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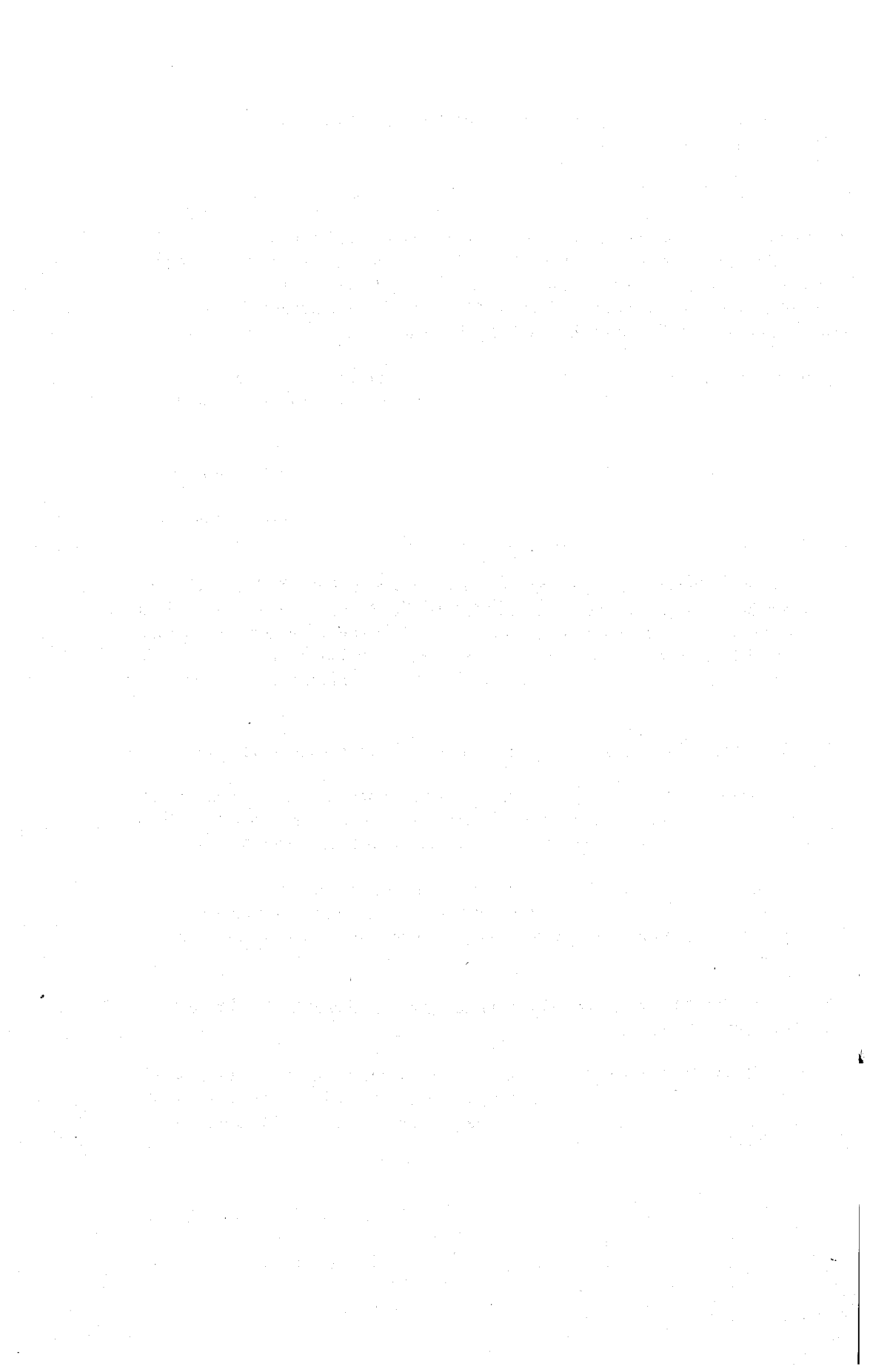
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**SUPERANNUATION INDUSTRY (SUPERVISION) LEGISLATION
AMENDMENT BILL 1994**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon. Ralph Willis, MP)



SUPERANNUATION INDUSTRY (SUPERVISION) LEGISLATION AMENDMENT BILL 1994

GENERAL OUTLINE AND MAIN PURPOSE OF THE BILL

This Bill amends the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993. Those Acts formed the centrepiece of a package of superannuation legislation which received Royal Assent on 30 November 1993 and which gave effect to the new prudential arrangements for superannuation that the Treasurer announced on 21 October 1992.

