

APPENDIX F:

ATTORNEY GENERAL'S DEPARTMENT OPINION ON PUBLIC OFFER FUNDS TRANSITIONAL PROVISIONS



Chief General Counsel

OGC93467892

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Dear Mr Duval

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993 - TRANSITIONAL PROVISIONS

I refer to your letter dated 18 October 1993 seeking advice on a proposal by solicitors acting for fund management companies, Freehill Hollingsdale and Page, relating to the transitional provisions of this Bill.

Background

4. Management companies have obtained the Freehills advice which argues that requiring a trustee to resign is not an 'acquisition of property' within the meaning of section 51(XXXI). It suggests that the substance of the original approach could be validly achieved by provisions inserting into the relevant trust deeds covenants that would allow the management company to force the trustee to resign. The advice cites examples of

provisions of the existing Corporations Law and Regulations which have the effect of deeming various covenants to be included in deeds.

Advice

5. It seems to me, with respect, that the Freehills advice does not provide a solution.

6. The Freehills advice outlines provisions for resignation by a fund trustee but (rather curiously) omits to provide expressly for the fund assets to vest in the management company. Presumably Freehills envisage that such a vesting will occur either (a) by direct force of the Commonwealth law, or (b) pursuant to a transfer authorized or required by or under the Commonwealth law, or (c) pursuant to action under the terms of the relevant trust deed relating to a vacancy in the office of trustee (though I understand that such deeds do not, at least usually, permit vesting in management companies), or (d) under the general law concerning a vacancy in the office of trustee.

7. In each of these alternatives, the Commonwealth law providing for the resignation of the trustee could be characterised as a law 'with respect to' the 'acquisition of property' - ie the management company's acquisition, by force of Commonwealth law or otherwise, of the legal title from the retiring fund trustee. (I mention that section 51(xxxi) applies even where the proprietary rights are obtained by some person other than the Commonwealth: see *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1992) 112 ALR 53, at 66 - 67 and 78.)

8. If the law is characterised as one 'with respect to' the 'acquisition of property', then it must provide 'just terms'. There is some risk that this might be held to require compensation to the former fund trustee in respect of its involuntary loss resulting directly from the operation of the Commonwealth law - in particular, the loss of its income as trustee.

9. There is a contrary argument that the mere transfer of the legal title is not an 'acquisition of property' of a kind to which section 51(xxxi) applies, and that there is also no 'acquisition of property' involved in the deprivation of the fund trustee of its rights to earn fees for performing trustee functions (eg. *R v Ludeke; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1985) 158 CLR 636 at 653). This raises issues on which two relevant High Court decisions are still awaited. (One is an appeal, argued on 9-10 March 1993, from the decision in *Peverill v Health Insurance Commission* (1991) 104 ALR 449. The other is *Mutual Pools & Staff Pty Ltd v The Commonwealth*, argued on 10 February 1993.)

10. Pending those decisions it is difficult to advise with any assurance. However, although my own inclination is to think that the Commonwealth law vesting the fund assets in the management company would not require 'just terms' for the retiring fund trustee, the risk of invalidity if 'just terms' are not provided cannot be safely disregarded.

Yours sincerely



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Chief General Counsel