



ComSuper Bill 2011

Governance of Australian Government Superannuation Schemes Bill 2011

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ComSuper Bill 2011 and Governance of Australian Government Superannuation Schemes Bill 2011

Date introduced: 24 March 2011

House: House of Representatives

Portfolio: Finance and Deregulation

Commencement: 1 July 2011 for the Governance of Australian Government Superannuation Schemes Bill 2011 (Governance Bill).

Sections 3 to 27 of the ComSuper Bill 2011 (ComSuper Bill) also commence on 1 July 2011. The other sections of this Bill commence on the date of Royal Assent.

Links: The links to these Bills, their Explanatory Memoranda and second reading speeches can be found on the Bills' home pages ([ComSuper Bill](#) and [Governance Bill](#)), or through <http://www.aph.gov.au/Bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Governance Bill and the ComSuper Bill, together with the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2011 (see separate Bills Digest) make substantial changes to the administrative and trustee arrangements applying to the following Commonwealth superannuation schemes:

- the scheme established under the *Superannuation Act 1922* (the 1922 Scheme)
- the scheme provided for under the *Papua New Guinea (Staffing Assistance) Act 1973* (PNG Scheme)
- the Commonwealth Superannuation Scheme (CSS)
- the Public Sector Superannuation Scheme (PSS)
- the Public Sector Superannuation Accumulation Plan (PSSAP)
- the Defence Forces Retirement Benefits Scheme (DFRB)
- the Defence Forces Retirement and Death Benefit Scheme (DFRDB)
- the Defence Forces (Superannuation) Productivity Benefits Scheme (DFSPB), and
- the Military Superannuation and Benefits Scheme (MSB).

Briefly, the Governance Bill contains provisions establishing the proposed Commonwealth Superannuation Corporation (CSC) to serve as the trustee of the above schemes. To this end the Governance Bill modifies the application of the *Commonwealth Authorities and Companies Act 1997*.

The ComSuper Bill establishes a statutory agency, also named 'ComSuper', to provide administrative services to the proposed CSC. This particular Bill does not amend any other legislation.

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Background

Current arrangements

Currently the Australian Reward Investment Alliance (ARIA) is the overall investment manager of the:

- CSS
- PSS, and
- PSSAP.¹

ARIA's operations are overseen by a seven member trustee Board appointed by the Minister for Finance and Deregulation.

The MSB is overseen by a Board of five trustees appointed by either the Chief of the Defence Force or the Minister for Defence Personnel, Materiel and Science.² The DFRDB and DFRB are run by the DFRDB Authority, which has five members. Its chair is the Commissioner for Superannuation and the other four members are appointed by the Minister Assisting the Minister for Defence and the Chiefs of the three armed services.³ The DFSPB is administered by either the MSB Trustee Board or the DFRDB Authority, depending on the membership of the scheme of the person on whose behalf amounts under this scheme are paid.

The Commissioner for Superannuation provides administrative services for all these schemes, including:

- collection of member contributions and maintenance of member accounts
- payment of lump sum and pension benefits
- member communications
- accounting services
- dispute resolution, and
- secretariat support functions.⁴

The Commissioner for Superannuation is also responsible for the administration of the 1922 and PNG schemes.⁵

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1. ARIA, 'About Us', website, viewed 30 March 2011, <http://www.aria.gov.au/about/index.shtml>
 2. Military Super, 'Board of Trustees', website, viewed 30 March 2011, <http://www.militarysuper.gov.au/aboutus/trustees.html>
 3. Defence Force Retirement and Death Benefit Scheme, 'The DFRDB Authority', website, 2010, viewed 30 March 2011, <http://www.dfrdb.gov.au/aboutus/authority.html>
 4. ComSuper, 'What we do', website, 11 January 2011, viewed 30 March 2011, http://www.comsuper.gov.au/about_comsuper/whatwedo.html

