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No. 82 2003–04

Superannuation Safety Amendment Bill 2003

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No. 82 2003–04

Superannuation Safety Amendment Bill 2003

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Contents

Purpose.	1
Background.	1
Basis of policy commitment.	2
Position of significant interest groups.	2
ALP policy position	2
Main Provisions	2
Schedule 1, Part 1	2
Item 29, new Part 2A.	3
Items 30 to 61.	3
Schedule 1, Part 2	3
Schedule 2	3
Schedule 3, Items 1 to 14.	4
Schedule 3 Part 2, items 12 to 14	4
Concluding Comments.	4
Endnotes.	5

Superannuation Safety Amendment Bill 2003

Date Introduced: 27 November 2003

House: Representatives

Portfolio: Treasury and Finance

Commencement: Sections 1 to 3 and items not otherwise specified: when the Act receives Royal Assent. Part 1 of Schedule 1 will commence on a date to be fixed by Proclamation to be within 6 months from the date of Royal Assent or otherwise on the first day after the end of that period. Part 2 of Schedule 1 commences on the day after the end of the period of 2 years beginning on the day on which the provision(s) covered by table item 2 commence. Schedule 2 commences at the same time as the provision(s) covered by the table item 2. Schedule 3 commences at the same time as the provision(s) covered by table item 2.

Purpose

The Bill is designed to modernise and strengthen the current prudential regime protecting superannuation savings in Australia. The primary mechanism in the Bill to achieve this end is to enhance the Australian Prudential Regulation Authority ('APRA') capacity to take preventative as against reactive enforcement action with respect to breaches of the law.

Background

For a comprehensive yet brief overview of Australia's superannuation industry and the background to this particular Bill, the reader is recommended to refer to the 'Regulation Impact Statement and Financial Impact Statement contained in the *Explanatory Memorandum*.¹

In addition, Mr Greg Brunner, General Manager of APRA has given an overview as to the organisation's view on responsibilities of trustees.²

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Basis of policy commitment

This Bill reflects the Government's policy to advance a series of reforms to superannuation contributions and payments and the manner in which the superannuation industry operates.³

Position of significant interest groups

An initial Issues Paper, *Options for Improving the Safety of Superannuation* was released on 2 October 2001. A Superannuation Working Group ('SWG') was established to consult on the Issues Paper. Over 50 submissions were received by the SWG which, after further rounds of consultations, released a background paper on 24 December 2001 and draft recommendations on 4 March 2002. The final report of the SWG was provided to the Government on 28 March 2002 and contained 28 recommendations.

The industry has generally supported the desirability of improving the safety of superannuation, but has expressed mixed views about the cost-benefit of some of the recommendations.⁴

ALP policy position

The ALP responded to the tabling of this Bill with a critical media release from Senator Nick Sherry, the Shadow Minister for Retirement Incomes and Savings.⁵

Main Provisions

Schedule 1, Part 1

Part 1 contains the initial series of amendments to the *Superannuation Industry (Supervision) Act 1993* (the 'Act'). **Items 1 to 19** are machinery provisions including definition amendments and additions. **Items 20 to 28** permit a registrable superannuation entity ('RSE') licence to be applied for by a group of individual trustees.

It appears that the civil penalty and strict liability provisions of the Act and regulations are compromised by the **new subsection 13A (3) in item 20**. Although the onus is on the person claiming protection to prove they made all reasonable inquiries with respect to a breach of the Act, a 'reasonableness' defence is not difficult to establish especially if the affected person is not bound by a trustee's obligations.

On the other hand it could also be argued that the **new subsection 13A (3)** is potentially onerous in the context of a trustee's fiduciary duties and places a high degree of risk on an individual person who is a member of a group of individual trustees holding an RSE licence. This could have implications for the cost of indemnity insurance to individual

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trustees. In this context it should be noted that a trustee's duties are of a higher order than those of a director of a corporation.

Item 29, new Part 2A

The item provides machinery provisions for granting RSE licences to constitutional corporations, other bodies corporate and groups of individual trustees.

