfer of the members of the Mercy Super superannuation fund (ABN 11 789 425 178) (the Mercy Super Fund) and their assets to the HESTA superannuation fund

(ABN 64 971 749 321) within the meaning and operation of regulation 6.29 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) is not a substituted appointment for the purposes of:

(a) *Criminal Code Act 1899* (Qld), Sch 1, s. 442F;

(b) *Crimes Act 1958* (Vic), s. 180;

(together, the Offence Provisions).

2. Pursuant to section 96(1) of the *Trusts Act 1973* (Qld), it is directed that Mercy Super Pty Ltd (the Mercy Super Trustee) would be justified in, or alternatively pursuant to the Offence Provisions (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) and section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld)), the Court assents to the Mercy Super Trustee:

(a) receiving for itself and its related parties from the H.E.S.T. Australia Ltd (the HESTA Trustee) (as trustee or in its personal capacity) the promises (or any of them) set out in the Transaction Documents;

(b) soliciting for itself and its related parties from the HESTA Trustee (as trustee or in its personal capacity) the promises (or any of them) set out in the Transaction Documents;

(c) receiving and enforcing for itself and its related parties the promises (or any of them) from the HESTA Trustee (as trustee or in its personal capacity) set out in the Transaction Documents.

3. The Mercy Super Trustee's costs of this application be paid or reimbursed out of the assets of the Mercy Super Fund on an indemnity basis.

4. I will hear the parties otherwise as to costs.

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – DECLARATIONS – APPROPRIATE FORM OF RELIEF – DISCRETION OF COURT – where the applicants are both trustees for registrable superannuation entities, Mercy Super and the HESTA Superannuation Fund – where the applicants propose to effect a successor fund transfer of the members of Mercy Super Fund and their assets to the HESTA Superannuation Fund – where the proposed successor fund transfer involves the transfer of Mercy Super members, their

benefits and matching assets to HESTA – where the transferred assets are not impressed with the first trust, but rather a new trust defined and constituted by the terms of the successor fund transfer deed and the governing rules of the successor fund – where neither trustee relies on a power of appointment in the transaction documents – where s. 442F of the *Criminal Code* (Qld) and s. 180 of the *Crimes Act* 1958 (Vic) prohibit secret commissions to trustees in return for substituted appointment – where the applicants seek a declaration that the proposed successor fund transfer is not a substituted appointment – where the applicants argue that the proposed successor fund transfer does not involve the replacement or substitution of a trustee – where the parties and APRA did not submit that the Court lacked jurisdiction to make the declaration sought – whether a declaration should be made that the proposed successor fund transfer is not a substituted appointment for the purposes of s. 442F of the *Criminal Code* (Qld) and s. 180 of the *Crimes Act* 1958 (Vic)

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – where the applicants alternatively seek assent or directions of the Court in respect of the proposed successor funds transfer – whether the Court should direct that the applicants are justified in effecting the proposed successor funds transfer

Acts Interpretation Act 1954 (Qld), s 35

Crimes Act 1900 (NSW), s 249E

Crimes Act 1958 (Vic), s 175, s 180

Criminal Code (Qld), s 442A, s 442F

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic), s 4

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Qld), s 9

Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.03, reg 6.29

Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 54.01, r 54.02, r 54.03

Trusts Act 1973 (Qld), s 96

Alcan (NT) Illumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41, cited

Bass v Permanent Trustee (1999) 198 CLR 334, cited.

Commonwealth v Sterling Nicholas Duty Free Pty Ltd (1972) 126 CLR 297, considered

Pharmacy Guild of Australia v Ramsay Health Care Ltd [2019] NSWSC 1045, considered

Re BT Funds Management Ltd as trustee for Retirement Wrap Superannuation Fund [2022] NSWSC 401, considered

Re Application by United Super Pty Ltd atf Construction and Building Unions Superannuation Fund [2021] NSWSC 1679,

cited
Sankey v Whitlam (1978) 142 CLR 1, cited
X v Australian Prudential Regulatory Authority (2007) 226
CLR 630, cited

COUNSEL: AC Stumer for the applicant in BS 10464/22
D Hogan-Doran SC with T Glover for the applicant in BS
10501/22
GA Thompson KC with EL Hoiberg for the first respondent
in both proceedings
O Bigos KC with E Smith for the second respondent in both
proceedings
C Archibald KC with S MacKenzie for the Australian
Prudential Regulation Authority, appearing with leave of the
Court

SOLICITORS: Allens for the applicant in BS 10464/22
Ashurst for the applicant in BS 10501/22
Crown Law for the first respondent in both proceedings
Victorian Government Solicitor's Office for the second
respondent in both proceedings
Australian Prudential Regulation Authority, appearing with
leave of the Court

Matters of introduction and background

- [1] Mercy Super Pty Ltd (**the Mercy Super Trustee**) is the trustee for a superannuation fund, Mercy Super (**Mercy Super**). The Mercy Super Trustee carries on business in Queensland. Mercy Super is registered as a “registrable superannuation entity” (**RSE**) under Part 2B of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**).¹ Mercy Super has approximately 13,000 members and the aggregate value of its fund is approximately \$1.6 billion.² The law of Queensland is the governing law of Mercy Super.
- [2] H.E.S.T. Australia Ltd (**the HESTA Trustee**) is the trustee for another registered RSE, the HESTA Superannuation Fund (**HESTA**). The HESTA Trustee is registered, and has its principal place of business, in Victoria. HESTA has approximately 930,000 members and approximately \$67 billion in members’ assets under management.³
- [3] The Mercy Super Trustee is proposing a “successor fund transfer” (**SFT**)⁴ which will involve a transfer of the Mercy Super members, their benefits and matching assets to

¹ Ex 1, Tab 5, [17].

² Ex 1, Tab 5, [18].

³ Ex 1, Tab 5, [22].

⁴ See Ex 1, Tab 5, [54] and Exh TMC-1, 318-361 (SFT Deed executed 26 July 2022).

