Parliament of the Commonwealth of Australia

Ninth Report of the
Senate Select Committee on Superannuation

Super
Supervision Bills

Occupational Superannuation Standards Amendment Bill 1993
Superannuation (Financial Assistance Funding) Levy Bill 1993
Superannuation Industry (Supervision) Bill 1993
Superannuation Industry (Supervision) Consequential Amendment Bills 1993
Superannuation (Resolution of Complaints) Bill 1993
Superannuation (Rolled-Over Benefits) Levy Bill 1993
Superannuation Supervisory Levy Amendment Bill 1993

Canberra

October 1993

MEMBERS OF THE COMMITTEE:

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Senator Bruce Childs		New South Wales
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LIST OF RECOMMENDATIONS

The Recommendations in this report are either recommendations for amendments to the Bills or recommendations for future government consideration. Accordingly, these have been preceded by either 'Amendment to XXX Bill' or 'For Government Consideration'.

Chapters 1, 2 and 3 do not contain any recommendations.

The Committee recommends that the Bills be agreed to subject to the following amendments:

Recommendation 4.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

Clause 64 - Acquisition of Assets by Funds from Members or Relatives

The Committee recommends that clause 64 be amended to allow certain types of assets to be acquired by a superannuation fund from a member or relative of the member at an arms length price.

These assets are to include only freehold or leasehold property, which reflects true market value, that is used wholly or exclusively in the business of the member or member's relative, plus certain strictly defined marketable securities.

The Committee further recommends that the sole purpose test be strengthened to ensure that any asset or assets included in the exemption provided under clause 64 acquired by the superannuation fund from a member or member's relative does not contravene the sole purpose test.

The Government Members of the Committee - Senators Childs, Evans and West have recommended in a minority report that this amendment not be agreed to.

Recommendation 4.2: Amendment to the Superannuation Industry (Supervision) Bill 1993

Penalty for Breach of Clause 64

The Committee recommends that the penalty for breach of clause 64 be amended to provide a maximum penalty of 200 penalty points (one penalty point equals $100) and/or one years imprisonment.

Recommendation 5.1: For Government Consideration

Public Offer Funds - Transitional Arrangements

The Committee recommends that the Government consider amending the Corporations Law to provide public offer superannuation fund managers with the right to request that the trustee retire on the grounds that it is in the best interests of unit holders.

Recommendation 6.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

Clause 65 Superannuation Fund Borrowings

The Committee recommends that short term borrowing be allowed where it was 'not intended' that the borrowing would be needed, rather than if the need for the borrowing 'was not reasonably foreseeable'. Accordingly, clause 65 should be amended to substitute the words 'not intended' for 'not reasonably foreseeable'.

Recommendation 6.2: For Government Consideration

Duties of Custodian

The Committee recommends that, following the implementation of the SIS legislation, consideration be given to spelling out in regulations the duties of custodians.

Recommendation 6.3: For Government Consideration

Capital Adequacy for Custodians and Fund Managers

The Committee recognises the need for a capital adequacy requirement to establish the substance of custodians and, to a lesser extent, provide a financial buffer in the case of insolvency. The Committee recommends that in drafting regulations the ISC continue to consider a more comprehensive and flexible approach to the capital adequacy requirements for fund managers and custodians.

Recommendation 6.4: Amendment to the Superannuation Industry (Supervision) Bill 1993

Removal of Investment Manager

The Committee recommends that provisions relating to the removal of fund managers consequent to a responsible officer becoming a disqualified person be amended to ensure that there is not an automatic termination of the manager.

The Committee further recommends that in these cases it is the duty of the fund manager to remove the disqualified person from any financial dealings with the fund.

Recommendation 6.5: Amendment to the Superannuation Industry (Supervision) Bill 1993

ISC Discretion regarding Custodians

The Committee recommends that the Government monitor the operation of SIS legislation to ensure that it does not result in any harsh or unintended consequences for custodians who temporarily fail to satisfy eligibility requirements.

Recommendation 6.6: Recommendations for JCCS

'Soft Dollar Commission'

The Committee recommends that the Joint Committee on Corporations and Securities investigate 'soft commissions' as part of its inquiry into institutional investment.

Recommendation 7.1: For Government Consideration

Appointment of Auditors

The Committee recommends that the ISC monitor closely the appointment and termination of auditors in the superannuation industry and, if necessary, advise the Government that legislation be introduced to protect auditors from unjust or unreasonable termination.

Recommendation 7.2: For Government Consideration

Removal of Auditors

The Committee recommends that the ISC continue the practice of notifying the professional accounting bodies where it has cause to believe that an auditor should be removed.

Recommendation 7.3: For Government Consideration

Registration of Auditors

The Committee further recommends that, in accordance with the Committee's first report *Safeguarding Super* (Recommendation 4.11), the Government, in consultation with the professional accounting bodies, again consider establishing a register of superannuation auditors and that the register consist of persons who have completed the training prescribed by the accounting professions.

Recommendation 8.1: For Government Consideration

Referral of Superannuation Powers

The Committee reiterates the recommendation of its first report that the Government explore the possibility of obtaining a referral by the states, either formal or de facto, of their power over superannuation.

Recommendation 8.2: For Government Consideration

Corporate Trustees ISC/ASC Returns

The Committee further recommends that the ISC and ASC implement a system of registration and filing where only a single return is required by corporate trustees of superannuation funds.

Recommendation 9.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

Collection and Use of Tax File Numbers (TFNs)

The Committee recommends that the SIS legislation be amended to allow superannuation funds to collect member TFNs, subject to member consent, from the date the Bill receives Royal Assent. In addition, the Committee recommends that the SIS legislation be amended to allow superannuation funds, to use TFNs for taxation and transfer of benefits purposes.

Recommendation 10.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

Exemption of States from SIS Provisions

The Committee recommends that the Bill be amended to exempt the States and the Northern Territory. It is further recommended that, if required, the ITAA and the Superannuation Guarantee Charge (Administration) Act be amended to ensure that existing treatment/coverage for certain state superannuation schemes under those Acts is maintained.

Recommendation 11.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

ISC Discretions and Reporting to Parliament

The Committee recommends that having regard to the impact of the SIS legislation on the superannuation industry, the Government amends 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.

Recommendation 11.2: For Government Consideration

Unclaimed Money - State and Commonwealth Legislation

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.

Recommendation 11.3: For Government Consideration

Exclusion of Board Members of Trustee Companies

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.

Recommendation 12.1: Amendment to the Superannuation Industry (Supervision) Bill 1993

Definition of Market Value

The Committee recommends that the Government amend the SIS legislation to insert the following definition of 'market value':

Market Value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudentially and without compulsion.

Recommendation 12.2 Amendment to the Superannuation Industry (Supervision) Bill 1993

Dates of Election for Regulated Funds

The Committee recommends that the Senate agree to a Government amendment extending the dates of elections for superannuation funds to become regulated funds under SIS according to the following schedule:

Type of fund	**Last Date of Election**
Governed by statute	30 June 1995
Less than five members	31 December 1994, or on the last day of its 1994/95 year of income, whichever comes first
More than five members	28 July 1994

Recommendation 13.1: Superannuation Industry (Supervision) Consequential Amendments Bill 1993

Definition of Value of Property in Bankruptcy

The Committee recommends that the Consequential Amendments Bill be amended to include a definition of 'the value of the property', which outlines a method of valuation and specifies a point in time at which the valuation is to occur.

Recommendation 16.1: Superannuation (Resolution of Complaints) Bill 1993

Jurisdiction of Tribunal to Review Prior Decisions of Trustees

The Committee recommends that the Government regulate to exclude from the Complaints Tribunal those matters involving trustee decisions, made prior to the commencement of the Superannuation (Resolution of Complaints) Act, as to who is entitled to a benefit which has already been paid.

Recommendation 16.2: For Government Consideration

Exclusion of Certain Matters by Regulation

The Committee recommends that the Government not exclude from the Tribunal's jurisdiction, the parts of a complaint involving issues of procedural fairness and the legal interpretation of the terms 'disability' in a deed.

Recommendation 17.1: For Government Consideration

Establishment of Independent Superannuation Consumer Advisory Service

The Committee recommends that the Government consider supporting the establishment of an independent superannuation consumer advisory service by way of grants from Consolidated Revenue over three years. The Committee further recommends that the Government review the funding arrangement with a view to industry assisted funding after the expiry of the three year period.

Recommendation 18.1: Recommendation for Amendment to the Superannuation (Resolution of Complaints) Bill 1993

Standard of Proof for Tribunal Decision

The Committee recommends the Bill be amended to specify that the degree of satisfaction required for the Tribunal to affirm a decision pursuant to clause 37(2) of the Bill is that of reasonable satisfaction, that is, satisfaction on the balance of probabilities.

Recommendation 18.2: For Government Consideration

Notifying Members of Rights of Review of Trustees Decisions

The Committee recommends that the ISC address the issue of notifying members of their right to have an adverse decision of a trustee reviewed by the Superannuation Consumer Complaints Tribunal.

CHAPTER 1 : INTRODUCTION

Reappointment of the Committee

1.1 On 13 May 1993 the Senate resolved that the Senate Select Committee on Superannuation be reappointed to allow it to complete three matters which had not been finalised when the 1993 federal election was called.[1] Subsequently, on 19 May 1993, four additional matters were referred to the Committee, namely:

- legislation to implement the recommendation in the Committee's first report, *Safeguarding Super*;
- increasing superannuation contribution from nine to 12 per cent;
- the interaction between allocated pensions and the social security system; and
- the use of superannuation funds to finance the purchase of housing by fund members.

1.2 In referring these new terms of reference the Senate resolved that the Committee report on or before the last sitting day of each of the budget and autumn sittings until the end of the Parliament or until the Committee presents its final report, whichever first occurs.

1.3 The Committee commenced its inquiry into these four matters by placing advertisements in a number of key newspapers and journals inviting written submissions. In addition, it contacted more than 500 persons/organisations who had expressed an interest in being on the Committee's mailing list which was compiled during the inquiry on its original terms of reference.

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1 Appendix A is a list of the Committee's reports since its establishment in June 1991.

Referral of the Bills

1.4 Following the introduction of the Superannuation Industry Supervision Bills (SIS Bills) into the House of Representatives on 27 May 1993, the Committee agreed that at the earliest opportunity it should convene a series of public hearings. The SIS Bills package comprises:

Bill	Date of Introduction to the Senate	Date of Reference to the Committee
Occupational Superannuation Standards Amendment Bill 1993	28.9.93	2.9.93
Superannuation (Financial Assistance Funding) Levy Bill 1993	18.10.93	2.9.93
Superannuation Industry (Supervision) Bill 1993	19.10.93	2.9.93
Superannuation Industry (Supervision) Consequential Amendments Bills 1993	18.10.93	2.9.93
Superannuation (Resolution of Complaints) Bill 1993	6.10.93	2.9.93
Superannuation (Rolled-Over Benefits) Levy Bill 1993	18.10.93	2.9.93
Superannuation Supervisory Levy Amendment Bill 1993	28.9.93	2.9.93

1.5 In essence, the SIS Bills represent the Government's response to the recommendation of the Committee's first report, *Safeguarding Super*. On 5 October 1993, following the introduction of two of the Bills into the Senate, the Senate resolved that the Committee present its report on or before the last sitting day in October 1993.

Conduct of the Inquiry

1.6 Having taken evidence on the need to increase the prudential control and supervision of superannuation funds during its initial period of appointment, the Committee was well placed to comment on the provisions of the Bills. In order to gain a better understanding of the more complex and possibly controversial aspects of the Bills, the Committee convened public hearings in Melbourne (22 September), Sydney (23 September) and Canberra (24 September). During these hearings 214 pages of oral evidence was taken from persons/organisations who had made a written submission (see Appendix B). Appendix C includes a list of witnesses who appeared at the public hearings.

1.7 In order to facilitate wider discussion of the Bills, the Committee agreed that unless otherwise ordered, written submissions would be published on receipt. Likewise, the Committee circulated uncorrected Hansard transcripts as they became available. References to oral testimony are to page numbers in these Hansard proofs. These appear in footnotes as 'Evidence p xx'. Written submissions to the inquiry appear as 'SIS Sub No xx'.

Appreciation

1.8 The Committee records its appreciation of the written submissions and oral evidence to this inquiry. The Committee also acknowledges the cooperation of the Parliamentary Secretary, Senator the Hon Nick Sherry, and officers of the Insurance and Superannuation Commission who attended the public hearings. Further, the Committee acknowledges the cooperation of the Parliamentary Secretary responsible for the ISC, the Hon Gary Johns MP, for providing the Committee with further informal briefings by ISC officers, and for publishing Government amendments to the Bills prior to their introduction in the House of Representatives and before the Committee's public hearings on the Bills. This greatly assisted the Committee's examination of a number of matters germane to the inquiry. The Committee appreciates the technical research support provided by the Parliamentary Research Service.

Structure of the Report

1.9 Chapter 2 of the report gives an overview of the package of Bills (hereafter referred to as the SIS Bills). Chapters 3 to 12 have been devoted to the principal bill, the Superannuation Industry (Supervision) Bill 1993. The Superannuation Industry (Supervision) Consequential Amendments Bill 1993, which inter alia will protect superannuation interests in cases of bankruptcy, is examined in Chapter 13. Chapters 14 to 18 address the Superannuation (Resolution of Complaints) Bill 1993. In Chapters 4 to 18 there are both recommendations for amendments to the Bills and recommendations for Government consideration and response. The Committee recommends that the package of Bills be agreed subject to these recommendations for amendment.

1.10 Following Chapter 18 there is a minority report on clause 64 of the Superannuation Industry (Supervision) Bill 1993 which has been prepared by the Government Members of the Committee, Senators Childs, Evans and West. This report recommends that recommendation 4.1 not be agreed to.

CHAPTER 2:

THE SIS BILLS: AN OVERVIEW

2.1 The package of SIS Bills is designed to increase significantly the prudential control and protection of the superannuation industry and substantially strengthen the security of superannuation savings. The Bills provide for a number of significant changes which will affect the consumers of superannuation products and services. Under the SIS legislation consumers will have access to a low cost dispute resolution mechanism and have benefits automatically rolled-over when they transfer or leave employment.

2.2 The Bills represent the culmination of an intensive and prolonged examination of the regulation of superannuation by a number of government agencies, the Australian Law Reform Commission and the Senate Select Committee on Superannuation during the past two years. To a large extent the changes proposed in the Bills are the result of Government initiatives to implement compulsory superannuation coverage and an increasing recognition within the community that superannuation savings should be subjected to tighter prudential and supervisory controls.

2.3 In its first report, *Safeguarding Super*, the Committee recommended far reaching change in the superannuation industry designed to safeguard retirement income savings. Whilst the Committee acknowledged there had only been a small number of fund failures, it stated that it was conscious that increases in superannuation savings will inevitably attract operators who will seek to use superannuation moneys for their own use. Accordingly, the Committee called on the Government to implement measures to minimise the risk of fraud, misappropriation and bad management practices.

2.4 In a number of its reports the Senate Select Committee on Superannuation has affirmed its belief that the Insurance and Superannuation Commission (ISC) should be given increased regulatory powers and assume the status of prime regulator of all superannuation-related personal and collective investments. The Bills provide for the ISC to have this enhanced regulatory power over the $169 billion national stock of superannuation assets.

Superannuation Industry (Supervision) Bill 1993

2.5 This Bill is the most important of these seven SIS Bills 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.

2.6 This Bill was the subject of the overwhelming majority of the 95 written submissions received by the Committee. In Chapters 4 to 12 the Committee examines in detail the key issues which arose during the inquiry in connection with the Bill.

2.7 *The Committee recommends that this Bill be passed subject to the amendments in Chapters 4 to 12.*

Superannuation Industry (Resolution of Complaints) Bill 1993

2.8 This Bill will establish arrangements for the resolution of complaints made by members and beneficiaries of superannuation and approved deposit funds regarding the decisions of trustees. It provides for a low-cost dispute resolution mechanism for the superannuation industry.

2.9 The Committee received evidence on this Bill from industry, consumer and government sources and has made recommendations and observations which appear in Chapters 14 to 18.

2.10 *The Committee recommends that the Bill be passed subject to the amendment in Chapter 18.*

Superannuation Industry (Supervision) Consequential Amendments Bill 1993

2.11 This Bill makes amendments to the *Income Tax Assessment Act 1936* and other Acts arising from the repeal of OSSA. Another feature of this Bill is that it amends the *Bankruptcy Act 1966* to specify the extent to which superannuation and life insurance moneys are protected in the event of bankruptcy. Chapter 13 examines the submissions on this proposal.

2.12 *The Committee recommends that this Bill be passed subject to the amendment in Chapter 13.*

Occupational Superannuation Standards Amendment Bill 1993

2.13 This Bill repeals the provisions of the *Occupational Superannuation Standards Act 1987* (OSSA) which have been replaced by the prudential compliance standards of the Superannuation Industry (Supervision) Bill 1993. Also, it provides for new arrangements to collect levies to operate the scheme to protect funds affected by fraud and to administer the rolled-over benefits funds. Further, the Bill changes the title of OSSA to the *Superannuation Entities (Taxation) Act 1993.*

2.14 *The Committee recommends that this Bill be passed without amendment.*

Superannuation (Financial Assistance Funding) Levy Bill 1993

2.15 This Bill provides for a levy on superannuation funds and approved deposit funds to provide financial assistance to any funds that suffer loss as a result of fraud or theft.

