

CHAPTER 3:

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993

3.1 This is the principal Bill in the SIS Bills package and is designed to:

- increase the level of prudential protection provided to the superannuation industry;
- increase the security of superannuation savings; and
- increase the protection and rights of superannuation fund members.

3.2 To establish a comprehensive framework of prudential supervision the Bill encompasses a broad range of matters including:

- constitutional powers and types of superannuation funds;
- trustees, members, employers, investments and reserves of superannuation funds;
- fund administration, return of surplus and unclaimed benefits;
- obligations of auditors and actuaries;
- losses from fraud or theft, penalties and removal of superannuation tax concessions; and
- public sector superannuation schemes, the role of the ISC and transitional provisions.

Responsibility

3.3 The ISC will have the responsibility of implementing the provisions of the Bill and will play the major role in the prudential supervision of superannuation funds. It will have the power to audit and investigate funds and it will be an offence to deliberately mislead or deceive the ISC.

Constitutional requirements

3.4 To be eligible for concessional tax treatment under the SIS Bill, superannuation funds will need to be legislated pursuant to either the pensions or the corporations powers of the Constitution.

3.5 The pensions power requires that the fund has the sole or dominant purpose of providing old age pensions, whilst the corporations power requires that the trustee is a trading or financial corporation. Where either of these are met the fund must make an irrevocable election to the Commissioner of the ISC to have the provisions of the SIS Bill apply to the fund. This will enable superannuation funds to be regulated by Commonwealth legislation.

Trustees - appointment, duties, powers and protection

3.6 Only suitable persons shall be allowed to be appointed as trustees. Under the Bill bankrupts or persons with a conviction of an offence involving dishonest conduct will not be permitted to be appointed as a trustee. Funds will need to provide and publish to members procedures for the appointment and removal of trustees.

3.7 The Bill seeks to codify the duties of trustees so that they cannot be avoided or modified. These duties require trustees to act honestly, exercise diligence and care, formulate and implement investment strategies, keep trust accounts separate, exercise prudential management over any trust reserves and allow a beneficiary access to any prescribed information or documents.

3.8 The SIS Bill also sets out the powers that trustees can exercise in order to carry out their duties. Under the SIS provisions, the trust deed must not permit the trustee to be subject to direction by any other person,

permit a discretion to be exercised in relation to the fund without the consent of the trustee or permit the governing rules of the trust to be amended without the consent of the trustee.

3.9 In addition, the Bill outlines protection that is available for trustees in carrying out their duties which includes indemnity from fund assets for any liabilities incurred as a trustee. This indemnity does not extend to dishonesty, wilful or reckless negligence, or a criminal or civil penalty imposed for a breach of the legislation.

3.10 Trustees will also have the right to seek professional advice, the cost of which can be paid out of the fund. Trustees will be protected against victimisation to ensure that they are not pressured or coerced into doing things against the best interests of beneficiaries.

Members of superannuation funds - representation

3.11 The Bill provides a choice for member representation on the trustee board of employer sponsored funds. The choice is either equal employer/employee representation on the board of trustees or a professional trustee. The equal representation requirements do not apply to funds with fewer than five members.

3.12 Professional trustees must be licensed with the ISC and be companies that have at least a certain prescribed level of net tangible assets. The Government has foreshadowed that, initially, it will regulate to set the minimum level at \$5 million.

3.13 Where a member has an inquiry or complaint the trustee must establish a procedure to ensure that the complaints or inquiries are dealt with within 90 days. Where a member is still dissatisfied they can complain to the Superannuation Complaints Tribunal to be established under the SIS legislation.

Employers

3.14 The Bill provides that where an employer is unhappy with the way the fund is being managed, and believes that it will no longer be a suitable fund for the employees, the employer can cease contributions without this constituting possible victimisation of the trustee.

3.15 Where an employer deducts superannuation contributions from an employee's salary, the contributions must be remitted to the fund within 28 days following the month in which the deduction was made.

Superannuation funds - investments and managers

3.16 To ensure that superannuation funds are properly invested and managed, trustees must appoint investment managers. Restrictions will be placed on who can be appointed as an investment manager. Companies cannot be appointed as investment managers where a director or executive has been involved in an offence involving dishonesty, or if they are in receivership. Where an investment manager takes custody of assets they must be companies of substance, with at least \$5 million in net tangible assets².

3.17 Trustees must formulate investment strategies for their funds which must be communicated to members. All investments must be made at arms length to ensure that they are genuine investments, whilst in-house assets are to be restricted to no more than five per cent of the market value of the fund. In-house assets are investments in an employer sponsor or associate.