Important provisions which are designed to enhance prudential control are the **new sections 29EA and 29EB** which permit APRA to impose additional conditions on an RSE licence and give directions to comply with the conditions on an RSE licence. It should be noted that such provisions can only be effective where APRA has adequate resources to review industry activity on a continuing basis. This resources issue will also apply to the **new Divisions 6 and 7 (new sections 29F to 29GB)** under which APRA can vary and revoke an RSE licence.

Risk management strategies (**new sections 29H to 29HC**) also will require ongoing effectiveness on the part of APRA. These provisions are given added weight by the offences of strict liability in the **new sections 29HD to 29JC**.

The **new Part 2B (new sections 29K to 29QB)** are machinery provisions for the registration of registrable superannuation entities. The regime is supported by new offences of strict liability in the **new sections 29PC, 29PE and 29Q**.

Items 30 to 61

The **new Part 18** contains machinery provisions providing for a system of prescribed standards applicable to the operation of regulated superannuation funds, approved deposit funds and pooled superannuation trusts together with the trustees and RSE licensees of those funds and trusts.

Schedule 1, Part 2

Part 2 contains the second group of amendments to the *Superannuation Industry (Supervision) Act 1993*. **Items 62 to 86** contain definitional amendments.

Schedule 2

Items 1 to 373 are machinery provisions amending relevant words in sections of the Act such that the application of the Act's provisions to groups of trustees is clarified.

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Schedule 3, Items 1 to 14

Part 1 refers to actuaries and auditors and makes enabling amendments to the *Retirement Savings Account Act 1997* ('RSA'). The **new subsection 66(4)** does not appear to establish a sufficiently rigorous regime for the disclosure of information to the Regulator as a person need only maintain that they were told that information has already been disclosed and that there is no reason to disbelieve this assertion.

Further it is suggested that the 12 months maximum penalty provided for in the **new subsection 66(5)** is inadequate when one considers the potential amounts of money involved and the consequences for [relatively] vulnerable individuals should a significant fraud or mismanagement occur.

The disclosure regime is strengthened by the **new subsection 66(6)** which has the effect of protecting a person from civil suits (which would include defamation actions) for the disclosure of information.

Items 5 to 10 apply the same provisions with respect to reporting to the Regulator, auditor responsibilities and self incrimination to the Act. The same reservations as expressed above with respect to the RSA amendments apply to the **new subsections 129(3A), (3B), (4), and 130(2A), (2B), (3)** as they apply to the Act.

Additionally, the **new subsection 130(2)** appears to have a wider application (that is to any person as against a person who is or was an auditor or actuary as in the **new subsection 130A (1)**) in establishing a 'good faith' defence. This could have significant impact for example to potential 'whistleblowers'. This said, the new subsection is deficient insofar as it will shift the onus to prove 'good faith' to the individual person who gives information to the Regulator in circumstances where there is a civil suit founded on consequences flowing from providing that information to the Regulator.

Schedule 3 Part 2, items 12 to 14

Part 2 provides the same style of amendments to the Act provisions as referred to in Part 1 of Schedule 3 above. In this Part, the amendments are applied to Defined Benefit Funds. The identified deficiencies in the paragraphs referring to the **new sections 66, 66A and 66B** of the RSA apply to the **new section 130C in item 14**.

Concluding Comments

Although the Government has identified the need to strengthen the prudential oversight and regulation of the superannuation industry, superannuation contributions and utilisation it is suggested that the Bill does not, for the reasons given in the above paragraphs, adequately address the potential for losses to those depending on superannuation savings.

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Endnotes

- 1 See in particular paragraphs 3.1 to 3.22.
- 2 The text of Mr Brunner's speech is available at: http://www.apra.gov.au/speeches/03_08.cfm
- 3 See for example the speech by Senator the Honourable Helen Coonan, Minister for Revenue and Assistant Treasurer on 20 November 2003 to the Investment and Financial Services Association: *Building the National Nest Egg – Challenges for a Greying Australia*.
- 4 *Explanatory Memorandum* paragraph 3.83.
- 5 *Safety of Super – weak and wimpy*, Media Release dated 1 December 2003. In response, the Minister for Revenue and Assistant Treasurer, Senator the Hon. Helen Coonan issued a *Media Release* on 3 December 2003, 'More opposition for opposition's sake from Labor'.

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