2.16 *The Committee recommends that this Bill be passed without amendment.*

Superannuation Supervisory Levy Amendment Bill 1993

2.17 This Bill amends the Superannuation Supervisory Levy Act 1991 as a result of amendments to certain sections of OSSA.

2.18 *The Committee recommends that this Bill be passed without amendment.*

Superannuation (Rolled-Over Benefits) Levy Bill 1993

2.19 This Bill provides for the imposition of levies on certain superannuation funds for the purposes of recouping the cost of maintenance by the ISC of a register of certain rolled-over benefits.

2.20 *The Committee recommends that this Bill be passed without amendment.*

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 assets[2].

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.

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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.

CHAPTER 4:

CLAUSE 64[3] - PROHIBITION ON SUPERANNUATION FUNDS ACQUIRING ASSETS FROM MEMBERS OR RELATIVES

Clause 64 has arisen from the questionable practices of a small section of the superannuation profession, who are more concerned with the 'gimmicks' of superannuation, rather than the long term true benefits that superannuation provides.[4]

Introduction

4.1 This chapter examines one of the most controversial aspects of the Superannuation Industry (Supervision) Bill 1993, clause 64. The chapter outlines the policy underlying clause 64, the submissions received on the issue and evidence provided at the public hearings plus a recommendation for an amendment to the Bill.

4.2 Of the total submissions received by the Committee on the SIS legislation approximately one half were concerned with the impact of clause 64 which prohibits regulated superannuation funds from acquiring assets from fund members or their relatives. Clause 64 is designed to take effect from 27 May 1993 as an anti-avoidance measure to prevent superannuation fund members selling assets to their superannuation fund in order to obtain cash benefits. Such transactions, according to a number of witnesses, have the potential to abuse the concessional tax treatment afforded to

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3 Clause 64 was Clause 62 when the Bill was introduced in the House of Representatives

4 John Fraser, SIS Sub No 40

superannuation funds.[5] Further examples of the current abuse involve members selling private assets to their fund, such as houses and boats in order to obtain cash benefits. The ISC Commissioner, Mr George Pooley, advised the Committee that there are a number of schemes in existence that are designed to manipulate assets in this way.[6]

4.3 The early date of effect was achieved by way of amendment to OSS Regulations. The Regulations and Ordinances Committee has given notice that it will move a motion of disallowance of this regulation.

Issues raised

4.4 The majority of written submissions received focused on the following areas of concern with clause 64, namely:

- its complete prohibition is too harsh as it discriminates against legitimate business transactions and small business activities;
- it prevents people from funding their own superannuation funds and in particular discriminates against the self employed;
- it fails to take into account the same types of investments held in different names;
- it appears easy to avoid simply by interposing another entity between the superannuation fund and the member; and
- its imposition of a jail sentence for breaches is too severe.

4.5 The Committee heard further evidence in relation to the impact of clause 64 at the public hearings. The evidence provided reinforced the impression that many in the superannuation industry view clause 64 as a draconian measure that is designed to 'crack a nut with a sledgehammer'.

4.6 Two witnesses, John Fraser and Tony Kincaid indicated that a degree of confusion and 'woolly thinking' surrounded the development of

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5 Tony Kincaid, John Fraser, evidence p 87

6 Evidence p 182

clause 64.[7] Mr Fraser provided an example of the types of abuse that clause 64 is designed to prevent, such as the selling of assets to a superannuation fund to overcome cash flow problems. He also gave some examples of how clause 64, in its present form, can be rendered inoperative.

4.7 It was suggested by Mr Kincaid that one way in which clause 64 could be avoided would be to transfer assets of the same value into another person's superannuation fund and have them transfer assets into your superannuation fund. Written submissions also described in detail how clause 64 could be avoided by similar means or by interposing a third party between the member and superannuation fund, so that the asset is sold to the third party and then on-sold to the superannuation fund. Once again, although higher transaction costs are incurred, clause 64 could be easily avoided.

4.8 The Committee also noted that there is an absence of empirical evidence supporting the need for clause 64. This point was highlighted in evidence provided to the Committee by the ISC who advised that their position was based on information that a number of organisations were providing advice on how to manipulate assets in a way that clause 64 is designed to prevent.[8]

4.9 *The Committee believes that to a large extent the problems which have given rise to measures to prohibit funds acquiring assets from members or relatives (clause 64) are the result of promoters who offer superannuation arrangements which are at odds with the rationale of concessional tax treatment afforded to superannuation. The Committee is of a view that the Government should monitor closely the activities of these promoters with a view to making their activities subject to the requirements and penalties of clause 64 and other relevant provisions of the SIS legislation.*

Alternatives to clause 64

4.10 A common feature of both the written submissions and the evidence provided at the public hearings concerned suggested ways in which clause

7 Evidence p 89

8 Evidence p 182

64 could be amended to enable it to provide an effective anti-avoidance mechanism whilst enabling certain transactions between a members and their superannuation funds to take place.

4.11 Alternatives to clause 64 focused upon the need of the ISC to analyse the type of transaction rather than its source. Accordingly, exemptions to clause 64 were suggested as a means of enabling the type of transaction to be scrutinised to ensure that dubious transactions such as the selling of paintings or holiday homes to the superannuation fund are prohibited. Precedent for this treatment of these transactions, it was suggested, could be found in Capital Gains Tax provisions of the *Income Tax Assessment Act 1936* (ITAA)[9].

4.12 The Committee noted that a major advantage associated with differing between types of assets is that, prima facie, it would allow a distinction between different types of transactions to occur. That is, the sale of legitimate assets on a commercial basis to a superannuation fund would be permissible, whilst the sale of assets that clause 64 is designed to prevent would still be disallowed.

4.13 A major question that arose in connection with the exclusion of certain types of assets is whether it would be preferable to specify what transactions should be entered into or what transactions should not be entered into. Evidence provided by John Fraser suggested that it would be more appropriate to describe the types of investments that are acceptable to a superannuation fund and specify that these transactions be carried out on an arms length basis.[10] In addition, a report could be attached to each ISC return detailing where a member-orientated transaction was involved.

4.14 Another approach to changing clause 64 was suggested by Jim Richardson, who recommended that the legislation specify what types of assets cannot be acquired by a superannuation fund from a member or relative of a member, for example such assets would include:

- jewellery;
- motor vehicles;

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9 Greenwood Challoner, SIS Sub No 42

10 Evidence p 89

- boats; and
- a print, etching, drawing, painting, sculpture or similar work of art.[11]

4.15 In outlining these exemptions Mr Richardson drew attention to the current definition of personal use assets, in section 160B of the ITAA 1936, as a precedent for such exclusion.[12]

4.16 Strengthening of the sole purpose provisions of the Bill rather than employing a blanket prohibition under clause 64 was yet another approach which the Committee considered. The sole purpose provisions, as contained in clause 60 of the SIS legislation, require the trustee of the fund to maintain the fund solely for certain purposes. These purposes are divided into core and ancillary purposes. Core purposes are those for which the fund must be maintained, for example, the provisions of benefits to each member of the fund upon reaching a prescribed age, although the member has not retired.

4.17 Ancillary purposes are those for which the fund may be maintained, in addition to the core purposes, for example, the payment of death benefits wholly or partly to a member's estate.

4.18 As it is apparent that the SIS legislation is framed to allow clause 64 to complement the operation of the sole purpose test, it would appear from a number of submissions that a more appropriate alternative would be to provide certain exemptions from clause 64, whilst increasing the powers of the ISC under the sole purpose test.

4.19 When providing exemptions from the operation of clause 64, regard must be given to achieving a balance between its original objective and a more equitable approach as outlined in the various submissions. Therefore, it was argued, exemptions from clause 64 should only relate to the acquisition of freehold or leasehold property which reflects true market value, that is used wholly or exclusively in the business of the member, and

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11 ibid

12 SIS Sub No 42

certain strictly defined marketable securities.[13] In this regard the ISC prepared a draft amendment which defines marketable securities. This appears in Appendix D and includes a share; or unit; or bond or debenture; or a right on option; or any other security; listed for quotation in the official list of a stock exchange in Australia.

4.20 It could be argued that this would provide a seemingly more equitable alternative which would allow superannuation funds to acquire certain assets from members, whilst at the same time providing the Government with certain checks and balances to ensure that the concessional tax treatment afforded to superannuation funds is not abused. The Committee acknowledges that strengthening the sole purpose test is a move away from its traditional use. However, given the nature and impact of clause 64, the Committee considers that some change is needed to balance the competing interests which became evident during the inquiry.

Recommendation 4.1:

The Committee recommends that clause 64 be amended to allow certain types of assets to be acquired by a superannuation fund from a member or relative of the member at an arms length price.

These assets are to include only freehold or leasehold property, which reflects true market value, that is used wholly or exclusively in the business of the member or member's relative, plus certain strictly defined marketable securities.

The Committee further recommends that the sole purpose test be strengthened to ensure that any asset or assets included in the exemption provided under clause 64 acquired by the superannuation fund from a member or member's relative does not contravene the sole purpose test.

Penalty for breach of clause 64

4.21 Another major issue surrounding clause 64 concerns the penalty for a breach of the provision which can be up to two years imprisonment. A

[13] COSBOA, SIS Sub No 49 provided the Committee with guidance on what type of marketable securities could be included within the amendments.

common feature of most submissions on the matter concerned the abhorrence at such a penalty, some describing it as totally inappropriate for the offence involved.[14]

4.22 When designing penalties for the breach of certain provisions, regard must be given to the severity and nature of the mischief that the provision is designed to prevent. The Committee noted that the imposition of a jail sentence for a breach of clause 64 would appear to be excessive given its intention.

Recommendation 4.2:

The Committee recommends that the penalty for breach of clause 64 be amended to provide a maximum penalty of 200 penalty points (one penalty point equals $100) and/or one years imprisonment.

[14] Greenwood Challoner, SIS Sub No 42

CHAPTER 5:

PUBLIC OFFER FUNDS - CLAUSE 18

'As Hope J. A. in *Parkes Management Ltd v Perpetual Trustee Co Ltd (1977) ACLC 40-354* observed, the Manager's position in the whole scheme is central to its existence and its removal in a very real sense changes in an important way the character of the scheme'[15]

'We note that there are many management companies which are ill equipped or unable to perform trustee functions or meet the capital adequacy or net tangible assets tests proposal'[16]

Introduction

5.1 This chapter outlines the issues faced by public offer funds as a result of the SIS legislation provisions for transitional arrangements and elections. It describes the operation of a public offer fund and the reasons underlying the single entity concept. There follows an analysis of the difficulties facing public offer funds as to whether the trustee or manager should be appointed as the single responsible entity (i.e. a corporate trustee) and the issue of the irrevocable election to become a public offer fund.

5.2 Under the SIS legislation public offer funds (i.e. funds offering superannuation products to individual members of the public) will come under the prudential control of the ISC. Previously they were regulated by the Australian Securities Commission (ASC). It is envisaged that these

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15 Bankers Trust, SIS Sub No 36, p 4

16 Trustees Companies Association of Australia, SIS Sub No 33, p 2

public offer funds will be operated by a single entity being the corporate trustee who may be either the fund manager or the trustee company. Under Corporations Law these funds are operated under the joint control and management of a trustee and a fund manager.

Public Offer Funds

5.3 A public offer fund is essentially any fund which is not a standard employer sponsored fund unless a declaration has been made by the ISC Commissioner to the contrary under clause 18(6). These funds are, therefore, superannuation schemes offered to the public through a registered prospectus. An indication of the money invested in public offer funds and Approved Deposit Funds was provided by Mr Peter Hutley, who advised that members of the Investment Funds Association (IFA), currently manage $14 billion in these types of funds.[17]

Single entity concept

5.4 Currently public offer superannuation funds operate on a dual entity basis comprising the trustee and the fund manager. A major objective of the SIS legislation is to ensure there is a move away from the dual entity structure to a single responsible entity, that is, either the trustee or the fund manager should operate the fund.

SIS legislation

5.5 The SIS legislation is silent on the issue of whether, in the transition from the present arrangements, the trustee or manager should become the responsible entity. Instead it sets out the **procedures** for achieving single entity status. These include, for example, how the trustee or fund manager should give notice of retirement. The legislation does not provide for the circumstances under which either the trustee or fund manager should retire.

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[17] Evidence p 127

Who should be the responsible entity?

5.6 The Committee has received a number of submissions on which party should become the responsible entity for the superannuation fund under the SIS legislation, most of which support the appointment of the manager as the responsible entity. The reasons include:

- the manger will have committed substantial amounts of capital and resources to the establishment and operation of the fund;
- the manager will have put its reputation at stake in relation to the management of the superannuation fund; and
- the manager will have adopted specific strategies and investments techniques for managing the fund.[18]

Collective Investments: Other Peoples Money[19]

5.7 The Committee has noted the recommendations made in the Australian Law Reform Commission (ALRC) Report No 65[20] concerning the management of collective investments which stated:

> The split responsibility presently prescribed by the law should cease. The scheme operator should have a clear set of obligations, prescribed by law, that it owes to the investors in the scheme. These would include the obligation to act honestly in all matters concerning the scheme and to prefer the interests of the investors to its own interests in all matters concerning the scheme.[21]

5.8 The ALRC concluded that where agreement cannot be reached on which party (the trustee or fund manager) should become the single entity, ultimately the fund manager should assume that status.

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18 Bankers Trust, SIS Sub No 36

19 The Australian Law Reform Commission (ALRC) - Report No 65 *Collective Investments: Other People's Money,* AGPS, Sydney, 1993

20 ibid

21 The Law Reform Commission Report No 65 *Collective Investments: Other People's Money, 1993,* Summary p 5

5.9 In contrast, the submission by the Trustees Companies Association of Australia (TCA) argued against any unfair or arbitrary removal of trustees[22]. TCA submitted that any removal of trustees would effectively eliminate a layer of prudential control for the superannuation fund.

5.10 The Committee was advised that in many cases the promoter or investors may wish to retain the existing independent trustee and that existing funds management companies may be unable to meet the requirements placed upon them by the SIS legislation, such as the proposed $5 million capital adequacy requirement.[23]

5.11 The impression gained by the Committee through both written submissions and oral evidence is that there is a need for a definite appointment of either the trustee or manager as the responsible entity for the superannuation fund, which should take place as soon as practicable after the commencement of the SIS legislation.[24] However, constitutional and administrative considerations make the achievement of this objective extremely difficult.

Constitutional issues

5.12 For example, the automatic appointment of a manager as the single responsible entity raises certain constitutional issues about which the Committee has received varying opinions. One view is that section 51(xx) of the Constitution, the corporations power, does not permit the Commonwealth to legislate for one of the competing parties to be approved as the single entity.

5.13 Another view, which was contested, was that the automatic appointment of a fund manager may constitute an acquisition of property (that is, for example, the denial of a trustee's commission) by the Commonwealth of a kind which requires 'just terms' within the meaning of section 51(xxxi).[25] [26]

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22 SIS Sub No 33

23 ibid

24 MLC Investments, SIS Sub No 86, also advised the Committee of the need to have a streamlined solution to the transitional issue from dual to single entity, as did Potter Warburg Asset Management, SIS Sub No 89, and Sly & Weigall SIS Sub No 79.

25 IFA, SIS Sub No 37 (Freehill's opinion) - See Appendix E

5.14 The Committee believes that the lack of legal certainty in this area is sufficient to warrant caution. To act decisively in favour of either the fund managers or the trustee companies may subject the Commonwealth to a legal challenge involving substantial claims for compensation. Accordingly, the Committee does not recommend the automatic appointment of either the trustee or manager as the single responsible entity for the fund.

Alternatives to automatic appointment

5.15 The Committee considered the option of providing grandfathering provisions to enable the trustee and fund manager to continue their current dual entity arrangement until one party becomes the single entity at a predetermined date in the future. This would involve the existing scheme not accepting any new members and a new scheme being created into which members of the existing scheme could transfer. However, given the need for stability and certainty within the superannuation industry this option is unnecessarily complex and time consuming and therefore has limited merit only.

5.16 Another approach would be to convene a meeting of members of the fund to determine their choice of who should be the single entity.[27] The Corporations Law currently provides for the removal of the trustee or fund manager by a resolution of 50 per cent or more of the value of units in the trust. However, many trust deeds have separate removal provisions which may favour trustees.[28]

5.17 In some funds the removal of the fund manager may only require an ordinary resolution, being 50 per cent of a certain unitholders votes. Whilst the trustee removal may require a special resolution, being 75 per cent of a certain percentage of unitholder votes.[29] The removal of a fund manager under these circumstances would appear to be inequitable. The Committee noted the Law Reform Commission Report No 65,[30] which provided for the appointment of either the trustee or fund manager under the transitional

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26 Attorney General's Department, Chief General Counsel's opinion of 21 October 1993 - Appendix F

27 Bankers Trust, op cit

28 ibid, p 4

29 ibid

30 ALRC, op cit

arrangements for collective investments. The Report recommended that within 18 months application of one party to remove the other party can be made to the ASC, provided the other party agrees. If this does not occur within 18 months the Report recommended that the manager be automatically appointed.