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Timeline

The following table gives a timeline of events since the initial announcement.⁶

Table 1: Timeline of Events

<i>Date</i>	<i>Event</i>
31 October 2008	Proposed changes were first announced
22 November 2009	Rudd Government announced appointment of Mr Tony Hyams as Chairperson of ARIA. Mr Hyams is also Chairperson of the Military Superannuation and Benefits Trustee Board and a director of the Australian Government Employees superannuation Trust. This appointment facilitates the Government's intention that ARIA forms the basis for the proposed CSC ⁷
26 November 2009	Further changes to the governance of Commonwealth superannuation schemes were announced
4 February 2010	Then Minister for Finance and Deregulation (Lindsay Tanner MP) introduced the Governance of Australian Government Superannuation Schemes Bill 2010, ComSuper Bill 2010 and Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010 (that is, the 2010 Bills) into the House of Representatives
24 February 2010	The 2010 Bills referred to the Senate Standing Committee on Finance and Public Administration
15 March 2010	Legislation Committee of the Senate Standing Committee on Finance and Public Administration recommended that these Bills be passed
13 May 2010	Department of Defence announced that the nomination of General Peter Cosgrove (Ret) AC, MC and Mr John McCullagh as the Australian Defence Force member representative directors on the proposed CSC
2 June 2010	The 2010 Bills passed by the House of Representatives
15 June 2010	The 2010 Bills introduced into the Senate
28 September 2010	The 2010 Bills lapsed with the end of the 42nd Parliament
24 March 2011	The 2011 package was introduced into the House of Representatives

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5. ComSuper, '1922 Scheme', website, 7 September 2009, viewed 30 March 2011, http://www.comsuper.gov.au/the_schemes/1922.html ; The Papua New Guinea (PNG) scheme, website, viewed 30 March 2011, http://www.comsuper.gov.au/the_schemes/png.html
 6. Timeline based on information from ARIA, 'Proposed ARIA and Military Super Boards merger', website, viewed 30 March 2011, http://www.aria.gov.au/news/2011/Boardmerger_update.shtml
 7. Explanatory Memorandum, Superannuation Legislation (Consequential amendments and Transitional Provisions) Bill 2011, p. 4.

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Basis of policy commitment

The merging of the trustee Boards of Australian Government superannuation schemes was first announced on 31 October 2008.⁸ Further decisions were announced in November 2009.⁹

Committee consideration

As at the date of writing the current Bills have not been referred to a committee. However, the Senate Standing Committee on Finance and Public Administration considered the 2010 Bills during early 2010. Its report concluded that these Bills be passed. That said, dissenting reports by Coalition and Family First members of this Committee recommended that the 2010 Bills not be supported in the Senate.¹⁰

Are the 2010 Bills similar to the 2011 versions?

The major provisions of the current ComSuper Bill 2011 are exactly the same as those of the ComSuper Bill 2010 passed by the House of Representatives on 2 June 2010.

While the major provisions of the Governance of Australian Government Superannuation Schemes Bill 2011 are generally similar to the 2010 version as passed by the House of Representatives on 2 June 2010 there are some significant differences, as follows:

- **Clause 4** of the current Governance Bill (Definitions) contains a set definition of the term ‘Act administered by CSC’. This definition was not present in the 2010 version
- **Subclause 8(3)** of the current Governance Bill requires the proposed CSC to have regard to the ‘unique nature of military service’ when performing a function under the legislation governing the various military superannuation schemes, namely:
 - Part IIIAA of the *Defence Act 1903*

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8. N Sherry (then Minister for Superannuation and Corporate Law) and L Tanner (the Minister for Finance and Deregulation), *Streamlined administration arrangements for Australian government superannuation schemes*, joint media release, Canberra, 1 October 2008, viewed 30 March 2011, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/072.htm&pageID=003&min=njs&Year=2008&DocType=0>
 9. L Tanner (then Minister for Finance and Deregulation), *Government superannuation reforms*, media release, Canberra, 26 November 2009, viewed 30 March 2011, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/31EV6/upload_binary/31ev60.pdf;fileType=application/pdf#search=%22Tanner%22
 10. Senate Finance and Public Administration Legislation Committee, *Governance of Australian Superannuation Schemes Bill 2010, ComSuper Bill 2010 and the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010*, Committee Report, March 2010, p. 15, p. 21 and p. 23, viewed 30 March 2011, http://www.aph.gov.au/senate/committee/fapa_ctte/super_schemes/report/report.pdf

