A tale told by an idiot, full of sound and fury, (perhaps) signifying nothing ...

With thanks to Rev. John Venn ...

The Traditional Model: The member as Beneficiary

Trust law is the starting point
- Legal form of most superannuation arrangements
- SIS employs both the mechanics and the language of trust law

Trust law is fundamentally paternalistic
- Best interests
- Conflicts
- Prudent person

Employment context dilutes paternalism
- Members are not ‘volunteers’
- Duty of “good faith”: an exogenous influence on the behaviour of the parties
Risk in the Traditional Model

Despite paternalism, beneficiaries are vulnerable in trust law

- No direct interest in the underlying assets – only an ‘expectancy’
- Terms of the deed may curtail protections
- Subject to legislative restriction (e.g. s52 covenants)
- Uncertain ability to receive ‘trust’ information
- Very limited ability to challenge trustee decisions

The Investor Model: The member as Investor

Imported into superannuation by Wallis et al

- Reinforced by CLERP 6 and the FSR Act

The embedded logic

- Superannuation -> investment -> product
- Member -> investor -> consumer
- Systemic efficiency maximises welfare

Impacts at two levels

- Regulatory objectives
- Regulatory instruments

Risk in the Investor Model

Caveat Investor

- Members are the ‘best judges of their own interests’
- Financial literacy?
- Behavioural biases?
- Moral hazard?
- Risk viewed on an aggregate basis
- Individual loss does not constitute systemic failure
- Objective frame of reference
- Individuals expected to reduce idiosyncratic risk
- Read and assimilate disclosures
- Invest in financial literacy or seek advice

The Public Model: The member as Citizen

Superannuation is a public activity

- Compulsion and ‘privatised’ welfare
- Responsible entities as quasi-public delegates

Administrative Law concerned with exercise of delegated responsibility

- Accountability
- Transparency
- Procedural fairness (‘natural justice’)

Public Model also concerned about equity and efficiency
Risk in the Public Model

**Primary objective** – provide an efficient and safe vehicle where individuals in the working population can accumulate assets to fund their retirement.

**Key risks are at an aggregate level**
- the accumulation of sufficient savings
- citizen confidence in the superannuation system
- the employment of the patient capital accumulated

So what?

There are important differences in the objectives of the different bodies of law:
- Trust law – ‘paternalistic’ beneficiary protection
- Securities law – caveat investor
- Administrative law – transparency, accountability and procedural fairness

These objectives co-exist uneasily in the real world
- Reliance on disclosure as a regulatory instrument
- Trustee duties in member investment choice
- Trustee duties in a master trust
- Equal representation on trustee boards