5.18 Whilst this solution might appear to provide certainty it is predicated on the possible removal of one of the competing parties, a course of action already described as having potentially adverse outcomes for the Commonwealth (see para 5.13).

5.19 The Committee was advised of another solution in an additional submission made by the Investment Funds Association which recommended:

> that additional covenants be inserted in the Corporations Law which place the manager on even footing with trustee by allowing it to request the trustee to retire if the manager believes that it is in the best interests of unitholders that further interests in the scheme are able to be issued after 1 July 1994. Freehill's advice supports this action.[31]

5.20 The Chief General Counsel's opinion is that this advice does not offer a solution in that it omits to expressly provide that the assets vest in the management company and that if an express provision were made it could be 'characterised' as a law with respect to the 'acquisition of property'.[32]

5.21 Notwithstanding this, if a dispute arises between the trustee and the fund manager it is of critical importance that neither party be or be seen to be placed at an unfair advantage. For example, if a ballot is required to determine single entity status, the right of one party to request that the other stand down could give it an unfair electoral advantage. It is possible that the party with the right under Corporations Law to request that the other stand down may use this power to add moral and legal force in any campaign to become the sole entity. The Committee believes that this is an unsatisfactory arrangement.

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31 IFA Additional material of 21 October 1993 to Sub No 37

32 See Appendix F

Recommendation 5.1:

The Committee recommends that the Government consider amending the Corporations Law to provide public offer superannuation fund managers with the right to request that the trustee retire on the grounds that it is in the best interests of unitholders.

Election to become a Public Offer Fund is irrevocable (Clause 18)

5.22 Under the SIS legislation, where a fund chooses to become a public offer fund it must make an irrevocable election to do so. The Committee has received a number of submissions stating that the necessity for the election to be irrevocable is unnecessarily restrictive.[33]

5.23 It was submitted that circumstances may change and at a later date the fund may wish to revert to an equal representation arrangement, for example, as a means of avoiding the potentially higher operating costs associated with public offer funds.[34] In these cases it is the Committee's understanding that the election may be revoked following a declaration by the Commissioner that the fund is not a public offer fund under clause 18(6). This can only occur where the Commissioner is satisfied that the internal corporate trustee will provide for equal employee/employer representation.

5.24 Mercers submission proposed that this should be clarified in the legislation.[35] The Committee was unable to form the opinion that this is necessary for the reason that clause 18(6) provides adequate scope for the revocation of the election.

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33 William M Mercer, SIS Sub No 72

34 ibid

35 ibid

CHAPTER 6:

FUND MANAGERS AND CUSTODIANS

Introduction

6.1 This chapter addresses the impact of the SIS legislation on both fund managers and custodians, and makes observations and recommendations on the following issues:

- borrowing;
- definition of custodian and investment manager;
- capital adequacy requirements;
- removal of investment manager;
- dismissal of custodians for breach of eligibility requirements; and
- 'soft dollar' or undisclosed commissions in funds management.

Borrowing - clause 65

6.2 Prior to amendments introduced into the House of Representatives on 27 September 1993, the SIS legislation allowed superannuation funds to borrow in exceptionally limited circumstances only. More specifically the clause allowed superannuation funds to borrow up to ten percent of fund assets for up to 90 days for the purposes of paying a benefit where there was a cash flow problem. However, the amendments now allow superannuation funds to borrow on a temporary basis to cover the settlement of securities transactions and provide that borrowing can take place where it does not exceed seven days and the amount borrowed does

not exceed ten per cent of the value of the assets of the fund. The borrowing is further limited to circumstances where the need 'was not reasonably foreseeable'.

6.3 The Law Council of Australia submitted that, due to the mechanics of international financing systems, in many cases it was likely that short term financing to settle transactions would be necessary.[36] This view was also expressed by witnesses from the National Australia Bank, who submitted that, due to the nature of international trading activities, it is highly probable that a funding mismatch could occur.[37]

6.4 Accordingly, the Committee believes that the words 'not intended' should replace 'not reasonably foreseeable'. This would clarify the intent of the legislation and take into account the realities of international financing.

Recommendation 6.1:

The Committee recommends that short term borrowing be allowed where it was 'not intended' that the borrowing would be needed, rather than if the need for the borrowing 'was not reasonably foreseeable'. Accordingly, clause 65 should be amended to substitute the words 'not intended' for 'not reasonably foreseeable'.

Definition of custodians and investment managers

6.5 The custodian's role is to hold the legal title of the assets whilst the investment managers invest the assets of the fund to obtain the maximum benefit for the fund members. Several submissions to the Committee raised the concern that the definition afforded to both a custodian and an investment manager were not clear and in practice could lead to a conflict of duties.[38] [39]

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36 Evidence p 153

37 National Australia Bank, SIS Sub No 26

38 ibid

39 Bankers Trust SIS Sub No 28

6.6 The Government addressed this matter by introducing an amendment in the House of Representatives defining a custodian as 'a person performing custodial duties in relation to the assets of the entity, and is designed to have the normally accepted meaning as given within the superannuation industry'.[40]

6.7 The Committee believes that, whilst this change is in the right direction, it still leaves in doubt the respective roles of fund managers and custodians. For example, the current definition afforded to an investment manager under clause 10 allows for no discretion to be made by the investment manager between different investments. Therefore, this definition may also cover some of the functions that are performed by custodians.[41]

6.8 Given the key roles that both investment managers and custodians play in the superannuation industry, investing and holding assets for superannuation fund members, it is vital that their roles be clearly defined.[42]

Recommendation 6.2:

The Committee recommends that, following the implementation of the SIS legislation, consideration be given to spelling out in regulations the duties of custodians.

Capital adequacy requirements - clause 120

6.9 Clause 120 provides that custodians must have a prescribed value of net tangible assets, otherwise known as a capital adequacy requirement. The Treasurer's press release of 27 May 1993, indicated that $5 million would be the minimum prescribed value.

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40 Superannuation Industry (Supervision) Bill 1993, Clause 10

41 National Australia Bank, SIS Sub No 26

42 K Richards, SIS Sub No 52, alerted the Committee to the need under SIS for the trustee of a small employer sponsored fund to obtain a dealer's licence when dealing in securities, further advising that the ASC requirements made this difficult.

6.10 It was submitted that, whilst being a means of ensuring that a custodian is an organisation of substance, a blanket capital adequacy requirement of $5 million dollars provides little assistance to fund members should the custodian become insolvent, and is an altogether inadequate form of prudential supervision as compared to other capital requirements such as the risk weighting of assets[43]. Unfortunately, time limitations prevented the Committee from exploring a viable system of asset risk weighting. This, along with the option of having a simple scale of net tangible assets relative to funds managed, could be considered by the Government when it is preparing regulations to the implement capital adequacy requirements.[44]

6.11 The Committee noted that small funds, in cases where an investment manager wishes also to act as a custodian, should they be unable to meet the $5 million capital adequacy requirement, they can appoint an outside entity to act as custodian provided that entity satisfies the capital adequacy requirement.

Recommendation 6.3:

The Committee recognises the need for a capital adequacy requirement to establish the substance of custodians and, to a lesser extent, provide a financial buffer in the case of insolvency. The Committee recommends that in drafting regulations the ISC continue to consider a more comprehensive and flexible approach to the capital adequacy requirements for fund managers and custodians.

Removal of investment manager - clause 118

6.12 Subclauses (1) and (2) of clause 118 set out when a person and an individual or a body corporate becomes a disqualified person. A 'disqualified person' is prohibited from being a fund manager or custodian. County NatWest submitted that under clause 118, a body corporate is a 'disqualified person' if any 'responsible officer', that is a director, secretary or executive

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43 County Nat West SIS Sub No 65

44 AAPBS, SIS Sub No 76, submitted that the definition of an approved guarantee be broadened to include an approved building society.

officer, has been convicted of an offence involving dishonesty or has been the subject of a civil penalty under the SIS provisions. County Natwest further advised that this 'strict liability' provision does not allow any flexibility to take account of particular circumstances to allow the manager to remedy the situation.[45]

6.13 This provision, therefore, has the potential to result in an investment manager losing its entire superannuation funds as a result of a single breach by an individual employee. The Committee believes that this consequence appears to be unduly harsh. However, it is not unreasonable to expect that any responsible officer who commits an act of dishonesty should not be in a position of authority and that the ISC and the fund should be in a position to remove such persons.

Recommendation 6.4:

The Committee recommends that provisions relating to the removal of fund managers consequent to a responsible officer becoming a disqualified person be amended to ensure that there is not an automatic termination of the manager.

The Committee further recommends that in these cases it is the duty of the fund manager to remove the disqualified person from any financial dealings with the fund.

Dismissal of custodians for breach of eligibility requirements - clause 120

6.14 The Committee also received submissions claiming that the provisions involving the dismissal of custodians under clause 120 are too harsh.[46] For example, National Australia Bank submitted that where the custodian ceases to comply with the eligibility requirements under clause 120, the trustee must automatically dismiss the custodian.

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[45] ibid, p 20

[46] National Australia Bank, SIS Sub No 26

6.15 In addition, clause 120 allows no time for the custodian to endeavour to correct its position. This could result in harsh and unintended consequences if the custodian only breaches the eligibility requirements temporarily.

Recommendation 6.5:

The Committee recommends that the Government monitor the operation of SIS legislation to ensure that it does not result in any harsh or unintended consequences for custodians who temporarily fail to satisfy eligibility requirements.

'Soft commissions'

6.16 The term 'soft commission' refers to undisclosed commissions, reimbursement for expenses incurred or non-monetary forms of payment. The Investment Funds Association advised the Committee that, for example, under this method of remuneration a funds manager may enter into an arrangement with a stockbroker to provide a certain amount of business to the stockbroker and that the funds manager may provide services in lieu of the normal stockbroking fee.[47] Such practices may also provide scope for tax minimisation, as undisclosed commissions may not be included in the broker's taxable income. Bankers Trust also advised the Committee on soft commissions and following their appearance provided a copy of the AIMG draft Practice Note of 23 September (see Appendix G).

6.17 On a number of occasions during its two year inquiry into superannuation the Committee has stated that there should be openness and transparency in the setting of fees, charges and commissions throughout the superannuation industry in order that consumers of services are able to compare relative prices and services. Unless sound reasons can be posited in favour of the practice of charging soft commissions, the Committee is of the view that the industry work on a 'commission only' basis. Failing this, the Commonwealth, through its corporations powers, should legislate against soft commissions.

[47] Evidence p 133

Recommendation 6.6:

The Committee recommends that the Joint Committee on Corporations and Securities investigate 'soft commissions' as part of its inquiry into institutional investment.

CHAPTER 7:

AUDITORS AND ACTUARIES

The efficacy of the SIS legislation really stands on auditors being independent and doing the right thing because after all members of superannuation funds only have an independent auditor to have an independent view - so that, what is said is being done, is being done ...[48]

Introduction

7.1 This chapter addresses concerns raised by auditors about their role under the SIS legislation. The Committee has reiterated its views on the need to establish a register of superannuation auditors and a recommendation is made on the appointment and termination of auditors.

7.2 The Committee did not receive any submissions from the actuarial profession per se, or other interested parties, on the role of actuaries under SIS. The Committee understands that auditors will rely upon actuaries to issue certificates that the fund is fully funded. Under the Superannuation Guarantee legislation actuaries are required to provide superannuation funds with actuarial certificates under Part IX of the ITAA.

Auditors and Actuaries - Part 16

7.3 The Committee received a number of submissions on the role of auditors under the SIS legislation, namely:

- the responsibilities being placed upon auditors under SIS are too onerous;

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[48] Andrew Skinner, evidence p 139

- auditors need some form of protection from trustees who may seek to influence their work;

- consideration should be given to appointing auditors for a set term; and

- consideration should be given to implementing a system of registration for superannuation auditors, although such auditors would not need to be registered company auditors but, as a minimum, show proficiency in superannuation.[49]

Auditor's responsibilities

7.4 A number of submissions suggested that under SIS auditors would be placed in an invidious and overly-onerous position in that they would be expected to discharge responsibilities beyond reasonable professional expectations.[50] The Committee noted these sentiments but concluded that auditors will play a vital and critical role in maintaining the high standards of ethical and prudent conduct in the superannuation industry and that the SIS legislation should focus on this imperative. Amongst other things, this is predicated on the need for the auditor to have an ongoing interest in the conduct of the fund throughout the year and not be a 'mere visitor' after balance date.

7.5 The Committee stresses that superannuation audits should be conducted in accordance with the Australian Auditing Standards.

7.6 Under clause 126 of the SIS Bill, auditors are required to inform the trustee when they form the opinion that it is 'likely' that a contravention of the SIS Act or regulations 'may have occurred', 'may be occurring or may occur'. This requirement is the result of an amendment introduced into the House of Representatives on 27 September 1993, which amended the original requirement in the SIS legislation that auditors must notify the trustee if they form the opinion that a contravention 'may occur'.

7.7 The Committee believes that the amendment to ensure that the auditor forms the opinion that it is 'likely' a contravention 'may occur' will

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[49] Andrew Skinner, SIS Sub No 27

[50] ICAA/CPA's

assist in alerting auditors to make findings about undesirable investments and accounting practices. In addition, it will provide a special focus for auditors to judge whether a superannuation fund is operating according to SIS standards.[51]

Recommendation 7.1:

The Committee recommends that the ISC monitor closely the appointment and termination of auditors in the superannuation industry and, if necessary, advise the Government that legislation be introduced to protect auditors from unjust or unreasonable termination.

Auditor protection

7.8 It was submitted that, given the 'expanded' and 'proactive' role of auditors as proposed in clauses 125-128 and the increased responsibility that these provisions entail, auditors should be afforded greater protection under SIS.[52] Concern was expressed that the legislation did not protect auditors from the 'whim of trustee' change and that auditors who did not perform 'low cost' audits would have their services terminated. It was suggested that the integrity and independence of auditors could be strengthened by appointing them for 12 months or even longer periods.[53]

7.9 The ISC informed the Committee that it would 'look again at the issue' but indicated that it had some 'practical difficulty' which centred on the nature of the auditor's task which could involve one or two audits, a single visit or on-going involvement in monitoring a superannuation fund.[54]

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51 Ms N Gallery, SIS Sub No 31, provided some interesting and noteworthy comments on the information that members need and the role that auditors should play in monitoring the quality thereof which the ISC could consider in developing regulations and guidelines.

52 Andrew Skinner, Evidence p 111
Robert Brown and John Gorsh, p 143

53 ibid

54 Evidence p 194

Register of auditors and auditor removal

7.10 Further to recommendation 4.11 in its first report, *Safeguarding Super*, the Committee again considered the proposal to establish a register of superannuation auditors. Although the Committee agrees with this proposal in principle it is concerned that, at this stage, given the large number of superannuation funds and the differing levels of skills required to audit the range of superannuation funds, a register of auditors would be difficult to establish and administer.

7.11 However, the Committee notes the call by the ASCPA/ICAA Joint Superannuation Committee to have the professional bodies manage their own internal affairs in relation to the removal of auditors and the proviso that the ISC Commissioner, if dissatisfied, can take appropriate action under the SIS legislation.[55] The Committee respects the rights and wishes of the professional bodies to be able to manage their own internal affairs but reiterates its position that it is in the public interest that superannuation auditors be disqualified should they be in breach of fundamental duties. The Committee believes that effective and on-going consultation between the ISC and the professional accounting bodies is of critical importance to the maintenance of high standards of superannuation audits.

Recommendation 7.2:

The Committee recommends that the ISC continue the practice of notifying the professional accounting bodies where it has cause to believe that an auditor should be removed.

7.12 The Committee noted the desire of the professional accounting bodies to have the SIS legislation address the duties of auditors and actuaries separately[56], however, this evidence did not establish conclusively any tangible benefits that would arise from such a distinction.

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55 Evidence p 143

56 Joint ASCPA/ICAA submission

Recommendation 7.3:

The Committee further recommends that, in accordance with the Committee's first report *Safeguarding Super* (Recommendation 4.11), the Government, in consultation with the professional accounting bodies, again consider establishing a register of superannuation auditors and that the register consist of persons who have completed the training prescribed by the accounting professions.

CHAPTER 8

REGULATED SUPERANNUATION FUNDS

8.1 This chapter outlines the difficulties and consequences of provisions in the SIS legislation for superannuation funds to become regulated superannuation funds. A regulated fund is a fund which elects to become subject to the provisions of the SIS legislation. Having become a regulated fund, the fund is thereby entitled to concessional tax treatment.

Regulated superannuation funds - clause 19

8.2 Clause 19 of the Bill states the requirements for a fund to become a regulated superannuation fund. Should these requirements not be met the fund will not be a complying superannuation fund and will, therefore, not be eligible for concessional tax treatment. The Bill sets out two alternative tests for a fund to become a regulated superannuation fund. The trustee of the fund must be a 'constitutional corporation' or a fund must be a 'pension fund'.[57]

8.3 A constitutional corporation is either a trading or financial corporation. The legislation assumes that a body corporate which acts as the trustee of a superannuation fund is a trading or financial corporation by virtue of that fact. The Treasurer's press release of 27 May 1993 stated that 'if the trustee is a body corporate then it is a financial corporation by virtue of its activity as trustee of a superannuation fund, and so the fund falls under the corporations power'.