This Bill makes a number of amendments, many of a technical nature, to the abovementioned Acts aimed at further enhancing and refining the operation of those Acts. The main amendments are:

Allowing certain non-bank financial institutions to offer 'approved guarantees'

The Bill amends the SIS Act to allow certain non-bank financial institutions to offer guarantees required under the SIS Act.

Currently only approved banks and the Commonwealth, States or Territories can offer the guarantees required under the SIS Act. Building societies, credit unions and similar organisations which are subject to supervision under the various State Financial Institutions Codes are considered to be institutions which should also be able to offer the guarantees required under the SIS Act and the Bill amends the SIS Act accordingly.

Allowing 'in-house' investments in certain non-bank financial institutions

An 'in-house asset' is essentially a loan to, or investment in, a standard employer sponsor of the fund (or an associate of such an employer sponsor) and the SIS Act places restrictions, for prudential reasons, on the level of such investments.

The Bill amends the SIS Act to treat deposits in certain non-bank financial institutions (which are subject to prudential supervision) in the same manner as deposits in an approved bank with regard to determining if they are 'in-house assets'.

Applications for the issue of a superannuation interest and application to become a standard employer-sponsor

The Bill amends the SIS Act to ensure that the trustee cannot accept a person as a member of a public offer entity unless that person has applied in the appropriate manner and has received relevant information (determined by the Commissioner) regarding the entity before doing so.

Acquisition of certain assets from members of regulated superannuation funds

The SIS Act imposes a general prohibition on the acquisition of assets from members, subject to a limited exception in relation to funds with less than 5 members (excluded superannuation funds) provided the asset acquired is business real property. The Bill amends the SIS Act to ensure that an excluded superannuation fund can only acquire business real property from a member (or relative of a member) if the property is business real property in the member's (or relative's) principal business.

Public Offer Superannuation Funds and Equal Representation

The SIS Act currently requires a standard employer sponsored fund which is a public offer fund to have an independent trustee. The Bill amends the SIS Act to allow such funds the option of either having an independent trustee or having equal numbers of employer and member representatives involved in the trusteeship of the fund. This provides funds with greater flexibility in organising their trusteeship while at the same time ensuring that members are protected - in the first instance by having a trustee who is independent and in the second by having direct involvement in the fund via equal representation.

Existing trustee may give notice of retirement

A fundamental principle of the SIS Act is that superannuation entities should be in the control of a single party (the trustees) who take full responsibility for the fund. However, the Corporations Law currently requires that superannuation entities which are public offer entities have dual responsible parties (the trustee and the management company). The SIS Act enables these public offer entities to change to have a single party (the trustees) in control of the fund. In many cases this will involve the trustee retiring and the management company taking over the role of trustee.

The effective and smooth operation of this changeover may be hampered if the existing trustee is required to hold a meeting of beneficiaries before retiring (as the governing rules of some superannuation entities may require). To overcome this problem, and therefore to ensure a smooth changeover, the Bill amends the SIS Act to provide that such a requirement in the governing rules of a fund has no effect.

Secrecy Provisions

The Bill amends the SIS Act to allow the Minister to approve disclosure of protected information (if it is in the public interest to do so) to the public at large, rather than just to particular members of the public. At the same time the Bill amends the SIS Act to ensure that appropriate protection is provided to an individual by only allowing disclosure of information that relates to the private affairs of an individual where such disclosure would not be unreasonable in the circumstances.

Approved purposes of, and payments to beneficiaries in, an approved deposit fund

The Bill amends the SIS Act to ensure consistency between related provisions in the Act which deal with the purposes for which an approved deposit fund may be maintained and payments to beneficiaries.

Disqualified persons not to be custodians

The SIS Act currently restricts disqualified persons from being trustees or investment managers of superannuation entities. There is however no similar requirement on custodians. The Bill amends the SIS Act to address this problem and ensure that custodians are subject to similar 'eligibility' requirements to those applying to trustees and investment managers.