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- the *Defence Force Retirement and Death Benefits Act 1973*
 - the *Defence Forces Retirement Benefits Act 1948*, or
 - the *Military Superannuation and Benefits Act 1991*, and
- **Clause 14** of the current Governance Act specifies that a CSC director's remuneration is to be determined by the Remuneration Tribunal. This particular requirement was not in the corresponding Division of the 2010 Governance Bill.

These differences noted, there are some significant aspects of the 2010 Governance Bill that have carried over into the 2011 Governance Bill, particularly the role of the President of the Australian Council of Trade Unions in appointing, and terminating the appointment of, three CSC directors. Further, the role, functions and operating rules of the proposed CSC are substantially the same in both the 2010 and 2011 Governance Bills.

Policy position of non-government parties/independents

Coalition

The Coalition did not support the passage of the 2010 Bills because:

- those particular Bills did not recognise the unique nature of military service and the proposed CSC (at that stage) would not function in the best interests of members of the military superannuation schemes
- the presence of members of the trade union movement on the then proposed CSC Board was not seen as appropriate in relation to the management of military superannuation benefits, and
- in particular, the role of the President of the Australian Council of Trade Unions in appointing and removing CSC Board members was not acceptable.¹¹

These points were repeated in the House of Representatives debate on the 2010 Bills.¹²

Senator Fielding

In his dissenting report on the 2010 Bills Senator Fielding recommended that the Senate not support these particular Bills because the proposed changes did not have the support of the majority of the

11. Liberal Party of Australia, *Coalition will not support amalgamation of civilian and military superannuation boards*, media release, 10 March 2010, viewed 30 March 2011, <http://www.liberal.org.au/Latest-News/2010/03/10/Coalition-will-not-support-amalgamation-of-civilian-and-military-superannuation-Boards.aspx>

12. L Hartsuyker, 'Second reading speech: Governance of Australian Government Superannuation Schemes Bill 2010 – ComSuper Bill 2010 – Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010', House of Representatives, *Debates*, 2 June 2010, p. 2934, viewed 5 April 2011, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-06-02/0053/hansard_frag.pdf;fileType=application%2Fpdf

MBS and DFRDB members and the lack of consultation with representatives of both current and former members of the Defence Forces.¹³ The Senator's position on the current Bills is not yet clear.

Position of major interest groups

The Defence Force Welfare Association strongly opposed the 2010 Bills, because:

- the proposed changes in those Bills did not recognise the unique nature of military service
- the proposed changes did not allow for adequate representation of both serving and retired members of the military superannuation schemes
- the requirements of military superannuation would be subordinated to the requirements of civilian superannuation schemes
- the proposed changes did not produce a benefit for military superannuation scheme members
- a concern that some of the tax exemption provisions in the 2010 Bills may result in the government 'siphoning off' member funds
- the proposed changes were likely to lead to the reduction of 'whole-of-life' benefits to military superannuants
- the remuneration of the then proposed CSC Board members may come only from some of the schemes which have invested funds, not all of them, and
- the proposed cost savings were unlikely to be realised.¹⁴

The Returned Services League (RSL) recommended that consideration of the 2010 Bills be deferred to give more time to military superannuants to examine these Bills. On this occasion the RSL raised several concerns:

- the findings and recommendations of the Government review (undertaken by Pricewaterhouse Coopers) that are cited as underpinning the need for the merger have not been made public for critical review
- assertions about prospective improvements resulting from the proposed merger are not substantiated
- benefits to military superannuants are ephemeral

