

APPENDIX E:

FREEHILL'S ADVICE ON PUBLIC OFFER FUNDS
TRANSITIONAL PROVISIONS

FREEHILL
HOLLINGDALE
& PAGE

SIS-37
(Supplement)

Our Ref: JHG:MV:39G

1 October 1993

Mr Peter Hutley
Executive Director
Investment Funds Association
Level 14
345 George Street
SYDNEY NSW 2000

Dear Peter

Superannuation Industry (Supervision) Bill 1993

We have been asked to consider proposals by which the Commonwealth Government might legislate to prevent the commercially undesirable consequences of section 369 of the Superannuation Industry (Supervision) Bill 1993 ("SIS"). This section has the effect of preventing a trust to which the section applies from issuing further superannuation interests except in limited circumstances on or after 1 July 1994, if neither the trustee or the management company has resigned with effect on or before 30 June 1994.

The recommendations of the Law Reform Commission on collective investments have now emerged and under these proposals, it is suggested that if the manager and the trustee cannot agree as to which of them is to become the scheme operator within 18 months, the manager may request to be appointed the scheme operator without the consent of the trustee.

In response to the suggestion that the legislation should force the trustee or the manager to retire, it has been suggested on behalf of the Commonwealth that the Commonwealth does not have the requisite legislative power under section 51(xx) of the Constitution (Corporations Power) or under section 51(xxii) (Acquisition of Property on Just Terms).

As to section 51(xxii), we do not believe that requiring a trustee to resign constitutes an acquisition of property by the Commonwealth of a kind which requires "just terms" within the meaning of section 51(xxii). We do not regard the argument that a Commonwealth law which deprives a person of a right which is not acquired by the Commonwealth as being unconstitutional because of the operation of section 51(xxii) as having any application to the present circumstances because of the solution suggested below.

As far as section 51(xx) of the Constitution is concerned, it is well settled that the words "with respect to" in section 51 of the Constitution are words of wide import and should be construed with all the generality which the words will admit.

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Investment Funds Association
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Section 1069(1)(n) of the Corporations Law provides that a deed (an approved deed establishing prescribed interests) shall contain covenants to the effect of the covenants prescribed by the regulations. Regulation 7.12.15(6)(g) requires that a trust deed include a covenant that the management company will retire from office at the request of the trustee in any circumstance specified in sub-regulation (10). Sub-regulation (10)(f) provides that one of the prescribed circumstances is "if the trustee reasonably believes that it is in the best interests of the holders of the prescribed interests for the management company to retire".

In the context of part 7.12 -division 5 of the Corporations Law, we believe that the mandatory inclusion in a trust deed of a provision such as that referred to above is within the legislative competence of the Commonwealth under section 51(xx) of the Constitution. It is unlikely that the Commonwealth would assert otherwise.

On that basis, it seems to us not unreasonable, that further regulations could be passed incorporating additional covenants into trust deeds in order to deal with the otherwise unacceptable commercial impost that will arise under the Government's present proposals if neither the trustee nor the management company is prepared to stand down.

Given that most investors in publicly offered trusts invest because of the perceived skills of the management company and not because of the identity of the trustee, it seems not unreasonable that the onus should be reversed so that covenants are included to the effect that:

- (a) if neither the management company nor the trustee has resigned to take effect on or before 30 June 1994, the management company may request the trustee to retire from office if the management company believes that it is in the best interests of the holders of interests in the trust that further interests should be able to be issued after 30 June 1994;
- (b) the trustee must resign if requested to do so by the management company pursuant to (a) above; and
- (c) the trustee cannot remove the management company for the same reason as that referred to in (a) above.

Yours faithfully

Freddie Hollingdale - Page