Removal of trustees of public offer entities

The Bill inserts a new requirement into the SIS Act to prevent another party from trying to exert undue influence on a trustee by threatening to remove the trustee unless the trustee complies with that party's requests. The amendment ensures that no other party would have the power to exercise such influence by ensuring that, unless the regulations provide otherwise, no person (other than the Commissioner) can remove a trustee of a public offer entity.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have any financial impact.

EXPLANATORY NOTES ON THE SUPERANNUATION INDUSTRY (SUPERVISION) LEGISLATION AMENDMENT BILL 1994

PART 1 - PRELIMINARY

CLAUSE 1 - SHORT TITLE

1. Self explanatory.

CLAUSE 2 - COMMENCEMENT

2. Subclause 2 provides that:

- Division 5 of Part 2 is taken to have commenced on 1 December 1993 (the commencement date for most of the SIS Act). This is because the amendments made are done to confirm the meaning of certain definitions contained in the SIS Act and the amendments are not considered to have any adverse effect on any person;
- Division 12 of Part 2 is taken to have commenced on 1 December 1993 (the commencement date for most of the SIS Act). This is because the amendments made only extend the options that certain funds have in meeting the trusteeship requirements of the SIS Act (as opposed to imposing any new obligations) and the amendments are not considered to have any adverse effect on any person;
- Division 15 of Part 2 is taken to have commenced on 1 December 1993 (the commencement date for most of the SIS Act). This is because the amendments clarify existing obligations (rather than imposing any new obligations) and the amendments are not considered to have any adverse effect on any person.

Subclauses 3 and 4 provide that Divisions 7, 8, 11 and 17 of Part 2 commence on the 28th day after Royal Assent, however, if the 28th day is less than 1 July 1994 then Division 7 commences on 1 July 1994.

Subclause 5 provides that if Royal Assent is received before 1 July 1994 then Divisions 9 and 16 of Part 2 commence on 1 July 1994.

Subclause 6 provides that Part 3 commences immediately after commencement of the Superannuation (Resolution of Complaints) Act 1993.

The remaining amendments commence on Royal Assent.

**PART 2 - AMENDMENT OF THE SUPERANNUATION INDUSTRY
(SUPERVISION) ACT 1993**

DIVISION 1 - PRINCIPAL ACT

CLAUSE 3 - PRINCIPAL ACT

3. Self explanatory.

**DIVISION 2 - AMENDMENTS RELATING TO THE RULES OF APPROVED
DEPOSIT FUNDS**

CLAUSE 4 - OBJECT

4. Self explanatory.

CLAUSE 5 - DEFINITIONS

5. This clause amends section 10 of the Superannuation Industry (Supervision) Act 1993 (the 'SIS Act') by removing the requirement for an approved deposit fund to have approved rules and, consequently, by removing the definition of approved rules.

CLAUSE 6 - APPLICATION

6. This clause provides that the amendments made by Division 2 apply in determining whether a fund is an approved deposit fund at any time after Royal Assent.

**DIVISION 3 - AMENDMENTS RELATING TO NON-BANK FINANCIAL
INSTITUTIONS**

CLAUSE 7 - OBJECTS

7. Self explanatory.

CLAUSE 8 - DEFINITIONS

3. This clause amends the definition of 'approved guarantee' in section 10 of the SIS Act so that such guarantees can be given by approved non-bank financial institutions and inserts a definition of 'approved non-bank financial institution' into section 10 of the SIS Act.

CLAUSE 9 - MEANING OF 'IN-HOUSE ASSET'

9. This clause amends the definition of 'in-house asset' in section 71 of the Act to provide that a deposit with an 'approved non-bank financial institution' is not an 'in-house asset'.

DIVISION 4 - AMENDMENTS RELATING TO THE PURPOSES FOR WHICH AN APPROVED DEPOSIT FUND MAY BE MAINTAINED**CLAUSE 10 - OBJECT**

10. Self explanatory.

CLAUSE 11 - DEFINITIONS

11. This clause amends the definition of 'approved purposes' in section 10 of the Act to allow the Commissioner to extend the purposes for which an approved deposit fund may be maintained.

DIVISION 5 - AMENDMENTS RELATING TO THE MEANING OF THE EXPRESSIONS 'PRIVATE SECTOR FUND' AND 'PUBLIC SECTOR FUND'**CLAUSE 12 - OBJECT**

12. Self explanatory.

CLAUSE 13 - DEFINITIONS

13. This clause amends the definitions of 'private sector fund' and 'public sector fund' to confirm that the expressions 'private sector fund' and 'public sector fund' are confined to funds that are covered by paragraph (a) of the definition of 'superannuation fund' in section 10 of the SIS Act.