13. S Fielding, Dissenting Report, Senate Finance and Public Administration Legislation Committee, *Governance of Australian Superannuation Schemes Bill 2010, ComSuper Bill 2010 and the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010*, Committee Report, March 2010, p. 23, viewed 5 April 2011, http://www.aph.gov.au/senate/committee/fapa_ctte/super_schemes/report/report.pdf

14. Defence Force Welfare Association, *Briefing notes on Governance of Australian Government Superannuation Schemes Bill 2010*, fact sheet, 2010, viewed 5 April 2011, <http://upperiscope.com.au/vets/DFWA%20Briefing%20Notes%20on%20Governance%20of%20Australian%20Government.pdf> and Submission to the Senate Standing Committee on Finance and Public Administration Legislation Committee on Governance of Australian Government Superannuation Schemes Bill 2010, the ComSuper Bill 2010 and the Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010, 3 March 2010, p. 10, viewed 5 April 2011, http://www.aph.gov.au/Senate/committee/fapa_ctte/super_schemes/submissions.htm

- as evidenced during the global financial crisis, bigger financial institutions do not necessarily deliver either prospective savings or improved long-term benefits, and
- the intended merger of military and civilian superannuation schemes is inconsistent with the principle of separateness underlying the legislation under which the schemes were originally established by the Parliament.¹⁵

Though preferring the establishment of a single industry superannuation fund for Commonwealth employees, the Australian Council of Trade Unions supported the proposed arrangements in the 2010 Bills.¹⁶

Financial implications

The Explanatory Memorandum for the Governance Bill notes that ARIA, the MSB Board and the DFRDB Authority will jointly incur a cost of \$1.1 million arising from undertaking due diligence checks and communication campaigns with scheme members about the proposed changes.¹⁷ The ComSuper Bill does not have any financial implications.¹⁸

Standing appropriations

Clause 34 of the Governance Bill appropriates the Consolidated Revenue Fund for the remuneration of the proposed CSC chair and directors (see below). **Clause 35** appropriates the Consolidated Revenue Fund in respect of any money payable by the proposed CSC in relation to a legal action, claim or demand related to the 1922 scheme, the DFRB, the DFRDB, the DFSPB or the PNG scheme (again, see below).

Main issues

The major issue arising from the proposed changes is the governance of the three military superannuation schemes under the new arrangements. As noted above, there are strongly held concerns that the resolution of legitimate military superannuation issues would be submerged or discounted by the proposed CSC Board, because of the majority of Board members represent civilian superannuation schemes. There are also significant concerns about the presence of CSC Board

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15. Returned Services League, 'The proposal to merge the military superannuation Boards into one Commonwealth superannuation Board', Submission to government, 2010, Attachment 1, p. 4 and 6, viewed 5 April 2011, http://www.aph.gov.au/Senate/committee/fapa_ctte/super_schemes/submissions.htm
 16. Australian Council of Trade Unions, 'Merger of trustee Boards on ARIA and Military Super', Submission to Senate Standing Committee of Finance and Public Administration, 5 March 2010, viewed 5 April 2011, http://www.aph.gov.au/Senate/committee/fapa_ctte/super_schemes/submissions.htm
 17. Explanatory Memorandum, Governance of Australian Government Superannuation Schemes Bill 2011, p. 5.
 18. Explanatory Memorandum, ComSuper Bill 2011, p. 4.

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members appointed by the President of the Australian Council of Trade Unions, and their potential role in making decisions involving military superannuation schemes.

Key provisions—ComSuper Bill

Part 2—ComSuper

Clause 4 establishes ComSuper as a separate entity.

Clause 5 states that ComSuper consists of the CEO and staff of ComSuper.

Clause 6 states that ComSuper's function is to assist its Chief Executive Officer (CEO) to perform the CEO's function (see below).