HESTA (**the Proposed Transfer**). Ordinarily, a member's benefits must not be transferred from a fund unless the member consents. An SFT is an exception permitted in specified circumstances under the SIS Act.⁵ An SFT involves a transfer of the members' benefits from an RSE to a different RSE, known as a "successor fund", where the consent of the individual members is not required.⁶

[4] The Proposed Transfer is to be made in accordance with a number of documents (**the Transaction Documents**). Included within the Transaction Documents are various promises made by the HESTA Trustee to the Mercy Super Trustee and others (**the Promises**). Relevantly, the Promises are:

- (a) to indemnify the Mercy Super Trustee, each former, present and future director of the Mercy Super Trustee, and each former, present and future officer or delegate of the Mercy Super Trustee with respect to certain liabilities;⁷
- (b) to agree to the novation to the HESTA Trustee of all agreements relating to the provision of services by the Mercy Super Fund administrator;⁸
- (c) to agree to the novation to the HESTA Trustee of all policies and agreements relating to the provision of group insurance arrangements;⁹
- (d) to represent and warrant the status, authority, capacity, and legal and regulatory compliance of the HESTA Trustee;¹⁰
- (e) to transfer all Mercy Super employees to the HESTA Trustee, where possible to a comparable role, and where a comparable role is not available, to a non-comparable role;¹¹ and
- (f) to conduct negotiations on an exclusive basis for a period of 6 months from the date a "Letter of Intent" is signed or until the execution of the Successor Fund Transfer Deed (whichever occurs earlier).¹²

⁵ See *Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations)*, rr. 6.29 and 1.03.

⁶ A requirement of an SFT is an agreement between the transferring RSE licensee and the receiving RSE licensee that the successor fund will confer on the members 'equivalent rights' to those rights the member had in the transferring RSE in respect of their benefits: SIS Regulations, r. 1.03.

⁷ Ex 1, Tab 13, Exh DJB-1, 239 (Successor Fund Transfer Deed) cl 10.1.

⁸ Ex 1, Tab 13, Exh DJB-1, 226 (Successor Fund Transfer Deed) cl 3.1(d).

⁹ Ex 1, Tab 13, Exh DJB-1, 226 (Successor Fund Transfer Deed) cl 3.1(e).

¹⁰ Ex 1, Tab 13, Exh DJB-1, 238 (Successor Fund Transfer Deed) cl 9.2.

¹¹ Ex 1 Tab 13, [42]-[44].

¹² Ex 1 Tab 13, Exh DJB-1, 208 (Letter of Intent) cl 10.

- [5] There are two applications before the Court. One is filed by the HESTA Trustee (“**the HESTA Application**”)¹³ and the other by the Mercy Super Trustee (“**the Mercy Super Application**”).¹⁴ The applications seek declaratory orders and alternatively assent or directions in relation to the Proposed Transfer and the Promises. The respondents to each proceeding are the Attorneys-General for Queensland and Victoria. The Australian Prudential Regulation Authority (**APRA**) appears pursuant to a previous grant of leave.¹⁵
- [6] The impetus for the applications is a recent decision of the Supreme Court of New South Wales in *BT Funds Management Limited as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401 (**BTFM**). In that case, Ball J gave consent to certain conduct engaged in or proposed to be engaged in which, absent consent, “may have amounted to a breach”¹⁶ of s. 249E of the *Crimes Act 1900* (NSW) and similar provisions in Queensland, Victoria and Western Australia.¹⁷ His Honour gave consent for the solicitation, receipt and enforcement of the benefits pursuant to s. 249E(2)(b) of the *Crimes Act 1900* (NSW) which, in effect, authorised the trustee of the subject fund to proceed with the proposed transfer.¹⁸
- [7] The applications are concerned with the similar provisions in Queensland (*Queensland Criminal Code* s. 442F) and Victoria (*Crimes Act 1958* (Vic), s. 180) (**the Offence Provisions**). To the extent that the applicants seek declaratory relief, the declaration sought is that an SFT of the members of the Mercy Super Fund and their assets to the HESTA Fund within the meaning and operation of regulation 6.29 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) is not a substituted appointment for the purposes of the Offence Provisions. In advancing their entitlement to this declaratory relief, the applicants have submitted that *BTFM* should not be followed. In the alternative, the applicants seek directions and assent in relation to the offering, giving, solicitation, enforcement and receipt of the Promises.

The Offence Provisions

- [8] The Offence Provisions are in substantially similar terms.

¹³ Ex 1 Tab 9.

¹⁴ Ex 1 Tab 1.

¹⁵ Orders of Jackson J dated 5 September 2022.

¹⁶ [2022] NSWSC 401 [1].

¹⁷ Ibid [13].

¹⁸ Ibid [1], [19]-[22].

[9] Section 442F of the Queensland *Criminal Code* states:

“442F Secret commission to trustee in return for substituted appointment

Any person who offers or gives any valuable consideration to a trustee, or any trustee who receives or solicits any valuable consideration for himself or herself or for any other person, without the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court, as an inducement or reward for appointing or having appointed, or for joining or having joined with another in appointing, or for authorising or having authorised, or for joining or having joined with another in authorising, any person to be appointed in the person’s stead or instead of the person and any other person as trustee, commits a crime.

[10] Section 180 of the *Crimes Act 1958* (Vic) states:

180 Secret commission to trustee in return for substituted appointment

Every person who offers or gives any valuable consideration to a trustee and every trustee who receives or solicits any valuable consideration for himself or for any other person without the assent of the persons beneficially entitled to the estate or of the Supreme Court as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing or for authorizing or having authorized or for joining or having joined with another in authorizing any person to be appointed in his stead or instead of him and any other person as trustee shall be guilty of an indictable offence, and shall—

- (a) be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.”