DIVISION 6 - AMENDMENTS TO MAKE TECHNICAL CORRECTIONS TO THE DEFINITION OF 'REVIEWABLE DECISION'**CLAUSE 14 - OBJECT**

14. Self explanatory.

CLAUSE 15 - DEFINITIONS

15. This clause amends the definition of 'reviewable decision' in section 10 of the SIS Act to correct a technical error.

CLAUSE 16 - APPLICATION

16. This clause provides that the amendments made by Division 6 apply to decisions made before or after Royal Assent.

DIVISION 7 - AMENDMENTS RELATING TO APPLICATIONS FOR THE ISSUE OF SUPERANNUATION INTERESTS AND APPLICATIONS TO BECOME A STANDARD EMPLOYER SPONSOR

CLAUSE 17 - OBJECT

17. Self explanatory.

CLAUSE 18 - TRUSTEE MUST NOT ISSUE INTERESTS, OR PERMIT PERSONS TO BECOME STANDARD EMPLOYER SPONSORS, EXCEPT PURSUANT TO APPLICATIONS

18. This clause amends section 153 of the SIS Act to require that the trustee of a public offer entity must not issue a superannuation interest or permit a person to become a standard employer-sponsor of the entity except pursuant to an 'eligible application'.

19. An 'eligible application' is made if an application for the issue of a superannuation interest or to become a standard employer-sponsor is:

- made in writing on a form made available by or on behalf of the trustee; and
- the form is in accordance with any requirement specified in a determination of the Commissioner; and
- when the form was received by the applicant, the applicant also received such additional information and documents as specified in a determination of the Commissioner.

20. A determination referred to above is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901.

DIVISION 8 - AMENDMENTS RELATING TO ARM'S LENGTH INVESTMENTS OF SUPERANNUATION ENTITIES

CLAUSE 19 - OBJECT

21. Self explanatory.

CLAUSE 20 - INVESTMENTS OF SUPERANNUATION ENTITY TO BE MADE ON ARM'S LENGTH BASIS

22. This clause amends section 109 of the SIS Act so that the parties to an investment transaction can deal with each other otherwise than at arm's length, provided that the terms and conditions of the relevant transaction are no more favourable than those which it would be reasonable to expect would apply if the parties were dealing with each other at arm's length.

DIVISION 9 - AMENDMENT RELATING TO ROLLOVER OF BENEFITS BETWEEN SUPERANNUATION FUNDS

CLAUSE 21 - OBJECT

23. Self explanatory.

CLAUSE 22 - WHAT HAPPENS IF BENEFITS ARE BELOW MINIMUM AMOUNT

24. This clause amends section 248 of the SIS Act so that the minimum amount referred to in section 248 is an amount prescribed by regulations for the purposes of that section. This simplifies the manner in which the minimum amount is to be ascertained.

DIVISION 10 - AMENDMENTS RELATING TO THE VALIDITY OF THE GOVERNING RULES OF SUPERANNUATION ENTITIES

CLAUSE 23 - OBJECT

25. Self explanatory.

CLAUSE 24 - TRUSTEE NOT TO BE SUBJECT TO DIRECTION

26. This clause amends subsection 58(3) of the SIS Act to ensure that a provision in the governing rules of a superannuation entity is not void if it contravenes subsection 58(1), but rather is only invalid to the extent that the provision is inconsistent with the requirements of that subsection. The amendment also ensures that section 58 is consistent with the requirements of subsection 60(3) of the Act.

CLAUSE 25 - EXERCISE OF DISCRETION BY PERSON OTHER THAN TRUSTEE

27. This clause amends subsection 59(2) of the SIS Act to ensure that a provision in the governing rules of a superannuation entity is not void if it contravenes subsection 59(1), but rather is only invalid to the extent that the provision is inconsistent with the requirements of that subsection. The amendment also ensures that section 59 is consistent with the requirements of subsection 60(3) of the Act and the amended subsection 58(3).