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[57] Sly & Weigall, SIS Sub No 79.
A number of submissions commented adversely on their perception of the need to incorporate under SIS.
Compass Financial Services, SIS Sub No 47
Allanfield Financial Services, SIS Sub No 74
The Committee noted that there is an alternative to incorporation, which involves satisfying the pensions test.

8.4 It was submitted that judicial interpretation suggests that a body corporate would not automatically be construed as a trading or financial corporation.[58] Ms L Slater drew the Committee's attention to the case of the *State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282* in which the test of whether a trustee constituted a financial corporation was said to be based on the number, frequency and complexity of the transactions undertaken by the trustee.[59] Ms Slater indicated that that some small superannuation funds operating under the corporate trustee provision may have difficulty in achieving the standing of a trading or financial corporation.[60] At the request of the Committee the ISC provided a copy of the advice on this matter prepared by the Chief General Counsel. This appears in Appendix H.

8.5 Whether a fund could satisfy the old age pension test if all funds were commuted and none taken as an old age pension was another constitutional issue raised by the Law Council. The Treasurer's press release which accompanied the introduction of the Bills in the Parliament states that 'such a fund is covered by the pensions power even if the effect of the commutation option has been that in fact the fund has always paid out the benefits as lump sum commutations'.

8.6 In its first report the Committee considered a number of longer term measures needed to strengthen the constitutional base of any enhanced prudential controls. Whilst acknowledging that there would be substantial political difficulties, it was agreed that the most simple and direct regulatory framework would be achieved by the referral by all states to the Commonwealth, as provided by s51 (xxxvii) of the Constitution, of their powers over superannuation. The Committee is still of this opinion.

Recommendation 8.1:

The Committee reiterates the recommendation of its first report that the Government explore the possibility of obtaining a referral by the states, either formal or de facto, of their power over superannuation.

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58 Australian Law Council, SIS Sub No 28

59 SIS Sub No 28

60 Evidence p 149

Trustee registration requirements

8.7 The Committee also noted that the registration requirements placed on trustee companies by the ISC and ASC may be excessive and that consideration should be given to implementing a more efficient form of registration to reduce compliance costs and unnecessary duplication of administration. Having trustee companies prepare one single return which is then used jointly by the ISC and ASC would promote efficiency. Under this arrangement the ISC could remit any moneys owing to the ASC on a regular basis.

Recommendation 8.2:

The Committee further recommends that the ISC and ASC implement a system of registration and filing where only a single return is required by corporate trustees of superannuation funds.

CHAPTER 9:

TAX FILE NUMBERS

9.1 This chapter outlines the issues surrounding the access to and use of Tax File Numbers (TFNs) under the SIS legislation. It concludes with recommendations on the expanded use of TFNs in tracking superannuation funds. The Government proposes allowing superannuation funds to obtain and hold a member's TFN for the purpose of transferring it to an eligible rollover fund (ERF). Under SIS legislation, provision has been made for the automatic rollover of certain benefits between funds for members who have left the fund or cannot be located. In addition, the ISC will maintain a register of superannuation fund members whose benefits have been deposited in an ERF.

9.2 The submissions received by the Committee focused on two major issues involving TFNs, namely:

- the date at which superannuation funds can begin to collect TFNs; and
- the purposes for which superannuation funds can use TFNs.[61]

TFNs - date of collection

9.3 Under the SIS legislation superannuation funds will not be able to collect TFNs from members until the SIS legislation commences on 1 July 1994. The submission by Noble Lowndes proposed that superannuation funds be able to collect TFNs from superannuation fund members prior to 1 July 1994 to ena65
ble the updating of relevant material and the collection of TFNs prior to the commencement of the lost member provisions of the SIS legislation.[62] The

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[61] Noble Lowndes SIS Sub No 25
ASFA SIS Sub No 68

[62] Noble Lowndes, op cit

Committee believes that there is merit in this proposal.

Use of TFNs

9.4 The second major issue raised in connection with TFNs involved their use by superannuation funds. Under SIS, TFNs can only be used in very limited circumstances, for example transferring a benefit to an Eligible Rollover Fund. However, where the fund is paying a benefit to a member, it will still have to ask the member for the TFN, even though the fund already has it.[63] [64]

9.5 The submission received from the Association of Superannuation Funds of Australia (ASFA) proposed that superannuation funds should be able to use TFNs for any purpose directly related to the conduct of the fund.[65] The submission by Noble Lowndes proposed that employees who disclose their TFNs for employment purposes should also be deemed to have disclosed them for superannuation purposes.

9.6 The Committee acknowledges that these proposals would streamline the administration of superannuation. It is further acknowledged that the lost member problem, which involves tracking small amounts of superannuation for hundreds of thousands of employees (some of whom may have as many as four superannuation accounts), needs to be addressed in an effective and efficient way. However, the expanded use of TFNs gives rise to a number of privacy considerations.

Tax File Numbers

9.7 The Privacy Commissioner has inter alia advised the Committee on the collection and use of TFNs for superannuation purposes. The Commissioner has expressed concerns about any extension of the use of TFNs beyond the original policy intent of the TFN legislation, which involved the ISC's access to TFNs based on the administration of the 'reasonable benefits limits'. The Commissioner believes the options of earlier access to, and increased use of, TFNs by superannuation funds and the ISC as being outside this original policy intent. Notwithstanding this, the

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63 ibid

64 SIS Sub No 25

65 SIS Sub No 68

Commissioner gave qualified support for earlier access to and increased use of TFNs. The qualifications include:

- that individual members are given notice of the practice at point of first collection of the TFN;
- that individual members are notified of the purpose of collection and any subsequent proposed uses;
- that individual members are informed that giving a TFN is voluntary for the purposes of identifying members, who may later need to claim benefits from an eligible rollover fund or the ISC; and
- that individual members are given the opportunity to opt for a specific collection for each authorised person.[66]

9.8 The Committee acknowledges these concerns and recommends that they be taken into account in amending and implementing the legislation.

9.9 Of paramount importance in the expanded use of TFNs in superannuation funds is the need for members to give express consent to the purposes for which they are being collected.

Recommendation 9.1:

The Committee recommends that the SIS legislation be amended to allow superannuation funds to collect member TFNs, subject to member consent, from the date the Bill receives Royal Assent. In addition, the Committee recommends that the SIS legislation be amended to allow superannuation funds, to use TFNs for taxation and transfer of benefits purposes.

[66] SIS Sub No 94

CHAPTER 10:

STATE SUPERANNUATION SCHEMES

'Because of the construction of the Commonwealth Constitution, there are inherent difficulties in applying some of the ISC's proposed powers to statutory schemes'.[67]

10.1 This chapter analyses the difficulties experienced in applying the SIS legislation to state public sector superannuation schemes and concludes with a recommendation for an amendment.

10.2 The Committee has received submissions from the Cabinet Office of both Queensland and NSW, claiming that the SIS legislation contains a number of provisions which undermine the power of the States to legislate and make policy in regard to their public sector superannuation schemes.[68]

10.3 The focus of the submissions is the seemingly inordinate amount of power that the SIS legislation provides the ISC to regulate state public sector superannuation schemes. The Queensland Government submission, for example, challenged the appropriateness of the ISC (a Commonwealth agency) having the power to suspend or remove a trustee body (appointed under a state law) and appointing a temporary trustee.[69]

10.4 The States submitted that as they already have a high level prudential control and supervision under their own statutes, SIS provided an unnecessary additional layer of regulation.[70] In this regard the NSW Government Superannuation Office provided information (see Figure 10.1) on the prudential controls applicable to NSW public sector superannuation schemes.

10.5 It was on the above grounds the States submitted that they be exempted from the SIS provisions.

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67 The Cabinet Office, NSW SIS Sub No 69

68 ibid
The Cabinet Office, Queensland, SIS Sub No 66

69 SIS Sub No 66, p 4

70 SIS Sub No 69

Figure 10.1:

PRUDENTIAL CONTROLS OVER NSW PUBLIC SECTOR SUPERANNUATION SCHEMES

- The NSW public sector superannuation schemes are administered in accordance with the Superannuation Administration Act which prescribes such matters as the constitution and functions of the State Authorities Superannuation Board and the State Superannuation and Investment and Management Corporation.
- The schemes are subject to Ministerial control and parliamentary scrutiny. The individual superannuation schemes are governed by their own Acts, which define the rights and obligations of the members, employers and scheme administrators, and prescribe regular actuarial valuations and reporting requirements.
- These Acts include the *Superannuation Act 1916*, the *State Authorities Superannuation Act 1987*, *First State Superannuation Act 1992*, and the *Police Regulation (Superannuation) Act 1906*.
- Government guaranteed employer-financed benefits characterise NSW public sector superannuation.
- The schemes are subject to annual external audits of accounts and records by the NSW Auditor-General under the *Public Finance and Audit Act 1983*, as well as to internal auditing requirements.
- *The Public Authorities (Financial Arrangements) Act 1987* specifies the State Authorities Superannuation Board's investment powers.
- The Annual Reports Act specifies disclosure requirements which must be complied with.
- Other prudential controls imposed by:

  The Public Sector Management Act 1988 and senior executive contracts.

  The Freedom of Information Act 1989

  The Independent Commission Against Corruption Act 1988

  The Ombudsman

Source: Paper presented by the NSW Superannuation Office on 23 September 1993.

Exclusion of public sector schemes

10.6 The Committee was further advised that should the states be granted exemption from the SIS provisions, there would be two unintended consequences:

> Firstly, concessional taxation treatment would cease for fund earnings and benefit payments from an exempted, and thus non-complying, superannuation scheme. Secondly, this non-compliant status would mean that employer contributions to exempted superannuation schemes would not be recognised for the purposes of the Superannuation Guarantee Charge (SGC) legislation.[71]

10.7 The joint submission recommended that either an amendment to the ITAA (S267) and the SIS Bill (Clause 45) would be needed to ensure the maintenance of concessional taxation treatment of public sector schemes and the deeming of contributions made by employers to these schemes as satisfying the Superannuation Guarantee (Administration) Act 1992 requirements.[72]

10.8 The Committee is in receipt of a letter from the Prime Minister to State Premiers which proposes that compliance with SIS be automatically required unless an exemption has been granted. Subject to certain conditions the Prime Minister has stated that exemptions would be available. These conditions include undertakings by relevant State/Territory governments:

- to guarantee the liabilities of the scheme by ranking the accrued liabilities of the scheme equally with State/Territory bonds; and
- to ensure compliance with the main operative provisions of the SIS legislation (vesting, preservation, disclosure and, where applicable, prudent investment).[73]

10.9 The Committee acknowledges the difficulties that the States have with the SIS legislation and agrees that amendments should be made to

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71 Joint submission from NSW, Qld, WA, Tas and NT, Submission No 90.

72 ibid

73 See Appendix I

accommodate the right of state parliaments to legislate in the area of state public sector employee superannuation. The Committee understands that the states are prepared to adopt parallel prudential controls and supervision which are consistent with the SIS standards.

Recommendation 10.1:

The Committee recommends that the Bill be amended to exempt the States and the Northern Territory. It is further recommended that, if required, the ITAA and the Superannuation Guarantee Charge (Administration) Act be amended to ensure that existing treatment/coverage for certain state superannuation schemes under those Acts is maintained.

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.[74]

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.[75] 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.[76]

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.[77] The Committee acknowledges that the current operation of section 232A of the Corporation Law may cause certain

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74 SIS Sub No 28, p 13

75 Mallesons Stephen Jaques SIS Sub No 80, p 7
Sly and Weigall, SIS Sub No 79

76 Sly and Weigall, SIS Sub No 79, p 4

77 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.

CHAPTER 12:

TECHNICAL MATTERS

12.1 This chapter analyses a number of technical matters which the Committee believes should be addressed, namely:

- lack of a definition for market value; and
- equal representation requirements for non-associated employers.

Market value definition

12.2 The Committee considered a submission from the Australian Institute of Valuers and Land Economists (AIVLE) which proposed that a definition of market value be inserted in the SIS legislation.[78]

12.3 The submission indicated that the definition of 'value' under clause 10 of the SIS legislation means 'market value' and includes 'amount'.[79] The SIS legislation, however, contains no definition of market value. The term market value is used in other parts of the legislation, for example, in the in-house asset provisions. The Committee has used the AIVLE definition of 'market value' in formulating recommendation 12.1.

Recommendation 12.1:

The Committee recommends that the Government amend the SIS legislation to insert the following definition of 'market value':

Market Value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudentially and without compulsion.

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78 SIS Sub No 82

79 SIS Sub No 82, p 1

Equal representation requirements for non-associated employers - clause 90

12.4 The Committee considered a proposal that under clause 90, superannuation funds that have Statutory Accounting Periods (SAPs), which balance prior to 30 December 1993, may have difficulties in meeting the equal representation requirements in non-associated employer-sponsored superannuation funds.[80] The Committee was advised that the funds affected are those which have more than one employer sponsor, and have at least one employer sponsor who is not associated with any of the other employer sponsors.

12.5 The Committee acknowledges that funds in this position will be placed at a disadvantage as they will have to comply with the equal representation rules from as early as 1 January 1994, whereas other funds will have until 1 July 1995 to adopt the equal representation provisions. The Committee understands that the ISC will use its powers to exempt or modify the legislation in respect of these funds. *As it could be construed that such a discretion exceeds the bounds of delegated legislative power, the Committee believes that the ISC should report to the Parliament annually on the nature and frequency of such exemptions or modifications.* (Refer to Recommendation 11.1)

Key Dates of Commencement

12.6 The SIS legislation provides that a superannuation fund must make an irrevocable election, pursuant to caluse 19, to become a regulated superannuation fund subject to the SIS provisions. Andrew Fairley advised the Committee that practitioners and regulators would have difficulty in meeting the demands of the 1 July 1994 date of election. He proposed that the burden could be eased by having a later date of election for the 'excluded funds' (funds with less than five months).[81]

12.7 The ISC has advised that the Government has addressed these concerns by extending the dates by which superannuation funds must elect to become regulated superannuation funds. Funds whose governing rules are in statute, will have until 30 June 1995 to make an election in accordance

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80 William M Mercer, SIS Sub No 72

81 SIS Sub No 91, pp 1-2

with clause 19. Funds with less than five members will have until 31 December 1994 to make an election, whilst funds with more than five members will have until 28 July 1994 to make the election.

Recommendation 12.2

The Committee recommends that the Senate agree to a Government amendment extending the dates of elections for superannuation funds to become regulated funds under SIS according to the following schedule:

Type of fund	Last Date of Election
Governed by statute	30 June 1995
Less than five members	31 December 1994, or on the last day of its 1994/95 year of income, whichever comes first
More than five members	28 July 1994

CHAPTER 13:

THE SUPERANNUATION INDUSTRY (SUPERVISION) CONSEQUENTIAL AMENDMENTS BILL 1993

AMENDMENT OF THE *BANKRUPTCY ACT 1966*

Introduction

13.1 This Amendments Bill affects the property that is available to creditors and that which is protected in bankruptcy; includes pensions as defined in the SIS Bill as 'income' for the purposes Part VI of the *Bankruptcy Act 1966*, and makes certain provisions in governing rules of superannuation funds and approved deposit funds void.

Property available to creditors and property that is protected

13.2 Section 116(1) of the *Bankruptcy Act 1966* (the Act) provides for the property of a bankrupt that is available for division among the bankrupt's creditors. Section 116(2) of the Act lists property of a bankrupt that is not available for division among a bankrupt's creditors.

13.3 Section 116(2) is amended by the Superannuation Industry (Supervision) Consequential Amendments Bill 1993. These amendments have two major effects. First, the requirement that policies of life assurance or endowment assurance that are protected by section 116(2) must have been in force for two years before the commencement of bankruptcy; and the requirement that similarly protected policies for annuities must have been in force for at least five years before the date of bankruptcy are

removed. Second, the new paragraph (2)(d) broadens the property that is not available for division among a bankrupt's creditors to include superannuation policies, the interest of the bankrupt in, or payment from, a regulated superannuation fund or approved deposit fund. However, there is a limit on the amount that can be protected by the new section 116(2)(d). The proposed section 116(5) limits the amount protected by section 116(2)(d) to the pension Reasonable Benefit Limit (RBL). The pension RBL is determined in accordance with section 140ZD of the *Income Tax Assessment Act 1936*. The RBL for the 1994-95 year of income is $800 000 and is indexed for each subsequent year.

13.4 The Committee is concerned that the removal of the time limits may provide a means by which bankrupts can avoid creditors.

Part IV of the Bankruptcy Act 1966

13.5 Division 4B of this Part requires a bankrupt who derives income during the bankruptcy to pay contributions towards the bankrupt's estate and enables the recovery of certain money and property for the benefit of the bankrupt's estate. This Amendments Bill adds to the definition of 'income' pensions within the meaning of the SIS Bill.

13.6 This Part of the Act allows a trustee in bankruptcy to assess a threshold amount as necessary income for the bankrupt and the amount received in excess of that figure divided by two must be paid to the trustee for creditors. When taken in totality the proposed changes restrict a bankrupt from taking advantage of the generous provisions relating to the period before bankruptcy.