[11] The term “Trustee” is defined in both Acts:

- (a) s. 442A(1) of the Queensland *Criminal Code* provides:

trustee includes the public trustee, an executor, administrator, liquidator, official assignee, or trustee in bankruptcy, receiver, administrator appointed under the *Guardianship and Administration Act 2000*, person having power to appoint a trustee, or person entitled to obtain probate of the will or letters of administration to the estate of a deceased person, or any other person occupying a fiduciary position.

- (b) s. 175 of the *Crimes Act 1958* (Vic) provides:

trustee includes trustee executor administrator liquidator trustee within the meaning of any Act relating to bankruptcy receiver director administrator or guardian under the *Guardianship and Administration Act 2019* or attorney under an enduring power of attorney under the *Powers of Attorney Act 2014* or person having power to appoint a trustee or person entitled to obtain probate of the will or letters of administration to the estate of a deceased person;

[12] The expression “valuable consideration” is defined in both Acts:

(a) s. 442A(1) of the Queensland *Criminal Code* provides:

valuable consideration includes any real or personal property; also money, loan, office, place, employment, agreement to give employment, benefit, or advantage whatsoever, and any commission or rebate, payment in excess of actual value of the goods or service, deduction or percentage, bonus or discount, or any forbearance to demand any moneys or moneys’ worth or valuable thing; also some detriment, loss or responsibility given, suffered, or taken, or the refraining from carrying out or doing something which lawfully should be done; and the acceptance of any of the said things shall be deemed the receipt of a valuable consideration. The offer of any valuable consideration includes any offer of any agreement or promise to give, and every holding out of any expectation of valuable consideration. The receipt of any valuable consideration includes any acceptance of any agreement, promise, or offer to give, or of any holding out of any expectation of valuable consideration.

(b) s. 175 of the *Crimes Act 1958* (Vic) provides:

valuable consideration includes any money loan office place employment agreement to give employment benefit or advantage whatsoever and any commission or rebate deduction or percentage bonus or discount or any forbearance to demand any money or money’s worth or valuable thing and the acceptance of any of the said things shall be deemed the receipt of a valuable consideration;

valuable consideration when used in connexion with the offer thereof includes any offer of any agreement or promise to give and every holding out of any expectation of valuable consideration;

valuable consideration when used in connexion with the receipt thereof includes any acceptance of any agreement promise or offer to give and of any holding out of any expectation of valuable consideration.

[13] In Queensland and Victoria, any act or thing prohibited by the legislation is prohibited whether done directly or indirectly by the person mentioned or by or through any other person.¹⁹

BTFM

¹⁹ *Criminal Code* (Qld), s. 442A(2); *Crimes Act 1953* (Vic), s. 175(2). See too *Criminal Code* (WA), s. 546(8).

[14] In *BTFM*, a wholly owned subsidiary of Westpac, BT Funds Management Limited (**BT**) was the trustee of the Retirement Wrap Superannuation Fund (**the RAP Super Fund**). There were two parts to the RAP Super Fund, one of which was known as the BT Super for Life Plan (**the Plan**). BT was proposing the possible transfer of all of the members of the Plan to another superannuation fund. As part of that proposal, BT wished to pursue negotiations with potential transferees and Westpac concerning the possibility of the transferee or Westpac paying all or part of BT'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 Plan. In the context of this proposal, BT applied for a series of orders giving consent to conduct involving the offering, soliciting and receipt of payments connected with the proposed transaction. BT was apparently concerned that, absent consent, its conduct may have amounted to a breach of s. 249E of the *Crimes Act* 1900 (NSW). That breach might have arisen if the provision applied to the solicitation from or payment or provision by a potential transferee or Westpac of the already described costs, losses or indemnities.

[15] The application was made *ex parte* and there was no contradictor. Orders were made the next day, when Reasons for the orders were published.

[16] The Reasons begin by noting that the Court had made orders giving its consent to certain conduct engaged in or proposed to be engaged in by BT which absent consent “may have amounted to a breach of s. 249E of the *Crimes Act* 1900 (NSW) [and of similar provisions in Queensland, Victoria and Western Australia]”.²⁰ The Reasons later observe:²¹

“[BT] is concerned that [s. 249E of the *Crimes Act* 1900 (NSW) and similar provisions in Queensland, Victoria and Western Australia] apply to the solicitation from or payment by a potential transferee or Westpac of the costs, losses or indemnities earlier described. Accordingly, it sought the consent of this Court to the solicitation and payment of those amounts, and any agreement to pay those amounts by the potential transferees or Westpac.”

[17] Ball J considered that the substance of s. 249E of the *Crimes Act* 1900 (NSW) made it a crime for a trustee to receive or to solicit a benefit from a person as an inducement or

²⁰ [2002] NSWSC 401 [1].

²¹ *Ibid* [10].

reward for the appointment of any other person to be a person entrusted with the property without the consent of either each person beneficially entitled to the property or the Supreme Court. His Honour reasoned as follows:²²

“It seems clear that [s 249E of the *Crimes Act* 1900 (NSW) and similar provisions in Queensland, Victoria and Western Australia] are broad enough to catch the payments or benefits which are in contemplation. Taking s. 249E as an example, [BT] holds the assets of the Plan as trustee for the members. It is contemplating appointing another trustee to hold those assets on trust for the members in its place. It is seeking to solicit payments and indemnities in connection with that transaction; and those payments and indemnities are sought and will be made as an inducement for the appointment, at least in the sense that [BT] intends to take into account, among other things, the extent to which a potential transferee is willing to pay or provide that indemnity in deciding whether and, if so, to whom it will transfer the business.”

[18] Ball J considered that the evident purpose of the provisions was to prevent a trustee from being persuaded by the prospect of personal gain to exercise its power to appoint a substitute trustee.²³

[19] His Honour relevantly observed that BT was “*contemplating appointing another trustee*” to hold the assets of the Plan.²⁴ In this respect, it is not clear why his Honour used the language of “appointing”. That language may have reflected submissions made, or the evidence relied upon, in *BTFM*. However, the language appears in the Reasons as an assumption rather than as a reasoned conclusion. It is not clear whether Ball J had been asked to address the specific question whether s. 249E of the *Crimes Act* 1900 (NSW) and the similar provisions in Queensland, Victoria and Western Australia were engaged on the facts of *BTFM*. I do not read *BTFM* as containing a *ratio decidendi* directed to the principal question before me. Further, as the decision was made on an *ex parte* application without a contradictor and in apparent circumstances of urgency, I have decided that I am not obliged, and I am not minded, to follow *BTFM* in dealing with the applicants’ primary argument.