Part 3—Chief Executive Officer, Staff and Consultants

Division 1—Functions and powers of the CEO

Clause 8 outlines the function and powers of ComSuper's CEO. The CEO's main function is to provide administrative services to the proposed CSC. ComSuper's CEO is subject to the direction of the CSC and must endeavour to act in accordance with the policies, guidelines and standards determined by the CSC, subject to the provisions of other relevant Commonwealth laws, particularly the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999*, and government policy on the administration of Australian government superannuation schemes.

Division 2—Appointment of the CEO

Clause 9 provides that ComSuper's CEO be appointed by the Minister (in this case the Minister for Finance and Deregulation), but stipulates that he or she must consult with the Defence Minister about this appointment.

Division 3—Terms and conditions of the CEO's appointment

Clause 15 states that the ComSuper CEO must disclose all pecuniary or other interests that give rise to a conflict of interest, or potentially do so.

Clause 18 gives the Minister the ability to terminate the CEO's appointment for a number of reasons, but requires that he or she consult the Defence Minister before doing so.

Key provisions—Governance Bill

Part 2—Commonwealth Superannuation Corporation

Division 1—Establishment and constitution of the CSC

Clause 5 renames the Board established under section 20 of the *Superannuation Act 1990* as the Australian Reward Investment Alliance (ARIA) as the Commonwealth Superannuation Corporation (CSC).

Clause 6 modifies the application of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) so that section 15 of that Act and any other provisions prescribed by regulation do not apply to the proposed CSC.

Section 15 of the CAC Act requires the directors of a Commonwealth authority to notify the relevant Minister if that body intends to:

- form a company or participate in the formation of a company
- participate in a significant partnership, trust, unincorporated joint venture or similar arrangement
- acquire or dispose of a significant shareholding in a company
- acquire or dispose of a significant business
- commence or cease a significant business activity, or
- make a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.

These actions are likely to form part of the normal activities of the proposed CSC. It would be inappropriate for this body's Directors to notify the relevant Minister before they carried out any or all of these actions. Therefore, it seems appropriate that section 15 of the CAC Act does not apply to the CSC.

Clause 8 outlines the functions of the proposed CSC. These functions are:

- the functions conferred on this proposed body by the Governance Act and the other Acts the CSC administers
- the general administration of the Governance Act and each other Act the CSC administers, and
- to do anything incidental to, or conducive to, the performance of the above functions.

While the complete list of Acts that the CSC will be responsible for administering has not yet been made available they will most certainly include all of the Acts (and associated regulations and trust deeds) that currently govern the operation of the relevant Australian Government superannuation schemes.

As noted above, **Subclause 8(3)** requires the CSC to have regard for the unique nature of military service when performing its functions under:

- Part IIIAA of the *Defence Act 1903* (which deals with superannuation benefits for the Australian Defence Force)
- the *Defence Force Retirement and Death Benefits Act 1973*
- the *Defence Forces Retirement Benefits Act 1948*, and
- the *Military Superannuation and Benefits Act 1991*.

These latter three Acts are the main pieces of legislation governing the operation of the three military superannuation schemes noted above (that is the DFRB, DFRDB and MSB). The requirement for the proposed CSC to take account of the unique nature of military service is likely to be a significant issue in any debate on these Bills.

Division 2—Board of the CSC

Also, as noted above, the membership of the proposed CSC Board is also likely to be a contentious issue in any debate on these Bills.

Clause 11 specifies that the proposed CSC's Board consist of a chair and ten other directors (**paragraph 11(1)(b)**). They are to be appointed as follows:

- the President of the Australian Council of Trade unions may nominate three directors
- the Chief of the Defence Force may nominate two directors, and
- the Minister nominates the remaining five directors as well as the chair of the Board.¹⁹

However, there are some conditions on the nomination to the CSC's Board:

- a person is not eligible for nomination if they contravene the *Superannuation Industry (Supervision) Act 1993* fitness and propriety standards²⁰
- before nominating a person, both the President of the Australian Council of Trade Unions and the Chief of the Defence Force must consult with one or more 'relevant organisations'. This term is defined in **Clause 4** to be an organisation:
 - a substantial number of whose members are members of a superannuation scheme administered by the proposed CSC or eligible employees within the meaning of the *Superannuation Act 1976*²¹ and whose principal purpose is to protect and promote the interests of its members in matters concerning their employment, or