DIVISION 11 - AMENDMENTS RELATING TO THE RULE PROHIBITING A SUPERANNUATION FUND FROM ACQUIRING ASSETS FROM ITS MEMBERS

CLAUSE 26 - OBJECT

28. Self explanatory.

**CLAUSE 27 - ACQUISITIONS OF CERTAIN ASSETS FROM MEMBERS OF
REGULATED SUPERANNUATION FUNDS PROHIBITED**

29. This clause amends section 66 of the SIS Act so that an excluded superannuation fund can only acquire business real property from a member (or relative of a member) if the property is business real property in the member's (or relative's) principal business.

**DIVISION 12 - AMENDMENTS RELATING TO THE REPRESENTATION OF
EMPLOYERS AND MEMBERS IN RELATION TO THE MANAGEMENT AND
CONTROL OF STANDARD EMPLOYER-SPONSORED FUNDS**

CLAUSE 28 - OBJECT

30. Self explanatory.

CLAUSE 29 - PRE 1 JULY 1995 RULES - FUNDS WITH 200 OR MORE MEMBERS

31. This clause amends paragraph 91(3)(a) of the SIS Act to allow a standard employer sponsored fund which is a public offer fund to either have an independent trustee or comply with the basic equal representation rules.

**CLAUSE 30 - POST 30 JUNE 1995 RULES - FUNDS WITH MORE THAN 4, BUT
FEWER THAN 50, MEMBERS**

32. This clause amends paragraph 92(3)(a) of the SIS Act to allow a standard employer sponsored fund which is a public offer fund to either have an independent trustee or comply with the basic equal representation rules.

**CLAUSE 31 - POST 30 JUNE 1995 RULES - FUNDS WITH MORE THAN 49
MEMBERS**

33. This clause amends paragraph 93(3)(a) of the SIS Act to allow a standard employer sponsored fund which is a public offer fund to either have an independent trustee or comply with the basic equal representation rules.

**DIVISION 13 - AMENDMENTS RELATING TO THE TRANSITION TO THE
SUPERANNUATION INDUSTRY SUPERVISION SCHEME**

CLAUSE 32 - OBJECT

34. Self explanatory.

CLAUSE 33 - EXISTING TRUSTEE MAY GIVE NOTICE OF RETIREMENT

35. This clause amends section 363 of the SIS Act to provide that the provisions of the governing rules of a fund or trust have no effect to the extent to which they require the holding of a meeting of beneficiaries before the existing trustee may give a notice of retirement referred to in section 363.

DIVISION 14 - AMENDMENTS RELATING TO THE DISCLOSURE OF INFORMATION

CLAUSE 34 - OBJECTS

36. Self explanatory.

CLAUSE 35 - SECRECY

37. This clause amends section 346 of the SIS Act to allow the Minister to approve disclosure of protected information or documents to the public at large, if it is in the public interest to do so. The clause also amends section 346 to restrict the Minister from approving disclosure of protected information or documents that relate to the personal affairs of an individual, if such disclosure would be unreasonable.

DIVISION 15 - AMENDMENTS RELATING TO THE PAYMENT OF AMOUNTS EQUAL TO THE INTERESTS OF BENEFICIARIES IN APPROVED DEPOSIT FUNDS

CLAUSE 36 - OBJECT

38. Self explanatory.

CLAUSE 37 - DEFINITIONS

39. This clause amends the definition of 'approved purposes' in section 10 of the SIS Act to ensure that the approved purpose in paragraph (c) of that definition only applies to the extent that it is consistent with the standards prescribed under section 32 of the Act and to ensure that the approved purpose is consistent with the operation of, and terminology used in, sections 15 and 53 of the Act.

CLAUSE 38 - APPROVED DEPOSIT FUNDS - PAYMENTS BY TRUSTEES

40. This clause amends section 15 of the SIS Act by:

- changing the wording of subsection 1 to ensure consistency with the related provisions in the definition of approved purposes and in section 53; and
- inserting a new subsection 1A that provides that for the purposes of paragraph (c) of the definition of 'approved purposes' in section 10, and for the purposes of section 53, if the trustee of a fund pays an amount equal to the beneficiary's interest in the fund to an approved deposit fund or regulated superannuation fund then the trustee is taken to have paid the amount to the beneficiary on request; and
- inserting a new subsection 1B that provides that for the purposes of paragraph (c) of the definition of 'approved purposes' in section 10, if a payment is not made immediately on request but is deferred for a period determined by the trustee concerned then the payment is taken to have been made on request; and

- by amending subsection 2 so that it applies to new subsection 1A as well as subsection 1.