The applicants’ primary argument

[20] The applicants’ primary argument is concerned with the proper construction of the Offence Provisions. They contend that, upon that proper construction, the proposed

²² Ibid [13].

²³ Ibid [18].

²⁴ Ibid [13].

SFT does not involve an appointment of a trustee in the stead of an existing trustee. Rather, the proposed SFT is said to involve the transfer of trust assets and the beneficiaries' interests in those assets to a different trust. As characterised, the proposed SFT does not involve the replacement or substitution of a trustee as is contemplated by the Offence Provisions.

[21] The Queensland Attorney-General and APRA adopt this primary argument as correct. The Victorian Attorney-General referred to the argument as involving a “narrow construction” and submitted “there may be other constructions available”. Ultimately, however, in oral submissions made on her behalf, the Victorian Attorney-General submitted that there was no real dispute as to the proper construction of the Offence Provisions.²⁵

[22] In *Alcan (NT) Illumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,²⁶ the joint judgment said:

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.”

[23] The Offence Provisions use the language of a trustee “appointing or having appointed or ... joining or having joined with another in appointing or for authorizing or having authorized or for joining or having joined with another in authorizing any person to be appointed in his stead or instead of him and any other person as trustee”. The applicants' primary argument may be distilled down to the proposition that an SFT involves not the appointment of a new trustee to an existing trust but rather the transfer of assets and members from one trust to a different trust. Once transferred, the assets are not impressed with the first trust but with a new trust, defined and constituted by the terms of the transfer deed and the governing rules of the successor fund. This point

²⁵ T 1-54 ll 1-10.

²⁶ (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

was particularly emphasised by the oral submissions made on behalf of the Attorney-General for Queensland.²⁷

- [24] 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.²⁸ A replacement or substituted trustee would assume office under the same trust as the first trustee, that trust being defined by existing terms applicable to the substitute. It may be noted that the headings of each of the Offence Provisions currently reads “*Secret commission to trustee in return for substituted appointment*”.²⁹
- [25] The applicants’ primary argument is consistent with the language employed in the Offence Provisions. Whilst there is no statutory definition of “appointment”, or indeed “appointing” or “appointed”, the concept of “appointment” of a trustee is well known in trust law.³⁰ APRA provided detailed written and oral submissions directed to the concept of “appointment” in Australian trusts legislation.³¹
- [26] The process by which a person becomes a trustee of an express trust is usually described as by “appointment”. A person usually becomes a trustee either by being specifically appointed by the instrument creating the trust or by being appointed a new trustee pursuant to a power contained in the trust instrument or pursuant to a statutory power exercisable by some person or the court.³²
- [27] Trust legislation in each jurisdiction in Australia uses the terminology of “appointment” in providing for a person to be designated to fill the position of a trustee, including by the court, and for the consequences of appointments, such as vesting of property.³³ Persons authorised to “appoint” new trustees are the persons nominated for the purpose of “appointing new trustees” in the trust instrument, the

²⁷ T 1-46 145-T 1-47 15.

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 1905, 511, 515 (J Mackey).

²⁹ See *Acts Interpretation Act 1954* (Qld), s. 35C(1) (heading forms part of the provision to which it is a heading).

³⁰ Paul Finn, *Fiduciary Obligations* (The Federation Press, 40th Anniversary Republication with Additional Essays, 2016) 300 [footnotes omitted].

³¹ Ex 1, Tab 17 [12]-[18].

³² JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) (**Jacobs’ Law of Trusts**) [15-01].

³³ See eg *Trustee Act 1958* (Vic), Parts III and IV; *Trusts Act 1973* (Qld), Part 2 (Appointment and discharge of trustees—devolution of trusts).

“surviving or continuing trustees” or “personal representatives of the last surviving or continuing trustee”, and the court.³⁴ A new trustee may be appointed “in the place of a trustee” who, amongst other things, seeks to be discharged.³⁵

[28] Trust legislation has used the same terminology of “appointment” for around 200 years. The terminology was present in the *Trustee Act* 1830 (UK),³⁶ which was the source of the *Trustee Act* 1852 (NSW)³⁷ and *Trustee Act* 1856 (Vic),³⁸ and was also picked up in the *Trustees and Incapacitated Persons Act* 1867 (Qld).³⁹ Trust legislation has also provided for the transfer, conveyance, devolution and vesting of assets to occur as acts which are separate from the “appointment” of a trustee.⁴⁰ An act of transfer is properly described as a matter for the power of the trustee in respect of dealings with the property of the trust.

[29] In my consideration, the term “appointment” has an established meaning within the law of trusts. The adoption of the term “appointment” in the Offence Provisions should be construed, consistent with the principle *in pari materia*,⁴¹ as having been intended to convey the same meaning as that term has when used in the trust legislation in each respective jurisdiction. That established meaning of “appointment... as trustee” is the placing or designation of a person in the office of trustee. That also reflects the natural meaning of the term. I find that the Offence Provisions should be read as having as their subject the designation of a person to office rather than the effect of a dealing with assets. The Offence Provisions are directed towards “appointment”, both “as trustee” and “instead of” the original trustee.

[30] The Transaction Documents do not rely upon any power of appointment. Rather, they rely upon an express power, aligned with the statutory permission for an SFT, empowering the Mercy Super Trustee to transfer member benefits to a successor

³⁴ *Trustee Act* 1958 (Vic) s. 41(1); *Trusts Act* 1973 (Qld) s. 12(1).

³⁵ *Trustee Act* 1958 (Vic) s. 41; *Trusts Act* 1973 (Qld) s. 12.

