


SGD 94/6 - What is the effect on the Superannuation Guarantee (Administration) Act 1992 (SGAA) of the High Court decision in Re Finance Sector Union of Australia; ex parte Financial Clinic (Vic.) Pty. Ltd . (1993) 67 ALJR 687?

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Superannuation Guarantee Determinations do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Determinations and Rulings.

Superannuation Guarantee Determination

What is the effect on the *Superannuation Guarantee (Administration) Act 1992* (SGAA) of the High Court decision in *Re Finance Sector Union of Australia; ex parte Financial Clinic (Vic.) Pty. Ltd. (1993) 67 ALJR 687*?

1. The High Court was called upon to consider whether an industrial award could specify which superannuation fund should be used for non-union members. It decided by a majority that the award in question *could not* require employer superannuation contributions in respect of employees who are not members of a union to be paid into a specified superannuation fund.
2. This case arose out of a dispute between a group of employers in the insurance industry and a union representing employees in that industry about an order of the Australian Industrial Relations Commission (AIRC) in 1990 which varied their award. The variation required all employers named as respondents to the award to make superannuation contributions to the Insurance Industry Superannuation Fund in respect of each of their employees, whether members of the relevant union or not. Although all employees were eligible for union membership, a significant number of employees were not union members.
3. The employers challenged the validity of the AIRC order on the ground that the specification of a particular superannuation scheme to which contributions were to be made was not a matter pertaining to the relationship between employers and employees and could not give rise to an 'industrial dispute'.
4. The Court held that an award is a settlement of a dispute between parties. A union representing its members, present and future, is a party to a dispute. Therefore, an award can properly specify which superannuation fund is to be used for union members. It is also appropriate for an award to specify the wages and conditions of non-members. Thus, if members are to receive the benefit of superannuation contributions, an award can provide that non-members also receive that benefit. However, this does not usually permit the award to specify the identity of the fund into which the contributions must be made because that does not necessarily have a sufficient relationship to the terms and conditions of employment of the union's members.
5. However, the Court recognised that there would be circumstances in which it would be acceptable for an award to specify the fund into which contributions for non-members of a union should be made. One example was the case where non-members' contributions were made into a fund which allowed for investment with the employer, because that could result in non-members' terms and conditions of employment being less favourable than those of the members.

Effect on SGAA

6. The High Court's decision recognises that an award can make provision for superannuation contributions for non-union members. Accordingly, it would be able to establish an earnings base for them that could be used for SGAA purposes [s.13(1)(a), 14(1)(a)].

7. For union members, if an award specifies the fund into which contributions should be made, it will be necessary for contributions to be made into that fund in order for them to be made in accordance with the award.

8. For non-union members, a consequence of the High Court's decision is that in some cases a contribution can be in accordance with the award even though it is not made into the 'award nominated fund'.

9. However, the Court did recognise that there are circumstances in which an award can properly nominate the fund for non-members' contributions.

10. Consequently, for SGAA purposes, the Commissioner will only accept a contribution made into a fund, other than those nominated in an award, as being in accordance with the award if:

- the award does not require contributions into a nominated fund; or
- a court decision has held that the particular award cannot specify the fund into which the relevant employees' contributions should be made. A decision by a court will apply only to the particular award before the court.

Commissioner of Taxation

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