41. These amendments clarify the obligations on the trustee of an approved deposit fund in relation to the paying of amounts to beneficiaries and also ensure consistency between the related provisions contained in the definition of approved purposes (in section 10 of the Act), section 15 of the Act and section 53 of the Act.

CLAUSE 39 - COVENANTS TO REPAY AMOUNTS TO BENEFICIARIES IN APPROVED DEPOSIT FUNDS

42. This clause amends section 53 of the SIS Act to provide that the trustee of an approved deposit fund need only comply with a request by a beneficiary to pay an amount equal to the beneficiary's interest in the fund if compliance with the request would not be inconsistent with any requirements imposed on the fund under section 32 of the Act.

43. A new subsection 53(2A) is inserted that provides that a reference in subsection 2 to a beneficiary includes a reference to the legal personal representative of a beneficiary. This ensures consistency with the definition of approved purposes in section 10 of the Act and with section 15 of the Act.

DIVISION 16 - AMENDMENTS RELATING TO RIGHTS IN RESPECT OF BENEFITS THAT HAVE BEEN AUTOMATICALLY ROLLED-OVER BETWEEN FUNDS

CLAUSE 40 - OBJECT

44. Self explanatory.

CLAUSE 41 - RIGHTS OF BENEFICIARY TO ROLLED-OVER BENEFITS

45. This clause amends section 251 of the SIS Act by adding two new subsections. These provide that a contingent right to death and disability benefits is not a right in respect of any benefits paid to an eligible rollover fund in accordance with Part 24 of the Act. Subsection 3 provides that subsection 2 is enacted for the avoidance of doubt.

46. This clarifies that where an amount of benefits is paid by one fund to an eligible rollover fund the rights that a beneficiary had to death and disability benefits in the first fund do not become rights that the beneficiary has against the eligible rollover fund. Rather, those rights would remain in the first fund unless the governing rules of that fund provide otherwise.

DIVISION 17 - AMENDMENTS RELATING TO CUSTODIANS OF SUPERANNUATION ENTITIES

CLAUSE 42 - OBJECT

47. Self explanatory.

CLAUSE 43 - INSERTION OF NEW SECTION

48. This clause provides that a new section is to be inserted into the SIS Act. The new section comprises six subsections:

- subsection 1 provides that a disqualified person must not intentionally be or act as a custodian of a superannuation entity;
- subsection 2 provides that a person is not prohibited from continuing as the custodian for a specified period, notwithstanding that the person is a disqualified person, provided the requirements set out in paragraphs (a) to (d) of this subsection are complied with;
- subsection 3 provides that a custodian must not permit a disqualified person who is an individual to be or act as a responsible officer of the custodian;
- subsection 4 sets out the requirements to be met by the custodian and trustee where the custodian becomes a disqualified person;
- subsections 5 and 6 provide for offences for contraventions of subsection 4.

49. The amendment ensures that disqualified persons are restricted from being custodians in the same manner that they are restricted from being investment managers.

DIVISION 18 - AMENDMENTS RELATING TO THE REMOVAL OF TRUSTEES OF PUBLIC OFFER ENTITIES**CLAUSE 44 - OBJECT**

50. Self explanatory.

CLAUSE 45 - INSERTION OF NEW SECTION

51. This clause provides that a new section is to be inserted into the SIS Act. The new section provides that the governing rules of a public offer entity must not permit the trustee to be removed by a person other than the Commissioner, unless the removal is of a kind specified in regulations. If the governing rules of a public offer entity are inconsistent with these requirements then these requirements prevail and the governing rules are to the extent of the inconsistency invalid.

DIVISION 19 - APPLICATION OF CERTAIN AMENDMENTS**CLAUSE 46**

52. This clause provides that, other than the amendments made to Parts 1, 19 and 24 of the SIS Act, the amendments made by Part 2 of the this Bill do not apply to a fund, scheme or trust in relation to a year of income earlier than the 1994-95 year of income.

PART 3 - AMENDMENT OF THE SUPERANNUATION (RESOLUTION OF COMPLAINTS) ACT 1993

CLAUSE 47 - OBJECT

53. Self explanatory.

CLAUSE 48 - PRINCIPAL ACT

54. Self explanatory.

CLAUSE 49 - INTERPRETATION

55. Self explanatory.

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