³⁶ 11 G.4 & 1 W.4 c.60; consolidated and enlarged in *The Trustee Act* 1850 (UK) 13&14 Vic c.60 and *The Trustee Act* 1852 (UK) 15&16 Vic c.55.

³⁷ 16 Vic No 19; extended in *The Trustee Act* 1853 (NSW) 17 Vic No 4.

³⁸ 19 Vic No 20.

³⁹ 31 Vic No 19; consolidated in *Trustee and Executors Acts* 1897-1964 (Qld).

⁴⁰ *Trustee Act* 1958 (Vic) ss. 44(3), 45, *Trusts Act* 1973 (Qld) ss. 15, 16.

⁴¹ Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) [8.280], [8.290].

fund.⁴² The HESTA Trustee relies on a power to receive member benefits as a successor fund trustee, and not as the appointed trustee of another regulated superannuation fund.⁴³ Further, and for the purposes of reg. 6.29 of the SIS Regulations, the HESTA Trustee has agreed with the Mercy Super Trustee that HESTA will confer on each transferring member equivalent rights in HESTA to the rights that the transferring member had in Mercy Super in respect of the transferred benefits.

[31] To qualify as an SFT, two already established and existing trustees must agree that the rights acquired by transferring members in the successor fund will be “equivalent”, but not necessarily identical, to their rights in the original fund.⁴⁴ The successor fund then incorporates the assets transferred from the original fund. The assets are not impressed with the first trust but with a new one, defined and constituted by the terms of the SFT deed and the governing rules of the successor fund.

[32] Viewed as such an SFT is more akin to an exercise of a power of advancement rather than a power of appointment. A power of advancement⁴⁵ gives a trustee the power to transfer trust property to a beneficiary or apply trust property for their “advancement or benefit”. A power of advancement in a trust may be used to transfer trust property to a new trust where it may be held on terms wholly⁴⁶ or partly different from the original trust.⁴⁷

Declaratory Relief

[33] No party or APRA made a submission to the effect that the Court lacked jurisdiction to make a declaration.

⁴² Ex 1, Tab 5, [57(a)], referring to Exh TMC-1, 157 (Mercy Super Trust Deed) cl 19.3 (the Mercy Super Trustee may transfer the whole or part of a member’s benefit to another superannuation fund without the request or consent of the member where the superannuation fund is a “successor fund”).

⁴³ Ex 1, Tab 5, [57(b)], referring to Ex 1, Tab 13, Exh DJB-1, 170 (HESTA Consolidated Trust Deed) cl 22.1 (the HESTA Trustee may accept moneys from another superannuation fund in respect of a person’s interest in that superannuation fund and shall apply the same to HESTA for the purpose of providing benefits for or in respect of that person and admit the person as a member of HESTA). See also Ex 1, Tab 13, [20].

⁴⁴ SIS Regulations, reg. 1.03(1).

⁴⁵ The power may be expressly conferred by the trust instrument or conferred by statute. The Court also has an inherent jurisdiction. See *Jacobs’ Law of Trusts*, 490-493 [20-57]-[20-59], 496-497 [20-62]. See e.g. *Pilkington v Inland Revenue Commissioners* [1964] AC 612; *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615.

⁴⁶ *Re Clore* [1982] Ch 456.

⁴⁷ *Re Hastings-Bass* [1975] Ch 25.

[34] The real issue concerned whether, as a matter of discretion, a declaration should be made.

[35] A helpful starting point is *Commonwealth v Sterling Nicholas Duty Free Pty Ltd*.⁴⁸ The Supreme Court of New South Wales made a declaration that the respondent was not prohibited by s. 7 of the *Airports (Business Concessions) Act 1959* (Cth) from delivering goods sold from a shop at Darlinghurst to persons about to depart overseas from Sydney Airport. The High Court ultimately found that the Supreme Court should not have made the declaration because it had misinterpreted the legislation in question. However, Barwick CJ identified an important statement of principle as follows:⁴⁹

“The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion, the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the Court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.

...

I find no reason to criticise the form of the declaration made. Indeed I would endorse it as a most careful and precise exercise of the jurisdiction to make a declaratory order.”

[36] This passage was cited with approval in *Bass v Permanent Trustee*.⁵⁰

[37] In *Sankey v Whitlam*,⁵¹ the High Court made declarations that certain documents which were the subject of a subpoena in criminal proceedings were not protected by Crown privilege. Gibbs ACJ relevantly said:⁵²

“The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very

⁴⁸ (1972) 126 CLR 297.

⁴⁹ Ibid 305.

⁵⁰ (1999) 198 CLR 334, 356 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁵¹ (1978) 142 CLR 1.

⁵² Ibid 25-26.

evils it is designed to avoid...[A] court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order.”

[38] In *X v Australian Prudential Regulatory Authority*,⁵³ the joint judgment⁵⁴ approved that part of the judgment of Gibbs ACJ which had referred to the use of the power as being “free from technicalities”.

[39] In *Pharmacy Guild of Australia v Ramsay Health Care Ltd*,⁵⁵ Ward CJ in Eq marshalled a number of authorities which bear upon the proper approach to the exercise of the discretion to make a declaration in relation to criminality. From her Honour’s judgment some propositions, which are particularly relevant to the present case, can be extracted:

- (a) whilst the case law suggests that the making of such a declaration should occur “only in exceptional cases”, the approach to be adopted is “essentially flexible”, with only one rigid rule being suggested (albeit in the United Kingdom) namely that once criminal proceedings have begun, the civil courts should not intervene;⁵⁶
- (b) whether a case is “fact sensitive” is a particularly important matter. In *R v Attorney General*,⁵⁷ Lord Steyn relevantly said that whether a case is fact sensitive or not “is a factor of great importance and most claims for a declaration that particular conduct is unlawful will founder on this ground ... It is clear as a pikestaff that there can be no issue of fact”;⁵⁸
- (c) the court will ordinarily refuse to grant a declaration based upon hypothetical facts and the question raised must not be abstract or hypothetical;⁵⁹

⁵³ (2007) 226 CLR 630, 637 [17].