Certain governing rules to be void

13.7 The Bill proposes that a new section be inserted into the Act to void any provisions in the governing rules of a superannuation fund of an ADF which have the effect of cancelling, forfeiting, reducing or qualifying a beneficial interest of a member who becomes a bankrupt, who commits an act of bankruptcy or who executes a deed of assignment or arrangement. The Committee notes that in *Re Bond; Ex parte Ramsay* (Hill J, Federal Court of Australia, 30 November 1992) a forfeiture clause which purported to defeat benefits to which a member had become absolutely entitled was

held to be void. The Committee also notes that this decision has been appealed and a decision has been reserved by the Full Federal Court. The Committee supports the amendment.

Submissions

13.8 The Committee received one submission concerning the provisions dealing with bankruptcy in the Superannuation Industry (Supervision) Consequential Amendments Bill 1993.[82]

Breach of the sole purpose test

13.9 Mr Tony Marks of Macquarie Investment Management Limited raised the issue of whether or not a trustee would be in breach of the sole purpose test if the trustee made a payment of a benefit to someone other than a member of a dependant[83]. The Committee notes that the legislation does not deal with this matter explicitly. Clause 58(1)(b)(v) of the SIS Bill however provides that an 'ancillary purpose' includes 'the provision of such other benefits as the Commissioner approves in writing.' It is anticipated that the Commissioner would use this discretion in circumstances where a creditor sought to have access to that part of a bankrupt's superannuation above the RBL. Alternatively, the trustee could pay the bankrupt member their entitlement and the trustee in bankruptcy could subsequently access the amount through the usual means.

'the value of the property'

13.10 Mr Marks also raised the issue of the definition of the term 'the value of the property'. He submitted that it is of particular importance for there to be some certainty concerning the method of evaluation that is to be used and the point in time at which the evaluation is to occur. He submitted that the date that an individual is declared bankrupt would provide certainty as well as avoiding complex and disputable calculations.

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82 SIS Sub No 85

83 ibid

Recommendation 13.1:

The Committee recommends that the Consequential Amendments Bill be amended to include a definition of 'the value of the property', which outlines a method of valuation and specifies a point in time at which the valuation is to occur.

13.11 Mr Marks raised a number of other points relating to taxation matters. Although these issues will need to be addressed, they fall beyond the scope of the Committee's current terms of reference.

CHAPTER 14:

INTRODUCTION TO CONSUMER MATTERS

14.1 In the course of its inquiry into superannuation, the Committee has identified a number of issues of particular interest to consumers where reform is required. These issues will also be of relevance to providers of superannuation who seek to provide a high standard of service to their clients. Of paramount importance is the establishment and effective operation of the proposed Superannuation Complaints Tribunal pursuant to the Superannuation (Resolution of Complaints) Bill 1993.

14.2 Chapter 15 examines the structure of the disputes resolution mechanism that will be established by the Superannuation (Resolution of Complaints) legislation. Chapter 16 examines the type of complaints that the Tribunal will have the jurisdiction to review. Chapters 17 and 18 examine the predominant issues that have been raised in the course of the Committee's inquiry.

14.3 In its first report, the Committee identified matters which may not readily be understood and therefore might become the subject of a dispute between a member of a superannuation fund and the fund. Some of these matters relate to the entitlements of individual members. Other matters that might be subject to dispute are of a more general character such as the election of trustees, investment policies, the alteration of trust deeds and the degree of employer influence over trustees.[84]

14.4 The Committee noted in its first report that the predominant view was that there was a need for the establishment of an independent dispute resolution mechanism that provided an alternative to the court system.[85]

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84 *Safeguarding Super*, June 1992, p 135

85 *ibid*, p 136

14.5 The Committee examined possible models for such an alternative dispute resolution mechanism and recommended that it be mandatory for all trustees to establish an internal dispute resolution mechanism. In respect to the external review of trustees' decisions, the Committee concluded that the decisions of trustees should be externally reviewable.

14.6 It was considered that a quasi-judicial statutory body could be established to review trustees' decisions where the internal dispute resolution mechanism had not resolved the complaint. Alternatively, it was considered that an industry authority could be established. The Committee preferred the latter and recommended that an industry review authority be established with the power to ensure that trustees' powers had been properly exercised and that all relevant evidence had been considered.

14.7 Notwithstanding the Committee's recommendation, the Government has decided to establish a quasi-judicial statutory review body. This is, of course, the proposed Superannuation Complaints Tribunal.

14.8 In August 1992, the Committee issued an Issues Paper entitled *Super Charges*. In that Paper, the Committee again identified the need to examine the establishment of a low-cost, external dispute resolution mechanism.[86]

14.9 In its sixth and seventh reports, *Super-Fees, Charges and Commissions* and *Super Inquiry Overview*, respectively, the Committee reiterated its earlier recommendation that a low cost and accessible external review body should be established.[87] [88]

14.10 The Committee's belief that a formal disputes resolution mechanism in the superannuation arena is necessary was confirmed in its inquiry into the Queensland Professional Officers Association Superannuation Fund. The findings of the Committee are set out in its eighth report entitled *Inquiry into the Queensland Professional Officers Association Superannuation Fund*.

14.11 The Committee received a significant number of written submissions in relation to 'consumer issues' within its terms of reference. The Committee heard evidence on these and other 'consumer issues' during the hearings on these Bills.

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[86] *Super Charges*, August 1992, p 63

[87] *Super - Fees, Charges and Commissions*, June 1993, p 48

[88] *Super Inquiry Overview*, June 1993, p 37

CHAPTER 15:

THE SUPERANNUATION COMPLAINTS TRIBUNAL

The Complaints Mechanism

15.1 The Superannuation (Resolution of Complaints) Bill (hereafter 'the Bill') establishes a Tribunal, which is to be known as the Superannuation Complaints Tribunal (hereafter 'the Tribunal'). The objective of this Tribunal is to provide mechanisms for the conciliation of complaints between trustees and members of superannuation funds and, where conciliation is unsuccessful, for the review of decisions of the trustees to which the complaints relate. The review mechanism is to be fair, economical, informal and quick.[89] Figure 15.1 shows the proposed mechanism.

The Complaint

15.2 The Tribunal cannot deal with a complaint unless the complainant has attempted to have the dispute settled by way of the trustee's internal dispute resolution mechanism established in compliance with clause 96 of the Superannuation Industry (Supervision) legislation. A trustee is required by that clause to establish arrangements for dealing with complaints and inquiries within 90 days.

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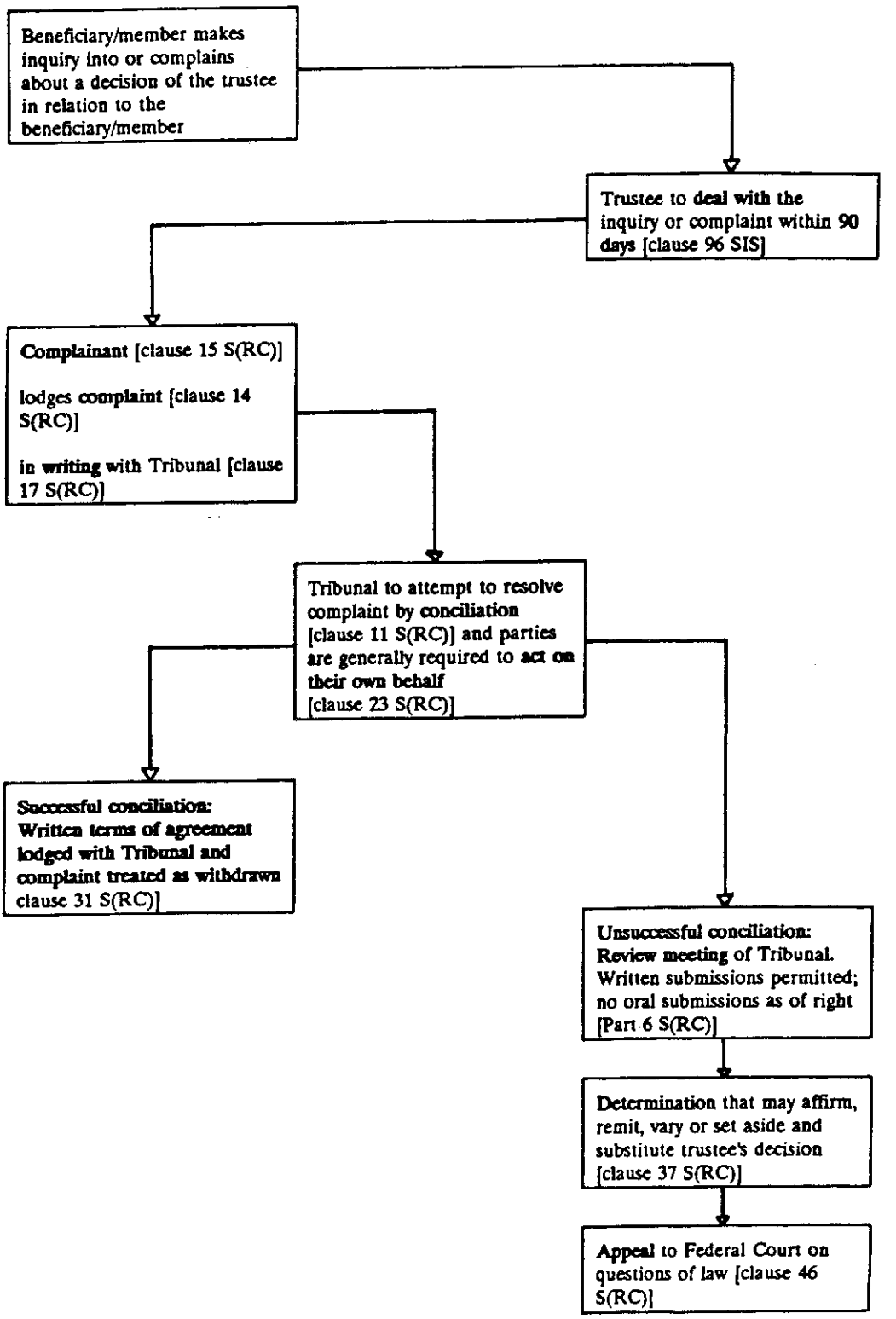
[89] Superannuation (Resolution Of Complaints) Bill 1993, clause 11

Figure 15.1:

COMPLAINTS MECHANISM UNDER SIS BILL AND SUPERANNUATION (RESOLUTION OF COMPLAINTS) BILL



15.3 Where the trustee's internal dispute resolution mechanism is unsuccessful a complainant may lodge a complaint with the Tribunal. Clause 16 of the Bill provides that the Tribunal must help a complainant where they need help in making their complaint.

Reviewable Decisions

15.4 Clause 14(1) of the Bill provides that a decision of a trustee of a fund, made either before or after the commencement of the Superannuation (Resolution of Complaints) Act, in relation to a particular member or former member of a regulated superannuation fund or a particular beneficiary or former beneficiary of an approved deposit fund, is a decision that the Tribunal has the jurisdiction to review. A decision of a trustee is defined in clause 4 of the Bill as the making or failure to make a decision by a trustee or by a person acting for a trustee.

Non-reviewable decisions

15.5 Clauses 14(2) and 14(5) provide that certain complaints are outside the jurisdiction of the Tribunal. Certain funds will be excluded from the jurisdiction of the Tribunal and decisions of trustees of those funds will not be reviewable by the Tribunal. Complaints relating to certain matters will also be excluded. These excluded funds and excluded matters will be prescribed by regulation.

The Grounds

15.6 Clause 14 provides that a complaint may be made about a trustee's decision on three grounds. The grounds of review are that the decision was in excess of the powers of the trustee, that the decision was an improper exercise of the powers of the trustee or that the decision is unfair or unreasonable.

The Complainant

15.7 Clause 15 is exhaustive in answering the question of 'who may make a complaint?'.

15.8 In relation to a trustee's decision regarding the payment of a benefit, clause 15(1)(a) provides that a person who has an interest in the benefit, or a person who claims to be entitled to benefits through such a person, or such persons' agents may make a complaint. Clause 15(2) sets out the circumstances when a person does not have an interest in a benefit for the purposes of clause 15(1)(a). Essentially, where a person who satisfies the criteria of clause 15(1)(a) has been notified by the trustee of the proposal to pay a benefit, and of the correct prescribed period of time in which to object, and that person has not objected, that person does not have an interest and therefore is not able to make a complaint.

15.9 In relation to a decision of a trustee that does not concern the payment of a benefit, clause 15(1)(b) provides that a member or former member of a regulated superannuation fund or a beneficiary or former beneficiary of an approved deposit fund or such persons' agents or personal legal representatives may make a complaint.

The Conciliation Process[90]

15.10 In the first instance, the Tribunal is required to attempt to settle a dispute by way of conciliation. The Tribunal may arrange conciliation conferences if it thinks it is desirable. These conferences may be conducted by telephone or by other means of communication and statements at conferences are privileged. Where a conciliation is successful and terms of agreement are put in writing and lodged with the Tribunal, the complaint is treated as withdrawn.

The Review Process[91]

15.11 Where a dispute is not resolved by way of conciliation, the Tribunal is to convene a review meeting. Parties to the dispute may make written submissions but may not make oral submissions unless the Tribunal so orders. The Tribunal may inform itself of any matter relevant to the review of a decision in any way it thinks appropriate. In its review of decisions, the Tribunal has all the powers, obligations and discretions of the trustee.

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[90] Part 5 of the Bill

[91] Part 6 of the Bill

The Determination[92]

15.12 The Tribunal is to make a determination in writing that affirms, remits, varies, or sets aside and substitutes the trustee's decision. The Tribunal must affirm the trustee's decision if it is satisfied that the decision was fair and reasonable in all the circumstances.

Appeals[93]

15.13 A determination of the Tribunal is appealable to the Federal Court on a question of law. Where a complainant does not defend an appeal instituted by another party, the Federal Court may not order costs against the complainant.

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92 Clause 37

93 Clause 46

CHAPTER 16:

ISSUES: THE COMPLAINT

Reviewable Decisions

16.1 In its sixth report the Committee noted that a small minority of consumer complaints were so serious that they constitute serious and wilful malpractice on the part of a very small number of participants in the industry. Accordingly, the Committee recommended that the proposed Tribunal adjudicate on consumer complaints arising out of personal superannuation contracts entered into after 1 July 1992, the date of commencement of the compulsory superannuation arrangements, where these have not been resolved at the company or industry level[94].

'Retrospectivity'

16.2 It was noted in paragraph 15.4 above that decisions of trustees made either before or after the commencement of the *Superannuation (Resolution of Complaints) Act* will be reviewable, unless otherwise excluded. This provision was one of a number of amendments to the SIS Bill successfully moved by the Government in the House of Representatives. The amended provision reads:

> "Complaints
> 14(1) This section applies if the trustee of a fund has made a decision **(whether before or after the commencement of this Act)** in relation to:
>
> (a) a particular member....
> (b) a particular beneficiary...."

(The amendment is shown in bold type.)

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94 *Super - Fees, Charges and Commissions,* June 1993, paragraphs 3.85 and 3.9

16.3 Concerns have been raised by industry organisations that this provision could create a double liability for trustees who have made and acted upon decisions in relation to the payment of some benefits. For example, in the case of a death benefit where a number of parties are claiming to be entitled to the benefit, and the trustee has made a decision as to who is entitled to the benefit, and has made the payment accordingly.[95] If the Tribunal determined that a different person was the beneficiary, the trustee would be required to make a payment to that person and then attempt to recover the money it initially paid out.

16.4 It was also submitted that 'trustees have historically been advised not to enter reasons for their decision making processes, or the documents upon which they have relied, into their minutes'.[96] Trustees therefore may be required to enter into the dispute resolution process with no record of why the decision was so made and having forgotten the reasons that the decisions were taken. Although this may be so in some practices, the Committee accepts the submission of Mr Noel Davis that the common law requires principles of natural justice to be applied by trustees when they make decisions[97], for example, in respect to disability claims. In support of his submission, Mr Davis cited a decision of the New South Wales Supreme Court, *Chammas v Harwood Nominees Pty Ltd*[98]. The Committee does not accept that past poor practices by trustees are sufficient reason to deny a complainant access to the Tribunal.

16.5 However, in some circumstances, it may be that where a decision has been made by a trustee, prior to the commencement of the *Superannuation (Resolution of Complaints) Act*, in respect to the issue of who is entitled to the payment of a benefit, that the Tribunal should not have the jurisdiction to review **that** decision. This would arise only in circumstances where more than one party is claiming the benefit **and** where the benefit has been paid by the trustee. The Tribunal would retain the jurisdiction to review decisions in respect of complaints made by the person who has been determined by the trustee to be the beneficiary. The Tribunal would retain the power to review decisions of trustees where a benefit has not been paid or where only

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95 William M Mercer Pty Ltd, SIS Sub No 72
Andrew Fairley & Associates, SIS Sub No 91

96 Andrew Fairley & Associates, *op cit*, covering letter, p 2.

97 Evidence p 104, 106

98 *(1993) 7 ANZ Insurance Cases 61-175.*

one party is claiming to be the beneficiary, that is, where there is no risk of a trustee being liable to pay out a benefit twice.

Recommendation 16.1

The Committee recommends that the Government regulate to exclude from the Complaints Tribunal those matters involving trustee decisions, made prior to the commencement of the Superannuation (Resolution of Complaints) Act, as to who is entitled to a benefit which has already been paid.