Prohibition on certain superannuation fund investments

3.18 Superannuation funds will be prohibited from providing loans to members or relatives or from acquiring assets from members or relatives. In addition, funds shall not be allowed to borrow money. An exemption from this prohibition will be allowable where the fund borrows to make a payment to a beneficiary which it is required to make under law, but only where the borrowing term does not exceed 90 days and the amount borrowed does not exceed ten per cent of the value of the fund. No exemption will apply where the fund is an Approved Deposit Fund (ADF).

3.19 A further exemption to this prohibition on borrowing will apply where temporary borrowings are required to cover the settlement of securities transactions.

3.20 Where a trustee maintains reserves, an investment strategy for their prudential management must be formulated.

² See para 3.12.

Fund administration

3.21 To ensure efficient fund administration occurs, the SIS Bill places certain legislative requirements upon the business management of the fund. These requirements include the keeping of minutes and records of all trustee meetings for at least ten years, records of changes in trustees and account keeping and production of annual reports. Trustees will be required to file annual returns with the ISC within a prescribed period.

Obligations of auditors and actuaries

3.22 The Bill imposes certain disclosure obligations upon auditors and actuaries. Where an auditor or actuary discovers a breach of the law or is concerned that a breach may occur, they are required to inform the trustee and request appropriate action be taken. Where no action is taken the auditor or actuary must inform the ISC.

Losses from fraud or theft

3.23 The Bill provides that where a fund is facing difficulty in paying benefits as a result of fraud or theft, it may apply to the Treasurer for a grant of financial assistance. The grant would be funded by means of a levy on the superannuation industry.

Public sector schemes

3.24 The provisions of the Bill are intended to apply equally to both public and private sector schemes.

Unclaimed benefits

3.25 Unclaimed benefits will arise where:

- the beneficiary has reached the eligibility age for a pension;
- the trustee determines that a benefit is immediately payable in respect of the beneficiary;
- the beneficiary has not applied to have the amount of benefits in the fund paid to him or her; and

- the trustee, after making reasonable efforts to find the beneficiary, is unable to pay the benefit.

3.26 Trustees are required to pay unclaimed money to the ISC Commissioner and provide the Commissioner with a statement of unclaimed monies together with the tax file numbers of those to whom the unclaimed benefits have been credited.

Eligible rollover funds

3.27 The Bill provides for the automatic rollover of certain benefits between funds for members who cannot be located or have left a fund.

3.28 For an amount to be eligible for rollover, the trustee must have determined that under the governing rules of the fund the benefit is immediately payable in respect of a member, that 90 days have elapsed since the benefit became payable and that at least two consecutive prescribed reports to members of the fund have not been received by the member.

3.29 Eligible rollover funds (ERFs) will be required to notify the ISC of all members on whose behalf they hold funds. The ISC will keep a central register of these benefits.

Penalties under the Bill

3.30 The Bill introduces a regime of penalties against trustees who do not act in accordance with its provisions. In the event that a trustee contravenes a provision, for example insider trading, a particular penalty will apply. Four categories of penalties for contraventions exist, namely:

- civil penalty;
- strict liability;
- fault liability; and
- civil liability.

These penalties can only be imposed by a court of law.

3.31 Contravention of a civil penalty requires the standard of proof in civil cases, that is, proof on the balance of probabilities. The monetary fine does not exceed \$200 000. Where trustees contravene a civil penalty knowingly,

intentionally or recklessly they may be exposed to criminal prosecution and be liable for up to five years imprisonment.

3.32 Contravention of a strict liability provision involves proof beyond reasonable doubt, however the trustee has the defence of reasonable excuse, that is, the trustee has taken all reasonable steps to prevent the contravention occurring.

3.33 Contravention of a fault liability provision requires proof beyond reasonable doubt that the trustees contravention was intentional or reckless.

3.34 Civil liability provisions are designed to allow beneficiaries to sue a trustee for any loss they may have suffered by the trustee's contravention of the provisions of the Bill.

Reversal of onus of proof

3.35 Generally in criminal prosecutions, the onus is on the prosecution to prove all of the elements of an offence. In relation to the contravention of some of the provisions of the SIS Bill, for example the insider trading provisions, the Bill provides for a reversal of the usual onus of proof. This means that, where a breach has occurred and a defence may be available to the defendant, the onus lies on the defendant to establish that the defence is available to the defendant.

Transitional arrangements

3.36 The SIS legislation will commence at the beginning of the 1994/95 year of income which for the majority of funds is 1 July 1994. The earliest start date for any fund is the 1 December 1993.

3.37 Superannuation funds that were supervised by both the ASC and the ISC before the SIS legislation will only be supervised by the ISC from 1 July 1994.