⁵⁴ Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.
⁵⁵ [2019] NSWSC 1045.

⁵⁶ Ibid [157], [160].

⁵⁷ [2004] 1 AC 357 [23].

⁵⁸ *Pharmacy Guild of Australia v Ramsay Health Care Ltd* [2019] NSWSC 1045 [161].

⁵⁹ Ibid [162].

- (d) a court is more likely to intervene where it is asked to rule on future as distinct from past conduct;⁶⁰
- (e) a court will be more cautious about granting declaratory relief that establishes that conduct is criminal as opposed to not criminal.⁶¹

[40] The applicants pressed the case for a declaration by submitting that the present circumstances involved the recognised general circumstances which are ordinarily required before a declaration is made namely the applicants' having a real interest in raising the question, the question being real and not theoretical and a proper contradictor being available.⁶² Beyond those general circumstances, the applicants relied upon the following further matters in support of the favourable exercise of the discretion:

- (a) the declaration concerns a pure question of law;
- (b) the case is not fact sensitive, indeed, there is no dispute about the facts as the facts are wholly contained within the Transaction Documents;⁶³
- (c) the declaration concerns the legality of future conduct because the transfer of assets and members has not yet occurred and the transaction is presently conditional upon approval;
- (d) there are no pending criminal proceedings; and
- (e) there is both a private and public interest in the applicants and the members of the funds they administer knowing that the Proposed Transfer is not unlawful.

[41] The Queensland Attorney-General did not make any submissions as to whether it was appropriate for this Court to make a declaration.

[42] The Victorian Attorney-General made submissions addressing the factors in favour of, and against, the making of a declaration in the present circumstances. In terms of the matters favouring the exercise of discretion, the Victorian Attorney-General accepted

⁶⁰ Ibid [164]; see also *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84, 90 [19].

⁶¹ Ibid [166].

⁶² *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437-438 (Gibbs J), quoting *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448 (Dunedin LJ).

⁶³ T 1-39 ll 20-25.

that the question before the Court involved a pure question of law and concerned future conduct. It was accepted that the declaration sought would declare that the conduct was not criminal as distinct from criminal. The factors relied upon as not favouring the exercise of discretion were identified as being that the possible offence involved a violation of the criminal law proper rather than being of a regulatory character, the applicants were said to have failed to demonstrate a cogent public or private interest, there was said to be no real issue in dispute and there were more appropriate remedies than a declaration, namely assent or consent.

[43] I do not regard as particularly significant the contention to the effect that the possible offence involves a violation of the criminal law proper rather than being of a regulatory character. A distinction between the criminal law proper and regulatory law is not one emphasised in the authorities and tends to dilute the broad statements made in the High Court to the effect that the jurisdiction is “large and most useful” and “free from technicalities”. I do not consider that there is any rigid rule to the effect that when the proposed conduct involves the criminal law proper, a court should be less inclined to grant declaratory relief.

[44] I consider that the applicants have demonstrated a sufficient interest in obtaining the declarations. The present facts are not hypothetical. The applicants are proposing to put into effect the Proposed Transfer which is subject to a condition precedent that “[a]ll authorisations, approvals and consents as are required or reasonably necessary in connection with the [Proposed] Transfer [are] obtained.”⁶⁴ The applicants consider that this condition will not be satisfied until the present application has been heard and determined.⁶⁵ The applicants have a real interest in the resolution of the question the subject of the declarations. They, and their respective members, have a real interest in knowing whether the Proposed Transfer and/or the Promises fall within the terms of the Offence Provisions. Presently, the lawfulness of the applicants’ future conduct might otherwise be in doubt, particularly because of the uncertainty created by *BTFM*.

[45] APRA made submissions directed to the public interest and contended that a declaration directed to the subject transaction might serve the public interest by providing clarification about whether SFTs are likely to contravene the Offence

⁶⁴ Ex 1, Tab 13, Exh DJB-1, 226 (Successor Fund Transfer Deed) cl 3.1(b).

⁶⁵ Ex 1, Tab 13, [34].

Provisions. APRA submitted that a declaration might assist other trustees who might be contemplating similar transactions. Presently, because of the outcome in *BTFM*, it is likely that trustees will be concerned about whether it is necessary to obtain directions or assent from the Court, and to incur the significant costs associated with any such applications, whenever an SFT is in contemplation. I regard this submission as well made.

[46] The Attorneys-General of Queensland and Victoria responded to the applications and were proper contradictors. APRA also appeared with leave. The Attorneys-General were parties well placed to oppose the declarations, if that course was considered appropriate. I am satisfied that there have been proper contradictors on the applications.⁶⁶

[47] In the circumstances, I am satisfied that the proper exercise of my discretion involves making the declarations. I have been particularly influenced by the fact that a pure question of law is involved, the conduct has not yet occurred and the declaration sought is to the effect that the conduct is not criminal. I also consider that there is significant utility in the declarations.

[48] Finally, it was not in dispute that, to the extent that a declaration is sought concerning the application of s. 180 of the *Crimes Act 1958* (Vic), the jurisdiction of this court to make that declaration arises under a combination of s. 4(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) and s. 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld). That conclusion may be explained as follows:

- (a) Section 4(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) provides that the Supreme Court of another State or Territory has and may exercise original jurisdiction with respect to State “matters”.
- (b) Section 4(5) of that same Act provides that s. 4(3) does not confer on any such court jurisdiction with respect to “criminal matters”. In *BTFM*, Ball J held that the proviso as to “criminal matters” was to be interpreted as applying only to criminal prosecutions.⁶⁷ There is other authority to the effect that proceedings

⁶⁶ *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378, 387 [30] (Greenwood, Logan and Yates JJ).