16.6 The legislation does not allow decisions of trustees going back for many years to be heard by the Tribunal. The Bill provides a discretion for the Tribunal to consider complaints relating to decisions of trustees made more than 12 months prior to the complaint, but generally there is a 12 month cut-off.[99] The Committee supports this component of the Bill.

Non Reviewable Decisions: Excluded Complaints

Introduction

16.7 It was noted above in paragraph 15.5 that complaints relating to certain funds and matters will be excluded from the Tribunal's jurisdiction. The Government has stated that complaints relating to questions of disability will be prescribed by regulation to be excluded from the Tribunal's jurisdiction.[100] There was some concern that complaints relating to life office personal superannuation disputes may also be excluded however, the ISC stated that '[t]he Government has said that the Tribunal is going to hear those sorts of complaints'.[101]

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99 ISC, evidence p 190

100 Attachment to Treasurer's press release of 27 May 1993, section 8, p 10

101 Evidence p 187

The debate surrounding the 'medical cases'

16.8 The Committee has received many submissions that express concern about the proposed exclusion of complaints involving medical issues. The consumers' concern is that if these type of complaints are excluded, the complainants, in reality, will have no forum in which to have their complaint heard. The Committee has also received submissions concerned that disability claims would 'potentially overwhelm the Tribunal' so that 'the Tribunal's time ... would be taken up in dealing with those matters rather than the other sorts of matters which are envisaged to come before the Tribunal'[102].

Complaints involving medical issues - what are they about?

16.9 The types of complaints that are relevant to this debate are disability claims.[103] Within this genre of complaint three issues are normally disputed or potentially open to dispute, namely:

- whether the trustees have followed the correct procedures in reaching a decision, rather than, for example, having their decision dictated by the insurer;
- the definition of 'disability' in the trust deed; and
- the medical evidence.[104]

16.10 The Committee did not receive any statistical evidence in relation to the proportion of disputes in each category. However, Mr Davis advised that 'the majority of the disputes are over procedures and whether principles of natural justice and so on are applied'. He further stated that disputes over medical evidence form the minority of disputes.[105]

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[102] Mr Lockery, ASFA, evidence p 89

[103] ASFA, evidence pp 89-90
Mr Davis, evidence p 103ff

[104] ibid

[105] Davis, op cit, p 109

Correct Procedures

16.11 In discussing 'correct procedures', the Committee is referring to the principles of procedural fairness which, as it was noted earlier, trustees are required to observe. As noted above, the majority of disputes relate to procedural fairness in trustee decision making.

16.12 In a submission from Ms Sonia Nolan, who has been involved in a disablement dispute with a trustee, a number of the matters that can become the subject of a such a dispute were identified. These included allegations relating to procedural fairness, namely, the lack of consideration given by a trustee to a member's treating doctors' reports and the disproportionate reliance given to a trustee's doctors' reports; as well as inconsistencies in the definitions of total and permanent disability in the trust deeds and the 'group life policy'; and the prohibitive expense involved with taking action in a court.[106]

16.13 In responding to the Committee's inquiry as to the types of procedures that might not be correctly followed, Mr Davis stated that members could be denied the opportunity to respond to an adverse medical report that trustees have obtained and based their decision upon. Evidence was also received that it is not uncommon for trustees to rely upon the decision of the insurer rather than making an independent decision. It was brought to the Committee's attention that there is expert evidence to this effect in a case that came before the New South Wales Industrial Court last year, *Fernance v Wreckair*[107].

16.14 It is the trustee who is required to make the decision as to whether or not a member is disabled under the trust deed. To rely on the decision of the insurer, the trustee as the decision-maker is allowing itself to be dictated to, which in administrative law is a ground for review. It was submitted that 'the Complaints Tribunal can have an important role to play in ensuring that the trustees have followed the correct procedures and done all that they should have done in deciding whether a member is permanently and totally disabled'.[108]

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106 SIS Sub No 13

107 Unreported, Industrial Court (NSW), 21 September 1992. Davis, evidence, p 104

108 ibid, Davis, p 105

Definition of 'disability' in the trust deed

16.15 The relevance of the meaning of the term 'disability' in the trust deed is something that is rarely considered by a consumer until a claim is made. It appears that the term is not used consistently in the industry, rather the deed defines its meaning. Consequently, disputes as to the meaning assigned to the term in any particular deed are a common form of dispute between trustees and consumers. These disputes do not involve the issue of whether a person is disabled, or to what degree they are disabled, but rather involve the interpretation of the term used in the deed. This issue does not involve medical evidence. The ISC believes that this problem is something that will diminish significantly over time.[109]

16.16 Notwithstanding the ISC's hope that this problem will diminish over time, the Committee has given consideration to whether this is the type of matter that should come before the Tribunal. The arguments that have been raised for the exclusion of certain matters from the Tribunal's jurisdiction do not seem to apply to this category of complaint.

16.17 The ISC is also aware of the problem where the trust deed has one definition of disability but the insurance contract has a different one. Mr Duval, the Australian Government Actuary, stated that this is a 'process' problem. He also stated that it is quite dangerous for the fund and that it is an issue that the ISC is aware of in conducting audits.[110]

Medical Evidence

16.18 As noted above, no statistical data was provided to the Committee, however, Mr Davis stated that disputes over medical evidence comprise a minority of disputes.[111]

16.19 It is this category of 'medical dispute' that has attracted allegations of potentially swamping and overworking the fledgling complaints resolution system. In disputes of this nature each party would come armed with its medical expert(s) who would give evidence in support of that party's case.

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[109] Evidence p 188

[110] ibid

[111] Evidence p 109

That evidence would then be able to be tested by questions from the opposing party and from the Tribunal.

Options

Tribunal to examine procedural matters in medically related complaints

16.20 The Committee notes that the regulations may exclude all of a complaint or only certain parts of a complaint involving 'excluded matters'. In this way, the Tribunal could hear the part of a complaint relating to the procedure of the decision (or the interpretation of 'disability,) but be excluded from determining issues involving medical evidence. Therefore one option is to permit the Tribunal to accept complaints involving medical issues for the purpose of ensuring that the decision had been made in accordance with the principles of procedural fairness. Where the Tribunal finds that the principles of procedural fairness have not been applied, the Tribunal could use its power pursuant to section 37 of the *Superannuation (Resolution of Complaints) Act* to remit the matter to the trustee for reconsideration in accordance with the Tribunal's directions.

16.21 It was acknowledged by the ISC that it could examine the possibility of whether the Tribunal could deal with those sorts of cases where the mechanism has gone wrong, for example if the trustees had not actually considered the case, where they had just taken out disability insurance, passed the case on to the insurance company that rejected it, and not looked at the case itself. The Committee endorses the Commission's agreement to examine this possibility.

16.22 Mr Duval submitted to the Committee that due process issues should be filtered out in the conciliation stage.[112] This appears to the Committee to be an excellent reason to allow complaints involving medical issues to come within the jurisdiction of the Tribunal, at least to the stage of determining whether or not natural justice has been observed, with the power to remit the matter to the trustee with directions.

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[112] Evidence p 186

16.23 The power to remit matters to the trustees with directions exists under clause 37(1)(b) of the Bill. Mr Duval stated, 'that power is there for due process issues, where the trustees have decided that something is irrelevant which the Tribunal feels is very strongly relevant'[113]. It appears to the Committee that in matters where procedure is being examined, it is irrelevant as to whether the substantive nature of the claim is a 'medical issue' or otherwise.

Tribunal to examine all complaints involving medical issues

16.24 Where the Tribunal is satisfied that a decision has been made by a trustee in accordance with the rules of natural justice, the issue arises as to whether the Tribunal should review the substantive issues, that is, the medical evidence.

16.25 It was submitted to the Committee that the Tribunal is an equally good position as a court to be able to decide this sort of issue. It was further submitted that the Tribunal would be in a particularly good position to conciliate and decide these matters if the Tribunal was constituted to include a member with medical training.[114]

16.26 It was submitted to the Committee that:

> it is incongruous that a low cost tribunal that is being established to resolve disputes should not be available to resolve disputes where a member is normally unemployed, in a weak financial position and therefore ordinarily unable to take issue with an adverse decision that in the end result has a dramatic effect on the lives of the people involved[115],

and further that disability disputes are 'the very sort of thing that this Tribunal ought to exist for.[116] [117]

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113 Evidence p 186

114 Davis, evidence p 105

115 ibid, p 107

116 ibid, p 109

117 see also:
Consumer Credit Legal Service (Vic) and Consumer Credit Legal Centre (NSW), SIS Sub No 53
Australian Federation of Consumer Organisations, evidence p 204-205

16.27 The Australian Consumers' Association submitted that it could see no reason why a superannuation complaints tribunal should not be able to hear medical cases. It noted that the trustees are not medical experts and this does not prevent trustees from making decisions. It submitted that the Tribunal could call on medical experts in the way that a court can do.[118]

16.28 The concept of the Tribunal having access to a medical advice panel was mooted by the Committee. This idea was put to Mr Davis as an alternative to appointing medically qualified members to the Tribunal should the Tribunal have the jurisdiction to hear 'medical complaints'. Mr Davis regarded this as a good alternative.[119]

Complaints involving medical issues to be excluded from procedural and substantive review

16.29 The Bill allows cases involving these types of complaints to be excluded from the Tribunal's jurisdiction by way of prescribing 'excluded complaints' and 'excluded matters' pursuant to the regulation making provision. The Government has made statements indicating that 'disability cases' will be excluded. In the course of the Committee's inquiry, the type of cases that fall into the 'disability cases' category were more clearly defined. These sub-categories of 'disability cases' have been outlined above. It has become clear to the Committee in the process of carefully examining the sub-categories of 'disability cases' and eliciting evidence in relation to each of these categories that the arguments for excluding 'disability cases' do not apply to all of the sub-categories.

Alternative forums for these complainants

16.30 The Committee explored possible alternative forums for complainants in 'disability cases'. When asked to address the issue of people who have complaints about disability having 'nowhere left to go', the ISC acknowledged that 'there are problems at the moment with the resolution of medical disputes'[120].

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[118] Mr R Drake, ACA, evidence p 161

[119] Davis, op cit, p 109

[120] Evidence p 187

16.31 The Committee asked other witnesses of possible alternative forums. Mr Davis submitted that an alternative forum 'does not readily come to mind'[121] and Mr Robert Drake of the Australian Consumers' Association gave evidence that the current alternative of going to court is really no option at all.[122]

Floodgates?

16.32 Mr Davis submitted that in his experience it would not be the case that a majority of disputes would be of the nature of disability disputes although it is quite a common dispute.[123] He further submitted that, in his experience, by allowing disability claims before the Tribunal the floodgates would not open.

16.33 In response to questioning by the Committee on the issue of the floodgates problem, Mr Drake (ACA) submitted that the floodgates issue manifests as a result of problems with how complaints are handled, rather than as a result of delay.[124]

16.34 With respect to permanent disability cases, Mr Pooley, Commissioner, ISC, was of the view that anybody who received an adverse decision from a trustee would not be satisfied and would go to the Tribunal. He submitted that if these cases were to be heard by the Tribunal it would be 'pretty swamped by all of those people and that would give it an awful lot of extra work'.[125] No data was provided in support of these claims.

Recommendation 16.2:

The Committee recommends that the Government not exclude from the Tribunal's jurisdiction, the parts of a complaint involving issues of procedural fairness and the legal interpretation of the term 'disability' in a deed.

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121 Davis, p 109

122 Evidence p 160

123 Evidence p 108

124 Evidence p 162

125 Evidence p 185

CHAPTER 17:

ISSUES: LEGAL REPRESENTATION AND CONSUMER ASSISTANCE

Legal Representation

17.1 Mr Noel Davis submitted that a consumer need not necessarily be represented before the Tribunal provided there is the capacity for representation when necessary. He advised the Committee that part of the function of the Tribunal will be to assist people to present their case.[126]

17.2 However, Mr Drake (ACA) stated that the legislation presents an anomaly as consumers are not permitted to have representation as of right whereas superannuation funds will, as incorporated bodies, necessarily require natural persons to represent them. ACA submitted that this creates a complete imbalance in representation.[127] It noted that the Tribunal will have a discretion to allow complainants to be represented where the Tribunal considers it necessary, but submitted that the issue should be left at the complainant's discretion[128].

17.3 The ISC countered the views of ACA by stating that the widespread use of legal representation, as distinct from direct communication between the Tribunal and the parties to the complaint, could undermine the capacity of the Tribunal to achieve the objectives of fair, economical, informal and quick resolution of disputes. It emphasised the inquisitorial nature of the Tribunal which permits the Tribunal to inform itself of all the information that it requires to make the correct decision. The ISC submitted that with

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126 Davis, op cit, p 107

127 Evidence p 162

128 ibid

this type of process, and with the Tribunal staff giving all the necessary assistance to complainants, legal representation should rarely be needed and that when legal representation is required the Tribunal has the discretion to permit it.[129]

17.4 The Committee has given careful consideration to the concerns raised by ACA. It also recognises the role of the Tribunal as an alternative dispute resolution forum in which the Tribunal has the mandate and the power to redress any imbalance of power or representation that may arise.

Consumer Advisory Service

An alternative to legal representation

17.5 As a result of the submissions concerning legal representation in particular, the Committee was concerned to ensure that there was an appropriate balance between the objectives of fair, economical, informal and quick dispute resolution and the access to consumers of appropriate assistance and advice in the preparation of their matters before the Tribunal.

17.6 For this reason the Committee was particularly attracted to the concept submitted by the Consumer Credit Legal Service (Vic) (CCLS) and the Consumer Credit Legal Centre (NSW) (CCLC) of an independent consumer advisory service, whether legal or multi-disciplinary.[130] The Committee therefore explored this option with a number of the witnesses in order to test its potential.

17.7 CCLS and CCLC submitted that as Australian employees are now compelled to become consumers of superannuation products, the Government should take responsibility for providing information and advisory services. They submitted that without such services many consumers will be unable to take advantage of the significant reforms in the area.[131] The Australian Pensioners' and Superannuants' Federation were similarly concerned that 'the value of the recent improvements in this area will be

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[129] Pooley, p 176

[130] SIS Sub No 53

[131] ibid

diminished if consumers are unable to access independent specialist legal and information services to enable them to take advantage of the new supervisory and disclosure arrangements'.[132]

17.8 Mr David Niven of CCLS gave evidence that the role of a consumer legal service reaches beyond the provision of advocacy services. He submitted that it involves providing consumers with 'assistance in understanding the nature of what their complaint is about' and 'assistance in [determining] whether they have a complaint that is legitimate or not'. The Committee was interested to learn that in the consumer credit sphere, the majority of cases dealt with by the CCLS are resolved by negotiation, with only two to three per cent of matters going to litigation.[133]

17.9 Mr Niven proposed that the roles of a specific superannuation advisory service would include helping consumers to understand how to go about making their complaints; how to determine whether they have a legitimate complaint; and how to prepare the documents, the arguments and the proofs relevant to their case. The service would also play a role in the 'macro' picture. By obtaining statistics and complaint data and by negotiating complaints, the service would be in a position to negotiate with industry and government in relation to changes in practice and policy. Mr Niven submitted that neither the macro nor the micro functions discussed above are the type of functions that should or could be dealt with by the Tribunal secretariat.[134]

17.10 The Australian Consumers' Association commended the concept of a consumer legal service. It noted that in the area of consumer credit, this concept had worked very well and very cost-effectively.[135] Similarly, AFCO and Mr Davis supported the idea of such a service.[136]

17.11 It was noted by ASFA that the vast bulk of complaints will be dealt with through documents rather than through hearings. ASFA therefore sees it as important that a person preparing a document clearly understands what

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132 SIS Sub No 73

133 Evidence, Niven, p 24

134 ibid, p 26-27

135 Evidence p 164

136 AFCO, evidence p 205
Davis, evidence p 108

it is that they need to establish, and the sorts of thresholds they have to reach.[137]

17.12 The Committee foresees a community advisory service playing a vital role in providing complainants with assistance in preparing their matters for review.

Funding

17.13 In relation to funding, the CCLS and the CCLC submitted that part of the superannuation levy be used for the purpose of funding a community advisory service. Alternatively, they submitted that the Government would need to make other funding arrangements. The CCLS is funded for its consumer credit work approximately 50 per cent through the consumer affairs budget, which is a State Government budget, and the other 50 per cent through the legal aid budget, which is a State-Commonwealth mix pursuant to the federal-state relations in that area.[138]

17.14 CCLS made submissions in respect to estimates of the funding that would be required to get a national coverage via centres in Melbourne and Sydney. It estimated that the costs would be approximately $200 000 per annum for a centre in Melbourne and a further $200 000 per annum for a centre in Sydney.[139] In the Committee's view, this would be a cost effective arrangement.

17.15 The Committee examined funding options, namely, a percentage of the supervisory levy on funds; unclaimed monies; and the surplus of the funding of the ISC. The Committee is aware that funding by way of these options may result in a heavier burden on some funds and consumers than on others. In addition, Mr Davis submitted that money should not be taken from the people for whom guarantee charge contributions have been made.[140]

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137 Evidence, p 93

138 Niven, evidence p 23

139 ibid, p 27

140 Evidence, p 107

Tribunal Secretariat Assistance to Complainants

17.16 In the context of the issue of adequate advice being available to consumers, the Committee heard submissions on clause 16 of the Bill which requires the Tribunal to help complainants to make complaints.[141]

What type of assistance will be provided?

