



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

P48/2021

BETWEEN:

**CLAIRE ELIZABETH HILL**

Appellant

and

**ZUDA PTY LTD (ACN 008 968 232)**

As trustee for THE HOLLY SUPERANNUATION FUND

First Respondent

and

**JENNIFER PATRICIA MURRAY**

As executor of the Estate of ALEC SODHY

Second Respondent

and

**JENNIFER PATRICIA MURRAY**

Third Respondent

**FIRST, SECOND AND THIRD RESPONDENTS’  
OUTLINE OF ORAL SUBMISSIONS**

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**20 Part I: CERTIFICATION**

1. These submissions are in a form suitable for publication on the internet.

**Part II: OUTLINE OF ORAL ARGUMENT**

**A. Special leave should be revoked**

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2. Sub-reg 6.17A(4) applies to the provision of a benefit to the extent that *‘the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2)’. It does not apply to a benefit payable pursuant to the terms of the governing rules themselves, as was the case here: Appellant’s Book p5. See RS 9-15.*
3. The fact that the governing rules internally define that obligation as a ‘Binding Death Benefit Nomination’ is irrelevant to whether it falls within sub-reg 6.17A(4). That the distinction was not adverted to below does not detract from its reality.
4. The appellant’s response to this (**Reply 14-22**) doesn’t answer the point. Her reliance on s55A (**Reply 17**) is circular as it is premised on the assumption that sub-reg 6.17A(4) applies. Her reliance on subs 52B(2)(e) (**Reply 19**) stands no higher than her reliance on s55A, and in any event subs 52B(2)(e) is not directed to invalidating the terms of the governing rules themselves. The appellant’s reliance on subs 59(1A) (**Reply 20**) is misplaced, especially since she concedes that s59 has no application to a SMSF: **Reply 4**.

5. The unstated premise to the appellant's submission at **Reply 21** is that the outcome is an undesirable one. It is the same outcome as is permitted by sub-reg 6.17A(4) even assuming it applies. There is no 'circumvention' of sub-reg 6.17A(5)-(7) if they do not apply in the first place.

**B. Ground 1**

6. It does not 'skew the analysis' to start with s59 (cf **Reply 4**). In the case of delegated legislation, a relevant contextual matter is necessarily the statute under which the regulation is made.
7. Reg 6.17A was introduced simultaneously with the introduction of subs 59(1A) and the corresponding amendment to subs 59(1). As the appellant accepts, s59(1A) is directed only to a superannuation entity *other than* a SMSF.
8. The purpose of reg 6.17A was to prescribe conditions for the purpose of subs 59(1A). This is reflected in the relevant explanatory statement (**JBA Vol 5 pp850, 852**). It is further reinforced by the reference in its heading to 's59(1A)'. To refer to this heading is not an attempt to read down otherwise clear language of a provision by reference to its heading, which was the vice addressed by members of this Court in the authorities referred to at **Reply 9**.
9. The appellant focuses on the language of sub-reg 6.17A(1) and the absence of any express reference therein to its non-application to a SMSF (see **Reply 5**). Sub-reg 6.17A(1) refers to the standard set out in sub-reg 6.17A(4). This necessarily directs attention, in ascertaining the true scope of the standard prescribed by sub-reg 6.17A(1), to the scope of sub-reg 6.17A(4). The appellant observes that sub-reg 6.17A(1) was part of reg 6.17A from its original 'enactment' (**Reply 5**). But so were sub-reg 6.17A(2), (3) and (4): **AS 19-20**.
10. Sub-reg 6.17A(4) applies '*if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2)*'. Sub-reg 6.17A(2) in turn expressly identifies the source of that permission as subs 59(1A), which it is common ground applies only to a superannuation entity *other than* a SMSF.
11. The respondents' construction does not involve any reading down of sub-reg 6.17A(1) to exclude a SMSF from its scope, let alone a 'failure to engage' with its

language or an attempt to ‘obliterate it from the statute books’ (**Reply 5**). Sub-reg 6.17A(1) cannot operate more widely than sub-reg 6.17A(4). The conclusion that sub-reg 6.17A(1) does not apply to a SMSF follows from the fact that sub-reg 6.17A(4) does not do so: **RS 53**.

12. Other textual and contextual reasons reinforce this conclusion: **RS 47-51**.

13. Section 55A is irrelevant to the proper construction of reg 6.17A. The appellant’s submission that s55A is engaged presupposes that 6.17A applies to a SMSF, and is therefore circular. In any event, there is no inconsistency with subs 55A(1). **RS 28-35**.

10 14. The appellant’s submission at **Reply 24** seems to logically apply to ground 1, not grounds 2 and 3. The submission is not correct (see sub-regs 6.17(1) and (2)). It is not supported by the authorities cited. Nor does it assist in the proper construction of reg 6.17A.

15. Even if the appellant was correct in her construction of reg 6.17A, it would not assist her as reg 6.17A imposes no prohibition on the trustee paying a benefit if the requirements of sub-reg 6.17A(4) were not met: **RS 55-56**. There is no scope for the operation of s55A unless reg 6.17A imposes such a prohibition. The issue is one of construction, not evidence: cf **Reply 22**.

### **Grounds 2 and 3**

20 16. These grounds do not affect the outcome of the appeal, which turns on ground 1. Unless able to assist in some way, the respondents do not propose to make oral submissions on grounds 2 and 3.

Date: 4 April 2022



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