⁶⁷ [2022] NSWSC 401 [17] (Ball J).

other than prosecutions are capable of being classified as “criminal”.⁶⁸ However, those authorities involved the exercise of powers closely associated with a criminal prosecution (extradition)⁶⁹ or determinations as to quasi-criminal conduct (domestic violence orders).⁷⁰

- (c) The present application involves a civil matter, not a criminal matter and jurisdiction to make a declaration concerning the Victorian legislation is conferred on courts of other States and Territories by s. 4(3).
- (d) Section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) provides that the Queensland Supreme Court may exercise jurisdiction conferred on it by a provision of a law of another State relating to cross-vesting of jurisdiction.
- (e) The combination of the Victorian and Queensland cross-vesting legislation provides jurisdiction to this court to make a declaration about the application of s. 180 of the *Crimes Act 1958* (Vic).

The Alternative Case: Assent or Directions

- [49] In the alternative to their primary argument, the applicants seek the directions or assent of the Court in respect of the Proposed Transfer and the Promises. The alternative case is premised on the basis that the primary argument is rejected.
- [50] In *BTFM*, Ball J considered that the New South Wales Supreme Court had power to consent to the benefits in question under s. 249E(2)(b) of the *Crimes Act 1900* (NSW). That section referred to the “consent” of the beneficiaries or of the Supreme Court. The Offence Provisions provide that an offence is not committed if the “assent” of the beneficiaries or the Supreme Court is obtained.
- [51] The applicants submit that the source of jurisdiction is the Court’s statutory power to give directions to a trustee. That is, when the Offence Provisions refer to the “assent”

⁶⁸ As to the meaning of “criminal” generally see *Western Truck Towing Pty Ltd v Magistrates’ Court of Victoria* [2014] VSC 88 [31]-[38] (Ginnane J) (judicial review proceedings in context of a prosecution not a “criminal” proceeding).

⁶⁹ *Brackenridge v New Zealand* [2000] 1 Qd R 1 [8] (Pincus JA), [9]-[15] (Thomas JA), [18] (Ambrose J) (extradition a “criminal” proceeding under s. 9(2) of the *Jurisdiction of Courts Cross-Vesting Act 1987* (Qld)).

⁷⁰ *COA v HAT* [2013] QCA 272 (McMurdo P) “...it is by no means certain that the Cross-vesting Act is intended to apply to quasi-criminal matters of the kind with which her application for leave to appeal is concerned, in light of the Act’s definition of ‘proceeding’” (in the context of an application to transfer an appeal from a domestic violence order).

of the Court, they should be construed as not creating a new jurisdiction of the court but rather as invoking an existing jurisdiction. Parliament's reference in the original legislation in 1905 to "*the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court*" ought be construed to refer to the supervisory jurisdiction of a judge of the Supreme Court with respect to trust administration.⁷¹ That capacity was well-developed by the time of the introduction of the Victorian Act in 1905, and continued when Chapter 42A was introduced into the Queensland *Criminal Code* in 1931. In my consideration, these submissions are correct and should be accepted.

- [52] The construction advanced by the applicants would also appear to be supported by extrinsic material. When introducing the 1919 law, the NSW Attorney-General described the requirement of "assent" as involving the "*approval*" of the beneficiaries or of a Supreme Court judge.⁷² Consistently, when introducing a cognate provision in South Australia in 1920,⁷³ the Chief Secretary confirmed that:⁷⁴

There would be no offence committed where the beneficiaries or a Judge of the Supreme Court authorised the transaction.

- [53] I accept the applicants' submissions that the avenues enacted under the various State Trustee Acts (or rules of Court) supply a "*mechanism of approval*".
- [54] In Queensland, the power to give directions to a trustee is contained in s. 96(1) of the *Trusts Act* 1973 (Qld). Under that section, "any trustee" may apply to the court for "directions concerning any property subject to a trust...or respecting the exercise of any power or discretion vested in the trustee". The Mercy Super Trustee seeks directions under that section. It is registered in Queensland and the Trust Deed for the Mercy Super Fund is governed by the laws of Queensland.
- [55] Section 35 of the *Acts Interpretation Act* 1954 (Qld) provides that a reference in an Act to an "entity" or "other thing" is a reference to an "entity" or "other thing" "in and of

⁷¹ *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 404-405; *Palmer v Ayres*; *Ferguson v Ayres* (2017) 259 CLR 478, [84] (Gageler J).

⁷² New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 1919, 2906 (J Garland, Attorney-General). See too New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1919, 3272 (D Storey).

⁷³ *Secret Commissions Prohibition Act* 1920 (SA). See s. 9 ('Secret Commission for trustee in return for substituted appointment').

⁷⁴ South Australia, *Parliamentary Debates*, Legislative Council, 28 September 1920, 822-3 (J G Bice).

Queensland”. It is arguable that the power in s. 96 of the *Trusts Act* 1973 (Qld) does not apply to a trustee registered outside of Queensland, or to a trust not governed by the law of Queensland, or to trust property not situated in Queensland.⁷⁵

[56] The HESTA Trustee is registered and has its principal place of business in the State of Victoria. The Trust Deed of the HESTA Superannuation Fund is silent on the governing law, but the HESTA Trustee does not contend that Queensland law governs the Trust Deed. The HESTA Trustee has applied for any direction to the HESTA Trustee to be made under the Victorian provisions, applying the cross-vesting legislation.

[57] The relevant Victorian provision is Rule 54.02 of the Supreme Court (*General Civil Procedure*) Rules 2015 (Vic). Rules 54.01 and 54.02 states:

“54.01 Definitions

In this Order –

administration proceeding means a proceeding for the administration of an estate or the execution of a trust under the direction of the Court;

...

54.02 Relief without general administration

(1) A proceeding may be brought for any relief which could be granted in an administration proceeding and a claim need not be made for the administration or execution under the direction of the Court of the estate or trust in respect of which the relief is sought.

(2) Without limiting paragraph (1), a proceeding may be brought for –

(c) an order –

...

(ii) directing any act to be done in the administration of an estate or in the execution of a trust which the Court could order be done if the state or trust were being administered or executed under the direction of the Court.”