19. See also **Subclause 12(5)**.

20. These are the standards applying to all superannuation trustees to determine their suitability for this role.

21. This is the legislation governing the operation of the Commonwealth Superannuation Scheme (CSS).

- an organisation that has as one of its principal purposes the protection and promotion of beneficiaries under a superannuation scheme administered by the proposed CSC in matters concerning their entitlements as beneficiaries.

Conceivably, this requirement may lead to both the President of the Australian Council of Trade Unions and the Chief of the Defence Force consulting with some or all of the following organisations before nominating CSC directors:

- the Defence Force Welfare Association
- the Returned Service League
- the Superannuated Commonwealth Officers Association, or
- the Community and Public Sector Union.

(This is not a complete list of possible organisations that may have to be consulted before CSC directors are nominated by these persons).

Subclause 38(2) allows the Governor-General to make regulations prescribing a different number of CSC directors under **paragraph 11(1)(b)** above (that is, a number of directors other than ten).

Under **clause 12**, if a person is nominated by either the President of the Australian Council of Trade Unions or the Chief of the Defence Force, the relevant Minister must appoint the person for the period specified in the nomination, providing that person does not breach the fitness and property standards noted above.

In the case of all other directors, the Minister must consult with the Defence Minister before making the appointment. Further, other than the first chair of the CSC's Board, the Minister must obtain that Board's agreement for the appointment of its chair (other than the appointment of the first Chair).

Obviously, these particular provisions have been included in the Governance Bill to address concerns that an unsuitable person may be making decisions in relation to military superannuation matters. However, they also recognise that the majority of the members of superannuation schemes administered by the proposed CSC are not current, or former, members of the Australian Defence Force.

As noted above, **clause 14** specifies that a CSC director's remuneration is to be decided by the Remuneration Tribunal.

In summary **clause 17** gives the Minister a wide range of grounds to terminate the appointment of a CSC director without requiring the consent of any other party. In all cases the Defence Minister must be consulted before such an action is taken. The requirement to obtain the consent of either the President of the Australian Council of Trade Unions or the Chief of Defence Force for the termination of a CSC's director's appointment is restricted only to directors nominated by them and only on a limited set of grounds.

Clause 17 deals with the early termination of CSC director's appointments. The requirement for the relevant Minister to consult with president of the Australian Council of Trade Unions when terminating the appointment of a CSC director was a significant issue in the debate on the 2010 Bills.

The Minister may terminate a CSC director's appointment, without consulting any other person or organisation, in the following circumstances:

- if they become a disqualified person under Part 15 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act)²²
- if they apply for legal relief in relation to bankruptcy or insolvent debtors
- if they come to a compounding arrangements with their creditors
- if they assign their remuneration to their creditors
- if their continuation would contravene the fitness and property standards of the SIS Act, or
- if they fail, without reasonable excuse, to comply with the obligations imposed by sections 27F or 27J of the CAC Act.²³

If a CSC director's termination is on the above grounds the Minister must consult with the Defence Minister before taking this action.

However, the Minister must obtain the consent of either the President of the Australian Council of Trade Unions or the Chief of the Defence Force in respect of the termination of CSC directors nominated by them, if the ground for such a termination are either:

- if they misbehave or develop either physical or mental incapacity for this position
- if they are absent without leave of absence from 3 consecutive Board meetings
- if they fail to comply with **clause 22**²⁴, or
- if the director in question has failed to comply with paragraphs 16(1)(a) or (b) of the CAC Act.²⁵

If a CSC director's appointment is to be terminated on this last ground the Defence Minister has to be consulted before this action is taken.

