

## CHAPTER 11:

# ISC POWERS AND CO-ORDINATION OF COMMONWEALTH POWERS

### Introduction

11.1 This chapter examines the following issues with respect to the SIS legislation:

- ISC discretions and exemptions;
- unclaimed money provisions;
- the interaction between the Corporations Law and the SIS legislation.

### *ISC exemptions and modification - Part 29*

11.2 Under part 29 of the SIS legislation the ISC has the power to modify or exempt the application of the provisions of the Bill, and the regulations, once it has received Royal Assent. However, certain powers provided for under Part 29 are of a temporary nature only and will expire on 30 June 1994.

11.3 The Committee was advised by ASFA that these powers be continued at least in the formative years or until narrower criteria are formulated.

11.4 A longer term view of the Commissioner's discretionary power was posited by the Law Council of Australia. It advised that after 1 July 1994, the anticipated date of commencement for SIS, trustees may erroneously and unintentionally make decisions based on the standards of OSSA. With this in mind Council argued that the Commissioner should have an indefinite discretion where there is an unintentional breach of the new SIS standard.

11.5 The Committee acknowledges the Senate Scrutiny of Bills Committee Report No 3 of 1993 (18 August 1993) in which concern was expressed about the ISC Commissioner's power to exempt and modify the application of the law without any set criteria or Parliamentary supervision.

11.6 The Committee is of the view that the legislation is complex, far reaching and is being superimposed on a diverse and evolving industry. In this environment it is reasonable to expect that the prime regulator, the ISC, should have some discretion to ensure that the legislation is administered both flexibly and equitably. However, it is of critical importance that the ISC not assume the powers of the Parliament in legislating superannuation policy. To ensure that this does not occur a system of reporting and accountability needs to be instituted. Accordingly, consistent with the report of the Scrutiny of Bills Committee, the Committee believes that the current provision of the Bill be agreed to with an amendment that the ISC report annually on the frequency, incidence and nature of the exercise of its discretions.

**Recommendation 11.1:**

The Committee recommends that having regard to the impact of the SIS legislation on the superannuation industry, the Government amend the SIS legislation to have the temporary powers of modification and exemption for the ISC continued until 1 July 1996. The Committee recommends that during this period the ISC develop definitive guidelines on discretions to replace the existing broad powers.

The Committee further recommends that the ISC report annually to Parliament on the frequency, incidence and nature of the exercise of its discretions.

***Unclaimed money provisions - Part 22***

11.7 Under clause 219 a benefit will become unclaimed money if it is immediately payable in respect of a person who has reached the eligibility age for an aged pension and the trustee is unable to locate the beneficiary after making reasonable efforts to do so. The Law Council raised the issue

of whether or not the unclaimed money provisions under the SIS legislation would override the unclaimed money legislation of the States or Territories.<sup>74</sup>

11.8 It was argued that should no provision be inserted, the unclaimed money may have to be paid to the States and Territories. (That is, the unclaimed moneys in superannuation funds would be subject to state unclaimed money legislation before a member reaches pensionable age).

**Recommendation 11.2:**

The Committee recommends that the Government negotiate with the States and the Northern Territory with a view to agreeing to amendments to the SIS and relevant state legislation to enable Commonwealth legislation on unclaimed superannuation moneys to operate to the exclusion of state law.

***Interaction of SIS legislation with Corporations Law***

11.9 Several submissions raised a concern that under current Corporations Law a trustee company that is limited by Guarantee will have difficulties in fulfilling its obligations to fund members due to restrictions placed upon directors under section 232A.<sup>75</sup> Section 232A operates to exclude a director, who is a fund member in a company limited by guarantee, from participating in Board decisions which relate to the company's conduct as trustee of the superannuation fund. This also poses a problem for representative trusteeship under the SIS legislation.<sup>76</sup>

11.10 Where the directors of a company, who are not also fund members, cannot form a quorum, a general meeting of the company will need to be called to deal with these matters.<sup>77</sup> The Committee acknowledges that the current operation of section 232A of the Corporation Law may cause certain

<sup>74</sup> SIS Sub No 28, p 13

<sup>75</sup> Mallesons Stephen Jaques SIS Sub No 80, p 7  
Sly and Weigall, SIS Sub No 79

<sup>76</sup> Sly and Weigall, SIS Sub No 79, p 4

<sup>77</sup> Malleson Stephen Jaques, SIS Sub No 80, p 7

problems for companies limited by guarantee who act solely as trustee of a superannuation fund.

**Recommendation 11.3:**

The Committee recommends that the ISC liaise with the ASC with a view to overcoming the exclusion of board members of trustee companies from participating in the company's conduct as trustee of a superannuation fund by the operation of section 232A of the Corporations Law.