⁷⁵ It has been held that the NSW Supreme Court has power to give directions to foreign trusts under s. 63 of the *Trustee Act* 1925 (NSW): *BTA Institutional Services Ltd v BNY Trust (Australia) Registry Ltd* [2009] NSWSC 1294; *Re Dion Investments Pty Ltd* [2013] NSWSC 1941. However, there is some debate about the correctness of that position: *Application of Rinehart* (2020) 104 NSWLR 274 [111]-[113] (Parker J); *Application by United Super Pty Ltd atf Construction and Building Unions Superannuation Fund* [2021] NSWSC 1679 [58] (Henry J).

[58] Rule 54.03(c) provides that persons having a beneficial interest under the trust need not be made parties to a proceeding seeking judicial advice. Rule 54.02 confers on a court the power to give directions to trustees, reflecting the long-standing power of the court to make such orders.⁷⁶

[59] In *Re Application by United Super Pty Ltd atf Construction and Building Unions Superannuation Fund*,⁷⁷ Henry J found that the New South Wales Supreme Court had power and jurisdiction under Rule 54.02 to give judicial advice to a trustee concerning the amendment of a trust deed, applying the relevant cross-vesting legislation.

[60] In my consideration, this Court has the same power to give directions under r. 54.02, applying the cross-vesting legislation. Specifically:

(a) Section 4(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) confers the relevant jurisdiction on the Supreme Courts of other States and Territories; and

(b) Section 9 of the *Jurisdiction of Courts (Cross-Vesting Act) 1987* (Qld) provides that the Queensland Supreme Court may exercise jurisdiction conferred on it by a provision of a law of another State relating to cross-vesting of jurisdiction.

[61] I find that this is an appropriate case to make the directions sought. No party or APRA opposed the making of directions or the giving of assent. The Mercy Super Trustee considers that the Proposed Transfer is in the best financial interests of the members of the Mercy Super Fund and has followed a careful process to approve the Proposed Transfer.⁷⁸ Similarly, the HESTA Trustee considers the Proposed Transfer is in the best financial interests of the members of both funds.⁷⁹ No reason has been suggested to doubt the considered decisions of both entities as to the suitability and beneficial nature of the Proposed Transfer and the Promises. In my consideration, the applicants are justified in pursuing the Proposed Transfer. In the event that I am wrong about the source of jurisdiction to provide assent, I would be prepared to provide the required assent under the Offence Provisions.

Orders

⁷⁶ *Application by United Super Pty Ltd atf Construction and Building Unions Superannuation Fund* [2021] NSWSC 1679 [61] (Henry J).

⁷⁷ [2021] NSWSC 1679 [55]-[64].

⁷⁸ Ex 1, Tab 5, [30]-[58].

⁷⁹ Ex 1, Tab 13, [27]-[31].

[62] In proceeding 10464/22, the orders of the court are that:

1. It is declared that a successor fund transfer of the members of the Mercy Super superannuation fund (ABN 11 789 425 178) (**Mercy Super Fund**) and their assets to the HESTA superannuation fund (ABN 64 971 749 321) (**HESTA Fund**) within the meaning and operation of regulation 6.29 of the *Superannuation Industry (Supervision) Regulations* 1994 (Cth) is not a substituted appointment for the purposes of:
 - (a) *Criminal Code Act* 1899 (Qld), Sch 1, s. 442F;
 - (b) *Crimes Act* 1958 (Vic), s. 180;(together, the **Offence Provisions**).
2. Pursuant to Rule 54.02 of the *Supreme Court (General Procedure) Rules* 2015 (Vic) (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Vic) and section 9 of the *Jurisdiction of Courts (Cross- Vesting) Act* 1987 (Qld)), it is directed that H.E.S.T. Australia Ltd (the **HESTA Trustee**) would be justified in, or alternatively, pursuant to the Offence Provisions (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Vic) and section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Qld)), that the Court assents to the HESTA Trustee:
 - (a) offering to the Mercy Super Pty Ltd (the **Mercy Super Trustee**) and Mater Misericordiae Ltd (**Mater**) the promises (or any of them) set out in the Transaction Documents;
 - (b) giving to the Mercy Super Trustee and Mater the promises (or any of them) set out in the Transaction Documents.
3. The HESTA Trustee's costs of this application be paid or reimbursed out of the assets of the HESTA Fund on the indemnity basis.
4. I will hear the parties otherwise as to costs.

[63] In proceeding 10501/22, the orders of the court are that:

1. It is declared that a successor fund transfer of the members of the Mercy Super superannuation fund (ABN 11 789 425 178) (the **Mercy Super Fund**) and their assets

to the HESTA superannuation fund (ABN 64 971 749 321) within the meaning and operation of regulation 6.29 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) is not a substituted appointment for the purposes of:

(a) *Criminal Code Act 1899* (Qld), Sch 1, s. 442F;

(b) *Crimes Act 1958* (Vic), s. 180;

(together, the **Offence Provisions**).

2. Pursuant to section 96(1) of the *Trusts Act 1973* (Qld), it is directed that Mercy Super Pty Ltd (the **Mercy Super Trustee**) would be justified in, or alternatively pursuant to the Offence Provisions (together with section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) and section 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld)), the Court assents to the Mercy Super Trustee:

(a) receiving for itself and its related parties from the H.E.S.T. Australia Ltd (the **HESTA Trustee**) (as trustee or in its personal capacity) the promises (or any of them) set out in the Transaction Documents;

(b) soliciting for itself and its related parties from the HESTA Trustee (as trustee or in its personal capacity) the promises (or any of them) set out in the Transaction Documents;

(c) receiving and enforcing for itself and its related parties the promises (or any of them) from the HESTA Trustee (as trustee or in its personal capacity) set out in the Transaction Documents.

3. The Mercy Super Trustee's costs of this application be paid or reimbursed out of the assets of the Mercy Super Fund on an indemnity basis.

4. I will hear the parties otherwise as to costs.