If the consent of either the President of the Australian Council of Trade Unions or the Chief of the Defence Force is given for the termination of the appointment of a CSC director nominated by them,

22. Part 15 of the SIS Act prescribes standards for trustees, custodians and investment managers of superannuation entities.

23. Briefly, these sections require that a director disclose material conflicts of interests to other directors in relation to the affairs of the CSC and where such an interest exists that director must not either be present when a relevant matter is discussed or vote on that matter.

24. Briefly, **clause 22** deals with the disclosure of relevant interests to the proposed CSC's Board when dealing with the investment matters of a particular scheme (see below).

25. Briefly, these paragraphs require the director to keep the responsible Minister and the Finance Minister informed and to supply the required reports within the time limits set by the Minister concerned.

only on the above grounds specified in the Governance Bill, then the Minister *must* terminate that appointment.

Clause 21 specifies the quorum for a CSC Board meeting. Under this clause the presence of nine directors constitutes a quorum. However, if a director is prevented from participating in a discussion because of a conflict of interest then the quorum is eight directors. This particular provision is important when combined with **clause 23** governing voting at meetings (see below).

Subclause 21(3) requires that if a matter being considered concerns only a military scheme, the quorum must include a director nominated by the Chief of the Defence Force.

Subclause 21(4) specifies that if an issue arises about whether a matter being considered by the Board concerns *only* the military schemes the chair must determine the issue. The Explanatory Memorandum explains that the chair must determine if the matter being considered relates *only* to the military schemes or whether the matter being considered has a wider application.²⁶

In circumstances where the proposed CSC Board makes decisions relating to the management and investment of funds of superannuation schemes it administers, **clause 22** requires the director(s) who may have a conflict of interest to:

- disclose any conflict of interest they may have to the Board
- to be absent from any discussion of any investment matter where a conflict of interest arises (unless the Minister or the Board otherwise decides)
- not take part in any decision on any matter where a conflict of interest arises, and
- to be absent from any discussion and decision-making where the Board or the Minister determines that the director, having a conflict of interest, may be involved in the relevant matter.

This requirement is in addition to the requirements of sections 27F or 27J of the CAC Act. These particular standards refer to a conflict of interest in relation to the affairs of the CSC itself. The requirements of **clause 22** refer to the investment affairs of the schemes which the CSC administers.

Clause 23 specifies the number of directors who have to agree for a CSC Board decision to be made:

- if **subclause 21(2)** applies (where a director is prevented from taking part in a discussion because of a conflict of interest) the agreement of eight directors is needed
- in any other case the agreement of nine directors is required.

In all cases a CSC Board decision requires the agreement of the required quorum for a valid decision to be made.

26. Explanatory Memorandum, Governance of Australian Government Superannuation Schemes Bill 2010, p. 15.

As noted above, one of the major concerns raised in relation to the 2010 Bills was the possibility that the position of the two CSC directors nominated by the Chief of the Defence Force could be overridden in relation to military superannuation scheme matters. There are some important implications for the CSC decision making in relation to military superannuation from the interaction of **paragraph 11(2)(b)** (Chief of the Defence Force to nominate two CSC Board directors), with **clause 21** (quorum required for decisions to be taken) and **clause 23**:

- if all eleven Board members are present (noting that Board decisions require the agreement of nine directors including the chair) a decision can be made without the agreement of two of the directors present under the voting rules in **clause 23**
- if ten Board members are present, and the provisions of **subclause 21(2)** *do not* apply (that is, no conflict of interest prevents a director from attending), a Board decision must still be made with the agreement of nine directors. A decision can be made without the agreement of one director present
- if **subclause 21(2)** applies (that is, one or more Board member(s) cannot participate in the discussion and decision-making due to a conflict of interest) the agreement of eight directors is required. If there are ten directors present a decision can be made, without the agreement of two directors present, and
- if one or more Board members cannot participate in a decision due to a conflict of interest, and there are nine directors present (eight directors required to agree for a decision to be made), the agreement of at least one other director present is not required for a decision to be made.