17.17 AFCO raised concerns that the role of the secretariat of the ISC was unclear, particularly in relation to the means by which the obligation of the Tribunal to assist complainants would be fulfilled. Mr Thomas of the ISC provided information that the requirement for assistance relates to 'to helping them [complainants] express their complaint and putting it in writing'.[142] This would accord with Mr Niven's concerns that it would be inappropriate for the Tribunal to assist complainants with the detailed preparation of their cases as this could create an appearance of bias, that is, the Tribunal could be seen to have a vested interest in the successful outcome for an applicant whom the Tribunal had assisted.[143]

Funding

17.18 With respect to the these functions of the Tribunal secretariat and the funding of the secretariat, the ISC recognises that 'it will be a very important part of the process and that adequate resources will have to be allocated to that function'[144].

17.19 The Committee notes that the funding of an independent advisory service has additional advantages. First, it would relieve the ISC secretariat of some of the more demanding consumer inquiries; and second, it would provide consumers with a service that is not only independent but also seen to be independent from the ISC. Some consumers may feel reluctant to show their hand to an advisory service operated by the watchdog body.

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141 Clause 16 of the Bill

142 Evidence, Thomas, p 213

143 Evidence, Niven, p 29

144 Evidence, Mr Thomas, p 213

Recommendation 17.1:

The Committee recommends that the Government consider supporting the establishment of an independent superannuation consumer advisory service by way of grants from Consolidated Revenue over three years. The Committee further recommends that the Government review the funding arrangement with a view to industry assisted funding after the expiry of the three year period.

CHAPTER 18:

OTHER CONSUMER ISSUES

Oral Submissions

18.1 Clause 34 provides that the Tribunal must conduct review meetings without oral submissions from the parties. The Committee received submissions from the Law Council and from William M Mercer raising the concern that this provision offended or infringed the principles of natural justice.

18.2 The Committee understands that the ISC has considered these views and has received advice that the rules of natural justice will not be breached as a party has a right to make written submissions and the Tribunal has a discretion to allow oral representations to be made where the Tribunal thinks it is necessary. The Committee received a submission[145] drawing its attention to the decisions of *Heatley v Tasmanian Racing and Gaming Commission*[146] and *Daguio v Minister for Immigration and Ethnic Affairs.*[147] It was held in these decisions that procedural fairness does not necessarily require hearings to be oral.

Appeals to the Federal Court

Grounds of appeal

18.3 Parties to a dispute before the Tribunal have the right to appeal to the Federal Court. Appeals will be on a on a question of law only.[148] The Committee received submissions proposing the right to a de novo

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145 Andrew Fairley and Associates, op cit, SIS Sub No 91

146 (1977) CLR 487

147 (1986) 71 ALR 173

148 Clause 46 of the Bill
Evidence, Pooley, p 176

review[149] at the level of the Federal Court. The Bill as it stands accords with the practice of the review of administrative decisions on the facts being limited to the Administrative Appeals Tribunal with appeals on questions of law only being heard by the Federal Court.

Actions in the Federal Court and representative actions

18.4 The Bill does not provide for de novo review at the level of the Federal Court, however it may be possible to commence some actions against trustees in the Federal Court under the *SIS* legislation. The *SIS* legislation does not expressly confer jurisdiction on the Federal Court but clause 10 of the Bill defines 'Court' to mean the Federal Court of Australia or the Supreme Court of a State or Territory. In defining 'Court' in this way, it could be said that the legislation impliedly confers jurisdiction on the Federal Court.

18.5 The Bill only allows beneficiaries to bring certain actions against trustees in the Federal Court. These are for matters of misleading conduct (clause 142), unfair dealing on issue or redemption of a superannuation interest (clause 150), misleading conduct in relation to a public offer entity (clause 156) and contravention of provisions taken to be included in the governing rules of a public offer entity (clause 166). In these specific cases, the Committee notes that it is arguable that a representative proceeding could be brought in the Federal Court pursuant to Part IV A of the *Federal Court of Australia Act 1976*.

Costs of appeals

18.6 The Australian Consumers' Association raised the problem of how a consumer could afford to pay for an appeal to the Federal Court. It was submitted it should either be funded by the ISC, as it is the Tribunal's decision that is the subject of the appeal, or that the ISC should act as a respondent in the appeal. The Australian Consumers' Association would not be in a position to fund test cases.[150]

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149 A fresh hearing on the facts and law.

150 Evidence p 164

Standard of Proof

Clause 37(2) provides:

> The Tribunal must affirm the decision if it is satisfied that the decision, in its operation in relation to the complainant, was fair and reasonable in all the circumstances.

18.7 The Committee is satisfied that this provision is adequately drafted to take account of the concerns raised that in any given set of circumstances there may be several reasonable but different decisions available to a trustee, and that the necessary choice of one of these reasonable options by a trustee should not be grounds for varying or setting aside that decision.

18.8 The Committee is concerned that the standard of satisfaction required in clause 37(2) be explicitly stated in order to avoid unnecessary litigation on the point. It has been agreed by all who have addressed the issue before the Committee that they understand the standard of proof to be on the 'balance of probabilities'.

Recommendation 18.1:

The Committee recommends the Bill be amended to specify that the degree of satisfaction required for the Tribunal to affirm a decision pursuant to clause 37(2) of the Bill is that of reasonable satisfaction, that is, satisfaction on the balance of probabilities.

Appointment of Members

18.9 Submissions were received by the Committee proposing that one Tribunal member be appointed by the Minister of Consumer Affairs,[151] however the Committee did not receive any representations from the Minister in relation to this proposal.

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[151] AFCO, op cit,
CCLS, CCLC, op cit.

18.10 The Bill provides for the appointment of a Chairperson, by the Governor General, and not fewer than five nor more than eight other members by the Minister [152] administering the Act.[153] Clause 8(4) of the Bill provides that two of the Tribunal members are to be appointed after the Minister administering the legisation has consulted with the Minister for Consumer Affairs about their appointment.

Life Insurance Complaints Board

18.11 The life insurance industry's revamped inquiries and complaints service came into operation in May 1991, following extensive consultation with industry, government and consumer groups. This body deals with disputes between life offices and trustees where there is a contractual arrangement between the two. Generally, it does not deal with disputes between fund members and trustees because there is no contractual arrangement between the fund member and the life office. However, it resolves disputes, involving personal superannuation, between fund members and life offices because there is a contractual relationship between the policyholder and the life office.

18.12 The Life Insurance Federation of Australia has submitted that the industry's system, that is, the Life Insurance Complaints Board, should continue to deal with complaints about personal superannuation.[154] As stated in paragraph 16.7, the Superannuation Complaints Tribunal will also deal with personal superannuation complaints.

Notification of a Right of Review

18.13 In the course of its inquiry, it appeared to the Committee that a large number of consumers were unaware of the existence of the Life Insurance Complaints Board and of their right to have adverse decisions reviewed[155].

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152 Clause 7 of the Bill

153 Section 19A, *Acts Interpretation Act 1901*

154 SIS Sub No 56

155 Evidence, p 187

18.14 The Committee recognises that although clause 96 of the SIS Bill does not prescribe a precise mechanism for trustee internal review, the issue of a beneficiary being notified of the existence of the Tribunal, and their right to have an adverse decision reviewed, will need to be addressed by the ISC. It may be appropriate for the trustee to advise the beneficiary of the right of review at the time of notification of any adverse decision.

Recommendation 18.2:

The Committee recommends that the ISC address the issue of notifying members of their right to have an adverse decision of a trustee reviewed by the Superannuation Consumer Complaints Tribunal.

MINORITY REPORT BY GOVERNMENT MEMBERS

- Senators Childs, Evans and West - on Clause 64 Prohibition on Superannuation Funds Acquiring Assets from Members or Relatives

We strongly oppose the Committee's recommendation to provide exemptions to clause 64 involving property used wholly and exclusively in the business of a member together with certain strictly defined marketable securities and associated changes to alter the sole purpose test provision (clause 60).

Clause 64 was introduced because the Government has been concerned for some time about abuses of the purpose of superannuation tax concessions. Such abuses include the selling of members private assets, for example cars, jewellery and boats to their superannuation fund in order to obtain cash. These transactions are clearly inconsistent with the purpose of providing concessional tax treatment to superannuation funds to encourage members to save for their retirement.

The need for clause 64 was also highlighted by evidence given to the Committee by the Insurance and Superannuation Commissioner, Mr George Pooley, who claimed that there are quite a number of organisations who are giving advice on how funds can manipulate assets in a way that clause 64 is designed to prevent.

Certain written submissions to the Committee also supported the introduction of clause 64. The Australian Superannuation Funds Association (ASFA) claimed that clause 64 should remain in its present from. According to ASFA, to attempt to distinguish between what assets are acceptable and what assets are not would be a very complicated task and may open the way for further abuse.

Therefore, any relaxation to the blanket prohibition in its present form would lead to both administrative complexity, enforcement difficulties and even greater abuse of the tax concessions.

Providing exceptions to clause 64 will result in inequity under the preservation rule, which for most Australians bars access to superannuation benefits before age 55, as some people will be in a position to sell assets to their superannuation fund whilst other people will not. This situation is clearly inconsistent with the current aim of making superannuation available to all on an equal basis.

The exemptions recommended in the majority report on clause 64 may also lead to administrative complexity. The ASFA submission highlighted this point by claiming that attempting to draw a fine line between what is and what is not an unacceptable investment is a complicated task that will give rise to considerable administrative difficulties.

The Committee has also recommended that the sole purpose test be amended to create additional powers designed to complement the exemption under clause 64, thereby giving the ISC greater scope to regulate against avoidance activities. However, this represents a move away from the traditional use of the sole purpose test, in that it will specifically relate to a special provision concerning business viability rather than the core and ancillary purposes of superannuation funds which focus on the generation of income in retirement.

Further evidence on this point was provided by Mr Pooley who claimed that the ISC had originally examined the possibility of combating the type of abuse that clause 64 is designed to prevent by modifying the sole purpose test but had found this approach to be unworkable.

Providing exemptions to clause 64 is also against the principle of diversification in investing superannuation funds. Many of the purchases by the smaller funds, which clause 64 addresses, involve assets which represent a substantial proportion of the total assets of the fund. For example, if a superannuation fund acquires a property from a member and the property then falls substantially in value, the member will have received little or no benefit from their superannuation fund, whereas investing in small parcels of assets can minimise the risk exposure of a fund.

Recommendation:

We recommend that the recommendation proposed in the majority report (Recommendation 4.1) relating to the amendment to clause 64 and the sole purpose test not be agreed to.

APPENDIX A:

LIST OF COMMITTEE REPORTS

Super System Survey - A Background Paper on Retirement Income Arrangements in Twenty-one Countries (December 1991)

Papers relating to the Byrnwood Ltd, WA Superannuation Scheme (March 1992)

Interim Report on Fees, Charges and Commissions in the Life Insurance Industry (June 1992)

First Report of the Senate Select Committee on Superannuation - *Safeguarding Super* - the Regulation of Superannuation (June 1992)

Second Report of the Senate Select Committee on Superannuation - *Super Guarantee Bills* (June 1992)

Super Charges - An Issues Paper on Fees, Commissions, Charges and Disclosure in the Superannuation Industry (August 1992)

Third Report of the Senate Select Committee on Superannuation - *Super and the Financial System* (October 1992)

Proceedings of the Super Consumer Seminar, 4 November 1992 (4 November 1992)

Fourth Report of the Senate Select Committee on Superannuation - *Super - Fiscal and Social Links* (December 1992)

Fifth Report of the Senate Select Committee on Superannuation - *Super Supervisory Levy* (May 1993)

Sixth Report of the Senate Select Committee on Superannuation - *Super - Fees, Charges and Commissions* (June 1993)

Seventh Report of the Senate Select Committee on Superannuation - *Super Inquiry Overview* (June 1993)

Eighth Report of the Senate Select Committee on Superannuation - *Inquiry into the Queensland Professional Officers Association Superannuation Fund* (August 1993)

Ninth Report of the Senate Select Committee on Superannuation - *Super Supervision Bills* (October 1993)

APPENDIX B:

LIST OF WRITTEN SUBMISSIONS

No 1	Howard V Smith & Associates Pty Ltd
No 2	Mr Jack Morris
No 3	Dr T D O'Neill
No 4	Superannuation Trust of Australia (STA)
No 5	Federation of Industrial, Manufacturing and Engineering Employees
No 6	Hunt & Hunt, Lawyers
No 7	Mr Alan W Mills
No 8	Sun Super
No 9	Self Managed Retirement Systems Pty Ltd
No 10	Permanent Trustee Company Ltd
No 11	Freedom of Choice Fund Management Ltd
No 12	Supermaster Investments Pty Ltd
No 13	Ms Sonia A Nolan
No 14	Mr Noel Davis (Clayton Utz, Solicitors)
No 15	Mr H E Ellis

No 16 Mr John D Lindsay

No 17 Mr H F Oostergo

No 18 Mr Peter J Griffiths

No 19 Phillips & Wilkins, Solicitors

No 20 Connelly Temple Ltd

No 21 Mackay and Allen

No 22 Geoff & Margaret Bolt

No 23 Chartered Pacific Superannuation Ltd

No 24 Mr Ray Kingston

No 25 Noble Lowndes Ltd

No 26 National Australia Bank (Melbourne)

No 27 Mr Andrew Skinner

No 28 Mallesons Stephen Jaques

No 29 Ian G Anderson & Associates

No 30 Mr Clive Butler

No 31 Ms Natalie Gallery

No 32 Mr John Justin Cleeland

No 33 Trustee Companies Association

No 34 Mr John Whittimore-Hull

No 35 Gells, Solicitors & Attorneys

No 36 Bankers Trust Australia

No 37 Investment Funds Association

No 38 Mr Howard Ellis

No 39 Priestley & Morris

No 40 John R Fraser Pty Ltd

No 41 Mr Barry McLean

No 42 Greenwood Challoner

No 43 Australian Federation of Consumer Organisations

No 44 Mr Wayne Vogt

No 45 Australian Consumers' Association

No 46 Master Builders Australia

No 47 Compass Financial Services

No 48 Arthur Andersen

No 49 Council of Small Business Organisations of Australia (COSBOA)

No 50 Edwards Karwacki Smith Pty Ltd

No 51 Uni super

No 52 Irwin & Richards

No 53 Consumer Credit Legal Service

No 54 Mr Howard Ellis

No 55 **TRANSFERRED TO SIS-5**

No 56 Life Insurance Federation of Australia (LIFA)

No 57 Jacques Martin Industry

No 58 Ms Edwina Blahout

No 59 Shepard Webster & O'Neill

No 60 Mr Graham & Mrs Patricia Strauss

No 61 Mr E H Shallcross

No 62 Gilshenan & Luton

No 63 Madison Securities

No 64 Dr G J Acton

No 65 County Natwest

No 66 Office of the Cabinet, Queensland

No 67 Supa-Funds Management Pty Ltd

No 68 Association of Superannuation Funds of Australia (ASFA)

No 69 The Cabinet Office, New South Wales

No 70 August Financial Management Ltd

No 71 Mr A Palombi

No 72 William M Mercer

No 73 Australian Pensioners' and Superannuants' Federation

No 74 Allanfield Financial Services

No 75 Monitor Money

No 76 Australian Association of Permanent Building Societies (AAPBS)

No 77 **IN CAMERA**

No 78 ASCPA/ICAA Joint Superannuation Committee

No 79 Sly & Weigall

No 80 Mallesons Stephen Jaques

No 81 Blake Dawson Waldron

No 82 Australian Institute of Valuers and Land Economists

No 83 Freehill Hollingdale & Page

No 84 Quaife Holdings Pty Ltd

No 85 Macquarie Investment Management Ltd

No 86 MLC Investments

No 87 Mark Stoney

No 88 Windmill Educational Supplies

No 89 Potter Warburg Asset Management

No 90 Joint Submission from NSW, Qld, WA, Tas and NT Governments

No 91 Andrew Fairley & Associates

No 92 Advance Bank Australia Limited

No 93 Mr Leigh Fitton

No 94 Privacy Commissioner

APPENDIX C:

LIST OF WITNESSES AT PUBLIC HEARINGS

MELBOURNE, 22 SEPTEMBER 1993

Mr Paul Bean, Manager, Life Insurance Complaints Board

Mr Don Blyth, National Director, Trustee Companies Association of Australia

Mr Darren Davis, Assistant Manager, Operations, Life Insurance Federation of Australia

Mr Peter Edmiston, State Director for Western Australia, Jacques Martin Industry

Mr John Fraser, Director, John R Fraser Pty Ltd

Mr David Goodear, Fund Manager and Adviser, Jacques Martin Industry

Mr David Gurney, Sales and Marketing Executive, Custodian Services Division, National Australia Bank Ltd

Ms Anne Maree Howley, Legal Consultant, Noble Lowndes Superannuation Consultants Ltd

Mr Torsten Krebs, Corporate Lawyer, National Australia Bank

Mr Ian Kincaid, Director, Supermaster Investments Pty Ltd

Mr John Maroney, Convenor Superannuation Committee, Life Insurance Federation of Australia