If the decision being taken concerns *only* the military superannuation schemes, then in the above circumstances the agreement of either one or both directors nominated by the Chief of the Defence Force is not necessarily required. However, under the provisions of **subclause 21(3)** at least one director nominated by the Chief of the Defence Force must be part of the quorum when all decisions concerning only the military superannuation schemes are taken.

Nevertheless, the validity of these points depends on the chair exercising their vote. It is normal practice for a chair to only cast their vote where a decision is deadlocked. But under the voting rules in **clause 23** this can never be the case in a CSC Board decision. Consequently, it may be appropriate for the role of the chair of the CSC Board in voting to be clarified.

Clause 24 deals with CSC Board decisions taken without a Board meeting. In these circumstances nine directors are required to agree for a decision to be taken provided that either:

- if the proposed decision concerns only the military superannuation schemes: that all directors were informed of the proposed decision, or
- in any other case: that all directors were informed of the proposed decision or that reasonable efforts were made to inform all directors of the proposed decision.

Part 4–Miscellaneous

Division 2–Provisions relating to the Board

Clause 34 specifies that the CSC chair and directors are to be paid remuneration and allowances:

- when performing functions in relation to a particular fund – out of that fund, or
- when performing functions in relation to the 1922 scheme, the DFRB, DFRDB, DFSPB or the PNG scheme – out of the Consolidated Revenue Fund.

The funds or schemes that may provide remuneration to the CSC's chair and directors are the CSS, the PSSAP and the MSB. All these schemes have substantial amounts of members' funds invested. It is normal superannuation industry practice for the trustees of a fund or scheme to be remunerated for their service out of the assets of the relevant scheme or fund.

However, most of the schemes mentioned in the second dot point do not have any member's funds invested, and so are unable to pay any remuneration to their trustees from their own resources. The exception is the DFSPB. However, it does not significant amounts of benefits paid on the behalf of its members.

Clause 35 generally indemnifies CSC directors, or their delegates, for any action done, or not done, in good faith in the performance of his or her CSC functions.

However, where the CSC is subject to an action, liability or claim **subclause 35(3)** allows the outstanding amount to be paid from either:

- the Consolidated Revenue Fund (in the case of actions related to of the DFRB, DFRDB, DFSPB or the PNG scheme), or
- the CSS, the PSSAP and the MSB (in relation to actions related to the operation of these schemes).

Subclause 35(4) appropriates the Consolidated Revenue Fund for amounts paid out from the CSS, the PSSAP and the MSB under **subclause 35(3)**. These particular appropriations are to be paid back to the relevant fund.

Division 3–Miscellaneous

Clause 37 requires the Minister to cause a review to be undertaken of the first five years of the operation of the Governance Bill and to consult with the Defence Minister about the terms and the review. The report of this review must be handed to the Minister within six months of the end of the first five year period and tabled in each house of Parliament within 15 sitting days of its receipt by the Minister.

Concluding comments

One of the most important points to note is that neither the Governance nor ComSuper Bills alter the legislation governing the operation of the various Commonwealth superannuation schemes that the CSC and ComSuper will administer. This means that the benefits paid by all these schemes are not affected by any of the changes implemented by these Bills.

The Government suggests that the benefits of the proposed changes are:

- lower administration costs, and
- lower investment management costs due to the larger size of pool of members' funds invested.

One of the issues raised in relation to the 2010 Bills is that they provided no benefits to military superannuants. This is only partly true. Insofar as the proposed changes reduce ongoing administrative costs, the ability of the Commonwealth to pay the unfunded benefits payable by these schemes is increased.²⁷ That said, this improvement will be slight in the context of the overall Commonwealth budget.

A larger benefit may arise from the savings generated by the larger size of members' funds invested. The lower costs of investment generated by economies of scale should, over time, improve members' investment returns.

27. An 'unfunded benefit' is one that is payable out of the Commonwealth's Consolidated Revenue Fund, not being otherwise provided for by the member's own contributions.

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