Mr Denis Mead, Principal, William M Mercer Pty Ltd

Mr Paul Murphy, Marketing Manager, County Natwest Australian Management Ltd

Mr Roger Nairn, General Manager, Custodian Services Division, National Australia Bank Ltd

Mr Mark Nipper, Boronia

Mr David Niven, Coordinator, Consumer Credit Legal Service (Victoria)

Mrs Sonia Nolan, Warrnambool

Mr Raymond Stevens, Director, William M Mercer Pty Ltd

Mr Kenneth Robinson, Superannuation Committee, Life Insurance Federation of Australia

Mr Robert Rowett, Company Secretary, County Natwest Australia Investment Management Ltd

Mr Kelvin Taylor, Director, Noble Lowndes Superannuation Consultants Ltd

Mr John Treloar, Client Relationship Executive, Custodian Services Division, National Australia Bank

Ms Marita Walls, Superannuation Committee Solicitor, Life Insurance Federation of Australia

Mr Peter Weeks, Chirnside Park

SYDNEY, 23 SEPTEMBER 1993

Mr Ray Connelly, Joint Managing Director, Connelly Temple Ltd

Mr Robert Coombe, Senior Legal Manager, Bankers Trust

Mr David Davis, Managing Director, Permanent Trustee Co Ltd

Mr Robert Drake, Policy Officer, Australian Consumers Association

Mr Graeme Fowler, Product Development Manager, Funds Management, Bankers Trust

Mr Carlisle Gorsuch, Member, Joint Superannuation Committee, Australian Society of Certified Practising Accountants, Institute of Chartered Accountants

Mr Peter Hutley, Executive Director, Investment Funds Association of Australia

Mr Kenneth Lockery, Deputy Federal President, Technical and Regulations, Association of Superannuation Funds of Australia

Mr Robert Mansfield, Chairman, Joint Superannuation Committee, Australian Society of Certified Practising Accountants, Institute of Chartered Accountants

Mr Anthony Marks, Deputy Chairman, Retirement Income Committee, Investment Funds Association of Australia

Mr David McMahon, Director Policy, New South Wales Department of Industrial Relations, Employment, Training and Further Education

Mr John Morgan, Member of Superannuation Committee, Law Council of Australia

Mr Robert Richardson, Director, Greenwood Challoner Services Pty Ltd

Mr Brian Scullin, Executive Director, Association of Superannuation Funds of Australia

Mr David Shirlow, Director of Policy Research, Association of Superannuation Funds of Australia

Mr Andrew Skinner, Chartered Accountant, Erskine Park

Ms Elisabeth Slater, Deputy Chair of Superannuation Committee, Superannuation Committee of the Law Council of Australia

CANBERRA, 24 SEPTEMBER 1993

Mr Robert Bastian, Chief Executive, Council of Small Business Organisations of Australia

Mr Des Breen, Executive Manager, Council of Small Business Organisations of Australia

Mr Donald Duval, Australian Government Actuary, Insurance and Superannuation Commission

Ms Gail Freeman, President's Representative, Council of Small Business Organisations of Australia

Ms Jennifer Mack, Director, Australian Federation of Consumer Organisations

Mr Denis Nelthorpe, Executive Member, Australian Federation of Consumer Organisations

Mr Frederick Pooley, Commissioner, Insurance and Superannuation Commission

Senator Nick Sherry, Parliamentary Secretary to the Minister for Primary Industries and Energy

Mr Trevor Thomas, Director, SIS Implementation Team, Insurance and Superannuation Commission

APPENDIX D:

DRAFT AMENDMENT TO CLAUSE 64 PREPARED FOR SENATOR WATSON

1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993

(Amendments to be moved by Senator Watson)

This version is based on the clause numbers of the Bill that was introduced into the House of Representatives in the Autumn Sittings. The clauses were re-numbered in the third reading print

Clause 62, page 49, subclause (1), line 37, insert "(other than a listed security)" after "an asset".

Clause 62, page 50, paragraph (2)(a), line 8, insert "(other than a listed security)" after "an asset".

Clause 62, page 50, subclause (4), before the definition of "relative" insert the following definition:

"'**listed security**' means:

(a) a share; or
(b) a unit; or
(c) a bond or debenture; or
(d) a right or option; or
(e) any other security;

listed for quotation in the official list of a stock exchange in Australia;".

APPENDIX E:

FREEHILL'S ADVICE ON PUBLIC OFFER FUNDS TRANSITIONAL PROVISIONS

FREEHILL
HOLLINGDALE
& PAGE

SIS -37
(Supplementa

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(xxxi) (Acquisition of Property on Just Terms).

As to section 51(xxxi), 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(xxxi). 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(xxxi) 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 yield admit.

SYDNEY
MLC CENTRE MARTIN PLACE
SYDNEY NEW SOUTH WALES 2000
TELEPHONE (02) 221 4000 INT + 61 2 221 3500 FACSIMILE (02) 233 6410 (02) 232 1274
TELEX AA121083 DX 361 SYDNEY
PERTH CANBERRA BRISBANE LONDON SINGAPORE
ASSOCIATED IN MELBOURNE AND ADELAIDE

Investment Funds Association
1 October 1993

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

Freehill Hollingdale & Page

APPENDIX F:

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

ATTORNEY GENERAL'S DEPARTMENT

Chief General Counsel

OGC93467892

21 October 1993

Mr D B Duval
Australian Government Actuary
PO Box 178
BELCONNEN ACT 2616

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 Hollingdale 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

DENNIS ROSE QC
Chief General Counsel

APPENDIX G:

AIMG DRAFT PRACTICE NOTE ON SOFT DOLLAR DEALINGS

AUSTRALIAN INVESTMENT MANAGERS' GROUP
PRACTICE NOTE
SOFT DOLLAR DEALING

INTRODUCTION

This paper seeks to expand on the subject of "soft dollar" commission which is mentioned under Dealing Guidelines on page 4 of the AIMG Code of Conduct and should be read in conjunction with the Commentary attached. This paper is not intended to be a set of rules, but rather a statement of principles which should be adhered to by the members of AIMG.

These principles provide a self-regulatory framework to give a greater degree of industry certainty with respect to soft dollar dealing and are consistent with the regulatory environment in force in the US and UK.

PRINCIPLES

An Investment Manager may enter into a soft dollar arrangement on behalf of a client providing:

1. The goods or services acquired are of demonstrable benefit to the client (see Appendix attached).

2. The cost of dealing will not disadvantage the client compared with similar dealing otherwise than under the soft dollar arrangement.

3. The broker acting under the soft dollar arrangement does not act as principal in the transaction.

4. There are no cash or money rebates involved which could be constituted to be a secret commission.

5. The total commitment made on behalf of all clients of the Investment Manager for such arrangements does not jeopardise currently or prospectively the Manager's ability to maintain adequate financial resources. This will reflect the nature of the Manager's business and reasonable changes in market circumstances which could be expected.

6. There is adequate disclosure to all clients of the Manager's policy relating to soft dollar arrangements.

Where an investment manager participates in soft dollar management, as well as complying with the principles outlined above they should be in a position to furnish to any client, on request, the approximate nature and extent of soft dollar transactions entered into on their behalf.

JULY 1993

APPENDIX

Typical Products and Services Purchased with Soft Dollars:

- Performance Measurement
- Third Party Research
- Fundamental Data-Bases
- Technical Analysis Software
- Portfolio Modelling Software
- Stock Quotation Systems
- Political or Economic Analysis

APPENDIX H:

ATTORNEY GENERAL'S DEPARTMENT ADVICE ON APPLICATION OF CORPORATIONS POWER

Chief General Couns

OGC93455418

5 May 1993

Mr D B Duval
Australian Government Actuary
PO Box 178
CANBERRA ACT 2601

Dear Mr Duval

CONSTITUTIONALLY PROTECTED SUPERANNUATION FUNDS

I refer to your memorandum dated 22 April 1993 concerning the application of the proposed new superannuation industry supervision legislation to funds which are protec by s.114 of the Constitution from taxation in relation to part of their income.

Background

2. The proposed new supervisory regime will grant 'complying fund' status to a fund for the purposes of tax laws if the fund satisfies one of the following conditions:

(a) its trustee is a trading or financial corporation within the meaning of s.51(xx the Constitution; or

(b) its rules provide that its sole or dominant purpose is the provision of old-age pensions.

It is intended that funds which meet these conditions will be regulated by Commonweal legislation under the corporations and pensions powers.

Advice

3. Your questions, and my answers to them, are set out below. For convenience, I ha dealt with your third question first.

(i) Would a corporation whose sole function was to be trustee of one or more superannuation funds be classified as a trading or financial corporation with the meaning of s.51(xx) of the Constitution?

4. Yes. In my view, the investment activities of superannuation funds, together with their handling of contributions and payment of pensions, constitute 'financial' activities

sufficient to enable a corporate trustee to be characterised as a 'financial corporation' for constitutional purposes (see *State Superannuation Board v Trade Practices Commission* (1982) 152 CLR 282).

(ii) If a fund trustee satisfies condition (a) above, is the trustee necessarily subject to Commonwealth regulation under the corporations power?

5. Subject to the provisions of the Constitution (eg. s.114 - see paragraph 7 below), the corporations power has been held by the High Court to support Commonwealth laws regulating at least the 'trading' and 'financial' activities of the corporations described in s.51(xx) and, in the case of trading corporations, activities undertaken by them for the *purposes* of trade (*Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1983) 158 CL 1 at 148–149, 179, 240–241, 269–271). Similarly, in the case of 'financial' corporations the power would extend to activities undertaken for the *purposes* of their 'financial' activities. Hence the performance by a corporation of the functions of a fund trustee may be regulated (since they are 'financial' activities), and activities associated with the performance by a corporate trustee of its duties as trustee, even if they are not themselves 'financial' activities, are undertaken for the purposes of 'financial' activities and may also be regulated.

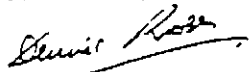
6. The drafting of provisions to bring fund trustees within the scope of the corporations power is a matter for the Office of Parliamentary Counsel (OPC), which is currently working on the proposed legislation.

(iii) If a trustee satisfies condition (a) above, does it follow that the trustee cannot be an agent or instrumentality of a State and that it is therefore not protected from taxation by s.114?

7. No. If the trustee was a company incorporated under the Corporations Law, the trustee would probably not be regarded as an agency or instrumentality of a State (cf. para.8 of the advice of 11 September 1992 to which you refer). However, a trustee established by special State legislation could well be both a 'financial' corporation (this would depend on its activities and the purposes for which it was established) and an agency or instrumentality of the State (this would depend on its relationship with the State). In order to induce State schemes to give up the protection of s.114, it would therefore be necessary to make it a condition of 'complying fund' status that a fund's trustee was a trading or financial corporation within the meaning of s.51(xx) of the Constitution and *also* a corporation formed under the Corporations Law. (I understand, however, that OPC's instructions are that s.271 of the Income Tax Assessment Act 193[illegible] not to be repealed.)

8. I am sending a copy of this advice to Mr Keith Byles of OPC.

Yours sincerely



DENNIS ROSE QC
Chief General Counsel

Telephone: 2506016
Facsimile: 2505921

APPENDIX I:

PRIME MINISTER'S LETTER TO STATE PREMIERS

PRIME MINISTER

CANBERRA

The Hon John Fahey, MP
Premier of New South Wales
Premier's Wing
State Office Block
Macquarie Street
SYDNEY NSW 2000

30 SEP 1993

SUPERANNUATION INDUSTRY (SUPERVISION) BILL [SIS BILL]

My dear Premier

I am writing in response to communications from several States concerning coverage of State superannuation schemes by the SIS Bill, and have written in similar terms to all Premiers and Chief Ministers.

The SIS Bill has three objectives: fair and equal treatment of contributors and beneficiaries; ensuring that superannuation is used for retirement income; and ensuring the security of retirement savings through appropriate prudential supervision.

While it is desirable that all superannuation funds comply with the legislation, there is a case for exempting public sector schemes which are totally unfunded or backed by an explicit government guarantee. In this regard, while the Commonwealth's main schemes will be required to comply in full, only the main operative provisions, such as vesting, preservation and disclosure, will apply to the Governor-General, Parliamentarians and Judges schemes.

In relation to State/Territory schemes, I propose that compliance with the SIS legislation be automatically required unless an exemption has been granted. Exemptions for individual schemes would be available, provided the relevant State/Territory government undertook to:

- guarantee the liabilities of the scheme by ranking the accrued liabilities of the scheme equally with State/Territory bonds; and
- ensure compliance with the main operative provisions of the SIS legislation (vesting, preservation, disclosure and, where applicable, prudent investment).

In order to ensure public confidence is maintained, these undertakings would need to be included in the annual reports of schemes exempt from the SIS legislation. Appropriate legislative arrangements would be put in place to ensure that exempt schemes can be used as vehicles to satisfy the requirements of the Superannuation Guarantee legislation.

If you are in broad agreement with this approach, the details could be settled by relevant Ministers - in the Commonwealth's case, the Treasurer, Mr John Dawkins - and officials.

Yours sincerely

(Sgd) P J KEATING

P J KEATING

APPENDIX J:

GLOSSARY OF TERMS

Allocated Pension	A pension where the member has his own account against which pension payments are debited and to which any investment earnings are credited. The pension will continue until the death of the pensioner, or until the account is exhausted. Upon death, any balance remaining in the account is paid to a designated beneficiary as a (taxable) lump sum payment, or is applied to secure further pension payments to a surviving spouse.
Annuity	A regular periodic payment to a person (cf pension). Where weekly, fortnightly or monthly payments out of a superannuation fund are involved, the expression 'pension' is more commonly used.
Approved Deposit Fund (ADF)	A fund which has the purpose of holding lump sum superannuation benefits rolled over for the purpose of maintaining the concessional taxation treatment until the taxpayer attains preservation age.
Arms' Length	A term which refers to the relationship between the employer company and the members of a superannuation fund. If the members of the fund are employees of the sponsoring company, an arms' length fund is said to exist.

Maximum Deductible Contribution Limit (MDCL)	A rule which places a cap on the level of superannuation contributions which employers or members can make for employees. When this limit is exceeded, the fund is deemed to be non-complying and loses concessional tax status.
Marketable Securities	A marketable security is defined in section 1097(1) of the Corporations Law. It includes a share in or debenture of an eligible body. An eligible body is taken to include a company, body corporate (other than a company) or an unincorporated society association or body.
Pooled Superannuation Trust	A Pooled Superannuation Trust (PST) is a resident unit trust that is used for investing the assets of various superannuation funds, Approved Deposit Funds (ADFs), tax advantaged insurance funds of life insurance companies, tax advantaged business of registered organisations and tax exempt entities.
Portability	Allowing a superannuation plan to be transferred from one fund (or one employer) to another.
Preservation	Maintenance of a member's entitlements in a superannuation fund until a specified minimum age (usually at least 55 years).
Prudential Controls	The measures instituted to supervise and control activities in the superannuation industry to ensure the security of contributor's funds.
Public Offer Funds	A Public Offer Fund (POF), as defined in the SIS legislation, is a regulated superannuation fund that is not a standard employer sponsored fund, unless the ISC Commissioner has made a declaration under clause 18 (6) stating otherwise. In effect this means that a POF is any fund that is offered to the public through a registered prospectus.

Reasonable Benefits Limit (RBL)	The maximum limit on the amount a member can receive from superannuation, ADFs or DAFs, with preferential taxation treatment. The limit can be calculated from a member's highest average salary.
Repatriation of Surplus	The act of transferring surplus assets in a superannuation fund to the sponsoring employer.
Rollover Funds	The funds into which eligible termination payments are deposited when a person leaves or changes employment. These funds are preserved until retirement age is reached. Rollover funds receive concessional tax treatment in that the tax liability is deferred until retirement age.
Sector Trusts	Unit trusts that specialise in investments in specific asset classes. For example, property trusts, fixed interest trusts and cash trusts. These trusts have their own trust deed, trustee, custodian and manager.
Securities	Financial instruments which are evidence of debt or of property. Bonds, certificates of stock and shares are documents which indicate the existence of a security.
Superannuation Fund	A fund designed to produce retirement benefits for members. To attract tax concessions, it must have these characteristics: (a) be indefinitely continuing, and (b) be maintained solely for following purposes: provision of benefits for fund members, or for dependants of each member in the event of death, or any other purpose allowed by the Insurance and Superannuation Commission in writing.
Surplus	A position reached in a superannuation fund whereby the accrued earnings and contributions exceed the funds accumulated liabilities.

Trust	A fiduciary relationship in which one person (the trustee) holds the title to property for the benefit of another (the beneficiary).
Trust Deed	The legal document which appoints trustees and defines their power.
Trustee	A person, usually one of a body of persons, appointed to administer the affairs of a company, institution, etc, who holds the title to property for the benefit of another.
Unfunded Scheme	A superannuation scheme where the employer has not contributed to match liabilities, that is, benefits payable to members as they accrue. Instead, payments are made to members when they are due.
Undeducted Purchase Price	In relation to an annuity or superannuation pension, that portion of monies used to purchase the annuity or pension which has not been claimed as a deduction.
Vesting	Conferring on a superannuation fund member the ownership of all or part of the accrued benefit applicable to that member.